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CASE LAW ON AMERICAN INDIANS AUGUST 2018-2019

Thomas P. Schlosser

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August 2018 – August 2019

CASE LAW ON AMERICAN INDIANS

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I. UNITED STATES SUPREME COURT

1. *Washington State Department of Licensing v. Cougar Den, Inc.*

No. 16-1498, 139 S.Ct. 1000 (U.S. Mar. 19, 2019). Wholesale fuel importer owned by a member of the Yakama Nation, which was incorporated under Yakama law and designated by the Yakama Nation as its agent to obtain fuel for members of the tribe, sought review of the decision of the Washington State Department of Licensing, which concluded that the Tribe's right under treaty to travel on highways did not preempt state fuel taxes and assessed importer \$3.6 million in taxes, penalties, and licensing fees. The Superior Court, Yakima County, No. 14-2-03851-7, Michael G. McCarthy, J., reversed. The Department appealed. The Supreme Court of Washington, Johnson, J., 188 Wash.2d 55, 392 P.3d 1014, affirmed. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) Washington's fuel tax burdened the treaty right of the Yakama Nation to travel upon all public highways in common with citizens of the United States, and (2) Washington's application of its fuel tax on importer was preempted by treaty's reservation to the Yakama Nation of the right to travel upon all public highways. Affirmed.

2. *Sturgeon v. Frost*

No. 17-949, 139 S.Ct. 1066 (Mar. 26, 2019). Hunter, who sought to use hovercraft to reach moose hunting grounds, brought action against National Park Service (NPS), challenging NPS's enforcement of a regulation banning operation of hovercrafts on the Nation River, which partially fell within a federal preservation area. State of Alaska intervened as a plaintiff. The United States District Court for the District of Alaska, H. Russel Holland, Senior District Judge, 2013 WL 5888230, entered summary judgment for NPS. Hunter and State appealed. The United States Court of Appeals for the Ninth Circuit, Nguyen, Circuit Judge, 768 F.3d 1066, affirmed in part, vacated in part, and remanded. Certiorari was granted. The Supreme Court, Chief Justice Roberts, 136 S.Ct. 1061, 194 L.Ed.2d 108, vacated and remanded. On remand, the Court of Appeals for the Ninth Circuit, Nguyen, Circuit Judge, 872 F.3d 927, held that regulation preventing use of hovercraft in federally managed

conservation areas applied to the river. Certiorari was granted. The Supreme Court, Justice Kagan, held that: (1) the Nation River was not “public land” within the meaning of the Alaska National Interest Lands Conservation Act (ANILCA); (2) even if United States held title to a reserved water right in the Nation River, that right could not justify applying NPS's hovercraft rule; (3) ANILCA exempts non-public lands, including waters, located within national park boundaries in Alaska from NPS's ordinary regulatory authority; (4) hovercraft rule does not apply to non-public lands in Alaska, even when those lands lie within national parks; and (5) NPS had no authority to regulate conduct on navigable waters in Alaskan national parks. As noted earlier, the Ninth Circuit has held in three cases—the so-called *Katie John* trilogy—that the term “public lands,” when used in ANILCA’s subsistence-fishing provisions, encompasses navigable waters like the Nation River. *See Alaska v. Babbitt*, 72 F.3d 698 (1995); *John v. United States*, 247 F.3d 1032 (2001) (en banc); *John v. United States*, 720 F.3d 1214 (2013). Those provisions are not at issue in this case and we therefore do not disturb the Ninth Circuit’s holdings that the Park Service may regulate subsistence fishing on navigable waters. *See generally*, Brief for State of Alaska as Amicus Curiae at 29–35 (arguing that this case does not implicate those decisions); Brief for Ahtna, Inc., as Amicus Curiae 30–36 (same). Reversed and remanded. Justice Sotomayor filed a concurring opinion in which Justice Ginsburg joined.

3. *Herrera v. Wyoming*

No. 17-532, 139 S.Ct. 1686, 2019 WL 2166394, at *1691-1713 (U.S. May 20, 2019). Defendant, a member of the Crow Tribe, was convicted of taking elk off-season or without a state hunting license and with being an accessory to the same. He appealed. The District Court of Wyoming, Sheridan County, affirmed. Supreme Court of Wyoming denied defendant's petition for review. Certiorari was granted. The Supreme Court, Justice Sotomayor, held that: (1) defendant was not precluded from arguing the right to hunt under 1868 Treaty between United States and Crow Tribe of Indians barred his conviction; (2) Wyoming's admission to the Union did not abrogate the Crow Tribe of Indians’ right to hunt under the treaty; (3) Wyoming's statehood did not render all the lands in the state occupied within the meaning of the treaty; (4) the Bighorn

National Forest did not become categorically occupied, within the meaning of the treaty, when it was created; and (5) the presence of exploitative mining and logging operations in the Bighorn National Forest did not render the forest occupied within the meaning of the treaty. Vacated and remanded. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh joined.

II. OTHER COURTS

A. *Administrative Law*

4. ***Oneida Indian Nation v. United States Department of the Interior***

No. 5:17-cv-913, 336 F.Supp.3d 37 (N.D. N.Y. Aug. 24, 2018). New York Native American tribe brought action against Department of the Interior under Administrative Procedure Act (APA) alleging abuse of discretion and violation of United States Code. This suit arose out of Assistant Secretary's decision to publish changed name of Wisconsin tribe to Oneida Nation, who filed petition to cancel New York tribe's trademark registration in Federal Register, and approval of constitutional amendment in Department's regional office's secretarial election. Department filed motion to dismiss. The District Court, Mae A. D'Agostino, J., held that: (1) alleged injury in fact arising out of ongoing trademark action was not redressable by New York tribe's action against Department; (2) confusion arising from Department's decisions was not sufficient injury in fact; and (3) confusion was not traceable to Department of the Interior's decision. Motion granted.

5. ***Kialegee Tribal Town v. Zinke***

No. 17-cv-1670, 330 F.Supp.3d 255 (D.D.C. Sept. 7, 2018). Federally recognized Indian tribe brought action against Secretary of the Interior and other federal officials, seeking declaratory and injunctive relief in its favor in connection with its claims that it was successor to Creek Nation, and as such, had treaty-protected rights of shared jurisdiction over land within the boundaries of the historic Creek Nation reservation. Defendants moved to dismiss for failure to state claim. The District Court, Colleen Kollar-Kotelly, J., held

that: (1) court had subject-matter jurisdiction, but (2) tribe failed to adequately allege specific conduct by Secretary of Interior and other officials that violated Indian Reorganization Act (IRA), as required to state claim for declaratory and injunctive relief. Motion granted.

6. *California Valley Miwok Tribe v. Zinke*

No. 17-16321, 745 Fed.Appx. 46 (9th Cir. Dec. 11, 2018). Plaintiff California Valley Miwok Tribe (“Tribe”), represented by the Burley Council, appealed from summary judgment entered in favor of Defendants the California Valley Miwok Tribe, represented by the Dixie Council, and the United States. The district court held that the 2015 Decision (“Decision”) by the Assistant Secretary–Indian Affairs (“Assistant Secretary”) did not violate the Administrative Procedure Act (“APA”). The district court correctly held that the Decision did not violate the APA. Tribal membership is a matter to be determined by the tribe, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978), but the Department of the Interior also has the responsibility to ensure that organized tribes are representative of potential membership, *Aguayo v. Jewell*, 827 F.3d 1213, 1226 (9th Cir. 2016). The Decision comported with that responsibility. The Assistant Secretary recounted the tribe’s long litigation history but did not rely on those earlier court holdings to reach a decision. Instead, the Assistant Secretary independently examined the facts and the law, before determining that: (1) the tribe was not reorganized, (2) its membership is not limited to five individuals, and (3) the United States does not recognize leadership of the tribal government. The Decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, and therefore, did not violate the APA. *Aguayo* at 1226. Affirmed.

7. *Comanche Nation of Oklahoma v. Zinke*

No. 17-6247, 754 Fed.Appx. 768 (10th Cir. Dec. 14, 2018). Native American nation brought action against Secretary of Interior under Administrative Procedure Act and National Environmental Policy Act (NEPA), challenging acquisition of land in trust for benefit of other Native American nation and seeking preliminary injunction against operation of casino. The United States District Court for the

Western District of Oklahoma, Joe Heaton, Chief Judge, 2017 WL 6551298, denied motion for preliminary injunction. Nation appealed. The Court of Appeals, Carlos F. Lucero, Circuit Judge, held that: (1) Nation did not have substantial likelihood of success on merits of challenge to regulations governing trust acquisitions, and (2) Nation did not have substantial likelihood of success on merits of NEPA claim. Affirmed.

8. *Tsi Akim Maidu Of Taylorsville Rancheria v. United States Department of Interior*

No. 2:17-cv-01156-TLN-CKD, 2019 WL 95511 (E.D. Calif. Jan. 03, 2019). For the reasons set forth below, the Court granted Defendants' Motion to Dismiss. Plaintiff challenged Defendants' determination that it “lost status as a federally recognized Indian tribe when the United States sold the Taylorsville Rancheria (the Ranch) in 1966 pursuant to Congressional mandate.” In 1958, Congress enacted the California Rancheria Act (“CRA”), which authorized the Department of the Interior to distribute forty-one rancherias's assets to “individual Indians”; *see* Pub. L. 85-671, 72 Stat. 619 (Aug. 18, 1958), *as amended* Pub. L. 88-419, 78 Stat. 390 (Aug. 11, 1964). After such distribution under the CRA, the recipients would not be entitled to government services “because of their status as Indians ... [A]ll statutes of the United States which affect Indians because of their status as Indians [would] be inapplicable to them, and the laws of the several States [would] apply to them in the same manner as they apply to other citizens.” Plaintiff alleged that Defendants sold the Taylorsville Rancheria to Plumas County in 1966. In 1998, Plaintiff alleged it filed a “letter of intent to petition for acknowledgment as an Indian tribe.” Plaintiff further alleged it later “sought clarification from the Defendants about its status as a federally recognized Indian tribe,” to which the then-Assistant Secretary of Indian Affairs responded by letter in June 2015. In the letter, the government allegedly explained that Plaintiff's relationship with the government terminated upon the 1966 sale of the Taylorsville Rancheria. Plaintiff challenged Defendants' conclusion that “the sale of the Ranch corresponds with the termination of the status of the tribe.” Plaintiff brought suit against the Department of Interior, its Secretary, and the Assistant Secretary for Indian Affairs. Defendants argued that: (1) general jurisdiction statutes do not waive sovereign immunity; (2) although

the Administrative Procedure Act (“APA”) waives sovereign immunity, Plaintiff fails to state a claim under the APA; and (3) Plaintiff’s claims are barred by the statute of limitations. Plaintiff responds that: (1) the action is not barred by the statute of limitations, and (2) the complaint sufficiently states a claim under the APA. Because the statute of limitations argument is dispositive, the Court will not address the parties’ other arguments. As a preliminary matter, the parties do not dispute that the six-year statute of limitations in 28 U.S.C. § 2401 (“section 2401”) applies to Plaintiff’s APA claims. Under section 2401, “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” 28 U.S.C. § 2401(a). Defendants argued that Plaintiff’s claims stem from one common allegation: that Defendants misinterpreted the CRA to find that the sale of the Taylorsville Rancheria had the legal effect of terminating Plaintiff’s status as a federally recognized tribe. Defendants stated in response that Congress enacted the Federally Recognized Tribe List Act, which requires the Secretary of the Interior to publish annually a list of all federally recognized tribes. According to Defendants, Plaintiff has not been included on the list of federally recognized tribes since its initial publication in 1979. As such, Defendants argued that Plaintiff’s claims accrued upon the 1979 publication of the list of federally recognized tribes because Plaintiff could or should have known it was not a federally recognized tribe at that point. Defendants alternatively argue that, at the very latest, Plaintiff’s claims accrued in 1998, when Plaintiff allegedly filed a letter of intent to petition for acknowledgment as an Indian tribe. Thus, the Court found that Plaintiff’s claims as currently alleged are time-barred and should be dismissed.

9. *National Lifeline Association v. Federal Communications Commission*

No. 18-1026, 915 F.3d 19 (D.C. Cir. Feb 01, 2019), *amended by* 921 F.3d 1102 (D.C. Cir. April 10, 2019). Petitions for review were filed challenging Federal Communications Commission (FCC) order limiting enhanced tribal telecommunications support to service provided using tribal facilities, and to low-income consumers living on rural areas of tribal lands. The Court of Appeals, Rogers, Circuit Judge, held that: (1) FCC action in changing its policy to limit

enhanced tribal telecommunications subsidy to service provided using tribal facilities was arbitrary and capricious; (2) FCC action in changing its policy to limit enhanced tribal telecommunications subsidy to service provided to low-income consumers living on rural areas of tribal lands was arbitrary and capricious; (3) FCC's notice was insufficient under Administrative Procedure Act requirements for notice-and-comment rulemaking; and (4) FCC improperly made substantive changes to its former policy without commencing new notice-and-comment-rulemaking proceeding. Petitions granted, order vacated, and matter remanded.

10. Cayuga Nation v. David Bernhardt

No. 17-1923, 374 F.Supp.3d 1 (D.C. D.C. Mar. 12, 2019). The Cayuga Nation is a federally recognized Indian nation. This case dealt with decisions by the Bureau of Indian Affairs (BIA) and the Assistant Secretary for Indian Affairs of the Department of the Interior (DOI) that recognized one faction within the Cayuga Nation, Defendant-Intervenor—now referring to itself as the “Cayuga Nation Council,” though alternatively referred to in the administrative record as the “Halftown Group”—as the governing body of the Cayuga Nation for the purposes of certain contractual relationships between that Nation and the United States federal government. These decisions were the product of an adversarial process between Defendant-Intervenor and Plaintiffs, a rival faction within the Cayuga Nation who asserted that they represent the Nation’s rightful government. Plaintiffs filed this lawsuit seeking to overturn the BIA and DOI decisions. The court denied Plaintiffs' Motion for Summary Judgment and granted both Defendants' and Defendant-Intervenor’s Cross-Motions for Summary Judgment. The court concluded that Plaintiffs have failed to establish that Defendants violated the Administrative Procedure Act (APA) in making decisions recognizing Defendant-Intervenor as the governing body of the Cayuga Nation for purposes of certain contractual relationships between the Nation and the United States federal government. The Court further concluded that Plaintiffs failed to establish that Defendants violated Plaintiffs' due process rights in making these decisions. In 2015, the Cayuga Nation’s leadership dispute came to a head. The BIA received two requests to modify existing federal-tribal contracts under the Indian Self-Determination Act (ISDEAA). One request came from Plaintiffs'

group: the BIA determined that the other request came from Mr. Halftown acting as the federal representative for the last Nation Council which had been formally recognized by the BIA in 2006. In response to these competing requests, the BIA declined to address the merits of the Nation's leadership dispute. Instead, the BIA continued to recognize the last undisputed government of the Cayuga Nation which had been identified by the BIA in 2006. The BIA concluded that the 2006 Nation Council, with Mr. Halftown acting as federal representative, had the authority to draw funds from the Nation's ISDEAA contract. In recognizing the 2006 Nation Council for purposes of deciding the 2015 ISDEAA request, the BIA emphasized that "[t]his interim recognition decision is intended to provide additional time to the members of the Nation to resolve this dispute using tribal mechanisms and prevent the need for the BIA to examine Nation law and make a subsequent determination based on the results of that determination." As an initial matter, Plaintiffs contended that Assistant Secretary Black was required to use de novo review on questions of Cayuga Nation law when reviewing Regional Director Maytubby's decision. But, instead of using de novo review, Plaintiffs argued that Assistant Secretary Black impermissibly deferred to Regional Director Maytubby's analysis of Cayuga law. The court concluded that Assistant Secretary Black was not required to use de novo review over Regional Director Maytubby's analysis of Cayuga Nation law. While it is generally true that the Interior Board of Indian Appeals (IBIA) reviews questions of law de novo, that is not the case with Indian law. Instead, "unless ... tribal law clearly dictate[s] a particular outcome, [the IBIA] will afford BIA latitude to exercise discretion in determining with whom it will deal in carrying on the government-to-government relationship with the tribe." *Picayune Rancheria*, 62 IBIA at 114; see also *LaRocque v. Aberdeen Area Dir., Bureau of Indian Affairs*, 29 IBIA 201, 204 (1996) (deferring to BIA's "reasonable interpretation" of tribal law). In summary, the Court determined that Assistant Secretary Black was not required to conduct a de novo review of Cayuga law. If he had been so required, Assistant Secretary Black conducted an independent review of the parties' arguments concerning Cayuga law and concluded that Regional Director Maytubby's determinations were valid. The standard of review used by Assistant Secretary Black was not contrary to law.

11. *Cross v. United States Department of Interior*

No. CIV 18-220-TUC-CKJ, 2019 WL 1425141 (D.C. D. Ariz. Mar. 29, 2019). United States Department of the Interior (“the government”) filed a Motion to Dismiss (MTD). Cross is an enrolled member of the Three Affiliated Tribes (TAT). The TAT is a federally recognized Indian tribe and resides on the treaty-established Fort Berthold Reservation (Reservation) in northwestern North Dakota. Cross is the spokesman for an *ad hoc* group of tribal members who have decided to request a Secretarial Election, via a Secretarial Petition, that would be administered by the Secretary. More specifically, this *ad hoc* group sought to petition the Secretary of the Interior (the Secretary) to call a Secretarial Election “for the purpose of repealing a 1986 constitutional amendment that had extinguished the pre-existing right of ALL (emphasis added) of the [Three Affiliated Tribes] non-resident, but otherwise constitutionally qualified, tribal voters to vote by absentee ballot in all tribal elections.” The Complaint asserted that many non-resident tribal voters have found returning to the Reservation to be economically or physically impracticable and unduly burdensome. The Complaint alleged the building of the world’s largest earth-filled dam on the Reservation took over 156,035 of TAT’s best and last remaining agricultural lands. This resulted in the destruction of nine historic river bottom communities, geographically fragmented the Reservation, and caused the exodus from the Reservation of TAT’s younger and productive members. Approximately 75%-80% of TAT’s enrolled members live and work off the Reservation. On July 14, 2017, Cross provided a Notice of Appeal (NOA) to Danks pursuant to 25 C.F.R. § 2.9. The NOA referenced both Danks decisions as to the number of signatures required and the conclusion that this decision was not appealable. The decision on appeal stated: “...You concede in your appeal that the Superintendent properly calculated the number of signatures needed for a valid petition based on the tribally provided number of tribal members who were 18 years of age and older as of May 18, 2017. If the Superintendent’s basic mathematical calculation is correct as you concede, other than that unchallenged calculation, the Superintendent made no decision and merely acted as a pass-through for information provided by the tribe as required by 25 C.F.R. § 81.57(a)(2)(i) and (ii).” The government asserted that the court lacked subject matter jurisdiction

of this matter. As courts of limited jurisdiction, federal courts are presumptively without jurisdiction over civil actions. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests upon the party asserting jurisdiction. The Complaint asserted federal question jurisdiction under 28 U.S.C. § 1331 as the primary basis for subject matter jurisdiction. However, the United States has not waived its sovereign immunity by the enactment of 28 U.S.C. §§ 1331 and 1343. *Cuevas v. Department of Homeland Security*, 233 F. App'x 642, 643 (9th Cir. 2007) (citing *N. Side Lumber Co. v. Block*, 753 F.3d 1482, 1484 (9th Cir. 1985)); 14 Fed. Prac. & Proc. Juris. § 3655 (4th ed. Nov. 2018). Similarly, the Declaratory Judgment Act did not provide a basis for subject matter jurisdiction. *Skelly Oil Co. v. Phillips Petr. Co.*, 399 U.S. 667, 671 (1950); *Countrywide Home Loans, Inc. v. Mortgage Guar. Ins. Corp.*, 642 F.3d 849, 852 (9th Cir. 2011); 14 Fed. Prac. & Proc. Juris. § 3655 (4th ed. Nov. 2018). The Complaint also refers to the Administrative Procedure Act (APA). The APA “contains a specific waiver of the United States' sovereign immunity.” *Matsuo v. United States*, 416 F. Supp. 2d 982, 988 (D. Haw. 2006) (citing *Bowen v. Massachusetts*, 487 U.S. 879, 891–92 (1988)); *see also Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1168 (9th Cir. 2017). While the APA waives the government's sovereign immunity, the APA also includes requirements for judicial review. As a general matter, the APA permits suits against the United States by “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of relevant statute[.]” 5 U.S.C. § 702. This portion of the statute constitutes the APA's judicial review provision. *See e.g. Navajo Nation*, at 1168. Claims asserted pursuant to the APA must satisfy section 702's “agency action” requirement and the further requirement under section 704 of the APA that a plaintiff must identify a “final agency action” to obtain judicial review. 5 U.S.C. § 704. The APA does not permit review where “statutes preclude judicial review” and “where the agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a). The finality requirement is considered a necessary element of any APA claim. *Dalton v. Specter*, 511 U.S. 462, 469 (1994); *Wild Fish Conservancy v. Jewell*, 730 F. 3d 791, 800 (9th Cir. 2013) (“To maintain a cause of action under the APA, a plaintiff must challenge “agency action” that is “final.”). A plaintiff has the burden of

identifying specific federal conduct, explaining how it is “final agency action,” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990), and identifying a discrete agency action that the federal agency was legally required to take but failed to do so, *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 64 (2004). In considering these factors, the court found no final agency action occurred in this matter. Rather, the government provided information to Cross, but did not take any action that represents the consummation of an agency’s decision-making process. As the government had not yet reviewed any Secretarial Petition submitted by Cross, no rights or obligations had been determined. *Bennett v. Spear*, 520 U.S. 154, 117 S1154 (1997). As Cross was not challenging a final agency action, his cause of action could not proceed under the APA. *Jewell*, 730 F.3d at 800. The court found it did not have subject matter jurisdiction of this matter and dismissal was appropriate. To the extent Cross argued the government acted in excess of its statutory jurisdiction or authority, the court declined to address these arguments as it had not been established this court had subject matter jurisdiction over this matter. This matter was dismissed for lack of subject matter jurisdiction.

**12. *Agua Caliente Tribe of Cupeño Indians of Pala
Reservation v. Sweeney***

No. 17-16838, 932 F.3d 1207 (9th Cir. Aug 07, 2019). The Agua Caliente Tribe of Cupeño Indians (the Cupeño) argued they were a federally recognized tribe, and as such, the Assistant Secretary of Indian Affairs (Assistant Secretary) within the Department of the Interior (Interior) must place the tribe on a list of federally recognized tribes published in the Federal Register. The Cupeño sent a letter to the Assistant Secretary, requesting that they be listed as a federally recognized tribe. When the Assistant Secretary denied their request, the Cupeño filed suit to compel such action. Having jurisdiction pursuant to 28 U.S.C. §§1331, 1361, and 5 U.S.C. § 706, the district court refused to compel the listing of the Cupeño because they had failed to exhaust the administrative process. The district court further concluded that the Assistant Secretary provided a rational explanation for refusing to make an exception to the administrative process for the Cupeño. The court determined that they had jurisdiction pursuant to 28 U.S.C. § 1291, and affirmed.

The Part 83 process applies to the relief the Cupeño seek, and the Cupeño failed to exhaust the process. We agree with the district court's determination that the Cupeño must exhaust administrative remedies, and until they do so, the Cupeño are not entitled to the relief they seek in this lawsuit. On three occasions since 1979, Interior has recognized tribes outside of the Part 83 process. To treat the Cupeño differently from those three tribes, the Cupeño argued, is arbitrary and capricious, and a violation of the Cupeño's equal protection rights. To prevail on an equal protection claim, the plaintiff must show the government has treated it differently from a similarly situated party and the government's explanation for different treatment does not meet the relevant level of scrutiny. *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 215 (2013). The court has held, "the recognition of Indian tribes remains a political, rather than racial determination," and therefore "appl[ies] rational basis review." *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004). The three tribes that Interior has recognized outside of the Part 83 process are: the Ione Band of Miwok Indians (the Ione), the Lower Lake Rancheria, and the Tejon Indian Tribe (the Tejon). Because Interior has rationally distinguished the Cupeño from the other tribes that were listed outside of the administrative process, we cannot order Interior to add the Cupeño to the list of federally recognized tribes published in the Federal Register. The court affirmed the district court's order granting summary judgment for Interior.

13. Robert Doucette v. United States Department of the Interior

No. C-18-859 TSZ, 2019 WL 3804118 (W.D. Wash. Aug 13, 2019). This matter came before the Court on (i) a motion for summary judgment, brought by plaintiffs Robert Doucette, Bernadine Roberts, Saturnino Javier, and Tresea Doucette, and (ii) a cross-motion for summary judgment brought by defendants United States Department of the Interior (Interior), Interior Secretary David Bernhardt, Assistant Secretary Tara Sweeney, and Principal Deputy Assistant Secretary (PDAS) John Tahsuda III. Plaintiffs were unsuccessful candidates for four open positions on the Nooksack Tribal Council, the governing body of the Nooksack Indian Tribe of Washington. They allege that, prior to the most recent change in

presidential administrations, Interior had established a policy of “interpreting Tribal constitutional, statutory, and common law to determine whether the Tribal Council was validly seated as the governing body of the tribe” for purposes of government-to-government relations. The court concluded that plaintiffs are not, as a matter of law, entitled to relief because Interior never adopted a policy of construing Nooksack law with respect to how Nooksack Tribal Council elections should be conducted, and defendants could not have behaved inconsistently with a non-existent policy. In refusing, for a period of time before the 2017 elections, to recognize actions taken by the Nooksack Tribal Council, Interior did not purport to interpret Nooksack law concerning the manner in which elections must be administered, but rather effectuated the consequences to the Tribe of having failed to even hold an election before the terms of half of the council members expired. Moreover, during the course of and subsequent to the 2017 elections, Interior admirably balanced the deference it owes the tribe, as a sovereign entity, with its responsibility to ensure that it deals only with a duly constituted governing body for the tribe. The court determine that Plaintiffs have not made the requisite showing to survive summary judgment, and their Administrative Procedure Act claim and this action were therefore dismissed with prejudice.

B. Child Welfare Law and ICWA

14. *Matter of P.T.D*

No. DA 17-0306, 391 Mont. 376, 424 P.3d 619 (S. Ct. Mont. Aug 22, 2018). Department of Public Health and Human Services, Child and Family Services Division, filed a petition to terminate putative father's parental rights to child, who was a member of, or eligible for, membership in the Fort Peck Indian Tribe. The District Court, 12th Judicial District, Hill County, No. DN-15-010, Daniel A. Boucher, J., granted the petition. Father appealed. The Supreme Court, Mike McGrath, C.J., held that: (1) family relationship did not exist between Indian child and putative father, and therefore, requirements of Indian Child Welfare Act (ICWA) did not apply; and (2) argument that oral pronouncement, minute entry, and order differed in the way they define the active efforts requirement was immaterial. Affirmed.

15. *In re E.H*

No. D073635, 26 Cal.App.5th 1058, 238 Cal.Rptr.3d 1 (Cal. Ct. App. Sept. 07, 2018). County health and human services agency brought action against mother to terminate her parental rights. The Superior Court, San Diego County, No. SJ13241, Michael J. Popkins, J., entered judgment terminating parental rights. Mother appealed. The Court of Appeal, Aaron, Acting P.J., held that agency's failure to provide Tohono O'odham Nation with notice of information in determining whether child was an Indian child was prejudicial. Reversed and remanded.

16. *Oglala Sioux Tribe v. Fleming*

No. 17-1135, 904 F.3d 603 (8th Cir. Sept. 14, 2018). Native American tribes and several tribe members brought 1983 Putative Class Action against state officials; alleging policies, practices, and procedures during 48 hour custody hearings relating to the removal of Native American children from their homes based on abuse and neglect allegations violated the Fourteenth Amendment's due process clause and the Indian Child Welfare Act (ICWA) by denying parents a meaningful post-deprivation hearing after their children were taken into temporary state custody. The United States District Court for the District of South Dakota, Jeffrey L. Viken, District Judge, 993 F. Supp.2d 1017, denied defendants' motion to dismiss, 100 F.Supp.3d 749, granted plaintiffs' partial summary judgment motion, and, 2016 WL 7324077, granted declaratory and injunctive relief. Defendants appealed. The Court of Appeals, Colloton, Circuit Judge, held that: (1) *Younger* abstention was warranted, and (2) exception to *Younger* abstention for patently unconstitutional actions did not apply. Vacated and remanded.

17. *In re K.L*

No. C079100, 27 Cal.App.5th 332, 237 Cal.Rptr.3d 915 (Cal. Ct. App. Sept. 18, 2018). After minor's mother was arrested for child cruelty and possession of a controlled substance, county health and human services agency filed petition to establish child, who was an Indian child, as court dependent. The Superior Court, Alpine

County, declared child to be dependent and placed child with presumed father. Noncustodial biological father appealed. The Court of Appeal, Hull, Acting P.J., held that: (1) placement with presumed father was not foster care placement and thus did not trigger Indian Child Welfare Act (ICWA) placement preference requirements, and (2) placement with presumed father was not placement with a guardian and thus also did not trigger ICWA placement preference requirements. Affirmed.

18. *In re N.G*

No. E070338, 27 Cal.App.5th 474, 238 Cal.Rptr.3d 304 (Cal. Ct. App. Sept. 21, 2018). After Department of Public Social Services (DPSS) sent Indian Child Welfare Act (ICWA) notices to the Blackfeet Tribe of Montana, the Navajo Nation, the Colorado River Indian Tribes, and the Colorado River Tribal Council, the Superior Court, Riverside County, No. RIJ1100389, Jean P. Leonard, Retired Judge, sitting by assignment, terminated mother's parental rights. Mother appealed. The Court of Appeal, Fields, J., held that: (1) trial court, on remand, was required to order DPSS to send ICWA notices to all federally recognized Cherokee tribes; (2) trial court, on remand, was required to fully investigate child's paternal lineal ancestry; and (3) substantial evidence did not show that DPSS complied with sending ICWA notices. Reversed and remanded.

19. *In re A.S*

No. D073561, 28 Cal.App.5th 131, 239 Cal.Rptr.3d 20 (Cal. Ct. App. Oct. 03, 2018). Dependency proceeding was initiated. The Superior Court, San Diego County entered orders selecting tribal customary adoption proposed by Mesa Grande Band of Mission Indians as permanent plan for children. Parents appealed. The Court of Appeal, Aaron, J., held that: (1) record demonstrated that parents were afforded sufficient opportunity to present evidence to tribe, in accordance with due process; (2) All-County Letter issued by Department of Social services was interpretive, and thus was not binding; (3) any error in trial court's failure to expressly confirm that parents were afforded due process opportunity to present evidence to tribe was harmless under the circumstances; (4) father failed to demonstrate that his due process rights were violated at selection

and implementation hearing; (5) mother's testimony about visitation with children and bond with children was relevant to detriment, and thus was admissible in selection and implementation hearing; (6) trial court acted within its discretion in determining that parents' testimony regarding visitation narratives, visitation scheduling, and progress with services was irrelevant, and thus inadmissible, in selection and implementation hearing; and (7) any error in admitting such testimony about visitation and progress with services was harmless. Affirmed.

20. *Brackeen v. Zinke*

No. 4:17-cv-00868-O, 338 F.Supp.3d 514 (N.D. Texas Oct 4, 2018). Foster and adoptive parents and states of Texas, Louisiana, and Indiana brought action against United States, United States Department of the Interior and its Secretary, Bureau of Indian Affairs (BIA) and its Director, BIA Principal Assistant Secretary for Indian Affairs, Department of Health and Human Services (HHS) and its Secretary seeking declaration that Indian Child Welfare Act (ICWA) was unconstitutional. Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians intervened as defendants. Plaintiffs moved for summary judgment. The District Court, Reed O'Connor, J., held that: (1) ICWA's mandatory placement preferences violated equal protection; (2) provision of ICWA granting Indian tribes authority to reorder congressionally enacted adoption placement preferences violated non-delegation doctrine; (3) ICWA provision requiring states to apply federal standards to state-created claims commandeered the states in violation of the Tenth Amendment; (4) BIA exceeded its statutory authority in promulgating regulations, in violation of the Administrative Procedure Act (APA); (5) BIA regulations were not entitled to *Chevron* deference; and (6) prospective and adoptive parents whose adoptions were open to collateral attack under ICWA had no fundamental right to care, custody, and control of children in their care. Motions granted in part and denied in part.

21. *Matter of L.A.G*

DA 18-0119, 393 Mont. 146, 429 P.3d 629 (S.C. Mont. Oct. 16, 2018). Department of Public Health and Human Services filed petition for termination of mother's parental rights as to her two

minor children. Following termination hearing, the District Court, Cascade County, Nos. ADN 16-175 and ADN-16-176, Gregory G. Pinski, P.J., terminated mother's parental rights. Mother appealed. The Supreme Court, Beth Baker, J., held that: (1) trial court violated Indian Child Welfare Act (ICWA) when it terminated mother's parental rights before having conclusive determination of children's status in Indian tribe; (2) trial court's oral findings and comments within written order did not implicitly establish that court agreed, active efforts to prevent the breakup of Indian family were made, as required under ICWA; but (3) mother's due process rights were not violated when Department raised issue of abandonment during closing argument. Reversed and remanded with instructions.

22. *In re L.D.*

No. H045544, 32 Cal.App.5th 579, 243 Cal.Rptr.3d 894 (Cal. Ct. App. 6th Dis. Jan. 24, 2019). County Department of Family and Children's services filed juvenile dependency petition on behalf of nine-year-old child who may have Native Alaskan ancestry. The Superior Court, Santa Clara County, No. 17JD024833, Michael L. Clark, J., found sufficient notice was sent, pursuant to the Indian Child Welfare Act (ICWA), to Athabascan Indian tribe in Alaska before declaring child dependent. The court subsequently issued restraining order protecting child from mother, and mother was later found to have violated restraining order by possessing or having access to handgun. Mother appealed to challenge the ICWA notice. The Court of Appeal, Grover, J., held that mother's challenge to ICWA notice was untimely. Appeal dismissed.

23. *Mitchell v. Preston*

No. S-18-0166, 439 P.3d 718, 2019 WL 1614606 (S.Ct. Wyo. Apr. 16, 2019). Following extensive litigation in child custody action, 2018 WY 110, 426 P.3d 830, father, an Indian tribe member who kept child on reservation, filed motion to establish jurisdiction in tribal court and motion for change of venue, seeking an order relinquishing permanent child custody jurisdiction to the tribal court. Mother, who was not a member of the tribe and who had been awarded primary custody of child, filed motion to strike. The District Court, Sheridan County, Norman E. Young, J., granted

mother's motion, and father appealed. The Supreme Court, Kautz, J., held that: (1) Indian Child Welfare Act (ICWA) did not apply; and (2) even assuming ICWA applied, tribal court's emergency orders under Parental Kidnapping Prevention Act (PKPA) did not give tribal court jurisdiction to make permanent custody decisions. Affirmed.

24. Navajo Nation v. Department of Child Safety

No. 1 CA-JV 18-0276, 246 Ariz. 463, 441 P.3d 982 (Ct. App. Ariz., Div. 1, Apr. 18, 2019). The Navajo Nation appealed the juvenile court's order appointing a permanent guardian for a child subject to the Indian Child Welfare Act ("ICWA") without the testimony of a qualified expert witness that the parent's or the Indian-relative custodian's continued custody would likely result in serious emotional or physical damage to the child. The court held that ICWA applies to guardianships and that it requires a qualified expert witness to provide this testimony. Because such testimony was not provided in this case, the court vacated the juvenile court's order and remand the case for a new hearing. In September 2017, the Department informed the court and parties that its designated expert witness was unwilling to provide the requisite testimony for the guardianship. That same month, Mother proposed Ian Service as her expert witness. The Department took no position on Service's qualifications as an expert witness, but the Navajo Nation objected. The court held a *voir dire* hearing to determine whether Service was qualified. During that hearing, Service testified that he had been an attorney for about ten years, mostly as a public defender or prosecutor in Idaho. He stated that ten to fifteen percent of his cases involved ICWA in some way and that he had served as an expert witness in two cases. He admitted, however, that both cases were before the same judge and involved the Shoshone-Bannock Tribe—not the Navajo Nation. He also acknowledged that he was not a member of any Indian tribe, was not recognized as an expert witness by the Navajo Nation, had never been contacted by the Navajo Nation to testify as an expert witness, and was not familiar with the Navajo Nation's parenting customs. Service further stated that he had only minimally reviewed the record and that he had not talked to the proposed Indian-relative placement, R.Y., the Department's expert witness who had refused to testify, or the Navajo Nation case

specialist assigned to this case. Section 1912(e)'s plain language states that no foster care placement, which includes permanent guardianships, may be ordered without expert-witness testimony on whether a parent's or an Indian-relative custodian's continued custody of a child will likely result in serious emotional or physical damage to the child. Therefore, a court must hear expert-witness testimony before ordering a permanent guardianship. The record shows that R.Y. was subject to ICWA and a guardianship proceeding took place. Thus, ICWA required the juvenile court to hear expert-witness testimony on whether Mother's or the Indian-relative custodian's continued custody of R.Y. would likely result in serious emotional or physical damage to R.Y. Because such testimony was not provided, the court's order is vacated.

25. In re Marriage of Stockwell and Dees

No. 17CA1482, 446 P.3d 957 (Colo. Ct. App. June 27, 2019). In this proceeding concerning the Allocation of Parental Responsibilities (APR) for L.D-S., Jennifer Lynn Dees, the child's mother, appealed the district court's order denying her motion to vacate a 2013 order giving majority parenting time to Joseph Cody Stockwell, the child's legal but not biological father. Dees contended that the court erred because it issued the APR order without first inquiring into the child's possible Indian heritage as required by the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 to 1963 (2018). Dees is right. In agreeing with her, the court clarified that: (1) a legal father under Colorado law is not necessarily a "parent" for purposes of ICWA and, (2) an APR to a legal father who does not qualify as a "parent" under ICWA is a "child custody proceeding" under ICWA. Because the APR to Stockwell here constituted a child custody proceeding and the court did not comply with ICWA, the court reversed the order denying Dees's motion and remanded for further proceedings. According to ICWA an Indian child who is the subject of an action for foster care placement or termination of parental rights; any parent or Indian custodian from whose custody such child was removed; and the Indian child's tribe may petition a court of competent jurisdiction to invalidate such action upon a showing that the action violated ICWA provisions. 25 U.S.C. § 1914 (2018). ICWA places no time limit on such a petition. Moreover, barring a parent's ICWA claim as untimely or waived under state

law would contradict our Supreme Court’s recognition that ICWA is also intended to protect the tribe, which was not at fault for the timing of the ICWA claim and whose interest may have been harmed. See B.H., 138 P.3d at 304 (“Because the protection of a separate tribal interest is at the core of the ICWA, otherwise sufficiently reliable information cannot be overcome by the statements, actions, or waiver of a parent, or disregarded as untimely.”) (citations omitted); see also *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). The court reversed the order denying the ICWA motion and remand for further proceedings as discussed below. Dees argued that the district court failed to comply with ICWA before issuing the October 2013 APR order. Stockwell responded that ICWA is inapplicable because he and Dees are parents of L.D-S. Stockwell is correct that ICWA does not apply to an award of custody to one of the parents, including in a divorce proceeding. 25 C.F.R. § 23.103(b)(3) (2018); see also *In re J.B.*, 178 Cal. App. 4th 751, 100 Cal. Rptr. 3d 679, 682 (2009) (a child custody proceeding does not include a proceeding in which a child is removed from one parent and placed with the other because placement with a parent is not foster care). But whether Stockwell qualifies as a parent for purposes of ICWA requires a closer look. As noted, Stockwell is L.D-S.’s legal father. Based on this status, he enjoys all the rights and responsibilities of legal fatherhood under state law. But Stockwell is neither L.D-S.’s biological parent, nor an Indian person who has adopted the child. So, Stockwell is not a parent as defined by ICWA. Because Stockwell is not L.D-S.’s parent under ICWA, we consider whether the APR to Stockwell was a “foster care placement,” which is defined as any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.] A foster care placement, which here takes the form of an APR to a person who is not a parent under ICWA, is a child custody proceeding under ICWA because the parent cannot have the child returned upon demand but must instead overcome procedural and substantive barriers to regain custody and control of the child. See also 25 C.F.R. § 23.2 (“Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request,

without any formalities or contingencies.”). In sum, the APR to Stockwell was a child custody proceeding for purposes of ICWA. The District Court, however, did not inquire into whether L.D-S. was an Indian child. That was error requiring a remand for further proceedings. *See* 25 U.S.C. § 1914.

26. *Oliver N. v. Dept. of Health & Social Services, Office of Children’s Services*

No. S-17067, 444 P.3d 171, 2019 WL 2896647 (Ak. S. Ct. July 5, 2019). The issue was whether new federal regulations have materially changed the qualifications required of an expert testifying in a child in need of aid (CINA) case involving children subject to the Indian Child Welfare Act (ICWA). The court concluded that they had. To support the termination of parental rights, ICWA requires the “testimony of qualified expert witnesses ... that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” Under the new federal regulations, experts who formerly could be presumptively qualified — based on their ability to testify about prevailing cultural and social standards in the child’s tribe, for example — must now also be qualified to testify about the “causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.” The court concluded that in these two cases the challenged expert witnesses failed to satisfy this higher standard imposed by controlling federal law. For this reason, the court reversed the orders terminating the parents’ parental rights and remand for further proceedings. In December 2016 the Bureau of Indian Affairs issued formal regulations accompanied by new guidelines discussing their implementation. The introduction to the new regulations notes they were enacted because the Department of the Interior found that “implementation and interpretation of [ICWA] has been inconsistent across states” and that “[t]his disparate application of ICWA ... is contrary to the uniform minimum [f]ederal standards intended by Congress.” The regulations set out relevant expert witness requirements and the standard for the “likelihood of harm” finding: “Who may serve as a qualified expert witness?” is explained at 25 C.F.R. § 23.122 (a): A

qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. (Emphasis added). Regarding the likelihood of harm finding, 25 C.F.R. § 23.121 states: (c) For ... termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding; (d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child. In these two parental rights termination appeals, we consider the superior courts' reliance on experts whose expertise is primarily rooted in their knowledge of tribal customs rather than professional training; the question before us is whether, based on their tribal expertise alone, they have what they "must have" to be qualified to testify under the new regulations. Oliver N. and Lisa B. argue on appeal that in their respective trials, the witnesses were not qualified under ICWA to testify as experts about whether returning to the parent's care would likely result in serious harm to the child. The court concluded that under the new BIA regulations, neither Encelewski nor Dale were shown to be qualified expert witnesses under ICWA for this type of testimony. The court recognized that this represented a departure from our precedent but found conclusion was compelled by the recent changes to federal law. In both cases, the Superior Court's order terminating parental rights was reversed and remanded for further proceedings consistent with this opinion.

27. *Watso v. Lourey*

No. 18-1723, 929 F.3d 1024, 2019 WL 3114047 (8th Cir. July 16, 2019). Mother, individually and for her children, and grandmother

brought action against county human services commissioner, tribal courts, and tribal judges contesting tribal courts' jurisdiction over her children's child custody proceedings. The United States District Court for the District of Minnesota, 2018 WL 1512059, Ann D. Montgomery, J., adopted report and recommendation of Katherine M. Menendez, United States Magistrate Judge, 2017 WL 9672393, and dismissed complaint. Plaintiffs appealed. The Court of Appeals, Benton, Circuit Judge, held that: 1) Indian Child Welfare Act (ICWA) did not preclude commissioner from referring tribal-member children's child protection proceedings to tribal courts; 2) federal statute giving Minnesota jurisdiction over civil causes of action to which Indians were party did not require that state court hearing be held before tribal court could exercise jurisdiction; and 3) absence of state court proceeding did not violate Plaintiffs' due process rights. Affirmed. Petition for Certiorari docketed October 28, 2019.

28. *Brackeen v. Bernhardt*

No. 18-11479, 2019 WL 3759491(5th Cir. Aug 9, 2019). This case presented facial constitutional challenges to the Indian Child Welfare Act of 1978 (ICWA) and statutory and constitutional challenges to the 2016 administrative rule (the Final Rule) that was promulgated by the Department of the Interior to clarify provisions of ICWA. Plaintiffs are the states of Texas, Indiana, and Louisiana, and seven individuals seeking to adopt Indian children. Defendants were the United States of America, several federal agencies and officials in their official capacities, and five intervening Indian tribes. The district court granted summary judgment in favor of Plaintiffs, ruling that provisions of ICWA and the Final Rule violated equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedure Act. Defendants appealed. Although the court affirmed the district court's ruling that Plaintiffs had standing, we reverse the district court's grant of summary judgment to Plaintiffs and render judgment in favor of Defendants. The district court concluded that ICWA's "Indian Child" definition was a race-based classification. We conclude that this was error. Congress has exercised plenary power "over the tribal relations of the Indians ... from the beginning, and the power has always been deemed a political one, not subject

to be controlled by the Judicial Department of the government.” *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). The Supreme Court’s decisions “leave no doubt that federal legislation with respect to Indian tribes ... is not based upon impermissible racial classifications.” *United States v. Antelope*, 430 U.S. 641, 645 (1977). “Literally every piece of legislation dealing with Indian tribes and reservations ... single[s] out for special treatment a constituency of tribal Indians living on or near reservations.” *Morton v. Mancari*, 417 U.S. 535, 552 (1974). The district court concluded that ICWA sections 1901–2312 and 1951–5213 violated the anticommandeering doctrine by requiring state courts and executive agencies to apply federal standards to state-created claims. The district court also considered whether ICWA preempts conflicting state law under the Supremacy Clause and concluded that preemption did not apply because the law “directly regulated states.” Defendants argue that the anticommandeering doctrine does not prevent Congress from requiring state courts to enforce substantive and procedural standards and precepts, and that ICWA sets minimum procedural standards that preempt conflicting state law. We examine the constitutionality of the challenged provisions of ICWA below and conclude that they preempt conflicting state law and do not violate the anticommandeering doctrine. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. Congress’s legislative powers are limited to those enumerated under the Constitution. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1476 (2018). “[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.” *Id.* The anticommandeering doctrine, an expression of this limitation on Congress, prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting. Federal statutes enforceable in state court do, in a sense, direct state judges to enforce them, but this sort of federal “direction” of state judges is mandated by the text of the Supremacy Clause.” *New York*, 505 U.S. 144, 178–179 (1992). The district court determined that ICWA provisions violated the nondelegation doctrine, reasoning that section 1915(c) grants Indian tribes the power to change legislative preferences with

binding effect on the states, and Indian tribes, like private entities, are not part of the federal government of the United States and cannot exercise federal legislative or executive regulatory power over non-Indians on non-tribal lands. However, the Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine. *See United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710 (1975). (“[I]ndependent tribal authority is quite sufficient to protect Congress’ decision to vest in tribal councils this portion of its own authority ‘to regulate Commerce ... with the Indian tribes.’”). The Bureau of Indian Affairs’ interpretation of section 1915 is also entitled to *Chevron* deference. Plaintiffs had Article III standing, but this court rendered judgment in favor of Defendants on all claims.

29. *In re. A.W.*

No. C086160, 38 Cal.App.5th 655, 251 Cal.Rptr.3d 50 (Cal. Ct. App. 3d Dist. Aug. 12, 2019). Having reason to know the minor may be an Indian child, the juvenile court ordered the County to provide notice to the Picayune Rancheria of the Chukchansi Indians tribe in accordance with the Indian Child Welfare Act (ICWA). The County knew that the maternal grandfather was a member of that tribe and that he lived on the tribe’s reservation. It also knew, or should have known, that mother was found to be an Indian child when she was a dependent of the court and that the Picayune Rancheria of the Chukchansi Indians tribe had intervened in that case. The court concluded that the County was required to send ICWA notice to the Picayune Rancheria of the Chukchansi Indians tribe in this case. Here the County only gave the tribe notice of a hearing which had already passed. Less than 60 days after that notice, the juvenile court held an unnoticed ICWA compliance hearing and found the ICWA did not apply, although it is well established that a non-Indian parent has standing to assert an ICWA notice violation on appeal. *In re Jonathon S.*, 129 Cal.App.4th 334, 339 (2005). Nonetheless, the County argued that this court does not have jurisdiction and parents do not have standing because they did not first bring a petition for invalidation in the juvenile court. The County argued that because a specific remedy [25 U.S.C. 1914] for ICWA violations exists, appeal is an improper remedy. It argued that a petition for

invalidation is the exclusive remedy available for ICWA notice and inquiry violations and, as such, parents were required to unsuccessfully pursue such a petition in the juvenile court prior to seeking relief on appeal. Yet despite arguing that a petition for invalidation is the exclusive remedy for an ICWA violation, the County also argued parents do not have standing to file such a petition for invalidation. It argued the petition is only available to parents of Indian children—not parents of a potential Indian child for whom ICWA inquiry and notice was not effectuated. The Court declined the County’s invitation to reexamine the “non-forfeiture doctrine”—or, more accurately described as the principle that a parent is not foreclosed from raising an ICWA inquiry or notice violation even if the issue could have been more timely raised by appeal from an earlier order.

C. Contracting

30. Fort McDermitt Paiute and Shoshone Tribe v. Price

No. 17-837, 2018 WL 4637009 (D.D.C. Sept. 27, 2018). This case, brought under the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. § 5301 et seq., concerned a medical clinic in McDermitt, Nevada, a small hamlet located in a remote area of the state near the Oregon border. In February 2016, the Fort McDermitt Paiute and Shoshone Tribe (the “Tribe”) informed the Indian Health Service (“IHS”)—an agency within the Department of Health and Human Services (“HHS”)—that it wished to take over operation of the clinic. In March 2016, IHS announced that it intended to close the clinic. The Tribe and IHS began negotiating a “self-governance compact and funding agreement” pursuant to Title V of ISDEAA, under which the Tribe would operate the clinic. The parties were able to reach agreement in some areas, but not all. On October 13, 2016, the Tribe set forth its position on five remaining sticking points in a “final offer” submitted pursuant to 25 U.S.C. § 5387(b). IHS responded on November 23, 2016, with a letter (the “Declination Letter”) rejecting the Tribe’s proposal on all five points. The parties subsequently resolved three of the five issues through further negotiations. The parties still disagreed whether IHS properly rejected two of the Tribe’s proposals under ISDEAA, which sets out limited grounds on which IHS may do so. First, the parties disputed

whether IHS's rejection of the Tribe's requested funding level was proper. IHS asserts that it properly rejected the request, because the amount of funds the Tribe proposed exceeded the funding level to which the Tribe was entitled. The Tribe's final offer requested \$1,106,453.00 in funding. IHS claimed in its Declination Letter that the Tribe was entitled to no more than \$375,533.00. Second, the parties disputed whether IHS properly rejected the Tribe's proposal to include a provision related to housing for clinic employees in the funding agreement. The parties cross-moved for summary judgment on these issues. The court denied both motions without prejudice as they relate to the funding issue, and order further proceedings. The court did, however, enter summary judgment for the Tribe on the employee-housing issue.

31. Cook Inlet Tribal Council v. Mandregan

No. 14-cv-1835, 348 F. Supp. 3d 1, 2018 WL 5817350 (D. D.C. Nov. 07, 2018). Non-profit corporation that provided services to Alaskan Native people brought action against Indian Health Service (IHS), Department of Health and Human Services, and agency officials, challenging decision declining proposed amendment to self-determination contract pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA) seeking increased funding for substance abuse programs to account for increased facility support costs. Parties filed cross-motions for summary judgment. The District Court, Emmet G. Sullivan, J., held that: (1) funding provision in ISDEAA was ambiguous regarding whether facility support costs needed to be funded exclusively from the Secretarial amount; (2) facility support costs were eligible as contract support costs; and (3) remand to IHS was warranted to determine amount of increased funding non-profit corporation was entitled to under ISDEAA. Plaintiff's motion granted in part; defendants' motion denied.

D. *Employment*

32. *Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan*

No. 17-1932, 748 Fed.Appx. 12, 2018 WL 4183717 (6th Cir. Aug. 30, 2018). Indian tribe that maintained separate health insurance group policies for its members and its employees brought action against plan administrator, alleging that administrator breached its fiduciary duties under the Employee Retirement Income Security Act (ERISA) by inflating tribe's medical bills with undisclosed administrative fees, failing to authorize payment of Medicare-like rates for certain health services obtained by tribe's members, and charging hidden fees in connection with its physician group incentive program. The United States District Court for the Eastern District of Michigan, Thomas L. Ludington, J., 200 F. Supp. 3d 697, dismissed tribe's claim related to administrator's failure to pay Medicare-like rates, and, 2017 WL 3007074, granted in part and denied in part parties' cross-motions for partial summary judgment as to remaining claims. Tribe appealed. The Court of Appeals, Boggs, Circuit Judge, held that: (1) presumption that employee health benefits offered by employer constituted single ERISA plan was not applicable; (2) tribe's health insurance group policies for its members and its employees were separate plans; (3) tribe's policy for its members was not governed by ERISA; (4) tribe stated breach of fiduciary duty claim relating to Medicare-like rates; but (5) administrator did not violate its fiduciary duties under ERISA through its operation of incentive program; and (6) tribe forfeited any claim to prejudgment interest as component of its damages. Affirmed in part, reversed in part, and remanded.

33. *Luiz v. Northern Circle Indian Housing Authority*

No. 18-cv-04712-RMI, 2018 WL 5733652 (N.D. Cal. Oct. 30, 2018). This is a petition for writ of habeas corpus, filed on August 6, 2018. Respondents moved to dismiss the action for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted. The court will grant Respondents' motion. In his petition, Petitioner states that he is challenging the denial of worker's compensation benefits by the Northern Circle Indian Housing Authority (NCIHA) and AMERIND Risk Tribal WC Program

(AMERIND), as administered by the Berkeley Risk Administrators. Petitioner further alleges the following: (1) NCIHA is a tribal housing authority on Indian land in Ukiah, California, which provides assistance for native Americans in Northern California; (2) AMERIND is a federally chartered corporation providing worker's compensation; (3) through contract, AMERIND provides worker's compensation for NCIHA through the AMERIND Tribal Worker's Compensation Program; (4) Petitioner's claim is administered by Berkeley Risk Administration in Scottsdale, Arizona. Petitioner was a non-native employee of NCIHA, where he worked as an IT professional for eighteen years before his claimed injury. On January 22, 2018, and on February 14, 2018, Petitioner filed a claim for worker's compensation benefits with NCIHA for an injury to his neck and shoulder. The claim was denied by Berkeley Risk Administrators as falling outside the coverage plan because the plan does not insure "idiopathic injuries arising from an obscure cause or unknown cause." Respondents move to dismiss on the ground that the court lacks subject matter jurisdiction based on tribal sovereign immunity. "Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1)." *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007) (quoting *E.F.W. v. St Stephen's Indian High Sch.*, 264 F.3d 1297, 1302-03 (10th Cir. 2001)). As a court of limited jurisdiction, the federal courts are presumed to lack subject matter jurisdiction unless the party asserting jurisdiction establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). When a defendant moves to dismiss a case for lack of subject matter jurisdiction, the plaintiff has the burden of providing by a preponderance of the evidence that the court possesses jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Generally, a federal court lacks subject matter jurisdiction over an Indian tribe because of tribal sovereign immunity. *Alvarado v. Table Mountain Rancheria*, 509 F. 3d 1008, 1015-16 (9th Cir. 2007). A tribe's sovereign immunity will extend to both tribal governing bodies and tribal agencies which act as arms of the tribe. *Allen v. Gold County Casino*, 464 F. 3d 1044, 1046 (9th Cir. 2006) (tribal casino held entitled to sovereign immunity). "It extends to agencies and subdivisions of the tribe and has generally been held to apply to housing authorities formed by tribes." *Marceau v. Blackfeet Hous.*

Auth., 455 F.3d 974, 978 (9th Cir. 2006) (vacated in part on other grounds). Thus, “[s]uits against Indian tribes are ... barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.” *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). Petitioner provides no basis for federal subject matter jurisdiction over this action in his petition. To the contrary, he admits in his petition that NCIHA and its insurer AMERIND enjoy sovereign immunity. Petitioner claims a violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1303, on the ground that he was not fully informed of his rights, duties, and obligations before his claim was denied by the claims administrator and a final order issued by a hearing examiner denying his benefits. The ICRA does not establish or imply a federal civil cause of action except that it provides for a petition for writ of habeas corpus. *See Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1323 (9th Cir. 1983); *Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1189 (9th Cir. 1998). “The term ‘detention’ in the statute must be interpreted similarly to the ‘in custody’ requirement in other habeas contexts.” *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010). However, “[a]t the time Congress enacted the ICRA, ‘detention’ was generally understood as having a meaning distinct from and, indeed, narrower than ‘custody.’” *Tavares v. Whitehouse*, 851 F.3d 863, 871 (9th Cir. 2017). “Specifically, ‘detention’ was commonly defined to require physical confinement.” In this case, Petitioner does not allege that he was ever in tribal custody or was detained by the tribe in any way. Thus, the court finds as a matter of law that Petitioner cannot state a claim under the ICRA and his reference to the ICRA provides no basis for federal subject matter jurisdiction. Based on the foregoing, this case is dismissed for lack of subject matter jurisdiction.

34. *Stathis v. Marty Indian School*

No. 28738, 930 N.W.2d. 653, 2019 WL 2528032 (S. Ct. S. Dakota June 19, 2019). High school principal at Indian reservation school brought action against the school, school employees, and members of school board, asserting claims for wrongful termination, breach of contract, breach of settlement agreement, libel, and slander; and requesting punitive damages arising from termination of his employment. The Circuit Court, First Judicial Circuit, Charles Mix

County, Bruce V. Anderson, J., granted defendants' motion to dismiss. Principal appealed. The Supreme Court, Gilbertson, C.J., held that federal law preempted the principal's action. Affirmed.

E. *Environmental Regulations*

35. *Pakootas v. Teck Cominco Metals, Ltd.*

No. 16-35742, 905 F.3d 565, 2018 WL 4372973 (9th Cir Sept. 14, 2018). Confederated tribes of Colville Reservation brought CERCLA action against the State of Washington and Canadian company, seeking to hold them liable for dumping several million tons of industrial waste into the Columbia River. After phase one of a trifurcated bench trial, the United States District Court for the Eastern District of Washington, No. 2:04-cv-00256-LRS, Lonny R. Suko, J., found the company was a liable party under CERCLA and, in phase two of trial, found the company liable for more than \$8.25 million of plaintiffs' response costs. After partial judgment was entered, the company appealed. The Court of Appeals, Gould, Circuit Judge, held that: (1) The district court did not abuse its discretion by directing entry of judgment on company's liability under CERCLA for response costs; (2) company expressly aimed waste it dumped into River at the State of Washington, thereby establishing requisite effects in Washington for exercise of specific personal jurisdiction; (3) tribes were entitled to recover investigation costs, as recoverable costs of removal; (4) tribes were entitled to recover reasonable attorney fees for prevailing in their action; (5) company was not entitled to divisibility defense. Affirmed.

36. *Havasupai Tribe v. Provencio*

No. 15-15754, 906 F.3d 1155, 2018 WL 5289028 (9th Cir. Oct. 25, 2018). Environmental groups and Indian tribes brought an action challenging United States Forest Service's approval of the resumption of the uranium mining operation on federal land. Mining companies intervened. *Grand Canyon Trust v. Williams*, 98 F. Supp.3d 1044 (D. Ariz. 2015) entered summary judgment in government's favor, and plaintiffs appealed. The court of appeals, Block, District Judge, sitting by designation, held that: (1) plaintiffs had Article III standing to assert claims under National

Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA); (2) Forest Service's conclusion that mining company had valid existing rights to mine uranium ore on public lands that were established prior to mineral withdrawal was final agency decision; (3) Forest Service's mineral report was not a major federal action requiring preparation of environmental impact statement (EIS); (4) Forest Service's mineral report was not an undertaking that triggered NHPA's consultation process; (5) groups' claim that Forest Service improperly determined that mining company had valid existing rights to mine uranium ore on public lands fell outside the zone of interests protected by General Mining Act; and (6) groups' claim that Forest Service improperly determined that company had valid existing rights to mine uranium ore on public lands fell within zone of interests protected by Federal Land Policy and Management Act (FLPMA). Affirmed in part, vacated in part, and remanded.

37. *Spokane County v. Department of Fish and Wildlife*

No. 95029-6, 192 Wash.2d 453, 430 P.3d 655 (Wash. Dec. 06, 2018). Counties brought action against the Department of Fish and Wildlife, seeking declaratory and injunctive relief regarding Department's authority to regulate construction or performance of work that would occur exclusively above ordinary high-water line. The Superior Court, Thurston County, No. 16-2-04334-5, John C. Skinder, J., entered judgment for Department. Counties sought direct review. The Supreme Court, Owens, J., held that upland projects that are entirely landward of the ordinary high-water line may be subject to the Hydraulic Code, and thus subject to regulation by the Department. Affirmed.

38. *Menominee Indian Tribe of Wisconsin v. U.S. Environmental Protection Agency*

No. 18-C-108, 360 F.Supp.3d 847, 2018 WL 6681397 (E.D. Wis. Dec. 19, 2018). Tribe brought action against Environmental Protection Agency (EPA) and Army Corps of Engineers, seeking declaratory and injunctive relief under Clean Water Act (CWA) and Administrative Procedure Act (APA) in substantive challenge to refusal of EPA and Corps to exercise jurisdiction over CWA permit from state of Michigan for discharge of dredged or fill material into

certain navigable waters. Tribe moved to amend the complaint to add APA claims challenging EPA's withdrawal of its objections to permit and alleging that EPA and Corps had violated National Historic Preservation Act (NHPA) section, and EPA and Corps moved to dismiss. The district court, William C. Griesbach, and the Chief Judge, held that: (1) EPA's withdrawal of its objections to permit was not reviewable under APA; (2) allegedly violated NHPA section did not apply because no federally funded or federally licensed project was involved; (3) a matter of apparent first impression, CWA citizen suit provision did not waive sovereign immunity for suits against Army Corps of Engineers; (4) CWA could not be used for substantive challenge to EPA's refusal to exercise jurisdiction; and (5) letters from EPA and Corps to tribe explaining refusal to exercise jurisdiction were not final agency actions subject to APA review. Plaintiff's motion denied; defendants' motion granted.

39. *Dine Citizens Against Ruining our Environment v. Bernhardt*

No. 18-2089, 923 F.3d 831, 2019 WL 1999298 (10th Cir. May 07, 2019). Environmental advocacy groups brought an action alleging that the Bureau of Land Management (BLM) violated National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA) in granting applications for permits to drill (APD) horizontal, multi-stage hydraulically fracked wells on public lands. *Dine Citizens Against Ruining Our Env't v. Jewell*, 312 F. Supp. 3d 1031 (D. N.M. 2018), entered judgment in BLM's favor, and the groups appealed. The court of appeals, Briscoe, Circuit Judge, held that: (1) the groups had standing to bring action; (2) environmental assessments (EA) did not arbitrarily define area of potential effects (APE) for each APD in way that excluded cultural sites; (3) EAs adequately analyzed cumulative effects of developing new APDs; (4) BLM did not abuse its discretion under National Historic Preservation Act (NHPA) when it failed to consult with state historic preservation office (SHPO); (5) EAs were properly tiered to its previous environmental impact statement (EIS); (6) NEPA required BLM to consider cumulative impacts of reasonably foreseeable wells in EAs; (7) groups failed to carry their burden to show that BLM acted arbitrarily or capriciously in analyzing air pollution impacts; and 8) BLM abused its discretion by failing to

consider cumulative water impacts. Affirmed in part, reversed in part, and remanded.

40. Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs

No. 17-17320, 932 F.3d 843, 2019 WL 3404210 (9th Cir. July 29, 2019). A coalition of tribal, regional, and national conservation organizations (“Plaintiffs”) sued the U.S. Department of the Interior, its Secretary, and several bureaus within the agency, challenging a variety of agency actions that reauthorized coal mining activities on land reserved to the Navajo Nation. Plaintiffs alleged that these actions violated the Endangered Species Act (“ESA”), Endangered Species Act, 16 U.S.C. § 1531 (1973). et seq., and the National Environmental Policy Act (“NEPA”), National Environmental Policy Act, 42 U.S.C. § 4321 (1969). et seq. The Navajo Transitional Energy Company (“NTEC”), a corporation wholly owned by the Navajo Nation that owns the mine in question, intervened in the action for the limited purpose of moving to dismiss under Federal Rules of Civil Procedure 19 and 12(b)(7). NTEC argued that it was a required party but that it could not be joined due to tribal sovereign immunity, and that the lawsuit could not proceed without it. The district court agreed with NTEC and dismissed the action. Affirmed. The Navajo Mine (“Mine”) is a 33,000-acre strip mine. It produces coal from which the Four Corners Power Plant (“Power Plant”) generates electricity. The Mine and Power Plant are both on tribal land of the Navajo Nation within New Mexico. The Mine operates pursuant to a surface mining permit issued by the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (“OSMRE”), under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201(1977). et seq. This lawsuit stems from changes and renewals to the lease agreements, rights-of-way, and government-issued permits under which the Mine and Power Plant operate. In 2011, APS and the Navajo Nation amended the lease governing Power Plant operations, including by extending the term of the lease through 2041. BHP Billiton (which at the time still owned the Mine) then sought a renewal of the existing surface mining permit for the Mine and a new surface mining permit that would allow operations to move to an additional area within the Mine lease area. The lease amendment and accompanying rights-of-

way could not go into effect, and the surface mining permits could not be granted, without approvals from several bureaus within the Department of the Interior. NTEC asserted that it was a required party, because of its economic interest in the Mine, that it could not be joined due to tribal sovereign immunity, and that the action could not proceed in its absence. Even though dismissal would have left their decisions intact, Federal Defendants opposed NTEC's motion to dismiss, arguing that the federal government was the only party required to defend an action seeking to enforce compliance with NEPA and the ESA. The district court granted NTEC's motion to dismiss. The court concluded that NTEC had a legally protected interest in the subject matter of this suit, because the “relief Plaintiffs seek could directly affect the Navajo Nation (acting through its corporation, Intervenor-Defendant NTEC) by disrupting its ‘interests in [its] lease agreements and the ability to obtain the bargained-for royalties and jobs.’” The court held that Federal Defendants could not adequately represent NTEC's interest in the litigation, because although the agencies had an interest in defending their analyses and decisions, “NTEC's interests in the outcome of this case far exceed” those of the agencies. We agree with the district court that Federal Defendants cannot be counted on to adequately represent NTEC's interests. Although, Federal Defendants have an interest in defending their decisions, their overriding interest, as it was in Manygoats, must be in compliance with environmental laws such as NEPA and the ESA. This interest differs in a meaningful sense from NTEC's and the Navajo Nation's sovereign interest in ensuring that the Mine and Power Plant continues to operate and provide profits to the Navajo Nation. Finally, Plaintiffs and the United States urge us to apply the “public rights” exception to hold that this litigation can continue in NTEC's absence. The public rights exception is a limited “exception to traditional joinder rules” under which a party, although necessary, will not be deemed “indispensable,” and the litigation may continue in the absence of that party. *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988). The court held that the exception does not apply here, reasoning that the public rights exception is reserved for litigation that “transcend[s] the private interests of the litigants and seek[s] to vindicate a public right.” *Kescoli v Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). The public rights exception may apply in a case that could “adversely affect the absent parties' interests,” but “the

litigation must not ‘destroy the legal entitlements of the absent parties’” for the exception to apply. (emphasis added) (quoting *Conner*, 848 F.2d at 1459). Here, although Plaintiffs nominally seek only a renewed NEPA and ESA process, the implication of their claims is that Federal Defendants should not have approved the mining activities in their exact form. The result Plaintiffs seek, therefore, certainly threatens NTEC's legal entitlements. We also recognize, as the Tenth Circuit has pointed out, that refusing to apply the public rights exception arguably “produce[s] an anomalous result” in that “[n]o one, except [a] Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on [that tribe's] lands.” *Manygoats*, 558 F.2d at 559. Or, at least, no one could obtain such review unless the tribe were willing to waive its immunity and participate in the lawsuit. This result, however, is for Congress to address, should it see fit, as only Congress may abrogate tribal sovereign immunity. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). It is undisputed that Congress has not done so here. The public rights exception, therefore, does not apply. Affirmed.

41. *United Keetoowah Band of Cherokee Indians v. Federal Communications Commission*

No. 18-1129, 933 F.3d 728, 2019 WL 3756373 (D.C. Cir. Aug 09, 2019). Cellular wireless services, including telephone and other forms of wireless data transmission, depending on facilities that transmit their radio signals on bands of the electromagnetic spectrum. The Federal Communications Commission (FCC or Commission) has exclusive control over the spectrum, and wireless providers must obtain licenses from the FCC to transmit. As part of an effort to expedite the rollout of 5G service, the Commission has removed some regulatory requirements for the construction of wireless facilities. These petitions challenged one of the FCC’s orders paring back such regulations, *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (Order)*, FCC 18-30, 2018 WL 1559856 (F.C.C.) (Mar. 30, 2018). The *Order* exempted most small cell construction from two kinds of previously required review historic-preservation

review under the National Historic Preservation Act (NHPA), and environmental review under the National Environmental Policy Act (NEPA). Together, these reviews assess the effects of new construction on, among other things, sites of religious and cultural importance to federally recognized Indian Tribes. We grant in part the petitions for review, because the *Order* does not justify the Commission's determination that it was not in the public interest to require a review of small cell deployments. In particular, the Commission failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risk, particularly given the vast number of proposed deployments and the reality that the *Order* will principally affect small cells that require new construction. The Commission accordingly did not, pursuant to its public interest authority, Construction Permits, 47 U.S.C. § 319(d), adequately address possible harms of deregulation and benefits of environmental and historic preservation review. The *Order's* deregulation of small cells is thus arbitrary and capricious. As for the Tribes' contention that the *Order* is invalid because the Commission did not meet its obligations to consult with Tribes, the Commission responds that it extensively consulted with Tribes, and that in any event, its consultation obligation is not judicially enforceable. We conclude that the Commission fulfilled its obligation to consult. The Commission presented abundant evidence that it "consulted" Tribes in the ordinary sense of the word, and the Tribes have offered no other concrete standard by which to judge the Commission's efforts. On this record, we cannot say that the Commission failed to consult with Tribes in its meetings and other communications, which began in 2016 and continued through early 2018. The Commission documented extensive meetings it held with Tribes before it issued the *Order*. Under Advisory Council regulations, "[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 C.F.R. § 800.16(f); *see also National Park Service and Related Programs*, 54 U.S.C. § 302706(b). The dictionary definition of consulting is "seek[ing] advice or information of." *Consult*, *American Heritage Dict.* (5th ed. 2019). Keetoowah complains that the FCC's efforts were "listening sessions, briefings, conference calls, and delivery of

remarks by a Commissioner” rather than “consultations,” and presents evidence that Tribes did not view these meetings as consultations. But it offers no standard by which to judge which consultations were “listening sessions”, or whether a “listening session” or a conference call qualifies as a consultation. We grant the petitions to vacate the *Order*’s removal of small cells from its limited approval authority and remand to the FCC. We deny the petitions to vacate the *Order*’s changes to Tribal involvement in Section 106 review and to vacate the *Order* in its entirety.

F. *Fisheries, Water, FERC, BOR*

42. *Robbins v. Mason County Title Insurance Company*

No. 50376-0-II, 5 Wash. App.2d 68, 425 P.3d 885 (Wash. Ct. App. Aug. 28, 2018). Insureds filed action against title insurance company, alleging that terms of title insurance policy obligated insurer to defend them against a claim by Squaxin Island Tribe that the 1854 Treaty of Medicine Creek gave Tribe the right to take shellfish on the insureds' tidelands. The Superior Court, Mason County No: 16-2-00686-1, Toni A Sheldon, J., granted summary judgment in favor of the insurer and denied insureds' cross-motion for partial summary judgment. Insureds appealed. The Court of Appeals, Bjorgen, J., held that: (1) Tribe's notification to insureds of plan to harvest shellfish in accordance with tribal shellfish rights constituted demand, as required for coverage under policy; (2) Tribe's demand to insureds was not founded upon a claim of title, as required for coverage under policy; (3) Tribe's demand to insureds was founded upon an encumbrance, as required for coverage under policy; (4) Tribe's right to harvest shellfish existed or was claimed to have existed prior to date of title insurance, as required for coverage under policy; (5) Tribe's right to harvest shellfish resembled profit prendre, not easement, and thus did not fall within policy exclusion for easements; and (6) insurer acted in bad faith in denying defense to insureds. Reversed and remanded.

43. *United States v. Uintah Valley Shoshone Tribe*

No. 2:17-cv-1140-BSJ, 2018 WL 4222398 (D. Utah Sept. 05, 2018). Plaintiff’s Motion for Summary Judgment and Defendants’ competing Motion for Summary Judgment came before the Court

on June 1, 2018. Plaintiff United States of America seeks, among other things, to permanently enjoin Defendants from selling and issuing hunting and fishing permits for use on state, federal, or tribal lands of the Ute Indian Tribe of the Uintah and Ouray Reservation (“Ute Tribe”). The sale of such licenses allegedly violates 18 U.S.C. § 1343, a criminal statute, which provides the following: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. The UVST, the Defendant, is not a tribe currently recognized by the United States. It is currently an organization composed of “Mixed-Bloods”⁴ (and their descendants) who were formerly members of the Ute Tribe, but whose membership therein and relationship to the federal government was terminated under the Ute Partition and Termination Act of 1954 (“UPTA”). Three UVST “tribal leaders” are named as Defendants. The United States argued that Defendants are engaged in a scheme to obtain money by false representations and promises. Based on the agreed factual stipulations it is difficult for the Court to find such a scheme to obtain money by false representations and promises through the sale of licenses. The question presented to the Court by the United States was more in the nature of a declaration as to the absence of sovereign power in Defendants to issue hunting and fishing licenses. Thus, it appeared to the Court the United States as trustee is entitled to a ruling so declaring but denied relief by way of an injunction because of the absence of evidence dealing with a criminal statute. It was clear to the court from the history, since Lincoln’s time as a result of congressional and tribal action, that Defendants have no power to issue licenses to hunt and fish on trust or Tribal lands. None. They should not do so, not because they have concocted a scheme to defraud purchasers of such licenses, but because they simply lack the power to issue such licenses. That resides elsewhere as determined above. It did not reside in Defendants.

44. *Silva v. Farrish*

No. 18-CV-3648 (SJF)(SIL), 2019 WL 117602 (E.D. N.Y. Jan. 07, 2019). Members of the Shinnecock Indian Nation (the “Tribe”), commenced this action alleging violations of their aboriginal usufructuary fishing rights under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and a continuing pattern of race discrimination in violation of Sections 1981 and 1982 of the Civil Rights Act of 1866, as amended, 42 U.S.C. §§ 1981, 1982, by Defendants Brian Farrish (“Farrish”), the New York State Department of Environmental Conservation (“NYDEC”), and the Suffolk County District Attorney’s Office (“SCDA”) (Farrish, Laczi, Seggos and the NYDEC collectively, the “State Defendants”). The Court respectfully recommends that the Complaint be dismissed in its entirety. However, the Court further recommends that Plaintiffs be granted leave to replead, but only as to their statutory claims for monetary damages against Farrish, Laczi, and Seggos in their individual capacities. Plaintiffs are members of the Shinnecock Indian Nation, a federally-recognized Indian tribe, who reside on the Shinnecock Indian Reservation (the “Reservation”) located in Suffolk County, New York. At all relevant times, Plaintiffs have fished in the waters of Shinnecock Bay and its estuary. According to Plaintiffs, “Colonial Deeds and related documents” support their aboriginal right to fish in such waters without interference. There was a pending state criminal action against him that implicated the State’s interest in enforcing its generally applicable fishing regulations, and which provided an adequate opportunity for judicial review of his federal constitutional claim. The State Defendants move to dismiss Plaintiffs’ Complaint on the grounds that: (i) all claims against the NYDEC, as well as those against Farrish, Laczi, and Seggos in their official capacities, are barred by the Eleventh Amendment and principles of sovereign immunity. The claims for injunctive and declaratory relief as to Silva are precluded under the *Younger* abstention doctrine. It is undisputed by Plaintiffs that the Eleventh Amendment precludes jurisdiction over their claims for monetary damages under 42 U.S.C. §§ 1981 and 1982 against the NYDEC. Plaintiffs maintain, however, that the *Young* exception to sovereign immunity applies to their claims for injunctive and declaratory relief against Farrish, Laczi, and Seggos in their official capacities. Plaintiffs also seem to

suggest that state regulation of Indian fishing rights is necessarily preempted by federal law. The Court disagrees. Initially, the Court acknowledges that Plaintiffs' claims for declaratory and injunctive relief, as pled in the Complaint, facially satisfy both components of the “straightforward inquiry” under *Verizon* for determining whether *Young* should apply. The Court concludes that this case is governed by *Coeur d'Alene*. Accordingly, the *Young* exception to Eleventh Amendment sovereign immunity does not apply to Plaintiffs' claims against Farrish, Laczi, and Seggos in their official capacities. The Court recommended that Plaintiffs' claims against the NYDEC, along with those against Farrish, Laczi, and Seggos in their official capacities, be dismissed as barred by the Eleventh Amendment.

45. *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*

No. 14-1271, 913 F.3d 1099, 2019 WL 321025 (D.C. Cir. Jan. 25, 2019). Indian tribe filed petition for review of Federal Energy Regulatory Commission orders denying its petition for order declaring that licensee for hydroelectric project failed to diligently pursue relicensing of project or that states had waived their authority to issue water quality certification for project, 147 FERC 61216, 2014 WL 2794387, and denying its motion for rehearing, 149 FERC 61038, 2014 WL 5293211. The court of appeals, Sentelle, Senior Circuit Judge, held that: (1) California and Oregon were not indispensable parties, and (2) states waived their authority under Clean Water Act (CWA) to issue water quality certification for the project. Petition granted.

46. *United States v. Turtle*

No. 2:18-cr-88-FtM-38MRM, 365 F.Supp.3d 1242, 2019 WL 423346 (Fla. Dist. Ct. App., Feb. 04, 2019) Defendant, a member of the Seminole Tribe of Florida, who lived on a Seminole Indian reservation, was charged with selling American alligator eggs in violation of Lacey Act, predicated on the Endangered Species Act (ESA). Defendant moved to dismiss. The District Court, Sheri Polster Chappell, J., held that: (1) the Tribe's usufructuary rights included the right to sell alligator eggs gathered from the

reservation; (2) ESA did not abrogate the Tribe's usufructuary right to sell alligator eggs; but (3) Congress could regulate the Tribe's usufructuary rights with reasonable and necessary conservation measures. Motion denied.

47. *Ak-Chin Indian Community v. Cent. Arizona Water Conservation Dist.*

No. CV-17-00918-PHX-DGC, 378 F. Supp.3d 797, 2019 WL 1356310 (D. Ariz. R. Mar. 26, 2019). Plaintiff Ak Chin Indian Community (the “Community”) sued Defendant Central Arizona Water Conservation District (“CAWCD”) for declaratory judgment and a permanent injunction regarding delivery of Central Arizona Project (“CAP”) water to the Community. CAWCD counterclaimed, seeking the opposite result. The Court joined the United States as a party under Rule 19, and the United States filed a crossclaim against CAWCD seeking declaratory relief regarding the interpretation of relevant statutes and contracts as they relate to the Community’s water rights. CAWCD asserted claims against the United States, but the Court dismissed them on sovereign immunity grounds. The Court granted the United States' motion for summary judgment on its claims against CAWCD. The Community is a federally recognized Indian tribe. CAWCD is a multi-county water conservation district and a municipal corporation authorized to operate and maintain the CAP, a system of canals, aqueducts, and related structures that deliver Colorado River water throughout central and southern Arizona. “The United States” in this case includes a number of federal officials and agencies that oversee reclamation matters. This case concerns the Ak Chin Water Rights Act of 1984, referred to and cited in this order as the “1984 Act.” See 1984 Act, Pub. L. No. 98-530, 98 Stat. 2698 (Oct. 19, 1984). The 1984 Act addressed water the Community is entitled to receive from the Colorado River. Section 2(a) of the Act required the Secretary to deliver a permanent water supply to the Community of “not less than seventy-five thousand acre-feet of surface water suitable for agricultural use except as otherwise provided under subsections (b) and (c).” 1984 Act, § 2(a). Section 2(b), which is the section in dispute, in this case, concerns an additional 10,000 acre-feet (“AF”) of water the Community may receive under certain conditions. It provides that “[i]n any year in which sufficient surface

water is available, the Secretary shall deliver such additional quantity of water as is requested by the Community not to exceed ten thousand acre-feet.” 1984 Act, § 2(b). The section further states that “[t]he Secretary shall be required to carry out this obligation referred to in this subsection only if he determines that there is sufficient capacity available in the main project works of the Central Arizona Project to deliver such additional quantity.” It is ordered: The court granted the United States’ motion for summary judgment on its claims against CAWCD.

48. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., et al.*

No. EDCV 13-00883 JGB, 162 F.Supp.3d 1053 (C.D. Cal. Apr. 19, 2019). The Tribe utilizes water supplied by CVWD and DWA. In 2016, CVWD’s and DWA’s public water systems covering the Reservation served a total population of 340,000 people. Today, the Tribe does not pump groundwater from the Reservation. The Tribe currently does not use water for agricultural purposes to any significant degree. For standing purposes, the Tribe must show an invasion to its legally protected interest. Under the Supreme Court’s decision in *Winters v. United States*, 207 U.S. 564, the creation of an Indian Reservation contains a right to water “to the extent needed to accomplish the purpose of the reservation.” *Cappaert v. United States*, 426 U.S. 128, 138 (1976). This right is referred to as a “*Winters* right.” The Supreme Court held this *Winters* right “reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.” (citing *Arizona v. California*, 373 U.S. 546, 600-01 (1963) (emphasis added)). In this case, the Ninth Circuit acknowledged limitations on a *Winters* right and noted that a *Winters* right “only reserves water to the extent it is necessary to accomplish the purpose of the reservation[.]” *Agua Caliente*, 849 F.3d at 1268. The Federal Circuit, considering a similar issue, reached the same conclusion. See *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350 (Fed. Cir. 2018). The tribe in Crow Creek argued any action affecting the water source at issue constitutes an injury to its *Winters* right, even if the action does not affect the tribe’s ability to draw sufficient water to fulfill the purposes of the reservation. The Federal Circuit rejected this argument, noting that a *Winters* right only entitled a tribe to enough water to fulfill the

purposes of its reservation, not more. It elaborated that the tribe's property right was usufructuary in nature in that the tribe did not own particular molecules of water but the advantage of its use. (citation omitted). The federal circuit held that the tribe cannot be injured by "action that does not affect [its] ability to use sufficient water to fulfill the purposes of the [r]eservation." This Court agreed with the federal circuit's analysis and finds that the Tribe must provide evidence of injury to its ability to use sufficient water to fulfill the purposes of the reservation.

49. *United States v. Washington*

No. 17-35760, 928 F.3d 783, 2019 WL 2608834 (9th Cir. June 26, 2019). The United States, on its own behalf and as trustee for a number of Western Washington Indian tribes, brought action against the State of Washington, seeking declaratory and injunctive relief concerning off-reservation treaty rights fishing. After entry of injunction granting tribal fishing rights, *U.S. v. State of Wash.*, 384 F. Supp. 312, (W.D. Wash. Feb. 12, 1974), and adjudication of tribes' off-reservation rights, *U.S. v. State of Wash.*, 626 F. Supp. 1405, (W.D. Wash. Jan. 1, 1985). Skokomish tribe commenced sub proceeding asserting its claim to usual and accustomed fishing rights in Satsop River. The United States District Court for the Western District of Washington, Nos. 2:17-sp-01-RSM, 2:70-cv-09213-RSM, Ricardo S. Martinez, Chief Judge, 2017 WL 3726774, entered summary judgment in favor of state and other tribes, and Skokomish tribe appealed. The court of appeals, Bea, Circuit Judge, held that tribe failed to properly invoke district court's continuing jurisdiction. Affirmed.

G. *Gaming*

50. *Forest County Potawatomi Community v. United States*

No. 15-105 (CKK), 330 F.Supp.3d 269, 2018 WL 4308570 (D. D.C. Sept. 10, 2018). Indian tribe brought this action under Administrative Procedure Act (APA) against the United States, challenging Department of Interior's (DOI) decision not to approve an amendment to a gaming compact between the tribe and State of Wisconsin under Indian Gaming Regulatory Act (IGRA). After the United States District Court for the District of Columbia, Colleen

Kollar-Kotelly, J., 317 F.R.D. 6, granted leave to intervene to nearby tribe that sought to develop competing gaming facility, tribe moved for summary judgment, while United States and nearby tribe cross-moved for summary judgment. The district court held that: (1) IGRA provision permitting tribal-state compact on any subjects directly related to operation of gaming activities was ambiguous, as would support *Chevron* deference; (2) interpretation of IGRA by Assistant Secretary of Indian Affairs was based upon a permissible construction of statute, as would entitle decision to *Chevron* deference; (3) Secretary's determination that exclusivity provision transferring responsibility for tribe's revenues onto another tribe violated IGRA was reasonable, entitling decision to *Chevron* deference; (4) Secretary's determination that proposed compact would have required another tribe to take responsibility for tribe's revenues was not arbitrary and capricious, as required to support tribe's APA claim; (5) Secretary's determination that compact's inclusion of loss of revenue from class II gaming and ancillary businesses violated IGRA was reasonable, and thus was entitled to *Chevron* deference; and (6) Secretary's determination that proposed compact calculated loss mitigation payments based on revenue from class II gaming and ancillary businesses was not arbitrary and capricious, as required to support tribe's APA claim. Tribe's motion denied; United States and nearby tribe's motions granted.

51. *Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation v. Unite Here International Union*

No. 16-cv-2660-BAS-AGS, 346 F.Supp.3d 1365 (S.D. Cal. Sept. 28, 2018). Federally-recognized Indian tribe that operated casino on its reservation brought action alleging that union which represented service and manufacturing employees skirted binding dispute resolution process by filing series of unfair labor practice charges directly with National Labor Relations Board (NLRB), and that State of California failed to make reasonable efforts to ensure that union would comply with dispute resolution process. Union and State moved to dismiss. The District Court, Cynthia Bashant, J., held that: (1) tribe had colorable basis for District Court to have federal question jurisdiction over action against State; (2) dispute between tribe and union over enforceability of alternative dispute mechanism

in tribal labor ordinance was not justiciable controversy with State of California; (3) claim by tribe against State for breach of implied covenant of good faith and fair dealing for not enforcing alternative dispute mechanism against union in tribal labor ordinance as implemented into Indian Gaming Regulatory Act (IGRA) gaming compact with State was not justiciable; and (4) court did not have federal question jurisdiction over dispute between tribe against union for opting to pursue its unfair labor charges against tribe with National Labor Relations Board (NLRB) instead of dispute resolution process in tribe's IGRA gaming contract with State of California. Motions granted.

52. *Brownstone, LLC. v. Big Sandy Rancheria of Western Mono Indians et al.*

No. 2:16-cv-04170-CAS(AGRx), 2018 WL 6697175 (C.D. Cal. Dec. 17, 2018). Brownstone, LLC filed this action against defendants Big Sandy Rancheria of Western Mono Indians (the “Tribe”) and the Big Sandy Rancheria Entertainment Authority (the “Authority”). Plaintiff alleges the following claims: (1) claims for the breaches of two contract; (2) money had and received; (3) conversion; (4) Open Book Account; and (5) declaratory relief. Defendants moved to dismiss. Plaintiff alleges that it was selected by the Tribe to provide expertise in developing a large, Class III gaming facility. The parties entered into contracts aligned with different phases of the Project. Following the initial Memorandum of Understanding (“MOU”), executed on January 16, 2007, the parties first entered into a Credit Agreement. The parties also entered into the Development Agreement on or about the same date as the Credit Agreement. Under the Development Agreement, plaintiff was to help the Tribe obtain either bridge financing or permanent financing for the Project. Plaintiff claimed that the plaintiff and the Tribal Parties continued to negotiate a third agreement, the Consulting Agreement, whereby plaintiff would provide services for the operations of the casino once completed. However, after the Tribe elected new leadership in September 2008, the Tribal Parties ultimately declined to execute the Agreement. Still, plaintiff claimed that it continued to seek financing sources to assist the Tribe with pursuing the Project, if without the complete cooperation of the Tribal Parties. Plaintiff alleged that the parties

agreed that licensing was unnecessary for the Credit Agreement and the Development Agreement, because those agreements only contracted plaintiff to perform certain services before any gaming operations occurred. On June 10, 2016, plaintiff filed this action. The Tribal Parties moved to dismiss plaintiff's complaint on the grounds that (1) the Court lacks subject matter jurisdiction over this matter; (2) that venue is improper; and (3) that plaintiff fails to state a claim for which relief is available. Plaintiff argues that the Court has subject matter jurisdiction in this case under 28 U.S.C. § 1331, commonly referred to as "federal question jurisdiction." Plaintiff contends that this case requires resolution of a substantial question of federal law under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA"), as well as the Tribal-State Compact between Big Sandy Rancheria and the State of California. Defendants responded that federal question jurisdiction does not provide this Court subject matter jurisdiction because a federal issue is not apparent on the face of plaintiff's complaint, nor is a question of federal law "a necessary element of one of one of [plaintiff's] well-pleaded state claims." The Court found that federal question jurisdiction did not confer jurisdiction over this matter because plaintiff's case does not satisfy the well-plead complaint rule. For the foregoing reasons, the Court granted defendants' motion to dismiss, pursuant to Rule 12(b)(1).

**53. *Koi Nation of Northern California v. United States
Dep't of Interior***

No. 17-1718 (BAH), 361 F.Supp.3d 14, 2019 WL 250670 (D.C. D.C. Jan. 16, 2019). The Koi Nation of Northern California, which was a landless federally recognized Indian tribe, brought action alleging that United States Department of the Interior's (DOI) decision concluding that the tribe was not eligible to game on lands under the Indian Gaming Regulatory Act (IGRA) restored lands exception violated the Administrative Procedure Act (APA), IGRA, and Indian Reorganization Act (IRA), and challenging the subsection of the regulation on which the DOI's decision relied, seeking declaration that tribe qualified as an Indian tribe restored to federal recognition under IGRA, and injunction invalidating subsection of implementing regulation to extent it excluded from eligibility for IGRA's restored lands exception tribes

administratively determined to be recognized outside the formal Part 83 Federal acknowledgement process. Koi Nation and DOI cross-moved for summary judgment. The District Court, Beryl A. Howell, Chief Judge, held that: (1) tribe's claim was ripe for judicial review; (2) statutory six-year limitations period for challenging agency regulation did not apply to tribe's claim challenging DOI regulation; (3) tribe was "restored to Federal recognition," within meaning of IGRA's restored lands exception; (4) even if IGRA's restored lands exception was ambiguous, Indian canon of construction would resolve the ambiguity in tribe's favor; (5) DOI decision violated statute prohibiting classifying, enhancing, or diminishing privileges and immunities available to Indian tribe relative to other federally recognized tribes; and (6) DOI failed to adequately explain its change in policy. Koi Nation's motion granted; DOI's motion denied.

54. Texas v. Ysleta Del Sur Pueblo

No. EP-17-CV-179-PRM, 367 F.Supp.3d 596, 2019 WL 542036 (W.D. Tex., Feb. 11, 2019). In litigation between State of Texas and Ysleta del Sur Pueblo Tribe regarding gaming activities on Pueblo tribal land, Tribe asserted counterclaim seeking declaration that Texas Constitution and Bingo Enabling Act, which enabled charitable bingo in Texas and defined which types of organizations were allowed to conduct charitable bingo, violated the Equal Protection Clause by allowing certain organizations the right to conduct bingo, but omitting Indian nations and their members from that list, and asserting that the state Attorney General enforced Texas's gaming laws in a discriminatory manner. Attorney General moved for summary judgment, asserting that §1983 was appropriate vehicle for alleging a constitutional claim and that the Tribe was not a proper claimant pursuant to §1983, and contending that the Tribe's claims failed on the merits because the Bingo Enabling Act was not unconstitutionally written or enforced. The District Court, Philip R. Martinez, J., held that: (1) Section 1983 was appropriate method for Tribe to assert claims; (2) Tribe could assert §1983 Equal Protection claim alleging that State unlawfully discriminated against Indians when it drafted Bingo Enabling Act; (3) Tribe could assert §1983 Equal Protection claim alleging that enforcement of Bingo Enabling Act discriminated against Tribe; (4) Tribe was barred from asserting

§1983 claim that its Equal Protection rights were violated because Congress had plenary power to deal with unique issues concerning Indian nations, and because Texas sought to unlawfully expand its regulatory reach; (5) district court would apply rational basis scrutiny rather than strict scrutiny; (6) under rational basis review, Bingo Enabling Act did not violate Tribe's equal protection rights; (7) Tribe could not prevail on §1983 claim alleging that enforcement of the Bingo Enabling Act violated Tribe's equal protection rights; and (8) under rational basis review, Texas's decision to have Attorney General, rather than local prosecutors, prosecute Tribe for alleged violations of gaming laws did not violate Tribe's equal protection rights. Motion granted.

55. *Texas v. Ysleta Del Sur Pueblo*

No. EP-17-CV-179-PRM, 2019 WL 639971 (W.D. Tex., Feb. 14, 2019). Plaintiff State of Texas moved for Summary Judgment and Permanent Injunction. In 1968, the United States Congress simultaneously recognized the Pueblo as a tribe and transferred any trust responsibilities regarding the Tribe to the State of Texas. S. Rep. No. 100-90S. Rep. No. 100-90 (1987), at 7. After the trust relationship was created, Texas held a 100-acre reservation in trust for the Tribe. However, in 1983, Texas Attorney General Jim Mattox issued an opinion in which he concluded that the State may not maintain a trust relationship with an Indian Tribe. Jim Mattox, *Opinion Re: Enforcement of the Texas Parks and Wildlife Code within the Confines of the Alabama-Coushatta Indian Reservation*, No. JM-17 (March 22, 1983). Mattox opined that a trust agreement with Indian tribes discriminates between members of a tribe and other Texas citizens on the basis of national origin in violation of the Texas Constitution. Therefore, Mattox determined that no proper public purpose existed for the trust. Accordingly, the Pueblo, alongside the Alabama-Coushatta Tribe in East Texas, sought to establish a federal trust relationship with the United States government. *See* S. Rep. No. 100-90S. Rep. No. 100-90 (1987), at 7. In 1999, the State sued the Tribe, and sought to enjoin gaming activities on the Pueblo reservation. On September 27, 2001, summary judgment was granted in the State's favor. *Texas v. del Sur Pueblo* ("Ysleta II"), 220 F. Supp. 2d 668, 687 (W.D. Tex. 2001) (internal citations omitted), *modified* (May 17, 2002), *aff'd*, 31 F.

App'x 835 (5th Cir. 2002), and *aff'd sub nom. State of Texas v. Pueblo*, 69 F. App'x 659 (5th Cir. 2003), and order clarified *sub nom. Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419 (W.D. Tex. Aug. 4, 2009). In his Memorandum Opinion, Judge Eisele determined that the Tribe cannot engage in “‘regulated’ gaming activities unless it complies with the pertinent regulations.” The court determined that the Tribe’s activities did not comply with Texas’s laws and regulations. Moreover, the court considered equitable factors and concluded that “[t]he fruits of [the Tribe’s] unlawful enterprise are tainted by the illegal means by which those benefits have been obtained.” Accordingly, the Tribe was permanently enjoined from continuing its operations. The Fifth Circuit summarily affirmed Judge Eisele’s opinion. *State v. del sur Pueblo*, 31 Fed. Appx. 835 (5th Cir. 2002). The facts in this case are undisputed. The lawsuit centers around the Tribe’s activities at Speaking Rock Entertainment Center, which is the primary location for the Tribe’s gaming activities. The Tribe’s gaming operations are a significant source of employment for the Pueblo people, and it uses the money raised at their casino to fund several important governmental initiatives, including education, healthcare, and cultural preservation. The Pueblo’s operations are not conducted pursuant to any license from the Texas Lottery Commission. The Court joined the refrain of Judges who have urged the Tribes bound by the Restoration Act to petition Congress to modify or replace the Restoration Act if they would like to conduct gaming on the reservation. The State of Texas’s Motion for Summary Judgment and Permanent Injunction was granted.

56. *Connecticut v. United States Dep’t of Interior*

No. 17-2564 (RC), 363 F.Supp.3d 45, 2019 WL 652321 (D.C. Feb. 15, 2019). State and Indian tribe brought action under the Administrative Procedure Act (APA) against defendant, including United States Department of the Interior (DOI), alleging that Secretary of the Interior unlawfully declined to approve amendment to secretarial procedures under the Indian Gaming Regulatory Act (IGRA) that would have allowed them to begin constructing commercial casino on state land. State and tribe moved to amend the complaint. The district court, Rudolph Contreras, J., held that: (1) defendants failed to show that they would be prejudiced by alleged

undue delay in moving to amend complaint; (2) Secretary's letter was final agency action, and thus subject to judicial review; (3) tribe and state sufficiently alleged that Secretary's letter was arbitrary and capricious on its face; (4) tribe and state sufficiently alleged that political pressure was brought to bear on officials responsible for approving proposed amendments; (5) tribe and state sufficiently alleged that political pressure caused Secretary to make decision that was not dictated by IGRA; and (6) proposed amendments to secretarial procedures plainly fell outside of DOI's definition of a tribal-state compact. Motion granted in part and denied in part. *See also* 344 F.Supp.3d 279.

57. *Frank's Landing Indian Community v. National Indian Gaming Commission*

No. 17-35368, 918 F.3d 610, 2019 WL 1119912 (9th Cir. Mar. 12, 2019). Indian community brought action against Department of Interior and National Indian Gaming Commission, challenging Interior's determination that tribe was ineligible for gaming for purposes of Indian Gaming Regulatory Act (IGRA). The United States District Court for the Western District of Washington, Benjamin H. Settle, J., 242 F.Supp.3d 1156, granted summary judgment in favor of Department of Interior. Tribe appealed. The court of appeals, Morgan Christen, Circuit Judge, held that: (1) a tribe must appear on the Secretary's annual list of federally recognized tribes in order to be eligible to engage in class II gaming, and (2) Franks Landing Act did not grant Community permission to engage in class II gaming. Affirmed.

58. *Texas v. Alabama-Coushatta Tribe of Texas*

No. 18-40116, 918 F.3d 440, 2019 WL 1199564 (5th Cir. Mar. 14, 2019). Tribe brought action against state seeking declaratory judgment that its gaming activities on tribal lands were permitted under Indian Gaming Regulatory Act (IGRA). State filed counterclaim to enjoin tribe from conducting gaming activities based on Ysleta del Sur Pueblo, Alabama, and Coushatta Indian Tribes of Texas Restoration Act. After state's motion for permanent injunction was granted, state moved to realign parties, moved for contempt, and sought declaration that IGRA did not apply, and tribe

moved for relief from injunction. The United States District Court for the Eastern District of Texas, Keith F. Giblin, United States Magistrate Judge, entered summary judgment in state's favor, 208 F.Supp.2d 670, and denied tribe's motion for relief from injunction, 298 F.Supp.3d 909. Tribe appealed. The court of appeals, Jerry E. Smith, Circuit Judge, held that National Indian Gaming Commission's (NIGC) determination that IGRA governed question of whether tribe could conduct class II gaming on tribal lands was not entitled to *Chevron* deference. Affirmed.

59. *Chemehuevi Indian Tribe v. Newsom*

No. 17-55604, 919 F.3d 1148, 2019 WL 1285060 (9th Cir. Mar. 21, 2019). Indian tribes brought action against state seeking declaratory judgment that duration provision of tribal-state gaming compacts violated Indian Gaming Regulatory Act (IGRA). The United States District Court for the Central District of California, No. 5:16-cv-01347-JFW-MRW, John F. Walter, J., 2017 WL 2971864, entered summary judgment in state's favor, and tribes appealed. The court of appeals, Gilliam, District Judge, sitting by designation, held that as matter of first impression, duration provisions were permitted by IGRA. Affirmed.

60. *City of Council Bluffs, Iowa v. United States Dep't of Interior*

No. 1:17-CV-00033-SMR-CFB, 368 F.Supp.3d 1276, 2019 WL 1368561 (S.D. Iowa, Mar. 26, 2019). City in Iowa filed suit against Department of Interior and National Indian Gaming Commission (NIGC), asserting claims under Administrative Procedure Act (APA) and seeking declaratory judgment invalidating NIGC's amended final order approving site-specific gaming ordinance enacted by Ponca Tribe of Nebraska. The Order allowed tribe to conduct Class II gaming, under Indian Gaming Regulation Act (IGRA), on 4.8-acre tract of land in Iowa that was within tribe's service area, designated pursuant to Ponca Restoration Act (PRA). The PRA restored tribe's government-to-government relationship with United States, and it was subsequently placed into trust by Bureau of Indian Affairs (BIA), as authorized by Indian Reorganization Act (IRA). State of Nebraska and State of Iowa

intervened as intervenor-plaintiffs. Parties cross-moved for summary judgment. The District Court, Stephanie M. Rose, J., held that: (1) NIGC appropriately found tribe was not estopped from asserting that parcel qualified for IGRA's restored lands exception; (2) NIGC reasonably interpreted PRA; (3) NIGC was not required to consider new IGRA regulations in interpreting PRA; (4) NIGC reasonably determined that new IGRA regulations did not apply; but (5) NIGC unreasonably failed to consider purported verbal agreement between tribe and Iowa. Plaintiffs' motion granted in part and denied in part; defendants' motion denied.

61. Pueblo of Isleta v. Grisham

No. 17-654 KG/KK, 2019 WL 1429586 (D.N.M. Mar. 30, 2019). Defendants' and Plaintiffs' moved for summary judgment. The Court found that: (1) Defendants' Summary Judgment Motion should be denied; (2) the Pueblos' Summary Judgment Motions should be granted. Plaintiffs the Pueblos of Isleta, Sandia, and Tesuque, and Plaintiffs-in-Intervention the Pueblos of Santa Ana, Santa Clara, and San Felipe (collectively, "the Pueblos"), are six (6) federally recognized Indian tribes that operate casinos in New Mexico pursuant to identical gaming compacts with the State of New Mexico ("the State"). Defendants are the State Governor, the State Gaming Representative, and the Chair and members of the State Gaming Control Board ("NMGCB") in their official capacities. The Pueblos and the State entered into gaming compacts in 2007 ("2007 Compacts"), and again in 2015, and 2016 ("2015 Compacts"). *Inter alia*, the compacts require the Pueblos to make quarterly revenue sharing payments to the State, in exchange for the Pueblos' nearly exclusive right to conduct certain kinds of gaming in New Mexico. In 2017, Defendants sent the Pueblos notices of non-compliance and notices to cease conduct, asserting that the Pueblos had miscalculated their revenue sharing obligations under the 2007 Compacts beginning as early as April 2011. Specifically, Defendants claimed that, in calculating their revenue sharing payments, the Pueblos had improperly excluded the face value of free play and deducted the value of prizes won by patrons as a result of free play wagers from their Class III gaming machines' "Net Win." Pursuant to the 2015 Compacts, which preserved Defendants' claims, Defendants instructed the Pueblos to make additional

revenue sharing payments to the State under the 2007 Compacts. The Pueblos of Isleta, Sandia, and Tesuque filed this civil action. In their complaints, the Pueblos ask the Court for a judgment declaring that: (1) Defendants' claims pursuant to the 2015 Compacts for additional revenue sharing payments under the 2007 Compacts violate federal law, and the 2015 Compacts are therefore invalid and ineffective to preserve Defendants' unlawful claims; (2) neither the Pueblos' claims in this lawsuit nor Defendants' claims for additional revenue sharing payments are subject to arbitration under the 2015 Compacts, and, (3) Defendants have no authority as a matter of federal law to pursue their claims for additional revenue sharing payments against the Pueblos. Plaintiff's motion for summary judgement was granted.

62. *Stockbridge-Munsee Cmty v. Wisconsin*

No. 18-1449, 922 F.3d 818, 2019 WL 1923403 (7th Cir. Apr. 30, 2019). Indian tribe brought action under the Indian Gaming Regulatory Act (IGRA) against second tribe and State, seeking injunctive relief from proposed expansion of second tribe's casino, located in the same county. The United States District Court for the Western District of Wisconsin, James D. Peterson, J., 299 F.Supp.3d 1026 and 2018 WL 708389, dismissed as untimely. First tribe appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that Indian tribe's lawsuit seeking injunctive relief from proposed expansion of second tribe's casino was barred by Wisconsin's six-year statute of limitations for contract actions. Affirmed.

63. *Yocha Dehe Wintun Nation v. Newsom*

No. 2:19-cv-00025-JAM-AC, 2019 WL 2513788 (E.D. Cal. June 18, 2019). On January 3, 2019, the Yocha Dehe Wintun Nation, Sycuan Band of the Kumeyaay Nation, and Viejas Band of Kumeyaay Indians (collectively "Plaintiffs" or "Tribes") filed a complaint against the State of California and Governor Gavin Newsom (collectively "Defendants"). Plaintiffs contend Defendants are not enforcing the state's ban on "banking and percentage card games" against cardrooms in California's non-tribal casinos. This, they argued, amounted to a breach of their Tribal-State Compacts and the covenant of good faith and fair dealing implied therein. For

the reasons discussed below, the Court granted Defendants' motion to dismiss with prejudice. In September 2015, June 2016, and August 2016, the State of California entered into Tribal-State Compacts with the Sycuan Band of the Kumeyaay Nation, the Viejas Band of Kumeyaay Indians, and the Yocha Dehe Wintun Nation, respectively. These agreements amended and superseded the 1999 Tribal-State Compacts between the parties. Yocha Dehe Wintun Compact, Viejas Band Compact, and Sycuan Band Compact (collectively "Tribal Compacts") at § 18.2. Each Compact included a Preamble. See Tribal Compacts at 1-2. In relevant part, the Preambles acknowledged that the tribes' exclusive right to operate slot machines and banked card games "create[d] a unique opportunity to operate a Gaming Facility in an economic environment free of competition...and that this unique economic environment is of great value to the Tribe." This "unique opportunity" was born out of a provision in the California constitution exempting Indian tribes from the state's general prohibition on "banking and percentage card games." CAL. CONST. art. IV, § 19(e) (1966). Over the years, Defendants have taken various positions on what type of gaming is allowed in light of the State's ban on banking and percentage card games. Compl. ¶¶ 33-37, 42, 48, 74, 107, 118. *See also* Cal. Penal Code §§ 330.11, 337j(f); *Oliver v. Los Angeles County*, 66 Cal. App. 4th 1397 (1997); *Huntington Park Club v. Los Angeles County*, 206 Cal. App. 3d 241 (1988). Plaintiffs contended the State's current interpretation effectively results in non-enforcement of its claimed prohibition. Indeed, Plaintiffs alleged Defendants have "been complicit in permitting, and at times even encouraging the cardrooms' unlawful conduct," abridging the Tribes right of exclusivity. Plaintiffs failed to state a breach of Compact claim, because the Tribal Compacts do not contain a right of exclusivity independent of the one provided by the state constitution. The California constitution provides: Notwithstanding [California's prohibition on Nevada-style casinos]...the Governor is authorized to negotiate and conclude compacts...for the conduct of lottery games, banking, and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. CAL. CONST. Art. IV, § 19(f) (2000). The question of whether a federally-recognized tribe has negotiated an agreement with the state to conduct otherwise prohibited gaming is a matter of

Compact interpretation. But the question of whether federally-recognized tribes are the only entities who may lawfully conduct otherwise prohibited gaming is not. Plaintiffs' exclusivity rights flow solely from the California constitution. This is the unavoidable barrier that prevents Plaintiffs from successfully maintaining their breach of Compact claims. Against this backdrop, Plaintiffs negotiated Compacts with the State in 1999. These negotiations culminated in Tribal-State Compacts that would only take effect if California voters enacted an amendment to the State Constitution that exempted tribes from California's prohibition on New Jersey- and Nevada-style gaming. The referendum passed, and the Compacts took effect. With the 1999 Compacts, Plaintiffs bargained for an economic opportunity, codified in state law, that they did not previously have: the exclusive right to conduct otherwise prohibited gaming. There is no doubt that the 1999 exclusivity provisions imposed an affirmative obligation on the State. But the 1999 compacts do not govern this suit. In 2015 and 2016, Plaintiffs renegotiated their Compacts with the State. See generally Tribal Compacts. Each Plaintiff's Compact includes a merger clause, noting that the new Compacts "set forth the full and complete agreement of the parties and supersede[s] any prior agreements or understandings with respect to the subject matter [t]hereof." Tribal Compacts at § 18.2. Plaintiffs argue the most-recently entered Compacts guarantee the same right of exclusivity that was bargained for in the 1999 agreements. Opp'n at 4. The Court disagreed. The Compacts, although recognizing the right of exclusivity provided by the California Constitution, do not include any express terms regarding Defendants' obligation to preserve that right. In fact, the Compacts contemplate the abrogation of that right, providing the Tribes limited recourse in the event their rights of exclusivity lapse. For the reasons set forth above, the Court granted with prejudice Defendants' Motion to Dismiss.

64. *Kalispel Tribe of Indians and Spokane County v. U.S. Dep't of the Interior*

No. 2:17-CV-0138-WFN, 2019 WL 3037048 (E.D. Wash. July 11, 2019). For the reasons detailed below, the Court granted Defendants' Motions for Summary Judgment. Located a few miles west of Spokane in Spokane County, Airway Heights is home to Fairchild

Air Force Base, Northern Quest Casino, and, more recently, the Spokane Tribe's casino. Though Airway Heights falls within Spokane Tribe's aboriginal land, the Kalispel Tribe obtained trust land within Airway Heights and successfully obtained permission to build the Northern Quest Casino twenty years ago. Northern Quest Casino has proved lucrative for the Kalispel, bringing in profits that benefited the Kalispel tribal members by funding local governmental interests as well as providing direct payments to tribal members. In 2001, the United States acquired land in trust for the Spokane Tribe nearby the Northern Quest Casino. Five years later, the Spokane Tribe sought Department of the Interior [Department] approval for gaming on the trust land with a proposed casino within two miles of the Northern Quest Casino. Permission for gaming on the property required a two-part determination by the Department of the Interior. Over the course of the next ten years the Department examined the Spokane Tribe's request. The Department consulted an expert to assess how an additional gaming facility would affect the surrounding community including the Kalispel. Local officials engaged with the Department to address concerns about the proposed casino. The Department initiated the processes required under the National Environmental Policy Act [NEPA] to assess the environmental impact. On June 15, 2015, the Department found in favor of Spokane Tribe; Governor Jay Inslee concurred, marking the conclusion of the approval process. In 2018, twelve years after the Spokane Tribe first requested a two-part determination, the casino opened for business with plans for further development into the future. Gaming is prohibited on trust lands unless “the Secretary after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community ...” Gaming on Lands Acquired after October 17, 1988, 25 U.S.C. § 2719(b)(1)(A) (1988). Bureau of Indian Affairs [BIA] regulations define “surrounding community” as “local governments and nearby Indian tribes located within a twenty-five-mile radius of the site of the proposed gaming establishment.” 25 C.F.R. § 292.2. Though the Kalispel tribe likely will suffer some detrimental impacts through loss of revenue, the Department's determination that the new casino would not be detrimental to the surrounding community was not arbitrary and

capricious. After exhaustive review, the Secretary permissibly weighed the benefits and detriments to the community concluding that approval of the new casino would not be a detriment to the surrounding community. The BIA spent ten years investigating the application, seeking expert review, and working with local officials and governments prior to issuing a decision. The BIA squarely addressed Kalispel's concerns regarding lost profits at the Northern Quest Casino. The Department's expert concluded that while the Kalispel may suffer in the short term, eventually the profits would rebound and both tribes would benefit. *Id.* Though this conclusion differs from the Kalispel's own expert, reliance on the agency expert was not arbitrary and capricious. In weighing detriment to the community, the Department need not find that the casino has no unmitigated negative impacts whatsoever, but instead the Secretary must weigh the benefits and possible detrimental impacts as a whole, "even if those benefits do not directly mitigate a specific cost imposed by the casino." *Stand Up for California! v. United States Dep't of Interior*, 879 F.3d 1177, 1187 (D.C. Cir. 2018), cert. denied sub nom. *Stand Up for California! v. Dep't of the Interior*, 139 S. Ct. 786, 202 L. Ed. 2d 629 (2019). The Department met its statutory obligations for consultation. The parties did not dispute that the Secretary followed the applicable regulations regarding consultation. Lastly, Kalispel argued that the Department violated the trust relationship with the Kalispel tribe. The Federal Government owes a duty of trust to all tribes; however, the scope of that duty must be established by statute and that trust duty necessarily equally applies to all tribes so the Government may not favor one tribe over another. *Lawrence v. Department of Interior*, 525 F.3d 916, 920 (9th Cir. 2008), see also *Nance v. EPA*, 645 F.2d 701, 711-12 (9th Cir. 1981). In this situation, the Spokane and Kalispel's interests are not aligned. Consequently, since the Department fulfilled its statutory duty to examine the benefits and harm to all effected parties, the Department did not violate the trust relationship. Upon review of the record, the Court concludes that the Secretary's decision is supported by substantial evidence. Further, the Environmental Impact Statement met statutory requirements. Federal Defendant's Cross Motion for Summary Judgment filed March 6, 2019, ECF No. 98, was granted.

H. *Jurisdiction, Federal*

65. *Consumer Financial Protection Bureau v. Think Finance, LLC*

No. CV-17-127-GF-BMM, 2018 WL 3707911 (D. Mont. Aug. 03, 2018). Plaintiff Consumer Financial Protection Bureau (“CFPB”) commenced this action on November 15, 2017. CFPB filed an Amended Complaint on March 28, 2018. The Amended Complaint alleges four violations of the Consumer Financial Protection Act. Defendants Think Finance, LLC (“Think Finance”) and “Subsidiaries” filed the instant Motion to Dismiss on April 24, 2018. Think Finance operates a lending business that extends credit, services loans, and collects debt throughout the United States. CFPB operates as an independent agency of the United States Government created under the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. § 5491(a). The Amended Complaint alleged that Think Finance, through the Tribal Lenders, collected loan payments that customers did not owe, as the loans issued to those customers were void ab initio due to violations of state law. CFPB alleged that Think Finance used unfair and abusive practices to collect on these void loans. Finally, CFPB alleged that Think Finance provided substantial assistance to Tribal Lenders and other entities who, in turn, committed deceptive, unfair, and abuse acts or practices by demanding payment for and collecting void debts. Defendants raised multiple grounds for dismissal, including: (1) that the structure of the CFPB is unconstitutional; (2) that the CFPB’s claims are not permitted by the CFPA; (3) that the Complaint fails to, and cannot, join indispensable parties; (4) that the Court lacks personal jurisdiction over Think SPV; (5) that the Complaint fails to state cognizable claims under the CFPA; and (6) that certain claims against the Subsidiaries are time-barred. Defendants’ Motion to Dismiss is denied.

66. *Chippewa Cree Tribe of Rocky Boy’s Reservation, Montana v. U.S. Department of Interior*

No. 15-71772, 900 F.3d 1152, 2018 WL 3978542 (9th Cir. Aug 21, 2018). Tribe petitioned for review of order of Department of the Interior (DOI) requiring Tribe to provide back pay and other relief to former chairman of Tribe's governing committee after finding that

chairman was removed from committee in retaliation for whistleblowing. The court of appeals, Friedland, Circuit Judge, held that: (1) chairman performed services on behalf of Tribe, as required for whistleblower protections of American Recovery and Reinvestment Act (ARRA) to apply to chairman; (2) DOI's order did not infringe Tribe's sovereignty and powers of self-governance; (3) Congress acted within its spending power in conditioning the receipt by Tribe of ARRA funds on the waiver of the right to a hearing with cross-examination before the Tribe could be found to have violated ARRA's whistleblower protections; (4) six months between chairman's disclosure of misuse of federal funds and his removal from board was within time frame that could have led reasonable person to conclude that chairman's whistleblowing was a contributing factor in his removal; and (5) DOI's finding that Tribe's removal of chairman was retaliatory was not arbitrary or capricious. Petition denied.

67. *Coriz v. Rodriguez*

No. CIV 17-1258 JB/KBM, 347 F.Supp.3d 707, 2018 WL 4179460 (D. N.M. Aug. 31, 2018). Tribal inmate filed petition for writ of habeas corpus. Petitioner moved for immediate release. The District Court, James O. Browning, J., held that: (1) petitioner was entitled to protections provided in Indian Civil Rights Act (ICRA); (2) petitioner's failure to exhaust his tribal court remedies precluded his immediate release; and (3) petitioner failed to demonstrate exceptional circumstances warranting his immediate release. Motion denied.

68. *Narragansett Indian v. Rhode Island Dep't of Transp.*

No. 17-1951, 903 F.3d 26, 2018 WL 4140270 (1st Cir. Aug. 30, 2018). Indian tribe brought action against federal and Rhode Island agencies, alleging breach of contract and seeking declaratory and injunctive relief regarding highway bridge reconstruction over historic tribal land. The United States District Court for the District of Rhode Island, William E. Smith, Chief District Judge, 2017 WL 4011149, granted defendants' motion to dismiss for lack of subject matter jurisdiction. Tribe appealed. Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that: (1) National Historic Preservation

Act (NHPA) did not expressly or implicitly waive federal government's sovereign immunity, and (2) tribe's breach of contract claim did not have any substantive basis in NHPA, and thus the federal court lacked federal question jurisdiction over the breach of contract claim against state agencies. Affirmed.

69. *In re National Prescription Opiate Litigation*

No. 17-md-2804, 327 F.Supp.3d 1064, 2018 WL 4203535 (N.D. Ohio Sept. 04, 2018). Cherokee tribe of American Indians brought state court action against drug companies, alleging that defendants allowed opioid diversion to occur in the Cherokee Nation via alleged actions and omissions in violation of state law. Defendant company removed case, which was then transferred into multidistrict litigation (MDL) involving various plaintiffs, asserting that the manufacturers, distributors, and retailers of prescription opiate drugs were liable for costs related to opioid public health crisis. Band of Chippewa American Indians brought state court action against opioid manufacturers, distributors, and pharmacies asserting state law claims, which the same defendant company removed, and which was also transferred into MDL. Both tribes moved to remand, defendant drug company moved to stay execution of any remand order pending in Chippewa tribe's action, and Cherokee tribe moved for oral argument pending in that case. The District Court, Dan Aaron Polster, J., held that: (1) company was acting under direction of federal officer, as required for removal under federal officer removal statute; (2) causal nexus existed between company's action under direction of federal officer and company's actions that gave rise to tribes' allegations, as required for removal under federal officer removal statute; and (3) company had colorable federal defense, as required for removal under federal officer removal statute. Motions denied.

70. *Navajo Nation v. Wells Fargo & Co.*

No. 17-CV-1219-JAP-SCY, 344 F.Supp.3d 1292, 2018 WL 4608245 (D. N.M. Sept. 25, 2018). Indian tribe filed suit on its own behalf and as *parens patriae* on behalf of its members against financial services company and national banking association that was company's primary subsidiary, asserting claims under federal,

state, and tribal law arising out of unfair, deceptive, fraudulent, and illegal banking practices that allegedly harmed the tribe's sovereign and quasi-sovereign interests. Company and association moved to dismiss. The district court, James A. Parker, Senior District Judge, held that: (1) consent order between Consumer Financial Protection Bureau (CFPB) and association finding that association violated the Consumer Financial Protection Act (CFPA) operated as final judgment on the merits of CFPA claims against the association, as required for the order to bar under the res judicata doctrine tribe's CFPA claims; (2) company was in privity with association, as required for consent order to bar under the res judicata doctrine tribe's CFPA claims; (3) tribe's CFPA claims formed same cause of action as claims resolved by consent order, as required for the consent order to bar under the res judicata doctrine the tribe's claims; (4) tribe was in privity with CFPB for its CFPA claims, as required for consent order to bar under the res judicata doctrine tribe's CFPA claims; and (5) tribe did not allege injury to quasi-sovereign interest that was sufficiently concrete to create actual controversy, and thus, tribe lacked standing in its parens patriae capacity to maintain claims for violations of the Equal Credit Opportunity Act (ECOA), the Electronic Funds Transfer Act (EFTA), the Truth in Lending Act (TILA), and the Fair Credit Reporting Act (FCRA). Motion granted.

71. *Cheykaychi v. Geisen*

No. 17-cv-01657-PAB, 2018 WL 6065492 (D. Colo. Nov. 19, 2018). Petitioner Harrison Cheykaychi filed a Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 and 28 U.S.C. § 2241. Petitioner asserted that his tribal court convictions were obtained in violation of his rights under the Indian Civil Rights Act (“ICRA”), at 25 U.S.C. § 1302. Petitioner is a member of the Pueblo of Kewa (formerly known as the Pueblo of Santo Domingo) (“Tribe”), a federally recognized Indian Tribe in New Mexico. *See* Land Acquisitions; Craig Tribal Association, Craig, Alaska, 82 Fed. Reg. 4915 (17, 2017). Petitioner alleged that he was arrested on September 17, 2016, within the external boundaries of the reservation, and charged with five separate offenses arising from his exchange with the Tribal Police that morning. Petitioner alleged that during a September 19, 2016 hearing, he was coerced by threats from the Tribal Court to plead guilty to criminal trespass, assault on

a tribal officer, and terroristic threats, in exchange for the Tribe's promise that it would drop the charges of eluding, intoxication, and disorderly conduct; and that he would receive a two and one-half year sentence. Petitioner stated that he was not appointed counsel at the hearing or afforded the opportunity to retain counsel. He was taken into custody immediately after the sentencing and was eventually transferred to the San Ignacio Detention Center in Colorado. On May 2, 2017, Petitioner filed a Petition for Writ of Habeas Corpus, asserting that the tribal court convictions were obtained in violation of the ICRA. Petitioner asks the Court to deem his tribal court conviction(s) invalid and to order Respondent to release him from custody. On May 9, 2017, the District of New Mexico issued an order dismissing the Kewa Pueblo based on sovereign immunity. On August 22, 2017, the Court issued an order directing Respondent Geisen to show cause why the § 1303 Petition should not be granted. Docket No. 13. On September 21, 2017, Respondent filed a Response in which he represented that, as the mere physical custodian of Petitioner, he was unable to address the merits of Petitioner's ICRA claims challenging the validity of his tribal court convictions or afford any relief beyond Petitioner's release from custody. Respondent maintained that one or more tribal officials are necessary parties to this action. On December 28, 2017, pursuant to the parties' joint motion, Petitioner was released from custody, under terms of supervision, pending final disposition of the Petition. On September 6, 2018, the Court issued an order directing Respondent to contact the proper tribal official(s) to obtain their position as to the merits of the ICRA. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. *Tonawanda Band of Seneca Indians*, 85 F.3d 874, 899-900 (2nd Cir. 1996) (concluding that tribal officials are appropriate respondents to a § 1303 petition because they have an interest in opposing the petition or granting the requested relief). Respondent filed a status report on October 5, 2018, in which he states that no one from the Santo Domingo Tribe would be entering an appearance or contesting the claims in Mr. Cheykaychi's Petition for Writ of Habeas Corpus. Mr. Cheykaychi remains subject to the Tribe's 2011 Banishment Order, which was not challenged in Mr. Cheykaychi's Petition, so he should not be released at the Pueblo, or allowed to enter the Pueblo without the prior consent of the Tribe. The Kewa Pueblo officials have informed Respondent that they do not intend to contest the merits of the ICRA claims. Respondent

indicates that he is without authority to address the merits of the Petitioner's claims. Because the § 1303 Petition is unopposed, the Petition was granted, and the tribal court convictions vacated.

72. *Napoles v. Rogers*

No. 17-16620, 743 Fed.Appx. 136, 2018 WL 6130279 (9th Cir. Nov. 21, 2018). Plaintiffs-Appellants, seven members of the Bishop Paiute Indian Tribe (collectively "Plaintiffs"), a federally recognized Indian tribe, appealed from the district court's dismissal of their petition for a writ of habeas corpus under 25 U.S.C. § 1303, the Indian Civil Rights Act ("ICRA"). The court established jurisdiction under 28 U.S.C. § 1291, reviewed de novo, *Jeffredo v. Macarro*, 599 F.3d 913, 917 (9th Cir. 2010), and affirmed on any ground supported by the record, *Bd. of Trustees of the Constr. Laborers' Pension Tr. for S. Cal. v. M.M. Sundt Constr. Co.*, 37 F.3d 1419, 1420 (9th Cir. 1994), *as amended on denial of rehearing* (Nov. 23, 1994). The court affirmed. The district court may not exercise jurisdiction over a habeas petition arising under 25 U.S.C. § 1303 unless Plaintiffs have exhausted their tribal remedies. *See Alvarez v. Lopez*, 835 F.3d 1024, 1027 (9th Cir. 2016). This requirement is rooted in the "policy of nurturing tribal self-government," and thus a federal court must "stay its hand until the party has exhausted all available tribal remedies." *Jeffredo v. Macarro*, 599 F.3d 913 at 918, (9th Cir. 2010) (internal quotation marks omitted). Plaintiffs have not exhausted the available tribal remedies. Plaintiffs argued they were detained within the meaning of § 1303, because they have been evicted from property in which they claim a possessory right, and because the tribal police issued trespass citations against them. Plaintiffs conceded, both in their motion for a stay before the district court and at oral argument, however, that a tribal court decision considering the validity of the trespass citations and their claim to the property is currently on appeal before the recently reinstated tribal appellate court. Because an appeal is pending in tribal court regarding the subject of Plaintiffs' § 1303 habeas claim, Plaintiffs have not exhausted their tribal remedies and the district court did not have jurisdiction. *Jeffredo*, 599 F.3d at 918. The district court's order dismissing the petition was affirmed.

73. *United States v. Cleveland*

No. CR 17-0965 JB, 2018 WL 4759889 (D.N.M. Nov. 21, 2018). Defendant moved to dismiss indictment charging him under statute punishing murder of certain federal officers or persons assisting those officers, arising from killing of Navajo Nation Department of Public Safety (NDPS) officer, alleging that NDPS officer was not federal employee and that statute thus did not apply. The District Court, James O. Browning, J., held that under the Self-Determination Contract, which granted Navajo Nation authority to enforce United States and Tribal Law, a Tribal officer without a Special Law Enforcement Commission (SLEC) does not have authority from the Secretary of the Interior to enforce federal laws, and so is not a federal employee for purposes of the Indian Law Enforcement Reform Act (ILERA), and thus statute punishing murder of certain federal officers or persons assisting those officers does not apply.

74. *Davilla v. Enable Midstream Partners L.P.*

No. 17-6088, 913 F.3d 959, 2019 WL 150627 (10th Cir. Jan. 10, 2019). Native American landowners brought trespass action against owner and operator of network of natural gas transmission pipelines. Granted summary judgment to plaintiffs and entered permanent injunction requiring removal of pipeline. Defendant appealed. The Court of Appeals, Tymkovich, Chief Judge, held that: (1) consent of minority of allottees did not form complete defense to remaining allottees' federal trespass claim; (2) expiration of easement permitting natural gas pipeline across allotted tribal land created duty on part of pipeline's owner to remove pipeline; and (3) district court was required to apply federal courts' traditional equity jurisprudence, rather than simplified injunction rule from Oklahoma law, in determining whether to grant injunctive relief. Affirmed in part, reversed in part, and remanded.

75. *United States v. Denezpi*

No. 18-cr-00267-REB-JMC, 2019 WL 295670 (D. Colo. Jan. 23, 2019). Mr. Denezpi maintained indictment in this case was duplicative of his prior conviction by the Court of Indian Offenses

of the Ute Mountain Ute Agency and thus constitutes double jeopardy. On July 17, 2017, Mr. Denezpi and V.Y. traveled from Teec Nos Pos, Arizona, to Mr. Denezpi's girlfriend's home in Towaoc, Colorado. Once inside the house, Mr. Denezpi allegedly barricaded the door and, by physical force and threats, forced V.Y. to engage in a nonconsensual sexual act. Tribal authorities arrested Mr. Denezpi the following day and charged him with one count of assault and battery in violation of Title 6, Ute Mountain Ute Code, Section 2; one count of making terroristic threats in violation of 25 C.F.R. § 11.402; and one count of false imprisonment in violation of 25 C.F.R. § 11.404. On December 6, 2017, Mr. Denezpi entered an *Alford* plea to the assault and battery count and was sentenced to time served. Six months later, a federal grand jury indicted Mr. Denezpi on one count of aggravated sexual abuse in Indian Country. *See* 18 U.S.C. § 2241(a)(1)-(2) (2007); 18 U.S.C. § 1153(a) (2013). Mr. Denezpi claimed this prosecution violates the Fifth Amendment proscription against double jeopardy, because it was imposed not by a tribal court but by a so-called "CFR court," which, Mr. Denezpi argues, is an arm of the federal government and not a separate sovereign. This argument misunderstands the source and nature of the CFR courts' authority. The Double Jeopardy Clause of the Fifth Amendment provides that no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This motion implicated the dual sovereignty doctrine, an exception to the general principle of double jeopardy, whereby "a single act gives rise to distinct offenses – and thus may subject a person to successive prosecutions – if it violates the laws of separate sovereigns." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867, 195 L. Ed. 2d 179 (U.S. 2016). *See also Heath v. Alabama*, 474 U.S. 82, 88, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985) ("[W]hen the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences.") (internal quotation marks omitted). The determination, whether two entities are separate sovereigns, "does not turn, as the term 'sovereignty' sometimes suggests, on the degree to which the second entity is autonomous from the first or sets its own political course." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. at 1867. Instead, the determination lies in the answer to "a narrow, historically focused question.... whether the prosecutorial powers of the two jurisdictions

have independent origins – or, said conversely, whether those powers derive from the same ‘ultimate source.’” (citing *United States v. Wheeler*, 435 U.S. 313, 320, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)). “The inquiry is thus historical, not functional – looking at the deepest wellsprings, not the current exercise, of prosecutorial authority.” The CFR courts were created by the Indian Department Appropriations Act of 1888. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (U.S. 1978). At first, all tribal courts were CFR courts. Along with a reduced BIA role and increased authority delegated to the tribes, the IRA paved the way for tribes to develop tribal courts and phase out the C.F.R. courts.” Today, most tribes have established tribal courts. See 25 C.F.R. § 11.104 (2019) (setting forth criteria for creation of tribal court). Only seven CFR courts – including those administered by the Ute Mountain Ute Agency – remain in operation. Although the CFR courts “retain some characteristics of an agency of the federal government,” *Tillett*, 931 F.2d at 640, the logic of *Wheeler* and its progeny clearly indicates that the CFR courts’ power to punish crimes occurring on tribal lands derives from their original sovereignty, not from a grant of authority by the federal government. When Indian courts were first established in the 19th century, *all* such courts were CFR courts. Therefore, the CFR court which convicted Mr. Denezpi was exercising the sovereign powers of the Ute Mountain Ute Tribe and is not an arm of the federal government. The charges brought in the present federal indictment thus are not duplicative of Mr. Denezpi’s conviction in that independent and sovereign court, and therefore his prosecution in this jurisdiction does not violate the Fifth Amendment’s Double Jeopardy Clause. Mr. Denezpi’s motion to dismiss was therefore denied.

76. *People ex rel. Becerra v. Huber*

No. A144214, 32 Cal.App.5th 524, 244 Cal.Rptr.3d 79 (9th Cir. Feb. 25, 2019). State brought enforcement action against owner of tobacco smoke shop, who was a member of the Wiyot Band of Indians, alleging violation of Unfair Competition Law (UCL). The Superior Court, Humboldt County, No. DR110232, W. Bruce Watson, J., granted summary adjudication to State and entered permanent injunction. Owner appealed. The Court of Appeal, Streeter, Acting P.J., held that: (1) exercise of state court jurisdiction

over enforcement action did not infringe tribal sovereignty, supporting application of default rule of existence of general jurisdiction on part of state court, and (2) State's enforcement of UCL was not preempted under doctrine of Indian preemption. Affirmed.

77. *Outliers Collective v. The Santa Ysabel Tribal Development Corporation*

No. 3:18-cv-00834-JAH-KSC, 2019 WL 1200232 (D.S.D. Cal. Mar. 13, 2019). Defendants The Santa Ysabel Tribal Development Corporation (“SYTDC”) and David Chelette’s (“Chelette”) (collectively referred to as “Tribal Defendants”) moved to dismiss plaintiff Outliers Collective’s (“Outco” or “Plaintiff”) Complaint pursuant to Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) 12(b)(1) and 12(b)(7). For the reasons set forth below, Defendants’ motions to dismiss was granted and the action was dismissed in its entirety as to all Defendants with prejudice. This action arises out of a Land Use Agreement (“Agreement”) entered into by a tribally chartered corporation, wholly owned by the Iipay Nation of Santa Ysabel, a federally recognized Indian Tribe, and a Nonprofit Mutual Benefit Corporation, organized under the laws of the State of California. In pertinent part, the Agreement set forth the terms by which Plaintiff would lease from SYTDC interior and exterior space on tribal lands for the cultivation, harvesting, and processing of medical cannabis pursuant to the Santa Ysabel Tribal Medicinal Cannabis Enterprise Act. In early 2017, a dispute arose regarding Plaintiff’s obligation to pay the Tribe’s Medical Cannabis Tax. Negotiations were unsuccessful and the Agreement was eventually terminated. The Tribal Cannabis Regulatory Agency revoked Plaintiff’s license and prohibited Plaintiff and its affiliates from accessing the facility, although some of Plaintiff’s property remained. On April 30, 2018, Plaintiff filed a complaint against Tribal Defendants for: (1) Breach of Contract; (2) Breach of Covenant of Quiet Enjoyment; (3) Conversion; (4) Unjust Enrichment; and (5) Declaratory Relief. Tribal Defendants each timely filed motions to dismiss pursuant to Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) 12(b)(1) and 12(b)(7). The motions have been fully briefed and are now before the Court. The Complaint alleges jurisdiction under 28 U.S.C § 1331. Plaintiff cites

to *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959) to support jurisdiction over a matter brought by a non-tribal plaintiff against a tribal defendant when the cause of action arises on Indian territory. The Complaint further alleges that SYTDC agreed to waive its sovereign immunity from suit in favor of Plaintiff. In response to Defendants' motions to dismiss, Plaintiff contends that the subject matter of the agreement is sufficient to invoke federal-question jurisdiction. First, Plaintiff's reliance on *Williams* is misplaced. The *Williams* Court reversed the Arizona Supreme Court's decision affirming judgment for plaintiff, a non-tribal member, in an action against a tribal member. The Court held that state courts did not have authority to exercise jurisdiction over civil suits against tribal members where the cause of action arose on an Indian reservation. *Williams*, 358 U.S. at 223. The Court reasoned that the exercise of jurisdiction by the state would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." The lack of authority by state courts to exercise jurisdiction, however, cannot be interpreted to mean jurisdiction automatically vests in District Courts. To be certain, the Supreme Court notes in *Williams* that Congress has acknowledged the authority of Indian governments over their reservations and the Court has consistently protected it. Second, SYTDC's limited waiver of sovereign immunity has no bearing on whether this Court has subject-matter jurisdiction. Subject-matter jurisdiction cannot be forfeited or waived. *Arbaugh*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)); *See also Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) (waiver of sovereign immunity by tribal housing authority did not by fiat confer jurisdiction on the federal courts). Even if the parties agreed, as Plaintiff contends, that a dispute arising out of the Agreement may be submitted to any federal court of *competent* jurisdiction within this District, this Court has an "independent obligation to determine whether subject-matter jurisdiction exists."

78. *United States v. Cooley*

No. 17-30022, 919 F.3d 1135 (9th Cir. Mar. 21, 2019). Motorist charged with narcotics offenses, as result of evidence discovered by tribal officer after seizing motorist on public highway that ran across reservation, filed motion to suppress this evidence. The United States District Court for the District of Montana, No. 1:16-cr-00042-SPW-1, Susan P. Watters, J., 2017 WL 499896, granted motion, and government appealed. The Court of Appeals, Berzon, Circuit Judge, held that: (1) as matter of first impression, the exclusionary rule applies in federal court prosecutions to evidence obtained in violation, not of the Fourth Amendment itself, but of the Indian Civil Rights Act's (ICRAs) Fourth Amendment counterpart, and (2) tribal officer's extra-jurisdictional acts violated the ICRAs Fourth Amendment counterpart and required suppression of evidence. Affirmed.

79. *United States v. Aysheh*

No. 1:17-cr-00370-JCH, 2019 WL 1877178 (D.N.M. Apr. 26, 2019). Mr. Iyad “Ed” Aysheh and his three brothers were charged in an 18-page indictment with conspiring to sell “Indian-style” jewelry in violation of the Indian Arts and Crafts Act (“IACA”), 18 U.S.C. § 1159. That statute criminalizes offering or selling a good “in a manner that falsely suggests it is ... an Indian product.” 18 U.S.C. § 1159(a). According to the indictment, in 2014, Mr. Aysheh’s brother Imad established a business in the Philippines called “Imad’s Jewelry” to manufacture Indian-style jewelry using Filipino labor. Imad imprinted the letters “IJ” on the jewelry, but not a country of origin stamp. After importing the jewelry into the United States, the other Aysheh brothers supposedly sold it to retailers and customers throughout the country, including New Mexico, misrepresenting it as Indian made. The indictment accused the Defendants of criminal misrepresentation of Indian produced goods in violation of 18 U.S.C. § 1159. It alleged that the Defendants conspiring to knowingly display and offer for sale for \$ 1,000 and more, jewelry manufactured in the Philippines, in a manner that suggested the jewelry was Indian produced ... when in truth and in fact, ... the good was not Indian produced ... in violation of 18 U.S.C. § 1159. As noted earlier, 18 U.S.C. § 1159 criminalizes

offering or selling a good “in a manner that falsely suggests it is ... an Indian product.” 18 U.S.C. § 1159(a). In his motion to dismiss, Mr. Aysheh explains that the criminal penalty provision of § 1159 has been challenged for vagueness and overbreadth under the First Amendment. Mr. Aysheh especially relies on a federal district court’s examination in *United States v. Pourhassan*, 148 F. Supp. 2d 1185 (D. Utah 2001) of whether the phrases “Indian produced” and “falsely suggests” under § 1159 were unconstitutionally vague or overbroad. The Pourhassan court held that, even applying a “strict” vagueness test, the phrases “Indian produced” and “falsely suggests” were not unconstitutionally vague and consequently, denied the defendant’s motion to dismiss the indictment. Defendant’s Opposed Motion to Dismiss all Counts in the Indictment denied.

80. *Taguma v. Benton*

No. 19-cv-199-bbc, 2019 WL 1877171 (W.D. Wis. Apr. 26, 2019). In this civil action for monetary relief, plaintiff Lori Taguma, a member of the Lac Courte Oreilles Tribe, contended that fellow members of the tribe, defendants Edward and Danielle Benton, violated her rights by threatening her and her family members with violence, shooting at her and her family members, using their influence within the tribe to encourage others to terminate her job and discontinue her mother’s Bureau of Indian Affairs lease, damaging her and her family’s vehicles and other property and otherwise harassing her. After reviewing the complaint, the court concluded that plaintiff may not proceed on any claim because her complaint does not involve any federal claim over which this court has jurisdiction. Plaintiff’s claims all seem to relate to matters involving state tort or criminal law, and therefore, they must be brought in state court. *Bresette v. Buffalo-Reyes*, No. 06-C-338-C, 2006 WL 3017256, at *1 (W.D. Wis. Aug. 7, 2006) (“Federal jurisdiction is not present just because the alleged [violation of state law] occurred on an Indian reservation.”). Plaintiff did not allege any facts that suggest that defendants were public officials or acting under the color of state law. The “under-color-of-state-law element of § 1983 excludes from its reach ‘merely private conduct, no matter how discriminatory or wrongful.’” *Id.* (quoting *Blum v. Yaretsky et al.*, 457 U.S. 991, 1002, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)).

Although plaintiff has made it clear that defendants have strong ties to members of the tribal council and are powerful within the community, federal courts have found that “[a] § 1983 action is unavailable ‘for persons alleging deprivation of constitutional rights under color of tribal law.’” *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (quoting *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983)). Similarly, plaintiff may not sue defendants as tribal actors under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), which provides relief for alleged constitutional violations by federal officials. *Evans v. Little Bird*, 656 F. Supp. 872, 874 (D. Mont. 1987), *aff’d in part*, *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989). Accordingly, this case was dismissed for lack of subject matter jurisdiction. Plaintiff must bring her claims in state court or in the tribal court that has jurisdiction over the Lac Courte Oreilles Tribe.

81. *United States v. Santistevan*

No. 3:19-CR-30017-RAL, 2019 WL 1915791 (D.S.D. Apr. 30, 2019). The Government charged Aaron Santistevan (Santistevan) with possession of ammunition by a prohibited person. Santistevan moved to suppress from use at trial the evidence seized from him and the vehicle he was driving on December 28, 2018, on the basis that the officers violated his rights under the Fourth Amendment. Magistrate Judge Mark A. Moreno held a suppression hearing, during which he received seven exhibits and heard testimony from five Rosebud Sioux Tribe Law Enforcement officers. The tribal officers’ detention of Santistevan was reasonable under the Fourth Amendment. Officers conducted a traffic stop for speeding and discovered Santistevan was driving with a suspended driver’s license. When Officer Antman learned that Santistevan was a non-Indian, he contacted the Todd County Sheriff’s Office immediately. Before Officer Antman was able to secure Santistevan, Santistevan led officers on a high-speed chase. The officers had probable cause to search the vehicle based on Officer Antman’s observations during the traffic stop, Santistevan’s flight, and the fire in the backseat of the vehicle that appeared to destroy evidence. Santistevan argues, “all evidence obtained following the issuance of the search warrant must be suppressed as the illegal fruit of the unreasonable stop and

search of the car on December 28, 2018.” Because this Court found that the stop and search were reasonable and constitutional, there is no illegal fruit to suppress. Santistevan’s Motion to Suppress denied.

82. *Wolf v. Alutiiq Education and Training, LLC*

No. 2:19-cv-41-GMB, 2019 WL 1966642 (M.D. Ala. May 02, 2019). Motion to Dismiss filed by Defendant Altuiq Education & Training, LLC (“AET”). Plaintiff Monisha Wolf brought claims against AET denominated as race discrimination, gender discrimination, mental suffering, and emotional distress. After careful consideration of the parties' submissions and the applicable law, the Motion to Dismiss was granted, but Wolf was allowed to re-plead the claims over which this court had subject-matter jurisdiction. Wolf is a black woman who began her employment with AET's predecessor, Career Education Services. AET took over the contract and asked Wolf to reapply for her position. AET did not retain Wolf, and she alleged that Adam Bennett, a white man, was retained over her. AET is a wholly-owned subsidiary of Alutiiq, which is a wholly-owned direct subsidiary of Afognak Native Corporation, which was formed in 1977 under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601. AET argues that Counts I and II must be dismissed for lack of subject-matter jurisdiction because these claims are asserted pursuant to Title VII, which does not apply to AET, an Alaskan Native Corporation. Pursuant to 43 U.S.C. § 1626(g), [f]or the purposes of implementation of the Civil Rights Act of 1964 [42 U.S.C. § 2000a, et seq.], a Native Corporation and corporations, partnerships, joint ventures, trusts, or affiliates in which the Native Corporation owns not less than 25 per centum of the equity shall be within the class of entities excluded from the definition of “employer” by § 701(b)(1) of Public Law 88-352 (78 Stat. 253), as amended [42 U.S.C. § 2000e(b)(1)], or successor statutes. 43 U.S.C. § 1626(g). If Title VII does not apply, the district court lacks subject-matter jurisdiction over those claims. *See Mastro v. Seminole Tribe of Fla.*, 578 F. Appx. 801, 802 (11th Cir. 2014). The court found that AET was not subject to suit under Title VII, and that the court lacked subject-matter jurisdiction over Wolf's gender and race claims asserted pursuant to Title VII in Counts I and II. *See Jones v. Chugach Educ. Servs., Inc.*, No. 3:11-cv-1217-J-34MCR, 2012 WL 472722, at *1 (M.D. Fla. Jan. 10,

2012), adopted, 2012 WL 473503 (M.D. Fla. Feb. 2, 2012). Wolf argued that she can proceed on race discrimination claims pursuant to 42 U.S.C. § 1981. AET did not dispute that this court had subject-matter jurisdiction over 42 U.S.C. § 1981 race claims. *See also Jones*, 2012 WL 472722, at *1 (“Defendant was exempt from employer liability under Title VII, as Defendant is an Alaskan Native Corporation ... however ... several cases have held that ANCs may be sued for retaliation under 42 U.S.C. § 1981.”). AET argued, however, that the § 1981 claim was due to be dismissed because Wolf has not sufficiently alleged a § 1981 race claim in Count I. AET correctly points out that Count I expressly invokes the Civil Rights Act of 1964 and not 42 U.S.C. § 1981. Because the Amended Complaint expressly refers to Title VII within the paragraphs of Count I but not to § 1981, the court concluded that the claim in Count I was due to be dismissed, but the court allowed Wolf an additional opportunity to plead her race discrimination claim pursuant to § 1981.

83. *United States v. Washington*

No. C70-9213RSMSUB-PROCEEDING NO. 17-03, 2019 WL 1989645 (W.D. Wash. May 06, 2019). This matter came before the Court on the Stillaguamish Tribe of Indians (“Stillaguamish”) motion seeking an order of the court to permit it to take a perpetuation deposition of its expert witness, Doctor C. Jill Grady, due to the expert’s age and the risk of further memory loss. Finding the Motion moot, the court denied the motion. Dr. Grady is a Cultural Anthropologist and an expert in the field of Native American Anthropology. She has a Bachelor of Arts Degree in Anthropology, and a Master’s degree and Ph.D. in Sociocultural Anthropology from the University of Washington. Stillaguamish first retained Dr. Grady to conduct research related to the Native American Graves Protection and Repatriation Act in 2002. Beginning in 2007, Dr. Grady began assembling evidence of Stillaguamish’s marine fishing treaty rights in the capacity of an expert witness and researcher. In order to provide her expert opinions, Dr. Grady developed a comprehensive understanding of the ethnohistory of the Stillaguamish’s people as well as that of other neighboring tribes and non-Indian settlers in the Puget Sound and their interactions with territorial, state and federal government.

Dr. Grady's expert opinions rely on her knowledge of the natural ecosystem that supports Stillaguamish fishing, hunting and gathering. Dr. Grady is about to turn seventy-seven years old. Dr. Grady currently experiences certain challenges typically associated with her age, some of which impact her memory recall. While Dr. Grady's capacity remains fairly sound today, she has expressed uncertainty regarding her memory, physical health and stamina six months from now, much less over more than a year from now when her testimony may be required. The Swinomish Indian Tribal Community ("Swinomish") opposes Stillaguamish's motion partly on the basis that the procedural posture of this case has changed while this motion was pending before the Court. Swinomish argued that case deadlines have been reset, that the case and discovery will proceed in the normal course, and that the motion is therefore moot. Stillaguamish recognizes that discovery may now proceed but feels that the concerns initially leading it to file its motion persists. The court agreed that its prior order moots the Stillaguamish motion. Stillaguamish no longer needs leave from the court to proceed with discovery under Rule 26(d)(1). Accordingly, having reviewed the motion and the remainder of the record, the court found and ordered that Stillaguamish Tribe of Indians' Motion is denied as moot.

84. United States v. Smith

No. 17-30248, 925 F.3d 410 (9th Cir. May 28, 2019). Defendant Indian member of Confederated Tribes of Warm Springs was convicted in the United States District Court for the District of Oregon, Anna J. Brown, J., of fleeing or attempting to elude a police officer under Assimilative Crimes Act (ACA) and Indian Country Crimes Act (ICCA). The defendant appealed. The Court of Appeals, Callahan, Circuit Judge, held that: (1) ACA applied to Indian country; (2) Indian-on-Indian exception in ICCA did not preclude application of ACA to all victimless crimes, and certainly not to offense of fleeing and eluding police; and (3) federal prosecution of defendant was not unlawful intrusion into tribal sovereignty. The case was affirmed.

85. *Jim v. Shiprock Associated Schools, Inc.*

No. CIV 17-1114 RB/JHR, 2019 WL 2285918 (D.N.M. May 29, 2019). This matter came before the Court on Defendant’s Supplemental Motion for Summary Judgment. The Court found the motion should be granted and this case dismissed. Plaintiff Kim R. Jim is a former employee of defendant Shiprock Associated Schools, Inc. (SASI). SASI was incorporated as a nonprofit corporation under the laws of New Mexico in 1979 and is registered to conduct business within the Navajo Nation. At the time of the allegations in the complaint, SASI was (and still is) authorized by the Navajo Nation Board of Education to operate Navajo community schools on the Navajo reservation in Shiprock, New Mexico, pursuant to the Navajo Nation Code, see 10 N.N.C. § 201, and the Tribally Controlled Schools Act (TCSA), 25 U.S.C. § 2501. SASI is the grantee of Bureau of Indian Education (BIE) funds received for operation of educational programs on the Navajo Nation for the benefit of Indian students. Ms. Jim alleged that SASI discriminated against her and terminated her because of her pregnancy and maternity leave. She brought suit for pregnancy discrimination pursuant to Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). For the Court to have subject matter jurisdiction over Ms. Jim’s claims, SASI must be a covered employer under both statutes. SASI contends that it is a “tribal organization” exempted from the definition of an employer under both Title VII and the ADA and disagrees that the Court has subject matter jurisdiction over this lawsuit. Relying on the Tenth Circuit’s reasoning in *Dille*, the *Giedosh* court found that the Little Wound School Board, Inc. (the Board) qualified as an “Indian tribe” for purposes of Title VII and the ADA. *See* 995 F. Supp. 2d at 1056–59. The *Giedosh* court found the following factors significant: (1) the Board was a nonprofit corporation incorporated under state law, *id.* at 1054; (2) “the Board’s membership [was] comprised solely of members of the Oglala Sioux Tribe[,]” and board members were democratically-elected “[t]o further the Tribe’s policy of community participation[,]” *id.* at 1055 (citations omitted); (3) the school was required to adhere to tribal resolutions and ordinances and was tribally chartered, meaning the Tribe had the authority to “step in at any time, for good reason, and assume the control and operation of

the school[,]” *id.* (citations omitted); (4) “[l]ike in *Dille*, the purpose of establishing the organization [was] to further the development, in this case the educational development, of the children living in Indian country, and to involve the Indian community in the education of the Indian children[,]” *id.* at 1057; (5) “[t]he Board is made up of members of the Tribe, and those members are democratically elected[,]” *id.*; and (6) “[t]he school, which is operated by the Board, services tribally enrolled members in the Kyle community and the surrounding area of the Pine Ridge Indian Reservation.” *Id.* The record before the Court supports the same conclusion in this case.

86. *People ex rel. Becerra v. Native Wholesale Supply Co.*

No. C084031, 37 Cal.App.5th 73, 249 Cal.Rptr.3d 445 (Cal. Ct. App. July 2, 2019). Attorney General brought action against Indian-chartered corporation headquartered on out-of-state reservation for sale of contraband cigarettes to the general public. The Superior Court, Sacramento County, No. 34200800014593CUCLGDS, David I. Brown, J., granted summary judgment in Attorney General's favor. The corporation appealed. The Court of Appeals, Robie, J., held that: (1) corporation was subject to personal jurisdiction; (2) corporation was considered a non-Indian for purposes of the Indian Commerce Clause analysis; (3) Indian Commerce Clause did not preempt Directory Statute or the California Cigarette Fire Safety and Firefighter Protection Act; and (4) Directory Statute did not violate the equal protection clause. Affirmed.

87. *Cedar Band of Paiutes v. U.S. Department of Housing and Urban Development*

No. 4:19-cv-30-DN-PK, 2019 WL 3305919 (D. Utah July 23, 2019). On April 22, 2019, plaintiffs Cedar Band of Paiutes (the “Cedar Band”), Cedar Band Corporation (“CBC”), and CBC Mortgage Agency (“CBCMA”) (collectively, “Plaintiffs”) filed a complaint against defendants United States Department of Housing and Urban Development (“HUD”). The central aim of plaintiffs’ complaint was to have the Mortgagee Letter 19-06 (the “2019 Mortgagee Letter”) that defendants issued on April 18, 2019, set

aside under the Administrative Procedures Act (“APA”). On the same day plaintiffs filed their complaint, plaintiffs also filed the Motion For Ex Parte Temporary Restraining Order and Preliminary Injunction (“Motion”). CBCMA is registered as a Governmental Mortgagee with HUD. Through its program, the Chenoa Fund, CBCMA provides down payment assistance (“DPA”) for mortgage loans insured by the FHA that are originated by other lenders, as well as a small number of conventional loans. The FHA insures the vast majority of loans for which CBCMA provides DPA. CBCMA then purchases the first mortgages and sells them on a secondary market. Provisions related to FHA insurance, including provisions related to the minimum required investment (“MRI”) for FHA insured loans, are codified at 12 U.S.C § 1709. In 2007, HUD published a final rule (the “2007 Rule”) that prohibited “sellers” from providing DPA “in their own home sales transactions” through an arrangement where “a so-called charitable organization provides a so-called gift to a homebuyer from funds that it receives, directly or indirectly, from the seller.” The 2007 Rule exempted governmental entities from this prohibition. The rule expressly specified that DPA “is permitted ... from ... governments.” The 2007 Rule also specifically provided “that a tribal government ... is a permissible source of down payment assistance.” Congress enacted changes to 12 U.S.C § 1709, formally incorporating some of the guidance of the 2007 Rule into statute. Specifically, 12 U.S.C. § 1709 was amended to provide that the MRI for a FHA insured loan could not consist, in whole or in part, of funds provided by any of the following parties before, during, or after closing of the property sale: i) The seller or any other person or entity that financially benefits from the transaction; and ii) Any third party or entity that is reimbursed, directly or indirectly, by any of the parties described in clause i). Notably, the 2008 amendments did not address the provision of DPA towards FHA insured loans by governmental entities. In 2012, HUD addressed that issue in an interpretive rule published in the Federal Register (the “2012 Rule”). According to the 2012 Rule, it was HUD’s interpretation that 12 U.S.C. § 1709 “did not prohibit FHA from insuring mortgages originated as part of the homeownership programs of Federal, State, or local governments or their agencies or instrumentalities when such agencies or instrumentalities also directly provide funds toward the required minimum cash investment.” The path running from the

statute—12 U.S.C. § 1709(b)(9)—through the 2012 Interpretive Rule and HUD Handbook and finally to the 2019 Mortgagee Letter does not clearly show how Defendants arrived at its new interpretive jurisdictional limitations. Furthermore, apart from the 2019 Mortgagee Letter, it does not appear that Defendants would readily have an adequate basis to enforce jurisdictional limitations on governmental entities providing DPA. Instead, the 2019 Mortgagee Letter imposes unprecedented, new duties on mortgagees to obtain letters showing that the governmental entity is providing DPA to someone within its own jurisdictional boundaries (and in the case of tribes, to a tribal member) or the DPA will be used toward an FHA insured loan to purchase property within that governmental entity’s jurisdiction. The 2019 Mortgagee Letter is more legislative in character than interpretive because it articulates new duties that were immediately imposed on mortgagees for the first time. Therefore, HUD’s action in the 2019 Mortgagee Letter should likely have been preceded by notice and comment. Motion was granted. Defendants were enjoined from any enforcement of Mortgagee Letter 19-06 until further order of this court. Specifically, Defendants shall not deny insurance nor cause insurance to be denied based on noncompliance with Mortgagee Letter 19-06 and shall provide public notice that the effective date of Mortgagee Letter 19-06 was suspended until after a final determination on the merits of the case.

88. *Kodiak Oil & Gas (USA) Inc. v. Burr*

Nos. 18-1824, 18-1856, 932 F.3d 1125 (8th Cir. Aug 5, 2019). Oil and gas company brought declaratory judgment action against four members of an Indian tribe and the Chief Judge of a tribal court, seeking a declaration that the tribal court lacked jurisdiction over a breach of contract action filed by the four individual defendants which sought to recover royalties pursuant to an oil and gas mining lease. Similarly, a resources company which was a defendant in the same tribal court lawsuit also filed a declaratory judgment action against the same defendants, as well as against the Court Clerk/Consultant of the tribal court. Both federal court actions were stayed pending resolution of the tribal court action, but after tribal supreme court ruled that the tribal district court had jurisdiction over the matter, the federal plaintiffs filed motions for preliminary

injunction preventing defendants from proceeding further with the underlying tribal court action. The Tribal court judge and clerk moved to dismiss. Thereafter, the first two federal lawsuits were consolidated, and the United States District Court for the District of North Dakota, Daniel L. Hovland, Chief Judge, 303 F.Supp.3d 964, issued a preliminary injunction. Tribal court officials appealed. The Court of Appeals, Grasz, Circuit Judge, held that: (1) oil and gas companies claims for declaratory and injunctive relief against tribal court officials were not barred by tribal sovereign immunity; (2) oil and gas companies properly exhausted their tribal court remedies before filing suit in federal court; and (3) factors weighed in favor of issuance of a preliminary injunction against any tribal court exercise of jurisdiction in the case. The case was affirmed.

89. *Chemehuevi Indian Tribe v. McMahon*

No. 17-56791, 934 F.3d 1076 (9th Cir. Aug 19, 2019). An action was brought pursuant to 42 U.S.C. § 1983 by the Chemehuevi Indian Tribe and four of its enrolled members alleging violations of various federal statutory and constitutional rights in connection with citations by San Bernardino County Sheriff's Deputies of four Tribe members for violating California regulatory traffic laws within the Reservation. The Court analyzed the history and establishment of the Chemehuevi Reservation and concluded that the area where the Tribe members were cited was within the boundaries of the Reservation and hence was "Indian country" under 18 U.S.C. § 1151(a). Accordingly, the court held that San Bernadino County did not have jurisdiction to enforce California regulatory traffic laws within that area. The Court held that the individual plaintiffs, but not the Tribe, could challenge the citations under § 1983. The Court held that because § 1983 was designed to secure private rights against government encroachment, tribal members could use it to vindicate their individual rights, but not the tribe's communal rights. The Court therefore vacated the district court's judgment dismissing the complaint as to the individuals but affirmed the judgment as to the Tribe.

I. *Religious Freedom*

90. *Priest v. Holbrook*

No. 18-35018, 2018 WL 5733098, 741 Fed.Appx. 510 (9th Cir. Oct. 31, 2018). David R. Priest, a Washington State prisoner and member of the Colville Indian tribe, appealed pro se from the district court's judgment dismissing his action under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") alleging that defendants' confiscation of his golden eagle feathers violated his First Amendment right to free exercise of his Native American religion and his rights under RLUIPA. The court reversed and remanded. The district court dismissed Priest's free exercise claim on the ground that Priest failed to allege a substantial burden to the practice of his religion. However, Priest alleged that the prison confiscated his sacred golden eagle feathers, he was unable to secure any additional feathers while incarcerated, and as a result, he was unable to participate in Native American religious ceremonies in accordance with his religious beliefs. Liberally construed, these allegations were "sufficient to warrant ordering [defendant] to file an answer." *Wilhelm v. Rotman*, 680 F.3d 1113, 1116 (9th Cir. 2012); *Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015) (elements of a free exercise claim). Furthermore, contrary to the district court's holding, Priest's free exercise claim was not barred even if state remedies exist for the loss of property. *See Wood v. Ostrander*, 851 F.2d 1212, 1215 (9th Cir. 1988) ("[T]he existence of state remedies is irrelevant ... where the plaintiff alleges a violation of a substantive right under ... the Bill of Rights...."). The court reversed and remanded Priest's free exercise claim for further proceedings consistent with this disposition. The district court dismissed Priest's RLUIPA claim on the ground that money damages are not available as a remedy for RLUIPA violations. However, in addition to monetary relief, plaintiff also requested "such other relief as it may appear plaintiff is entitled to." Because the relief Priest seeks is not limited to monetary relief, the court reversed dismissal of Priest's RLUIPA claim and remanded for the district court to consider the merits of this claim in the first instance.

91. *Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership*

No. CV-18-0057-PR, 245 Ariz. 397, 430 P.3d 362 (S.Ct. Ariz. Nov. 29, 2018). Hopi Tribe brought an action against Flagstaff for public nuisance after the city moved forward with sale to ski resort of reclaimed wastewater for artificial snowmaking on public land. City filed a third-party indemnification claim against the resort. The Superior Court, Coconino County, No. CV2011-00701, Mark R. Moran, J., dismissed action against resort. The Tribe appealed. The Court of Appeals, 244 Ariz. 259, 418 P.3d 1032, reversed in part, vacated in part, and remanded. A petition for review was granted. The Supreme Court, Pelander, J., held that Tribe's alleged injury from environmental damage to land, which had religious and cultural significance to Tribe, was different in degree but not in kind or quality suffered by the public, and thus Tribe did not sufficiently allege the required special injury to maintain claim. The Court of Appeals' opinion vacated and remanded; the trial court's judgment affirmed.

J. Sovereign Immunity

92. *Romero v. Wounded Knee, LLC*

No. 16-5024-JLV, 2018 WL 4279446 (D.S.D. Aug. 31, 2018). Plaintiff Leslie Romero initiated this action against defendant Wounded Knee LLC. Plaintiff claims she was sexually assaulted and harassed while employed by defendants. She alleges torts and violations of Title VII of the Civil Rights Act of 1964 and the South Dakota Human Relations Act of 1972. Plaintiff is an enrolled member of the Oglala Sioux Tribe (“Tribe”) and the incidents alleged in the complaint occurred within the exterior boundaries of the Pine Ridge Indian Reservation at Manderson, South Dakota. Defendants failed to file answers to plaintiff’s complaint, so the clerk entered default against them. Plaintiff filed a motion for default judgment, and the court entered an order finding she was entitled to default judgment. The court later acknowledged it will not enter final judgment in plaintiff’s favor until the court makes findings regarding the specific claims in the complaint on which it would enter judgment and the appropriate amount of damages

supported by evidence. To prevent an adverse final judgment, WKCDC raised the issues of tribal court exhaustion and tribal sovereign immunity in a motion to set aside default judgment. WKCDC indicates that nearly two decades ago the Oglala Oyata Woitancaan (“OOW”) was established in coordination with the federal government. The OOW was a geographic designation covering primarily Pine Ridge. An emphasis of the OOW was facilitating infrastructure development funds from the federal government to Pine Ridge. The Tribe’s Constitution created community governments called Districts that represent local interests, and each District could choose whether to participate in the OOW. WKCDC claims there was an OOW Board with a member who was also a member of an entity WKCDC refers to as the Wounded Knee District Task Force. According to WKCDC, once the OOW expired, the District Task Force became WKCDC and the District Task Force’s assets and property were transferred to WKCDC. WKCDC alleges its articles of incorporation demonstrate its affiliation with the Tribe and WKCDC’s tribal sovereign immunity. The court ordered that the case was stayed pending tribal court exhaustion and a further order from the court. The court further ordered that WKCDC, as the party asserting there is tribal court jurisdiction and tribal court exhaustion must occur, must file within thirty (30) days of the date of this order a declaratory judgment action in the Oglala Sioux Tribal Court naming the plaintiff Leslie Romero to address to that court at least the issues of tribal court jurisdiction and WKCDC’s tribal sovereign immunity defense. In the tribal court case, Ms. Romero may contest tribal court jurisdiction and assert her arguments regarding WKCDC’s tribal sovereign immunity without waiving her assertion in this court that there is no tribal court jurisdiction.

93. JW Gaming Development, LLC v. James

No. 3:18-cv-02669-WHO, 2018 WL 4853222 (N.D. Cal. Oct. 5, 2018). From 2008 to 2011, Plaintiff JW Gaming, LLC (“JW Gaming”) invested \$5,380,000 in the Pinoleville Pomo Nation’s casino project, believing that it was matching an investment in the same amount from the Canales Group, LLC (“the Canales Group”). JW Gaming now alleges that leaders and members of both Pinoleville Pomo Nation (“the Tribe”) and the Canales Group were

part of a years-long scheme to fraudulently induce its investment and to conceal that fraud. It brings suit alleging breach of contract, fraud, and violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–68. Motion to dismiss brought by the Tribal Defendants. Because the Tribal Defendants were not entitled to sovereign immunity and the other claims are properly pleaded, the motions were denied. From December 2011 to April 2012, JW Gaming, tribal leadership, and the Canales Group engaged in negotiations, mostly via email, regarding the future of the Casino Project. In a promissory note dated July 10, 2012 (“the Note”), “The Tribe and/or the Gaming Authority” promised to repay JW Gaming its \$5,380,000.00 investment plus interest. Tribal Defendants Leona Williams and Angela James signed the note, which included a limited waiver of sovereign immunity. The Tribal Defendants and the Canales Group represented that they were entering into a separate note (“the 2012 Canales note”) regarding the Canales investment. After learning about the alleged fraud, JW Gaming brought suit in Mendocino County Superior Court on March 1, 2018. Defendants removed it to federal court on May 7, 2018. The Tribal Defendants argue that JW Gaming’s suit primarily focuses on contractual recovery for alleged breach of the Note. Because the Tribe, not its representatives, was party to the contract, it is the real party in interest. JW Gaming counters that it is suing the tribal employees in their individual capacities for their own fraudulent conduct and that it asserts no claims of vicarious liability. The Supreme Court allowed a personal capacity suit against a tribal employee who was acting within the scope of his employment. The court reasoned a judgment would not “operate against the [t]ribe” but was “simply a suit against [the employee] to recover for his personal actions.” *Lewis v. Clarke*, 137 S. Ct. 1285, 1291, 197 L. Ed. 2d 631 (2017). The Court rejected the tribe’s argument that the indemnification clause in the employment contract should permit the application of sovereign immunity. Instead, “[t]he critical inquiry [was] who may be legally bound by the court’s adverse judgment, not who [would] ultimately pick up the tab.” Applying *Lewis* to the facts alleged here, this suit was against the Tribal Defendants in their individual capacities and the Tribe was not the real party in interest. JW Gaming alleged that the individuals themselves engaged in fraud and that it suffered damages as a result. In the event of an adverse judgment, the

individual defendants, not the Tribe, were bound. *See Lewis*, 137 S. Ct. at 1192–93.

94. *Wilson v. Horton's Towing*

No. 16-35320, 906 F.3d 773 (9th Cir. Oct. 9, 2018). Truck owner brought action against tribal police officer and towing company alleging that towing company converted his truck by impounding it on reservation at state patrol's direction, towing it off of reservation, and releasing it to tribal police officer pursuant to tribal court order of forfeiture. The United States substituted for officer. The United States District Court for the Western District of Washington, 2016 WL 1221655, entered summary judgment in defendants' favor, and owner appealed. The Court of Appeals, Pregerson, District Judge, sitting by designation, held that: (1) owner was required to exhaust his remedies before tribal court before filing suit against company in federal court, and (2) officer was entitled under the Westfall Act to immunity from the truck owner's conversion claim. Affirmed in part, vacated in part, and remanded.

95. *Wilhite v. Awe Kualawaache Care Center*

No. CV 18-80-BLG-SPW, 2018 WL 5255181 (D. Mont. Oct. 22, 2018). In the late 1990s, the Crow Tribe (Tribe) determined that a significant number of its tribal members were in need of an on-reservation nursing facility. On April 11, 1998, by tribal resolution, the Tribe established the Awe Kualawaache Care Center (Care Center), a forty bed, long-term nursing facility located in Crow Agency, Montana. The Care Center provides twenty-four-hour medical services exclusively to members of the Crow and Northern Cheyenne Tribes. The resolution stated the Care Center was an “instrumentality of the Crow Tribe,” created to meet the medical needs of its members. Pursuant to tribal law, the Care Center gives hiring preference to Indians living in or near the reservation. Attached to the resolution was an ordinance that governed operation of the Care Center. The ordinance stated that, “[a]s an instrumentality of the Tribe, the Care Center, its officers, employees, agents and attorneys shall be clothed by federal and tribal law with all the privileges and immunities of the Tribe ... including sovereign immunity from suit in any state, federal, or

tribal court.” The ordinance further stated sovereign immunity may only be waived in accordance with the specific procedure provided in the ordinance. The Care Center operates under what is known as a 638 contract, which is a contract between a tribe and the federal government that provides for tribal administration of federal programs. *Demontiney v. United States ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 805-06 (9th Cir. 2001). Tammy Wilhite was employed as a registered nurse at the Care Center. One day, a patient at the Care Center informed Wilhite that he had been molested during transport. Wilhite reported the conversation to her supervisor. When nothing was done, Wilhite reported the incident to law enforcement. Allegedly, Wilhite was subsequently harassed by her supervisor and terminated from employment by the Care Center’s board of directors. Wilhite filed suit in federal district court, alleging solely that she was entitled to damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., (RICO). Wilhite named the Care Center and its board and administrator as defendants. The individually named defendants are all members of the Tribe. Wilhite does not dispute the tribe’s sovereign immunity extends to the Care Center. Instead, Wilhite argues (A) the Defendants may not assert sovereign immunity because the Court already determined it has subject matter jurisdiction, (B) an insurance company is precluded under 25 U.S.C. § 5321(c)(3) from asserting the Tribe’s sovereign immunity as a defense, and (C) the individual defendants are not protected under sovereign immunity. Here, the Court determined it had subject matter jurisdiction over civil RICO claims in its prior order denying the Defendants’ motion to dismiss on that basis. It did not address sovereign immunity because the issue was not raised at that time. However, the Defendants notified Wilhite that they would raise a sovereign immunity defense in the event the Court denied their initial motion to dismiss. 25 U.S.C. § 5321(c)(1) obligates the United States to obtain or provide liability insurance for tribes operating under a 638 contract. Such insurance policies must “contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit.” 25 U.S.C. § 5321(c)(3). Wilhite asserted § 5321(c)(3) operated as a waiver of sovereign immunity because she sought nothing more than policy limits, and thus it was really the insurance company that was asserting sovereign immunity, not the

Defendants. The Ninth Circuit rejected a similar argument in *Evans v. McKay*, where it held § 5321(c)(3) exclusively applies to insurers, not tribes, and therefore did not serve as a waiver of the tribe's sovereign immunity. 869 F.2d 1341 (9th Cir. 1989). Wilhite argued *Evans* is distinguishable because it dealt with a § 1983 claim rather than a civil RICO claim. However, Wilhite did not articulate how or why the type of claim changes the meaning of the statute. The Court rejected Wilhite's argument as precluded under *Evans*. If the plaintiff sought to recover from the tribe, tribal sovereign immunity would extend to tribal officials and tribal employees who act in their official capacity and within the scope of their authority. *Cook v. AVI Casino Enters.*, 548 F.3d 718, 726-27 (9th Cir. 2008). *Cook* plainly barred Wilhite's claim against the individual defendants because the acts complained of consist of official action taken by the Care Center's board and administrator and Wilhite expressly sought to recover from the tribe. Wilhite argued *Cook* did not apply because she sought recovery from the tribe's insurance policy, not tribal assets. Wilhite cited no authority for the proposition that she may circumvent sovereign immunity by limiting her claim to policy limits and the Court was aware of none. Carried to its conclusion, the argument would mean tribes effectively waive their sovereign immunity by purchasing insurance, so long as a claim was limited to policy limits. Such a conclusion is at odds with Supreme Court precedent, which states sovereign immunity is not waived absent "express authorization by Congress or clear waiver by the tribe." *Kiowa Tribe of Oklahoma v. Mfg. Techs. Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, L. Ed. 2d 981 (1998). The purchase of insurance hardly constitutes a "clear waiver" of immunity, as noted by other courts faced with similar arguments. *See Seminole Tribe of Florida v. McCor*, 903 So. 2d 353, 359 (Fla. 2d DCA 2005); *Atkinson v. Haldane*, 569 P.2d 151, 167-70 (Alaska 1977). The Court found it lacked subject matter jurisdiction because the Defendants were immune from suit. The Defendants' motion to dismiss was granted.

96. *Mitchell v. Tulalip Tribes of Washington*

No. 17-35959, 740 Fed.Appx. 600, 2018 WL 5307748 (9th Cir. Oct. 25, 2018). Thomas Mitchell, his wife, and two other married couples are non-tribal property owners in fee simple of residences within the historical boundaries of the Tulalip Indian Reservation in

Snohomish County, Washington. They appealed dismissal of their claims for declaratory and injunctive relief seeking to quiet title against the Tulalip Tribes of Washington (“the Tribes”) regarding tribal ordinances that they alleged create a cloud on their title. The district court dismissed the claims as unripe and did not address the Tribes’ alternative grounds for dismissal including *res judicata* and tribal sovereign immunity. The court affirms the dismissal on grounds of tribal sovereign immunity. When the district court dismissed on grounds of ripeness, it did not address Washington law that recognizes cloud on title as a hardship fit for judicial determination. *See, e.g., Robinson v. Khan*, 89 Wn. App. 418, 419, 948 P.2d 1347, 1349 (1998); Wash. Rev. Code § 7.28.010. Nevertheless, the court affirmed because this case must be dismissed under the doctrine of tribal sovereign immunity, which protects Indian tribes from suit absent congressional abrogation or explicit waiver. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L. Ed. 2d 106 (1978). Indian tribes possess “the common-law immunity from suit traditionally enjoyed by sovereign powers;” *See McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989) (“Because they are sovereign entities, Indian tribes are immune from unconsented suit in state or federal court.”). This common-law immunity from suit applies to actions for injunctive and declaratory relief. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Congress must “unequivocally express” its intent to abrogate immunity. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 134 S. Ct. 2024, 2031, 188 L. Ed. 2d 1071 (2014) (internal quotation omitted). “The tribe’s immunity is not defeated by an allegation that it acted beyond its powers.” *Imperial Granite Co.*, 940 F.2d at 1271. The claims here are not brought under any federal law that abrogates tribal immunity and the Tribes have not waived their immunity. The Tribes, therefore, cannot be sued in federal court. Affirmed.

97. *Laake v. Turning Stone Resort Casino*

No. 17-3588, 740 Fed.Appx. 744, 2018 WL 5344936 (2nd Cir. Oct. 29, 2018). Appellant John Laake (“Laake”), proceeding *pro se*, appealed from the district court’s judgment dismissing his complaint against Turning Stone Resort Casino (“Turning Stone”) for lack of subject matter jurisdiction based on tribal sovereign immunity.

Laake had purchased a vendor booth for a multi-day event hosted by Turning Stone and attempted to use the booth to conduct tarot card readings, occult readings, and other paranormal demonstrations. Turning Stone employees, finding this conduct improper, informed Laake that he would have to stop, or he would be forced to leave the casino. Laake later sued Turning Stone for alleged violations of his First Amendment and equal protection rights, as well as for infliction of emotional distress and defamation under New York common law. The district court dismissed the complaint. Here, the district court properly concluded that it lacked subject matter jurisdiction over the complaint against Turning Stone. Indian tribes have sovereign immunity from suit unless “Congress has authorized the suit or the tribe has waived its immunity.” *C&L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 416, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. at 754.). Tribal immunity extends to tribal commercial enterprises, such as gambling venues. *See Kiowa Tribe*, 523 U.S. at 754–55. Turning Stone is a commercial enterprise, owned and operated by the Oneida Indian Nation of New York, a federally recognized Indian tribe. *See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017). Neither congressional abrogation of immunity nor waiver has occurred here. Therefore, Turning Stone, as a commercial enterprise of the Oneida Indian Nation of New York, was entitled to sovereign immunity. Laake argued that the Indian Civil Rights Act of 1968 (“ICRA”) supersedes Turning Stone’s immunity. However, it is settled law that suits like this against a tribe under ICRA are also barred by sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 59. ICRA provides no private right of action against a tribe and may be enforced only in tribal court or by a petition for habeas corpus in federal court. 98 S.Ct. 1670; *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 713–14 (2nd Cir. 1998). The court affirmed the judgment of the district court.

98. *Cayuga Indian Nation of New York v. Seneca County, New York*

No. 11-CV-6004 CJS, 354 F.Supp.3d 281 (W.D. N.Y. Dec. 11, 2018). Indian tribe brought action challenging county's ability to impose and collect ad valorem property taxes on parcels of real estate it owned. Parties filed cross-motions for summary judgment. The District Court, Charles J. Siragusa, J., held that tribal sovereign immunity barred the county from bringing suit against the tribe. The tribe's motion was granted.

99. *Barron v. Alaska Native Tribal Health Consortium*

No. 3:18-cv-00118-SLG, 373 F.Supp.3d 1232 (D. Alaska Jan. 2, 2019). Former employee brought §1981 action in state court against employer, an Alaska Native tribal health consortium, alleging disparate treatment and retaliation on the basis of race. After removal, employer moved to dismiss for lack of subject matter jurisdiction. The District Court, Sharon L. Gleason, J., held that: (1) employer was an arm of Alaska's tribes with tribal sovereign immunity, and (2) as a matter of first impression, Congress did not abrogate tribal sovereign immunity as to §1981 claims. Motion granted.

100. *Alaska Logistics, LLC v. Newtok Village Council*

No. 3:18-cv-00108-SLG, 357 F.Supp.3d 916 (D. Alaska Jan. 11, 2019). Logistics company brought action against the governing body of Newtok Village tribe and contractor, asserting claims for breach of contract, breach of good faith and fair dealing, quantum meruit, misrepresentation, and unfair trade practices, arising out of an agreement to transport construction materials and cargo. Governing body brought counterclaims, alleging fraud, misrepresentation, unfair and deceptive practices, and breach of contract. Company filed counterclaims to counterclaims, which were identical to company's original causes of action. Governing body moved to dismiss and to strike company's counterclaims to counterclaims. The District Court, Sharon L. Gleason, J., held that: (1) governing body did not waive its tribal sovereign immunity by asserting counterclaims; (2) company failed to establish that governing body agreed to a forum selection clause that manifested

the tribe's intent to surrender tribal sovereign immunity in clear and unmistakable terms; (3) company failed to show that jurisdictional discovery was warranted on the issue of tribal sovereign immunity; and (4) company's counterclaims to counterclaims, were redundant, and thus, could be stricken. Motions granted.

101. Stillaguamish Tribe of Indians v. Washington

No. 17-35722, 913 F.3d 1116 (9th Cir. Jan. 22, 2019). Stillaguamish Tribe of Indians brought action against State of Washington and the Attorney General of Washington, seeking a declaration that its tribal sovereign immunity barred any lawsuit for indemnification arising from a contract with the State of Washington concerning construction of a revetment to protect salmon populations in a river on tribal lands following a landslide near the river. The United States District Court for the Western District of Washington, Robert J. Bryan, Senior District Judge, 2017 WL 3424942, granted the tribe's summary judgment motion. Defendants appealed. The Court of Appeals, McKeown, Circuit Judge, held that under the well-pleaded complaint rule, the district court lacked federal question jurisdiction over declaratory judgment action that was based on existence of a tribal immunity defense. Vacated and remanded.

102. Edwards v. Foxwoods Resort Casino

No. 17-CV-05869 (JMA) (SIL), 2019 WL 486077 (E.D.N.Y. Feb. 7, 2019). On October 6, 2016, Plaintiff Curtis Edwards and Victoria Edwards visited the Foxwoods Resort Casino. Plaintiffs are both New York residents. While inside the Casino, they were confronted and detained by Casino security on suspicion of credit card fraud at the neighboring Mohegan Sun Casino. Curtis was informed that he was being arrested and that the police were on their way. Upon the arrival of tribal police, Curtis was advised again that he was under arrest and would be transported to police headquarters. Victoria insisted the officers examine a photo of the suspect. Once the police confirmed that Curtis did not match the appearance of the suspect, he was released from custody. When Plaintiffs returned to their hotel room, an unidentified employee of the hotel opened Plaintiffs' room, saw them, and abruptly left. Defendant Foxwoods Resort Casino is a business “located in the State of Connecticut[.]” Plaintiffs' complaint alleges violations of the Fourth Amendment based on: (1)

false imprisonment; (2) false arrest; and (3) unlawful detention. Plaintiffs also allege that the actions of the Tribal police officers underlying these violations were motivated by Plaintiffs' race. Additionally, Plaintiffs bring state law claims of (1) assault and battery; (2) negligent hiring; and (3) trespass. Defendants have moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and Federal Rule of Civil Procedure 12(b)(2), for lack of personal jurisdiction. Defendants argue that subject matter jurisdiction is lacking because: (1) Plaintiffs fail to raise a federal question; (2) Indian tribes are not citizens of a state and therefore destroy complete diversity; (3) 28 U.S.C. § 1343 is not an independent source of jurisdiction; and (4) Tribal Sovereign Immunity precludes Plaintiff's claim. In response, Plaintiffs' motion papers argue that: (1) the allegations of racial profiling and constitutional violations are sufficiently pled and raise federal questions; and (2) any claim of sovereign immunity has been waived by "Sovereign Immunity Waiver Ordinance Number 011092-01," which the Tribe enacted. Here, there were no colorable federal claims. To the extent Plaintiffs sought to invoke federal question jurisdiction by claiming the Defendants violated their rights under the Fourth and Fourteenth Amendments, such an argument is unavailing. These constitutional protections did not apply to Defendants. Moreover, Plaintiffs could not sue Defendants under 42 U.S.C. § 1983 ("Section 1983") because none of the Defendants were acting under the color of state law. Defendants' motion to dismiss for lack of jurisdiction was granted.

103. Long v. Snoqualmie Gaming Commission

No. 77007-1-I, 435 P.3d 339, 2019 WL 912132 (Wash Ct. App. Div.1, Feb. 25, 2019). Former chief executive officer (CEO) of Native American tribe's casino brought action against tribe's gaming commission, alleging commission violated terms of a settlement agreement by refusing to rescind revocation of former CEO's gaming license. The Superior Court, King County, No. 17-2-01853-8, Jeffrey M. Ramsdell, J., dismissed action. Former CEO appealed. The Court of Appeals, Leach, J., held that: (1) any waiver by tribe of its own sovereign immunity, without more, did not also necessarily waive commission's sovereign immunity in matters falling within exclusive purview of commission, and (2) settlement agreement executed between tribe and former CEO, waiving tribe's

sovereign immunity for purposes of resolving any dispute arising under agreement, did not constitute waiver of immunity of commission. Affirmed.

104. In re Greektown Holdings, LLC

No. 18-116518-1166, 917 F.3d 451, 2019 WL 92265866 (6th Cir. Feb. 26, 2019). Litigation trustee brought strong-arm proceeding to avoid allegedly fraudulent transfers, and Indian tribe named as defendant moved to dismiss on sovereign immunity grounds. The United States Bankruptcy Court for the Eastern District of Michigan, Walter Shapero, J., 516 B.R. 462, denied the motion, and the Indian tribe appealed. The District Court, Paul D. Borman, J., 532 B.R. 680, reversed and remanded. On remand, the Bankruptcy Court, Shapero, J., 559 B.R. 842, granted motion to dismiss, and litigation trustee appealed. The District Court, Borman, J., 584 B.R. 706, affirmed. Appeal was taken. The Court of Appeals, Clay, Circuit Judge, held that: (1) Congress did not unequivocally express intent to abrogate Indian tribe's sovereign immunity from cause of action by litigation trustee in strong-arm capacity to set aside allegedly fraudulent prepetition transfers made by Chapter 11 debtor to tribe; (2) while tribal sovereign immunity could be waived by litigation conduct, it could not be waived by the litigation conduct, not of tribe, but of tribe's alleged alter ego or agent; and (3) litigation conduct of filing bankruptcy petition does not waive tribal sovereign immunity as to a separate, adversarial fraudulent transfer avoidance claim. Affirmed.

105. Solomon v. American Web Loan

No. 4:17cv145, 375 F.Supp.3d 638 (E.D. Va. 2019). These motions arose out of complicated lending scheme that involving tribal immunity, forced arbitration, and several layers of corporate entities in an attempt to avoid liability for allegedly usurious interest rates. At its core, this case involves a lending scheme envisioned by Mark Curry ("Curry"), whereby he and his corporate entities attempt to use the sovereign immunity of the Otoe-Missouria Indian Tribe (the "Tribe") to evade this lawsuit. Mindful of the strong federal policy favoring tribal immunity, self-governance, and a safe treasury, the court rejected his arguments. Plaintiffs produced enough evidence to show that Curry shifted all of the risk of his scheme to the Tribe

and kept the lion's share of the revenue for himself, through a scheme that infringed upon the Tribe's self-governance and placed the Tribe's treasury at risk. In other words, Plaintiffs made a sufficient showing that Curry was acting for himself, not for the Tribe. Defendants' motions denied.

106. Gingras v. Think Finance, Inc.

No. 16-2019-cv, 922 F.3d 112 (2d Cir. 2019). The federal government and many states have laws designed to protect consumers against predatory lending practices. In this case, the court considered what happens when those laws conflict with the off-reservation commercial activities of Indian tribes. The court held that, notwithstanding tribal sovereign immunity, federal courts may entertain suits against tribal officers in their official capacities seeking prospective, injunctive relief prohibiting off-reservation conduct that violates state and substantive federal law. The court also considered the specific lending agreements between these Plaintiffs and these Defendants and held that the agreements' arbitration clauses were unenforceable and unconscionable. Payday loans are ostensibly short-term cash advances for people who face unexpected obligations or emergencies. The loans are typically for small sums that are to be repaid quickly—in anywhere from several weeks to a year. “Typically, online lenders charge fees and interest that, when annualized, result in interest rates far in excess of legal limits or typical borrowing rates, often exceeding 300%, 500%, or even 1,000%.” This suit involved payday loans made by Plain Green, LLC, an online lending operation, which holds itself out as a “tribal lending entity wholly owned by the Chippewa Cree Tribe of the Rocky Boy’s Indian Reservation, Montana.” J. App. 150. The borrowers were Plaintiffs-Appellees Jessica Gingras and Angela Given, who are Vermont residents. In July 2011, Gingras borrowed \$1,050 at an interest rate of 198.17% per annum. She repaid that loan and borrowed an additional \$2,900 a year later, this time with an interest rate of 371.82%. She has not repaid the second loan. To receive their loans, Gingras and Given were required to sign loan agreements. The loan agreements provided for arbitration in the event of a dispute between the borrower and Plain Green. The loan agreements also provide that Chippewa Cree tribal law governs the loan agreement and any dispute arising under it. An arbitrator, whom the borrower may select from the American Arbitration

Association (“AAA”) or JAMS, “shall apply Tribal Law” and any arbitral award must “be supported by substantial evidence and must be consistent with [the loan agreement] and Tribal Law.” Chippewa Cree tribal courts were empowered to set aside the arbitrator’s award if it does not comply with tribal law. Gingras and Given alleged that the loan agreements violated Vermont and federal law. The loans originated from Plain Green, LLC. Plain Green’s Chief Executive Officer is Defendant Joel Rosette; two members of Plain Green’s Board of Directors, Ted Whitford and Tim McInerney, were also defendants. Gingras and Given brought this class action in the District of Vermont, seeking, among other relief, an order barring Defendants from continuing their current lending practices. Tribal Defendants moved to dismiss, arguing that they are entitled to tribal sovereign immunity. The district court disagreed and denied their motion. It concluded that tribal sovereign immunity does not bar suit against the Tribal Defendants in their official capacities for prospective, injunctive relief under a theory analogous to *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Specifically, the district court read the Supreme Court’s decision in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014), to condone that form of action to vindicate violations of state law. All Defendants also moved to compel arbitration pursuant to the loan agreements. The district court denied those motions. It concluded that the arbitration agreements are unconscionable and unenforceable because they insulate Defendants from claims that they have violated state and federal laws. In particular, it held that because the agreements apply tribal law exclusively and restrict all arbitral awards review solely by a tribal court, the neutral arbitral forum is illusory. All Defendants timely appealed. First, the court concluded that the arbitration agreements were unenforceable because they were designed to avoid federal and state consumer protection laws. Similar to the agreement in *Hayes*, Plaintiffs’ agreements required the application of tribal law only and disclaimed the application of state and federal law.⁴ See J. App. 116–17. The arbitration mechanism in the agreements purported to offer neutral dispute resolution but appears to disallow claims brought under federal and state law. The Supreme Court has made clear that arbitration agreements that waive a party’s right to pursue federal statutory remedies are prohibited. See *Am. Exp. Co. v. Italian Colors Rest.*,

570 U.S. 228, 235–36, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013).. By applying tribal law only, arbitration for the Plain Green borrowers appears wholly to foreclose them from vindicating rights granted by federal and state law. We agree with the Fourth Circuit that “[t]he just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce.” Plain Green is a payday lending entity cleverly designed to enable Defendants to skirt federal and state consumer protection laws under the cloak of tribal sovereign immunity. That immunity is a shield, however, not a sword. It poses no barrier to plaintiffs seeking prospective equitable relief for violations of federal or state law. Tribes and their officers are not free to operate outside of Indian lands without conforming their conduct in these areas to federal and state law. Attempts to disclaim application of federal and state law in an arbitral forum subject to exclusive tribal court review fare no better. The judgment of the district court was affirmed.

107. Bell v. City of Lacey

No. 3:18-cv-05918-RBL, 2019 WL 2578582 (W.D. Wash. June 24, 2019). Defendants Nisqually Tribe, John Simmons and Elatta Tiam’s (collectively “the Tribe Defendants”) moved for Judgment on the Pleadings. After being arrested and charged with a crime in the city of Lacey, Bell was held for 19 days at a detention facility owned and operated by the Nisqually Tribe on Reservation land. The facility detains non-tribal members pursuant to an Agreement between the Tribe and the City of Lacey whereby the latter pays the former for incarceration services. At the end of his time at the facility, Bell suffered a stroke. He has now sued numerous parties including the Nisqually Tribe and the Tribe’s Chief Executive Officer, John Simmons, and its Chief Financial Officer Eletta Tiam (Bell also sued several Doe Defendants who allegedly failed to give him medical treatment, but they are not the subject of this Order). Bell alleged claims for false imprisonment, declaratory and injunctive relief, negligent infliction of emotional distress, and negligence against all three Tribe Defendants. The Tribe Defendants moved to dismiss Bell’s claims against them, arguing that the claims are barred by sovereign immunity and because they are factually implausible and time-barred. However, the Ninth Circuit has held that tribal officers allegedly violating

federal law are not immune from suits seeking prospective relief under the doctrine of *Ex Parte Young*. See *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (citing *Burlington N.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991) (overruled on other grounds)). In this case, no waiver or abrogation had occurred. Consequently, the claims for monetary relief against the Tribe Defendants were dismissed. However, because Bell's complaint cites *Ex Parte Young*, but the parties do not address it in their briefs, the court found it lacked sufficient materials to decide whether Bell's claim for declaratory and injunctive relief against Simmons and Tiam could be dismissed. That question was reserved pending further briefing. Bell's primary argument was that he may sue the Tribe as a third-party beneficiary of the Tribe's Agreement with the City. The Agreement waived the Tribe's sovereign immunity to the following extent: the Nisqually Indian Tribe is a Sovereign Nation with all immunities attendant thereto with the following exception that the parties to this agreement have specifically negotiated: The Nisqually Indian Tribe does hereby expressly consent to venue in the courts of the state of Washington for any legal dispute by and between the parties to this agreement and further agrees that any such dispute shall be interpreted pursuant to the laws of the state of Washington. According to Bell, he was included as a "party" to the Agreement and can therefore sue the Tribe in a state or federal court. Under Washington law, "[t]he creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract." *Postlewait Const., Inc. v. Great Am. Ins. Companies*, 106 Wash. 2d 96, 99 (1986) (quoting *Lonsdale v. Chesterfield*, 99 Wash. 2d 353, 361 (1983)). Here, the Agreement expressly allocated mandatory responsibilities for medical treatment and transportation to the City. While the Agreement stated that the Tribe must provide "room and board" to inmates, this did not show that the parties intended to create a contractual obligation. Furthermore, even if inmates could be considered third-party beneficiaries under the Agreement, the waiver of sovereign immunity did not clearly encompass claims brought by third parties. The Agreement only waived sovereign immunity for disputes between "the parties to this agreement," the same "parties to this agreement" that are also referred to as having "specifically

negotiated” the waiver exception. Consequently, the Agreement did not “unequivocally express” an intent to waive sovereign immunity for third-party beneficiaries. *See Santa Clara Pueblo*, 436 U.S. at 58. The court found that Bell’s remaining arguments also lacked merit. Bell argued that his claim “sounds in habeas” because he alleged that the Tribe’s Agreement to detain state prisoners is illegal. However, as the Tribe Defendants correctly point out, Bell could not maintain a habeas action when he was no longer being detained. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004). There was no dispute that Bell has been released from Tribal custody and there was no clear indication that he would be returned to it. Finally, Bell contended that Simmons and Tiam cannot invoke sovereign immunity because they were sued in their individual capacities. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017). However, courts “may not simply rely on the characterization of the parties in the complaint” when assessing whether a claim is actually against an officer in their official capacity. *Id.* at 1290. Here, Bell’s claims against Simmons and Tiam stem from policy-level decisions made as representatives of the Tribe and administrative conduct undertaken as officers of the Tribe. None of Simmons and Tiam’s actions were directed at Bell personally. Sovereign immunity thus extends to Simmons and Tiam for Bell’s claims seeking monetary relief. For the above reasons, all claims against the Tribe were dismissed and the false imprisonment, conspiracy, negligent and reckless infliction of emotional distress, and negligence claims against Simmons and Tiam were dismissed. The court ordered further briefing on the issue of whether Bell’s claim for declaratory and injunctive relief against Simmons and Tiam should survive under the doctrine of *Ex Parte Young*.

108. *Williams v. Big Picture Loans, LLC*

No. 18-1827, 929 F.3d 170, 2019 WL 2864341 (4th Cir. July 3, 2019). Borrowers brought putative class action against lending entity, and related defendants, alleging that payday loans carried unlawfully high interest rates. The United States District Court for the Eastern District of Virginia, No. 3:17cv00461REPRCY, 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,

held that: (1) burden of proof to demonstrate tribal immunity as an arm of the tribe was on party seeking such immunity, and (2) entities were entitled to sovereign tribal immunity. Reversed and remanded with instructions.

109. Joan Wilson and Paul Franke, M.D., v. Alaska Native Tribal Health Consortium

No. 3:16-cv-00195-TMB, 399 F.Supp.3d 926, 2019 WL 2870080 (D. Alaska, July 3, 2019). Defendants Alaska Native Tribal Health Consortium's ("ANTHC"), Andrew Teuber's ("Teuber") and Roald Helgesen's ("Helgesen") (collectively "Individual Defendants") moved to Dismiss for Lack of Subject Matter Jurisdiction and to Dismiss for Failure to State a Claim ("Motion to Dismiss"). For the reasons explained below, Defendants' Motion to Dismiss was granted. ANTHC is a "Tribal Organization and inter-Tribal consortium of federally recognized Alaska Tribes and Tribal Organizations" which co-manages Alaska Native Medical Center ("ANMC"), a tertiary-care hospital that provides medical services in Anchorage, Alaska. From 2014 to 2016, ANTHC employed Wilson as Chief Ethics and Compliance Officer. From 2013 to 2016, ANTHC employed Franke by contract as the Chief Medical Officer of ANMC. Wilson and Franke asserted that they have "intimate knowledge of the day-to-day operations" of ANTHC, including billing practices of ANMC. They repeatedly allege that Teuber, President of ANTHC, and Helgesen, Chief Executive Officer of ANTHC and Hospital Administrator of ANMC, were "well-aware" that ANMC and ANTHC's various billing practices were fraudulent. Specifically, Plaintiffs allege that ANTHC engaged in the following fraudulent practices: double billing for certain medical services; billing for services performed by ineligible providers; billing for unauthenticated services; and accepting incentive payments from Medicaid and Medicare without satisfying program requirements. Plaintiffs allege that Wilson "repeatedly brought these issues to the attention of ANTHC and Helgesen," "repeatedly attempted to reverse these [inappropriate] practices." On May 6, 2016, Helgesen terminated Wilson's employment with approval from Teuber, his direct supervisor. In June 2016, ANTHC notified Franke that his contract, which was due to expire on June 7, 2016, would not be

renewed. On August 29, 2016, Plaintiffs initiated this action against ANTHC as a qui tam lawsuit on behalf of the government and under seal pursuant to the False Claims Act (“FCA”). On December 6, 2017, the United States declined to intervene in the action. On June 21, 2018, Plaintiffs filed an Amended Complaint as a private action on behalf of themselves against ANTHC. Plaintiffs alleged that their employment at ANTHC was terminated as a result of Plaintiffs' opposition to ANTHC's fraudulent billing practices in violation of federal and state laws. Defendants moved for dismissal of each of Plaintiffs' four claims. ANTHC contends that dismissal is appropriate because ANTHC is an “arm of the tribe,” which means it is both entitled to tribal sovereign immunity, which bars all claims against it, and is not “a person” subject to liability under the FCA retaliation provision. The quasi-jurisdictional nature of sovereign immunity means that if ANTHC is found to maintain such immunity, this Court lacks jurisdiction to resolve this action as it pertains to ANTHC. “Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe.” Tribal sovereign immunity extends to tribal governing bodies or entities acting as “an arm of the tribe” as well as organizations comprised of multiple tribes. In *White v. University of California*, the Ninth Circuit Court of Appeals set forth the appropriate analysis to determine whether an entity is an “arm of the tribe.” If a court finds that an entity is an “arm of the tribe,” that entity is both (1) entitled to maintain tribal sovereign immunity, and (2) is not liable under the FCA retaliation provision, because it is not “a person” under the FCA. *White*, established a five-factor analysis to determine if an entity is an “arm of the tribe:” (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities. Plaintiffs argued that ANTHC is not an “arm of the tribe” because it was created by Congress, not directly by resolution of the tribes; and tribal status is not required in order to obtain federal funding through the Indian Self-Determination and Education Assistance Act (“ISDEAA”). The ISDEAA, in pertinent part, determines that an “inter-tribal consortium ... shall have the rights and responsibilities of the authorizing Indian tribe and §

325(a) authorizes the fifteen tribes and tribal health organizations to form “a consortium,” which eventually became ANTHC. Furthermore, ANTHC was incorporated as a tribal non-profit organization. Based on these facts, the Court found that ANTHC's creation, authorized by Congress and formed by regional health entities and tribes, supports a finding that it is “an arm of the tribe.” The Court found that the tribes and regional health entities identified in § 325(a) P.L. 105-83 intended to share their immunity with ANTHC, which supports a finding that ANTHC is “an arm of the tribe.” For the foregoing reasons, this Court found that an analysis of the five factors articulated in *White* demonstrates that ANTHC is an “arm of the tribe.” Because ANTHC is an “arm of the tribe,” it maintains tribal sovereign immunity, which deprives this Court of subject matter jurisdiction over the claims brought against ANTHC and simultaneously establishes that ANTHC is not a “person” subject to the FCA. Accordingly, Defendants' Motion to Dismiss was granted with respect to the FCA claim against ANTHC identified in Count I, which was dismissed with prejudice.

***110. Jason Matyascik v. Arctic Slope Native Ass’n Ltd.,
d/b/a Samuel Simmonds Memorial Hospital***

No. 2:19-cv-0002-HRH, 2019 WL 3554687 (D. Alaska Aug. 5, 2019). Plaintiff is Jason Matyascik. Defendant is Arctic Slope Native Association, Ltd., d/b/a Samuel Simmonds Memorial Hospital. Defendant is “the P.L. 93-638 regional health organization for the Arctic Slope Region of Alaska.” Plaintiff alleges that “[o]n or about May 14, 2018,” he “contracted with” defendant “to renew his employment contract” at defendant's “hospital as a physician,” Plaintiff alleges that defendant “refused to honor the contract, terminating [his] employment without providing him” the three-month notice called for in the contract for early termination. Plaintiff also alleges that “[d]uring the 2017-2018 term of [his] employment, [defendant] promised to reimburse several unpaid sums to him yet failed to fulfill those promises.” Defendant moved to dismiss plaintiff's claims, arguing that the court lacks subject matter jurisdiction because it is entitled to tribal sovereign immunity and because plaintiff has not exhausted his administrative remedies. “Tribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe.” *White*

v. Univ. of Calif., 765 F.3d 1010, 1025 (9th Cir. 2014). Defendant argued that it is an arm of its member tribes. Defendant was entitled to sovereign immunity because it is an arm of its member tribes. And, if defendant was entitled to sovereign immunity, defendant has not waived that immunity as to plaintiff's contract and statutory claims. As for plaintiff's conversion claim, plaintiff conceded that he has not exhausted his administrative remedies as required by the Federal Tort Claims Act (FTCA). *See Valadez-Lopez v. Chertoff*, 656 F.3d 851, 855 (9th Cir. 2011) (quoting *Jerves v. United States*, 966 F.2d 517, 518 (9th Cir. 1992)) (FTCA ““provides that before an individual can file an action against the United States in district court, [he] must seek an administrative resolution of [his] claim””). Plaintiff's conversion claim was dismissed. Defendant's motion to dismiss was granted. Plaintiff's contract and statutory claims were dismissed with prejudice, and plaintiff's conversion claim was dismissed without prejudice.

K. *Sovereignty, Tribal Inherent*

III. *Gustafson v. Poitra*

No. 20170423, 916 N.W.2d 804, 2018 WL 4087949 (N.D. Aug. 28, 2018). Non-Indian fee owner of two parcels of land located on Indian reservation by virtue of a foreclosure judgment brought action against claimants claiming an interest in the parcels. Following a bench trial, the District Court, Rolette County, Northeast Judicial District, Anthony S. Benson, J., entered judgment quieting title to fee owner, finding claimants' lessor's lien to be void, and awarding fee owner a money judgment in the amount of \$67,567.98 and attorney's fees in the amount of \$6,620. Claimants appealed. The Supreme Court, McEvers, J., held that: (1) an express determination by the trial court in a prior foreclosure action, that it had jurisdiction over non-Indian owned fee land located within Indian reservation, had res judicata effect in fee owner's subsequent action to quiet title to the land, and (2) the tribal court did not have jurisdiction over non-Indian fee owner's quiet title action. Affirmed.

**112. *World Fuel Services, Inc. v. Nambe Pueblo
Development Corporation***

No. CIV 18-0836 JB/SCY, 362 F.Supp.3d 1021, 2019 WL 293231 (D.N.M. Jan. 23, 2019). Petroleum fuel supplier brought action against federally chartered tribal corporation seeking to compel arbitration of contract dispute concerning unpaid federal excise taxes allegedly owed to supplier pursuant to fuel supply agreement with respect to fuel sales on tribal land. Tribal corporation moved to dismiss for lack of subject-matter jurisdiction, or, in the alternative, for failure to state a claim. The District Court, James O. Browning, J., held that: (1) District Court had diversity jurisdiction; (2) District Court would construe tribal corporation's motion to dismiss for failure to exhaust tribal remedies as motion to dismiss for failure to state a claim, rather than as motion to dismiss for lack of subject-matter jurisdiction; (3) Indian tribe's sovereign immunity extended to tribal corporation; (4) tribal corporation waived its sovereign immunity for purposes of arbitration; (5) supplier was required to exhaust tribal remedies; and (6) stay pending exhaustion of tribal court remedies was warranted. Motion granted in part and denied in part.

113. *Stanko v. Oglala Sioux Tribe*

No. 17-3176, 916 F.3d 694, 2019 WL 846573 (8th Cir. Feb. 22, 2019). An arrestee, who was not a member of an Indian tribe, brought §1983 action against a federally recognized tribe, the Oglala Sioux Tribe, and various tribal officers, seeking damages for violation of the plaintiff's constitutional and civil rights in connection with allegations that the arrestee was traveling on a federally-maintained highway on reservation land when he was arrested, detained, assaulted, battered, and robbed. The United States District Court for the District of South Dakota, Jeffrey L. Viken,, Chief District Judge, 2017 WL 4217113, granted defendants' motion to dismiss for failure to state a claim. Arrestee appealed. The Court of Appeals, Loken, Circuit Judge, held that: (1) arrestee did not state an Indian Civil Rights Act (ICRA) claim, and (2) arrestee failed to exhaust available tribal court remedies. Affirmed.

114. *Knighton v. Cedarville Rancheria of Northern Paiute Indians*

No. 17-15515, 922 F.3d 892, 2019 WL 1781404 (9th Cir. Apr. 24, 2019). Former tribal administrator sought declaratory and injunctive relief against tribe, tribal court, and tribal court judge to avoid tribal court jurisdiction over claims that she defrauded tribe and breached her fiduciary duties to it. The United States District Court for the Eastern District of California, William Horsley Orrick, J., 234 F.Supp.3d 1042, dismissed action. Former administrator appealed. The Court of Appeals, Piersol, Senior Judge for the District of South Dakota, sitting by designation, held that: (1) tribal court had subject-matter jurisdiction over tribe's claims against administrator; (2) administrator reasonably should have anticipated that her conduct on tribal land would have fallen within tribes regulatory jurisdiction; (3) conduct of administrator threatened or had some direct effect on political integrity, economic security, or health or welfare of tribe; and (4) tribe's adjudicatory authority did not exceed its regulatory authority over conduct of administrator during her employment. Affirmed.

115. *Employers Mutual Casualty Company v. Branch*

No. CV-18-08110-PCT-DWL, 381 F.Supp.3d 1144, 2019 WL 1489121 (D. Ariz. Apr. 4, 2019). This case involves an attempt by a tribal court to assert jurisdiction over a party that never set foot within the tribe's reservation, never contracted with any tribal members or organizations, and never expressly directed any activity within the reservation's confines. Employers Mutual Casualty Company ("EMC") is an Iowa-based insurance company. In 2004, EMC sold commercial general liability policies to Service Station Equipment and Sales, Inc. ("SSES") and Milam Building Associates, Inc. ("Milam"). Neither company has any tribal affiliation. While these insurance policies were in place, SSES and Milam were each hired to perform certain work on a gas station in Chinle, Arizona. This gas station was situated on tribally-owned land within the Navajo Nation reservation. In March 2005, an employee of a subcontractor that had been hired by Milam accidentally breached a fuel line. This breach, which went undetected for five months, caused over 15,000 gallons of gasoline

to leak into the ground. In response, the Navajo Nation sued an array of parties, including SSES, Milam, and EMC, in Navajo tribal court. EMC, in turn, moved to dismiss on the ground that it was not subject to tribal jurisdiction. After the tribal courts rejected this argument, EMC filed this action in federal court seeking declaratory and injunctive relief. The Court holds that EMC is not subject to tribal jurisdiction. The Supreme Court has never held that a tribal court has jurisdiction over a non-member, and although the Ninth Circuit has issued several decisions recognizing (or noting the possibility of) such jurisdiction, those cases have almost exclusively involved instances where a non-member was physically present on tribal land and thereafter engaged in the conduct giving rise to liability. Moreover, to the extent the Ninth Circuit has suggested an insurance company may be sued in tribal court despite the absence of any physical presence on tribal land, its decisions have been limited to circumstances where the policyholder was a tribal member, and the insurance company engaged in conduct specifically directed toward the reservation. No court has ever recognized tribal jurisdiction under the circumstances presented here, where an insurance company simply sold a policy to a non-tribal member. The Court thus concluded this case does not satisfy either of the jurisdictional tests recognized by the Ninth Circuit: (1) EMC is not subject to jurisdiction under the “right to exclude” test because EMC has never done anything to enter tribal land (and thus cannot be excluded), and (2) neither of the exceptions recognized in *Montana v. United States*, 450 U.S. 544 (1981), is applicable.

116. Hestand v. Gila River Indian Community

No. 17-16583, 765 Fed.Appx. 334, 2019 WL 1765219 (9th Cir. Apr. 19, 2019). Plaintiff-Appellant John Hestand filed a complaint in tribal court against Defendants-Appellees Gila River Indian Community and Linus Everling, in his official capacity, (Defendants) alleging age discrimination. The tribal court dismissed Hestand’s complaint on the basis of tribal sovereign immunity. After the tribal court of appeals affirmed, Hestand filed a complaint in the district court. He appealed the court’s order granting Defendants’ motion to dismiss with prejudice, and its conclusion that claim and issue preclusion barred his claims. The court affirmed. Hestand argued that federal questions involving sovereign immunity are

always subject to de novo review. However, the court has previously explained the general “rule that federal courts may not readjudicate questions—whether of federal, state, or tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason.” *AT & T Corp. v. Coeur d’Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002).. While the court reviews de novo a *district court’s* determination whether sovereign immunity applies, *Linneen v. Gila River Indian Committee.*, 276 F.3d 489, 492 (9th Cir. 2002), this case involved a *tribal court’s* determination. Principles of comity generally require the court to recognize and enforce tribal court decisions. *See AT & T Corp.*, 295 F.3d at 903.. There are, however, “[t]wo circumstances [that] preclude recognition: when the tribal court either lacked jurisdiction or denied the losing party due process of law.” *Id.* Neither applied here. The tribal court’s jurisdiction was never challenged—Hestand himself brought the claims to tribal court. For the first time on appeal, Hestand claimed that violations of due process entitle him to de novo review. But the district court did not consider this issue, and it was therefore waived. *See Tibble v. Edison Int’l*, 843 F.3d 1187, 1193 (9th Cir. 2016).. Even if the court were to consider the claim, Hestand alleged no actual due process violations by the tribal court; instead, he included a general accusation that “the actions of the Defendants and tribal court denied Plaintiff’s due process rights.” This conclusory allegation did not preclude recognition of the tribal court’s decision. Moreover, Hestand did not appeal the factual and legal bases for the district court’s holding that claim and issue preclusion barred his claims. Instead, he attempted to argue the merits of his suit, claiming that the Indian Civil Rights Act somehow abrogates sovereign immunity in suits involving tribal employees, and that sovereign immunity was not a viable defense. Yet this is precisely what claim preclusion seeks to prevent. *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (“Res judicata ... bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action.”) (quoting *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997)). Because the district court correctly held that claim and issue preclusion barred Hestand’s claims, the court did not reach their merits. Affirmed.

117. *Muscogee Creek Indian Freedmen Band, Inc. v. Bernhardt*

No. 18-1705 (CKK), 385 F.Supp.3d 16, 2019 WL 1992787 (D.D.C. May 6, 2019). Persons whose lineal ancestors were Creek Nation Freedmen and citizens of Muscogee Creek Nation (MCN) brought action against MCN's principal chief, Interior Secretary, and other federal officials seeking declaratory and injunctive relief to secure rights and privileges of MCN citizenship. Defendants moved to dismiss. The District Court, Colleen Kollar-Kotelly, J., held that: (1) plaintiffs were required to exhaust their tribal remedies before bringing action; (2) presence of federal defendants did not obviate plaintiffs' obligation to first seek administrative and judicial remedies in tribal forums; and (3) plaintiffs failed to establish that it would be futile to require them to exhaust their tribal remedies. Motions granted in part and denied in part.

118. *State v. Thompson*

No. A18-0545, 929 N.W.2d 21, 2019 WL 2079426 (Minn. Ct. App. May 13, 2019). Defendant was convicted in the District Court, Beltrami County, John G. Melbye, J., of first-degree driving while impaired (DWI). Defendant appealed. The Court of Appeals, Johnson, J., held that: (1) the fact that the tribal police officer who initially observed defendant's impairment was not a peace officer for purposes of impaired driving laws was irrelevant to defendant's conviction; (2) as a matter of first impression, a state law-enforcement agency is authorized to enforce impaired-driving laws on an Indian reservation to the extent that such an offense is committed by a non-Indian; and (3) tribal officer did not unlawfully detain or arrest defendant. Affirmed.

119. *Rincon Mushroom Corporation of America v. Mazzetti*

No. 09-cv-2330-WQH-JLB, 2019 WL 2341376 (S.D. Cal. June 3, 2019). The matter before the Court is the Ex Parte Motion for an Emergency Order Staying Enforcement of the Rincon Tribal Court “Judgment” Pending Appeal in Tribal Court of Appeals filed by Plaintiff Rincon Mushroom Corporation of America. On October 20, 2009, Plaintiff Rincon Mushroom Corporation of America

(RMCA) initiated this action by filing the Complaint. The action concerns tribal regulation of non-Indian fee simple land (the Property) located within the boundaries of the reservation of the Rincon Band of Luiseno Mission Indians (the Tribe). Defendants Bo Mazzetti, John Currier, Vernon Wright, Gilbert Parada, Stephanie Spencer, Charlies Kolb, and Dick Watenpaugh (the Rincon Band Defendants) are tribal officials sued in their individual and official capacities. The Complaint alleges the following ten causes of action: (1) intentional interference with contract; (2) intentional interference with advantageous economic relationship; (3) conspiracy to intentionally interfere with contract; (4) conspiracy to intentionally interfere with advantageous economic relationship; (5) conspiracy to deprive plaintiff of equal protection and equal privileges and immunities under 42 U.S.C. § 1985(3); (6) civil RICO; (7) civil RICO conspiracy; (8) negligent interference with contract; (9) negligent interference with advantageous economic relationship; and (10) violation of 42 U.S.C. § 1983. On September 21, 2010, the Court granted a motion to dismiss filed by the Rincon Band Defendants. Court dismissed the Complaint for failure to exhaust tribal court remedies. The Court of Appeals for the Ninth Circuit affirmed that Plaintiff RMCA must exhaust tribal remedies on the issue of tribal jurisdiction before bringing suit in federal court. The Court of Appeals stated, “We emphasize that we are not now deciding whether the tribe actually has jurisdiction under the second Montana exception. We hold only that where, as here, the tribe’s assertion of jurisdiction is ‘colorable’ or ‘plausible,’ the tribal courts get the first chance to decide whether tribal jurisdiction is actually permitted. If the tribal courts sustain tribal jurisdiction and Rincon Mushroom is unhappy with that determination, it may then repair to federal court. However, the Court of Appeals held that this Court abused discretion by dismissing the case rather than staying it. The Court of Appeals reversed the dismissal and remanded with instructions to stay the case pending Plaintiff RMCA’s exhaustion of tribal remedies. In the years following the Order staying the case, the Court ordered and the parties filed three status reports as to the exhaustion of tribal remedies. On June 25, 2015, the Court issued an Order administratively closing the case “without prejudice to any party to move to reopen, and without prejudice to the resolution of any statute of limitations issue associated with the filing of this complaint.” On July 26, 2017, the

Court denied Plaintiff RMCA's motions to reopen the case. The Court stated, "[T]he record reflects that RMCA has been afforded multiple opportunities to challenge tribal jurisdiction through motions for partial summary judgment and a trial on the issue of jurisdiction. Finally, RMCA will also have the opportunity to seek tribal court appellate review of the tribal court's ruling on jurisdiction. The Court concluded that RMCA has failed to establish that it lacks an adequate opportunity to challenge tribal court jurisdiction. The Court reviewed the record, which established legal and factual disputes between the Rincon Band Defendants and Plaintiff RMCA but did not demonstrate that the assertion of tribal jurisdiction was motivated by a desire to harass or was conducted in bad faith. The Court concluded that the evidence in the record was insufficient to "prove the enforcement of the statutory scheme was the product of bad faith conduct or was perpetuated with a motive to harass." *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 (9th Cir. 1986). For the reasons stated in the Court's July 26, 2017 Order, the Court found that no exception to the exhaustion requirement applied in this case based on express jurisdictional prohibition, lack of opportunity to challenge jurisdiction, or a plain lack of jurisdiction.

120. Coeur D'Alene Tribe v. Hawks

No. 17-35755, 933 F.3d 1052, 2019 WL 3756886 (9th Cir. Aug. 9, 2019). The panel reversed the district court's order dismissing for lack of subject-matter jurisdiction an action filed by an Indian tribe seeking to enforce a tribal court judgment against nonmembers. The panel held that inherent in the recognition of a tribal court's judgment against a nonmember is a question regarding the extent of the powers reserved to the tribe under federal law. Because the action presented a substantial issue of federal law, the district court had federal question jurisdiction under 28 U.S.C. § 1331. In 2016, the tribe sued the Hawks in the Coeur d'Alene Tribal Court (the "Tribal Court") for encroachment on submerged lands without a permit in violation of tribal law. The Hawks were served with notice but did not answer the complaint or otherwise contest the allegations. The Tribal Court accordingly entered default judgment against the Hawks in the form of a \$3,900 civil penalty and a declaration that the tribe was entitled to remove the

encroachments. The tribe subsequently sought federal recognition and enforcement of the Tribal Court's judgment by filing a complaint in the U.S. District Court for the District of Idaho. A tribe's authority does not spring from federal law but rather derives from the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis omitted) (quoting Felix Cohen, Handbook of Federal Indian Law 122 (ed. 1945)). Tribal sovereignty nevertheless "exists only at the sufferance of Congress and is subject to complete defeasance." *Id.* at 323. Thus, because "federal law defines the outer boundaries of an Indian tribe's power over non-Indians," *Nat'l Farmers*, 471 U.S. at 851, the question of "whether a tribal court has adjudicative authority over nonmembers is a federal question." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

L. *Tax*

121. *Tulalip Tribes v. Washington*

No. 15-CV-940 BJR, 349 F.Supp.3d 1046, 2018 WL 4811893 (W.D. Wash. Oct. 4, 2018). Indian tribe and municipality located on Indian reservation brought action against state of Washington, its governor, director of the Washington State Department of Revenue, county, county treasurer, and county assessor, seeking declaration and injunction prohibiting state and county from collecting retail sales and use tax, business and occupation tax, and personal property tax from non-Indian owned businesses located in the municipality, arguing that the collection of taxes imposed on tribal sovereignty and was preempted by operation of federal law. The District Court, Barbara Jacobs Rothstein, J., held that: (1) state and county's collection of taxes from non-Indian owned businesses in municipality located on Indian reservation was not preempted by operation of federal law, and (2) state and county's collection of taxes did not infringe on Indian tribe's tribal sovereignty. Ordered accordingly.

122. *Seminole Tribe of Florida v. Biegalski*

No. 18-12094, 757 Fed.Appx. 851, 2018 WL 6437564 (11th Cir. Dec. 7, 2018). Indian tribe brought action against executive director of State Department of Revenue for injunctive and declaratory relief

regarding state's imposition of tax on electricity delivered to tribe's reservations. The United States District Court for the Southern District of Florida, D.C. Docket No. 0:16-cv-62775-RNS, Robert N. Scola, Jr., 2017 WL 4570790, dismissed with prejudice based on claim preclusion and later, 2018 WL 1902838, denied tribe's motion for consideration. Tribe appealed. The Court of Appeals held that action was barred, on claim preclusion grounds, by previous judgment that tax was not preempted by federal law. Affirmed.

123. Everi Payments, Inc. v. Washington State Department of Revenue

No. 50791-9-II, 6 Wash. App.2d 580, 432 P.3d 411 (Wash. Ct. App. Dec. 11, 2018). Taxpayer brought action seeking business and occupational (B&O) tax refund. The Superior Court, James Dixon, J., 2017 WL 3317325, granted summary judgment in favor of the Department of Revenue, and taxpayer appealed. The Court of Appeals, Worswick, J., held that: (1) state was not categorically barred from levying a B&O tax on taxpayer; (2) Indian Gaming Regulatory Act (IGRA) did not expressly preempt B&O tax imposed on taxpayer; (3) cash access services provided by taxpayer at tribal casinos fell outside the realm of the IGRA, and were, therefore, capable of being subject to generally-applicable state tax laws, including a B&O tax; (4) Washington-Tribal Compacts did not operate to preempt B&O tax imposed on taxpayer; (5) Indian Trader Statutes did not apply, and thus, did not preempt imposition of a B&O tax on taxpayer; (6) B&O tax was not preempted by federal law; and (7) Department of Revenue rule governing taxation of non-enrolled persons doing business in Indian county did not apply to prevent the Department from assessing a B&O tax on taxpayer. Affirmed.

124. Agua Caliente Band of Cahuilla Indians v. Riverside County

No. 17-56003, 749 Fed.Appx. 650 (9th Cir. Jan. 28, 2019). Plaintiff Agua Caliente Band of Cahuilla Indians appeals the summary judgment entered in favor of Defendant Riverside County and Intervenor-Defendant Desert Water Agency, upholding the right of the County to assess and collect a possessory interest tax (“PIT”) from non-Indian lessees of Indian trust lands on the Agua Caliente

Reservation. In *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), we held that this very tax is permissible. Plaintiff argues that our cursory preemption analysis there is clearly irreconcilable with *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and therefore not controlling. In *Bracker*, the Supreme Court recognized that “[m]ore difficult” preemption questions arise in cases like this, in which “a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.” 448 U.S. at 144. In such cases, *Bracker* instructs that a court’s inquiry should not be “dependent on mechanical or absolute conceptions of state or tribal sovereignty.” Instead, courts should engage in “a particularized inquiry into the nature of the state, federal, and tribal interests at stake.” In *Agua Caliente*, decided nine years before *Bracker*, we did not expressly engage in that particularized, interest-balancing inquiry. But we did consider the congressional purpose behind “the legislation dealing with Indians and Indian lands,” the PIT’s legal incidence, and the indirect economic effect of the PIT on the tribe and tribal members. See *Agua Caliente*, 442 F.2d at 1186–87. A few years later, in *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), we again upheld the assessment and imposition of a PIT on non-Indian lessees of land held in trust by the federal government for an Indian tribe.¹ In *Fort Mojave*, we engaged in a more extensive analysis of the PIT’s effect on federal and tribal interests, foreshadowing the later requirements of *Bracker*. Indeed, in *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1158 (9th Cir. 2013), we observed that our PIT cases, including *Fort Mojave*, “applied a similar mode of analysis” to *Bracker*. We conclude that our PIT precedents are not clearly irreconcilable with *Bracker*. Additionally, relying on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145. Plaintiff argues that 25 U.S.C. § 465 bars this tax. Once again, we already addressed this issue: “In *Agua Caliente*, for example, we stressed that ‘[t]he California tax on possessory interests does not purport to tax the land as such,’ which would be barred by § 465, ‘but rather taxes the “full cash value” of the lessee’s interest in it,’ which is not covered by § 465.” *Chehalis*, 724 F.3d at 1158 n.7 (alteration in original) (quoting *Agua Caliente*, 442 F.2d at 1186). Affirmed.

125. *Blue Lake Rancheria Economic Development Corporation v. Commissioner of Internal Revenue*

No. 16150-17L, 152 T.C. No. 5, 2019 WL 1077266 (T.C. Mar. 6, 2019). Corporation of federally recognized Indian tribe, and corporation's division, petitioned separately for review of IRS determinations to proceed with liens to collect unpaid employment taxes arising from division's business operations. Actions were consolidated. The Tax Court, Goeke, J., held that: (1) IRS notices of determination to sustain tax liens were sufficient to provide Tax Court with jurisdiction; (2) state law did not restrict Indian tribal corporation's power, pursuant to charter issued by Department of Interior (DOI) under Indian Reorganization Act (IRA), to create legally distinct corporate division whose federal employment tax liabilities were not collectible from corporation by IRS; (3) Indian tribal corporation's power to create legally distinct corporate division was within scope of IRA; and (4) Indian tribal corporation's division acted as legally distinct entity, and thus IRS could not collect division's employment tax liabilities from corporation. Ordered accordingly.

126. *Big Sandy Rancheria Enterprises v. Becerra*

No. 1:18-cv-00958-DAD-EPG, 395 F.Supp.3d 1314, 2019 WL 3803627 (E.D. Cal. Aug. 13, 2019). Plaintiff Big Sandy Rancheria Enterprises (“BSRE”) brought this action challenging the application of California’s cigarette tax and licensing statutes. BSRE is a tribal corporation incorporated under section 17 of the Indian Reorganization Act, 25 U.S.C. § 5124 (“IRA”), which authorizes the Secretary of the Interior to issue a charter of incorporation to any Indian tribe upon petition by such tribe. Although only BSRE, and not the tribe, was a plaintiff to the instant action, BSRE alleged that corporations created pursuant to section 17 of the IRA were “essentially alter egos of the tribal government.” Defendants did not dispute that Indian tribes are exempt from the Tax Injunction Act’s (“TIA”) prohibition but did dispute that plaintiff BSRE is equivalent to an Indian tribe. Defendants argued that BSRE, as a corporation organized under section 17 of the IRA, was a distinct entity from the Big Sandy Rancheria Band of Western Mono Indians—regardless of how the latter is constitutionally

organized—and that BSRE therefore cannot invoke the tribe’s jurisdiction under 28 U.S.C. § 1362 or its exemption from the TIA. Here, BSRE emphasized that it “exclusively distributes tobacco products to Indian tribes and Indian tribal members on their land” and does not make any sales to non-members or the general public. Notably, tribe-to-tribe transactions involving the movement of goods through a state, including outside of Indian country, are not immune from state regulation. Indeed, many courts have affirmed states’ off-reservation authority to enforce state laws. *See, e.g. Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069 (1980) at 161–62 (authorizing off-reservation seizures, noting “[i]t is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries”); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 21 (1st Cir. 2006) (“It is beyond peradventure that a state may seize contraband located outside Indian lands but in transit to a tribal smoke shop.”). The court finds that plaintiff’s challenge to the state’s licensing requirements failed as a matter of law. For the reasons set forth above, (1) the Attorney General’s motion to dismiss and CDTFA’s motion to dismiss for lack of jurisdiction were granted; (2) Plaintiff’s fifth cause of action was dismissed for lack of jurisdiction; (3) Plaintiff’s remaining causes of action were dismissed with prejudice for failure to state a claim.

M. *Trust Breach and Claims*

127. Inter-Tribal Council of Arizona, Inc. v. United States

No. 15-342L, 140 Fed.Cl. 447, 2018 WL 5069161 (Fed. Cl. Oct. 17, 2018). Inter-tribal council representing Arizona Indian tribes sued United States, claiming breach of tribal trust obligations under Arizona-Florida Land Exchange Act (AFLEA) by failing to ensure sufficient security for full payments to be made by landowner for land exchange involving sale of land that was former site of Indian boarding school, by failing to collect and deposit or make up trust payments on which landowner defaulted, and by failing to prudently invest trust funds. Government moved to dismiss for lack of subject-matter jurisdiction and for failure to state claim. The Court of Federal Claims, Firestone, Senior Judge, held that: (1) claim based on insufficient initial security requirements was time barred; (2)

government fulfilled its trust obligation to ensure adequate security; (3) government was not required to make up defaulted payments; (4) portion of prudent investment claim was time barred; and (5) timely portion of prudent investment claim was sufficiently alleged. Motion granted in part and denied in part.

128. Oneida Indian Nation v. Phillips

No. 5:17-CV-1035, 360 F.Supp.3d 122, 2018 WL 6001002 (N.D.N.Y. Nov. 15, 2018). Oneida Nation of American Indians brought action against trustee and trust, alleging that Oneida Nation had right to possess 19.6 acres of land as part of Oneida reservation under federal treaty, statutory and common law, and the federal constitution, and that trustee's conduct in executing and recording various documents in county land records was an unlawful attempt to obtain possession and control over that land, seeking declaratory judgment and permanent injunction. Trustee and trust counterclaimed that trust had right to possess land under federal and state treaty, statutory and common law, and the federal constitution, and that trustee's conduct was lawful action to maintain possession and control over land. Oneida Nation moved to dismiss counterclaim for failure to state a claim. The District Court, Glenn T. Suddaby, Chief District Judge, held that trust and trustee failed to plausibly allege a claim to the disputed land. Motion granted.

129. Pueblo of Jemez v. United States

No. CIV 12-0800 JBVHR, 366 F.Supp.3d 1234, 2018 WL 6002913 (D.N.M. Nov. 15, 2018). Pueblo of Jemez Indian Tribe brought action under federal common law and the Quiet Title Act (QTA), seeking a judgment that the tribe had exclusive right to use, occupy, and possess the lands of the Valles Caldera National Preserve pursuant to its continuing aboriginal title to such lands. United States objected to admission of hearsay contained in testimony of tribe member and the tribe's memorandum of law. District Court, James O. Browning, J., held that: (1) American Indian oral tradition evidence was inadmissible hearsay; (2) oral tradition evidence was admissible under enumerated exceptions to rule against hearsay; and (3) oral tradition evidence was inadmissible under residual hearsay exception. Requests granted in part and denied in part.

130. *Pueblo of Jemez v. United States*

No. CIV 12-0800 JBJHR, 2019 WL 1139724 (D.N.M. Mar. 12, 2019). This matter came before the Court on: (i) the United States' Motion on the Pleadings and for Summary Judgment, filed August 17, 2018; and (ii) the United States' Motion on the Pleadings and for Summary Judgment, filed August 17, 2018 (collectively the "Motion"). The primary issues were: (i) whether Plaintiff Pueblo of Jemez' admissions that other tribes used the Valles Caldera National Preserve lands defeat its claim that it was the exclusive aboriginal user of the lands; (ii) whether admissions that the third-party owners interfered with Jemez Pueblo's Valles Caldera use means that Jemez Pueblo did not maintain any aboriginal title through continuous use; (iii) whether any statutes of limitations accrued and expired in the decades preceding the United States' purchase of the Valles Caldera; (iv) whether rule 19 of the Federal Rules of Civil Procedure bars Jemez Pueblo's claim, because the Pueblo of Santa Clara is a necessary and indispensable party; and (v) whether the laches doctrine bars Jemez Pueblo's claim, because Jemez Pueblo supported the United States' acquisition of the Valles Caldera rather than asserting its aboriginal title claim. First, the Court concludes that whether other tribes used the Valles Caldera does not per se defeat Jemez Pueblo's claim to aboriginal title over that land. The Court concluded further that genuine issues of material fact remain regarding the extent of other tribes' Valles Caldera use. The United States asserted that "[i]t cannot reasonably be disputed that other tribes used the Preserve lands in a manner that defeats Plaintiff's aboriginal title claim." Although the United States Court of Appeals for the Tenth Circuit in this case stated that, "to establish aboriginal title, a Tribe "must show that it used and occupied the land to the exclusion of other Indian groups," *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1165-66 (10th Cir. 2015) (emphasis in original) (internal quotation marks omitted), the exclusive-use-and-occupancy rule is subject to exceptions for joint and amicable use, dominant use, and permissive use, *See Alabama-Coushatta Tribe of Tex. v. United States*, No. 3-83, 2000 WL 1013532, at *12 (Fed. Cl. June 19, 2000). Hence, evidence of other Pueblos' Valles Caldera use will not necessarily defeat Jemez Pueblo's aboriginal title claim. Jemez Pueblo asserts that its "use of the Valles Caldera was

dominant.” Plaintiff Pueblo of Jemez’s Response in Opposition to Defendant United States’ Motion on the Pleadings and for Summary Judgment at 19, filed August 31, 2018 (“Response”). The dominant use exception to the exclusive use rule recognizes that, where another tribe commonly uses the land with the claimant tribe, proof of the claimant tribe’s dominance over the other tribe preserves its exclusive use of the land. *See United States v. Seminole Indians of Fla.*, 180 Ct. Cl. 375, 383-86 (1967). Moreover, the claimant tribe’s dominance illustrates its ability to exclude other tribes from the area, even if it never chooses to exercise that ability. Second, the Court concluded that Jemez Pueblo’s admission that third-party owners interfered with its Valles Caldera use does not defeat Jemez Pueblo’s aboriginal title claim. The United States asserts that the “[t]he Tenth Circuit remanded this case so that the parties could submit evidence about whether ‘the Baca grant or use of the land by the Baca heirs or their successors’ ‘actually interfered with the Jemez Pueblo’s traditional occupancy and uses of the land in question here before or after 1946,’ ” (quoting *Pueblo of Jemez v. United States*, 790 F.3d at 1168), and contends that “[t]he Bond and Dunigan families exercised their ownership in a manner that defeats Jemez’s claims that it maintained any title to the Preserve,” Indeed, the Tenth Circuit has directed the Court to determine whether there was “actually substantial interference by others” with Jemez Pueblo’s traditional uses of the Valles Caldera, *Pueblo of Jemez v. United States*, 790 F.3d at 1166, and mentions that substantial interference could result from “white settlement and use, authorized by the federal government both statutorily and in fact,” 790 F.3d at 1166 (citing *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1393 (Ct. Cl. 1975)). The Court, however, in accord with controlling Supreme Court of the United States of America precedent, interpreted this statement to indicate that aboriginal title extinguishment could result only from Congressionally authorized interference with Jemez Pueblo’s traditional Valles Caldera use. *See, e.g., United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941)(“Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme.”); *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985) (“[C]ongressional intent to extinguish Indian title must be ‘plain and unambiguous,’ and will not be ‘lightly implied.’ ” (quoting *United States v. Santa Fe Pac. R.R. Co.*, 314

U.S. at 346, 354)). Hence, based on the Tenth Circuit's mandate to consider evidence of "substantial interference by others," *Pueblo of Jemez v. United States*, 790 F.3d at 1166, the Court has identified five factors, none of which by itself is dispositive, that could support a finding that non-Indians substantially interfered with aboriginal title over time so as to effectuate a gradual taking absent express Congressional intent: (i) the creation of an Indian reservation; (ii) Congressionally authorized non-Indian settlement of historic tribal lands; (iii) a Congressionally ratified Executive Order increasing the size of reservation lands set aside for exclusive Indian use; (iv) a cabinet-level order, pursuant to a Congressional act, imposing restrictions on Indian use of their historic lands; and (v) Congressional or executive action designating tribal land for conservation, recreation, or commercial use, such as a forest reserve, grazing district, or the like. Third, the Court concluded that the statutes of limitations to which the United States directs the Court do not bar Jemez Pueblo's aboriginal title claim. The United States contended that Jemez Pueblo's claim is time-barred if the United States permitted "interference with its aboriginal title," Motion at 27 (quoting *Pueblo of Jemez v. United States*, 790 F.3d at 1147), then asserts that "the facts make clear that Baca heirs' successors precluded traditional Indian use in a manner that caused Plaintiff's claims to accrue both before and after 1946," Motion at 27. In addressing the United States' argument that the Baca heirs' use of the Valles Caldera is a cloud on title sufficient to trigger accrual against the United States in 1860, the Tenth Circuit counters that "simultaneous occupancy and use of land pursuant to fee title, and aboriginal title, can occur, because the nature of Indian occupancy differs significantly from non-Indian settlers' occupancy." *Id.* at 1165. The Tenth Circuit highlights such disparate use when it states that "it is ... easy to see how a peaceful and private Indian pueblo might have used portions of this large area of land for its traditional purposes while one agreeable rancher was using portions of it for grazing livestock." *Id.* Jemez Pueblo argued that Jemez people "alive during both periods of Bond and Dunigan ownership" continued to access the Valles Caldera for traditional purposes, to include hunting game, taking eagles, and conducting religious pilgrimages to Redondo Peak, *See* Response at 22-23, and that "its claim accrued only when the United States acquired an interest in the Valles Caldera in 2000 and began limiting the Jemez Pueblo's

access to the land in a manner inconsistent with its aboriginal title,” Response at 27 (quoting *Pueblo of Jemez v. United States*, 790 F.3d at 1152). Based on the nature of aboriginal occupancy, the Court was not convinced that, as a matter of law, a taking occurred between 1860 and 2000, and, therefore, did not bar Jemez Pueblo’s claim based on the United States’ theory that the statute of limitations accrued. Defendants’ motions denied.

131. Goss v. Bonner

No. CV-18-08295-PCT-SMB, 2019 WL 2137266 (D. Ariz. May 16, 2019). Plaintiff Keith Goss is a podiatrist who previously worked for Tuba City Regional Health Care Corporation (“TCRHCC”), which is owned by the Navajo Nation and is operated under the Indian Self-Determination and Education Assistance Act (“ISDEAA”), Pub. L. 93-638, 88 Stat. 2203. Plaintiff filed this action in Coconino County Superior Court. The FAC brought individual counts of defamation against the Individual Defendants. Plaintiff allege that beginning around March 1, 2017 and continuing throughout June, he became aware of statements made by each of the Individual Defendants to people outside of official workplace proceedings. He alleges that the statements were published to people and impeached his honesty, integrity, or reputation. He also alleges that the Individual Defendants knew that the statements were false. In the alternative, Plaintiff brought a Bivens claim for violation of right to privacy. On October 19, 2018, the United States concurrently removed this action from the Superior Court to this court and filed a “Notice of Substitution,” substituting the United States for the Individual Defendants in each of the seven defamation claims pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the “Westfall Act,” 28 U.S.C. § 2679. (the “Scope Certification”). The Director of the Torts Branch, Civil Division, United States Department of Justice, acting on behalf of the Attorney General, certified that the Individual Defendants “were covered persons acting within the scope of their deemed federal employment as employees of the Indian Health Service in carrying out functions authorized under the Self-Governance Compact with TCRHCC at the time of the incidents giving rise to suit.” The United States then brought a motion to dismiss the Defamation Counts pursuant to Rule 12(b)(1).

When a federal employee is sued for a wrongful or negligent act, the Westfall Act “authorizes the Attorney General to certify that a United States employee was acting within the scope of his employment at the time of an incident which gives rise to a civil claim.” *Meridian International Logistics, Inc. v. United States* 939 F.2d 740, 743 (9th Cir. 1991) (citing 28 U.S.C. § 2679(d)(1)-(2)). The action then proceeds under the Federal Tort Claims Act (“FTCA”). *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420, 115 S.Ct. 2227 (1995). However, “[b]ecause the government has not waived its sovereign immunity under the ... FTCA ... for claims arising out of libel or slander,” the Court lacks subject-matter jurisdiction over a defamation claim against the United States, and such claim must be dismissed. *See Dora v. Achey*, 300 Fed.Appx. 550, 551 (9th Cir. 2008). “[T]he Attorney General’s certification is ‘the first, but not the final word’ on whether the federal officer is immune from suit and correlatively, whether the United States is properly substituted as defendant.” *Osborn v. Haley*, 549 U.S. 225, 246 (2007) (quoting *Lamagno*, 515 U.S. at 432). The party challenging the certification “bears the burden of presenting evidence and disproving the Attorney General’s certification by a preponderance of the evidence.” *Jackson v. Tate*, 648 F.3d 729, 732 (9th Cir. 2011). The question of whether a federal employee is acting within the course and scope of his employment is determined by applying respondeat superior principles of the state in which the alleged tort occurred. *Green v. Hall*, 8 F.3d 695, 698–99 (9th Cir. 1993). In cases where the United States is substituted for an employee that is also a tribal employee, “[t]he tribal employee must also be deemed to have acted as a federal employee in carrying out the allegedly tortious activity.” *Wilson v. Horton’s Towing*, 906 F.3d 773, 781 (9th Cir. 2018), *cert. denied*, (2019 WL 825553, Apr. 22, 2019). The Ninth Circuit recently articulated that the test found in *Shirk v. U.S. ex rel. Dep’t of Interior*, 773 F.3d 999 (9th Cir. 2014), also applied to challenges to Attorney General Certifications. *Wilson*, 906 F.3d at 781. The *Wilson* court found that the test had two parts. First, the district court looks at whether the language of the federal contract encompassed “the activity that the plaintiff ascribes to the employee.” *Id.* (quoting *Shirk*, 773 F.3d at 1007). Second, the court looks at whether the employee’s activity fell within the scope of employment as defined by state law. *Id.* In Arizona, “[t]he conduct of a servant is within the scope of

employment if it is of the kind the employee is employed to perform, it occurs substantially within the authorized time and space limit, and it is actuated at least in part by a purpose to serve the master.” *Smith v. Am. Express Travel Related Servs. Co., Inc.*, 876 P.2d 1166, 1170 (Ariz. Ct. App. 1994). As to the first prong of the Shirk test—whether the language of the federal contract encompassed the activity that the plaintiff ascribes to the employee—Plaintiff only raises this issue in his Response to the Motion to Dismiss. Plaintiff’s argument is somewhat circular, alleging that the statements were not made in the scope of employment, and thus cannot be “carrying out the contract or agreement.” In the FAC, Plaintiff alleges that the Individual Defendants acted outside the scope of their employment but does not specifically state how the allegations were not related to functions of the hospital. It is the Plaintiff’s burden to provide evidence that disproves the Scope Certification, and Plaintiff has not shown that the Individual Defendants were not acting pursuant to the Self-Governance Compact. As to the second prong of the Shirk test—whether the employee’s activity fell within the scope of employment—Plaintiff argue that the Individual Defendants were not acting in the scope of their employment. Plaintiff argues that “there was no legitimate work activity when the Defendants off the work site and in social settings made statements about Plaintiff being dangerous and taking kick-backs.” Taken as true, Plaintiff’s allegations do not establish that the defendant’s actions exceeded the scope of his employment. Now that the court has determined that the United States is the proper defendant for the Defamation Counts, the court now considers the United States’ motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1). The United States argues that dismissal is warranted because the action is covered under the FTCA, and the government has not waived its sovereign immunity in defamation claims. The United States also argues that dismissal is warranted due to Plaintiff’s failure to exhaust administrative remedies. Here, Plaintiff does not dispute that the Defamation Claims cannot go forward under the FTCA. Rather, Plaintiff argues that there are questions as to whether the Individual Defendants are considered federal actors and whether they were acting within the scope of employment. For the reasons stated above, the court finds that the United States is the proper Defendant. Accordingly, the Defamation Counts must be dismissed,

and the court need not address the United States' additional arguments.

132. Western Shoshone Identifiable Group by Yomba Shoshone Tribe v. United States

No. 06-896L, 143 Fed.Cl. 545, 2019 WL 2480154 (Fed. Cl. June 13, 2019). Yomba Shoshone Tribe, Timbisha Shoshone Tribe, Duckwater Shoshone Tribe, and individual enrolled tribal members sued United States, asserting breach of trust claim due to federal government, as trustee, allegedly breaching its fiduciary duty by mismanaging three tribal trust funds due to imprudent investing in securities that were too short-term, resulting in less than maximum returns over thirty-three-year period, for which tribes sought to recover \$216,386,589.83 in damages. Bench trial was held. The Court of Federal Claims, Marian Blank Horn, J., held that: (1) tribes had standing to pursue breach of trust claim for all three funds; (2) government had fiduciary duty to invest tribal trust funds; (3) Department of Interior's (DOI) investment policies did not warrant deference; (4) largest fund was prudently invested for several time periods; (5) largest fund was imprudently invested for other time periods; and (6) smaller two funds were imprudently invested except during final year. Ordered accordingly.

133. Moody v. United States

No. 2018-2227, 931 F.3d 1136, 2019 WL 3309394 (Fed. Cir. July 24, 2019). Lessees, who had entered into five agricultural leases with Indian tribe, brought action against United States, alleging that government breached leases by terminating them and ordering lessees to vacate land and that government's actions constituted taking without just compensation under Fifth Amendment. The United States Court of Federal Claims, No. 1:16-cv-00107-EJD, Edward J. Damich, Senior Judge, 135 Fed.Cl. 39, dismissed complaint, and lessees appealed. The Court of Appeals, Dyk, Circuit Judge, held that: (1) United States was not party to leases; (2) United States' alleged revival of leases did not subject it to liability for breach of implied-in-fact contracts; and (3) Bureau of Indian Affairs' (BIA) alleged violation of regulations in canceling leases did not give rise to takings claim. Affirmed.

134. *Bell v. City of Lacey*

No. 3:18-cv-05918-RBL, 2019 WL 3412713 (W.D. Wash. July 29, 2019). On June 24, 2019, the Court issued an order dismissing the Nisqually Tribe from the case and dismissing all claims for damages against Nisqually CEO John Simmons and CFO Eletta Tiam. However, the Court declined to dismiss the declaratory and injunctive relief claim against Simmons and Tiam pending additional briefing on whether that claim may proceed under the doctrine of *Ex parte Young*. After reviewing the submissions from both parties, the Court hereby grants the Tribe Defendants' Motion for Judgment on the Pleadings in full and dismisses all claims against Defendants Simmons and Tiam. Although a state official acting within the scope of their valid authority normally enjoys sovereign immunity, if the official is enforcing a law that conflicts with federal authority they are "stripped of [their] official or representative character." *Ex parte Young*, 209 U.S.123, 159–60 (1908). A court may therefore issue declaratory judgment and enjoin official conduct in conflict with the Constitution or congressional statutes. *Id.* at 155-56; *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 848 (9th Cir. 2002) (explaining that *Ex parte Young* extends to claims for declaratory relief). This doctrine applies equally to tribal officials. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007). The tribe Defendants argue that *Ex parte Young* does not support Bell's claim for injunctive and declaratory relief against Simmons and Tiam for several reasons. First, they argue that Simmons and Tiam are not proper defendants for an *Ex parte Young* action because they lack the requisite connection to enforcement. Second, they assert that Bell's requested relief would require affirmative acts by the tribe itself, rather than just tribal officials. Third, they contend that Bell lacks standing, and his claim for declaratory and injunctive relief is not ripe. The Court agrees. If a plaintiff wants to enjoin unlawful government action, *Ex parte Young* does not permit them to sue just *any* official. *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001). Rather, the defendant "must have some connection with the enforcement of the act' to avoid making that official a mere representative of the

state.” *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999) (quoting *Ex parte Young*, 209 U.S. at 157). “This connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.” *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004). The Court cannot conclude that Simmons and Tiam are proper defendants in an *Ex parte Young* action. Attempts to assert a claim under *Ex parte Young* may amount to an “end run around tribal sovereign immunity” if the tribe itself “is the real, substantial party in interest.” *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002); *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992) (quoting *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945)). This may be the case “if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.” *Shermoen*, 982 F.2d at 1320 (quoting *State of Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969)). Courts have also addressed this issue by asking whether the judgment sought “would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.” *Dawavendewa*, 276 F.3d at 1160 (quoting *Shermoen*, 982 F.2d at 1320). The tribe Defendants’ Motion for Judgment on the Pleadings is granted in full. Defendants Simmons and Tiam are dismissed from the case.

135. Little Traverse Bay Band of Odawa Indians v. Whitmer

No. 1:15-cv-850, 398 F.Supp.3d 201, 2019 WL 3854299 (W.D. Mich. Aug. 15, 2019). Plaintiff, the Little Traverse Bay Band of Odawa Indians (the “Tribe”) claimed that in 1855, the United States entered a treaty with its predecessors and created an Indian reservation spanning more than 300 square miles in the Northwest portion of Michigan's Lower Peninsula. The Tribe sought declaratory judgment from the court that the claimed reservation has continued to exist to this day and has not been diminished or disestablished by any government action.

Defendant and Intervenor-Defendants' moved for summary judgment. Collectively, the Defendants asserted that summary judgment was warranted on the Plaintiff's claim for a declaratory judgment and injunctive relief because no Indian reservation was ever created, or in the alternative, any reservation created was subsequently diminished. Whether a reservation was created depends upon the construction of an 1855 treaty between the United States and the Tribe's political predecessors. But treaties between Indian tribes and the United States are not interpreted like other international compacts, other laws, or even other contracts. Instead, when construing an Indian treaty, the court must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L. Ed. 877 (1943)). Once versed in the relevant history, "[c]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985). Ultimately the court concluded that, after a review of the entirety of the historical record, summary judgment was warranted on the Tribe's claims because the 1855 treaty cannot plausibly be read to create an Indian reservation, even when giving effect to the terms as the Indian signatories would have understood them and even when resolving any ambiguities in the Treaty text in favor of the Indians. The 1855 Treaty simply cannot bear the construction that the Tribe would place on it, *especially* considering the historical context. The Tribe's predecessor bands bargained for—and received—permanent homes in Michigan in the form of individual allotments. They did not bargain for an Indian reservation, and no such reservation was created by the unambiguous treaty terms because the terms do not establish federally set-aside land for Indian purposes or indefinite federal superintendence over the land. *See Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905 (1991).). The Tribe asserted that their predecessors understood that a treaty requiring the United States to withdraw land from sale for their benefit created an Indian reservation. But the court concluded that when the Treaty

is placed in the relevant historical context, it cannot plausibly be read to have created an Indian reservation, and the Tribe's predecessors did not believe that it did so. Accordingly, the court determined summary judgment was warranted on the Tribe's claims. The Defendants' motions for summary judgment were granted.

N. *Miscellaneous*

136. *Little Traverse Bay Bands of Odawa Indians v. Whitmer*

No. 1:15-cv-850, 365 F.Supp.3d 865, 2019 WL 687882 (W.D. Mich. Jan. 31, 2019). American Indian tribe brought action against Michigan State and municipal officials for failure to recognize reservation land. Government moved for judgment on the pleadings. The District Court, Paul L. Maloney, J., held that: (1) tribe was not judicially estopped from claiming interest in reservation land; (2) prior proceeding before Indian Claims Commission did not collaterally estop tribe from claiming interest in reservation land; and (3) tribe's claims were not barred by Indian Claims Commission Act. Motion denied.

137. *Navajo Nation v. San Juan County*

No. 18-4005, 929 F.3d 1270, 2019 WL 3121838 (10th Cir. July 16, 2019). Indian tribe and tribal members brought action alleging that county commission and school board districts within county violated Equal Protection Clause. The United States District Court for the District of Utah, No. 2:12-CV-00039-RJS, Robert J. Shelby, J., denied county's motion to dismiss, 2015 WL 1137587, entered summary judgment in tribe's favor, 150 F.Supp.3d 1253, 162 F.Supp.3d 1162, rejected county's proposed remedial plan, 266 F.Supp.3d 1341, and adopted special master's remedial election districts, 2017 WL 6547635. County appealed. The Court of Appeals, Moritz, Circuit Judge, held that: (1) tribe was not prohibited by consent decree and settlement order in Voting Rights Act (VRA) litigation from bringing lawsuit; (2) United States' approval of original district boundaries pursuant to consent decree did not deprive district court of jurisdiction over tribe's action; (3) county commission districts were unconstitutionally based on race;

(4) deviation of 38% in populations between school board districts violated Equal Protection Clause's one-person, one-vote principle; (5) district court did not clearly err in concluding that racial considerations predominated in creating county's proposed remedial redistricting plans; (6) county's drawing of race-based boundaries for districts was not narrowly tailored to its compelling interest in complying with VRA; (7) district court did not clearly err in concluding that race was not predominate factor in its expert's redistricting plans; and 8) district court did not abuse its discretion when it prioritized compliance with one-person, one-vote principle over county's administrative burden. Affirmed.

138. Brakebill v. Jaeger

No. 18-1725, 932 F.3d 671, 2019 WL 3432470 (8th Cir. July 31, 2019). This appeal arose from a challenge by six Native American plaintiffs to portions of North Dakota's elections statutes. North Dakota requires a voter to present a specific form of identification at the polls before receiving a ballot. That identification must provide, among other things, the voter's current residential street address. Six plaintiffs sued the North Dakota Secretary of State, alleging that the provisions place an unconstitutional burden on the right to vote of many Native Americans. The district court agreed and enjoined the Secretary from enforcing certain statutory requirements statewide. The Secretary appealed. The court concluded that the alleged burdens did not justify a statewide injunction and vacate the district court's order. They concluded first that the plaintiffs' facial challenge to the residential street address requirement likely failed and that the statewide injunction as to that provision cannot be justified as a form of as-applied relief. The district court thought the residential street address requirement posed an impermissible legal obstacle because Native American communities often lack residential street addresses. The Secretary disputed whether street addresses are truly lacking in these communities and complains the district court mistakenly relied on outdated evidence about two counties that had not finished assigning addresses as of 2011. But even assuming that a plaintiff can show that an election statute imposes "excessively burdensome requirements" on some voters, that showing did not justify broad relief that invalidates the requirements on a statewide basis as applied to all voters. Here, the plaintiffs have not presented evidence

that the residential street address requirement imposes a substantial burden on most North Dakota voters. Even assuming that some communities do not have residential street addresses, that fact did not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have them. The court further concluded that the statute's requirement to present an enumerated form of identification did not impose a burden on voters that justified a statewide injunction to accept additional forms of identification. The district court found that 4,998 otherwise eligible Native Americans and 64,618 non-Native voters lacked a qualifying identification. The court also found that 65.6% of the Native American group were missing at least one of the underlying documents needed to obtain a valid identification from the State. These data, however, leave 513,742 of 583,358 eligible voters in the state, or 88 percent, as to whom the plaintiffs have not shown a lack of qualifying identification. In short, the evidence is insufficient to show that the valid form of identification requirement places a substantial burden on most North Dakota voters. The district court's order of April 3, 2018, granting a preliminary injunction is vacated, and the case is remanded for further proceedings.

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