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Thomas P. Schlosser

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CASE LAW ON AMERICAN INDIANS

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I. UNITED STATES SUPREME COURT

1. *Haaland v. Brackeen, et al.*, No. 21-376, 2023 WL 4002951 (U.S., June 15, 2023).

A birth mother, foster and adoptive parents, and the State of Texas brought action against the United States, the Department of the Interior and its Secretary, the Bureau of Indian Affairs (BIA) and its Director, and the Department of Health and Human Services (HHS) and its Secretary seeking a declaration that the Indian Child Welfare Act (ICWA) was unconstitutional, as well as injunctive relief. The Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morengo Band of Mission Indians intervened as Defendants. The United States District Court for the Northern District of Texas, *Brackeen v. Zinke*, 2018 WL 10561971 (N.D. Tex. July 24, 2018), denied defendants' Motion to Dismiss and granted in part plaintiffs' Motion for Summary Judgment. Defendants appealed. The United States Court of Appeals for the Fifth Circuit, 937 F.3d 406, reversed, and on rehearing en banc, the Court of Appeals, 994 F.3d 249, affirmed in part and reversed in part. Certiorari was granted. The Supreme Court, Justice Barrett, held that: [1] the ICWA does not exceed Congress's power under Article I of the Constitution to legislate with respect to Indian affairs; [2] the ICWA does not impermissibly tread on the States' authority over family law; [3] the ICWA's "active efforts" requirement for parties who initiate the involuntary proceedings to place child in foster care or terminate parental rights does not violate Tenth Amendment's anticommandeering principle; [4] the ICWA's notice and expert testimony requirements pose no anticommandeering problem under the Tenth Amendment; [5] the ICWA provision setting forth hierarchical placement preferences for custody proceedings involving Indian children does not violate Tenth Amendment's anticommandeering principle with respect to state agencies; [6] the ICWA does not violate Tenth Amendment's anticommandeering principle by requiring state courts to apply its hierarchical placement preferences in making custody determinations involving Indian children; [7] the ICWA's recordkeeping requirements are consistent with the Tenth Amendment's anticommandeering principle; [8] the foster and adoptive parents did not have Article III standing to assert equal protection challenge to ICWA's placement preferences; and [9] State of Texas lacked Article III standing to assert equal protection challenge to ICWA's placement preferences. Affirmed in part, reversed in part, vacated in part, and remanded with instructions. Chief Justice Roberts, and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson, joined. This case arises from three separate child custody proceedings governed by ICWA; a federal statute that aims to keep Indian children connected to Indian families. ICWA governs state court adoption and foster care proceedings involving Indian children. Among other things, the Act requires placement of an Indian child according to the Act's hierarchical preferences, unless the state court finds "good cause" to depart from them. 25 U.S.C. 1915 § (a)-(b). Under those preferences, Indian families or institutions from any tribe (not just the tribe to which the child has a tie) outrank unrelated non-Indians or non-Indian institutions. Further, the preferences of the Indian child or her parent generally cannot trump those set by statute or tribal resolution. In involuntary proceedings, the Act mandates that the Indian child's parent or custodian and tribe be given notice of any custody

proceedings, as well as the right to intervene, 25 U.S.C.§ 1912(a)-(c) and a court cannot order relief unless the party demonstrates, by a heightened burden of proof and expert testimony, that the child is likely to suffer "serious emotional or physical damage" if the parent or Indian custodian retains custody. 25 U.S.C. § 1912(d)-(e). Even for voluntary proceedings, a biological parent who gives up an Indian child cannot necessarily choose the child's foster or adoptive parents. The child's tribe has "a right to intervene at any point in [a] proceeding" to place a child in foster care or terminate parental rights, as well as a right to collaterally attack the state court's custody decree. §§ 1911(c), 1914. The Tribe thus can sometimes enforce ICWA's[OBJ], and transmit to the Secretary of the Interior all final adoption decrees and other specified information, *see* 25 U.S.C. § 1951(a). Petitioners—a birth mother, foster and adoptive parents, and the State of Texas—filed this suit in federal court against the United States and other federal parties. Petitioners challenged ICWA as unconstitutional on multiple grounds. They asserted that Congress lacks authority to enact ICWA and that several of ICWA's requirements violate the anticommandeering principle of the Tenth Amendment. They argued that ICWA employs racial classifications that unlawfully hinder non-Indian families from fostering or adopting Indian children. And they challenged —the provision that allows tribes to alter the prioritization order—on the ground that it violates the nondelegation doctrine. The Court has characterized Congress's power to legislate with respect to the Indian tribes as "plenary and exclusive," *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct 1628, 158 L.Ed.2d 420, superseding both tribal and state authority, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106. The Court has traced that power to multiple sources. First, the Indian Commerce Clause authorizes Congress "[t]o regulate Commerce ... with the Indian Tribes," U. S. Const., Art. I, § 8, cl. 3, and the Court has interpreted the Indian Commerce Clause to reach not only trade, but also certain "Indian affairs," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209. The Treaty Clause provides a second source of power. In sum, Congress's power to legislate with respect to Indians is well established and broad, but it is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders. Petitioners contend that ICWA impermissibly treads on the States' traditional authority over family law. But when Congress validly legislates pursuant to its Article I powers, the Court "has not hesitated" to find conflicting state family law preempted, "[n]otwithstanding the limited application of federal law in the field of domestic relations generally." *Ridgway v. Ridgway*, 454 U.S. 46, 54, 102 S.Ct. 49, 70 L.Ed.2d 39. And the Court has recognized Congress's power to displace the jurisdiction of state courts in adoption proceedings involving Indian children. *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390, 96 S.Ct. 943, 47 L.Ed.2d 106 (per curiam). Petitioners' anticommandeering challenges, which address three categories of ICWA provisions, are rejected. To succeed, petitioners must show that § 1912(d) harnesses a State's legislative or executive authority. But the provision applies to "any party" who initiates an involuntary proceeding, thus sweeping in private individuals and agencies as well as government entities. Given all this, it is implausible that § 1912(d) is directed primarily, much less exclusively, at the States. And as for petitioners' challenges to other provisions of § 1912—the notice requirement, expert witness

requirement, and evidentiary standards—the Court doubts that requirements placed on a State as litigant implicate the Tenth Amendment. But regardless, these provisions, like § 1912(d), apply to both private and state actors, so they too pose no anticommandeering problem. State courts are a different matter. ICWA indisputably requires them to apply the placement preferences in making custody determinations. §§ 1915(a), (b). But Congress can require state courts, unlike state executives and legislatures, to enforce federal law. The Court does not reach the merits of Petitioners' two additional claims—an equal protection challenge to ICWA's placement preferences and a nondelegation challenge to § 1915(c), the provision allowing tribes to alter the placement preferences—because no party before the Court has standing to raise them.

§ 1915(c)—the provision that allows tribes to alter the prioritization order—on the ground that it violates the nondelegation doctrine. The Court has characterized Congress's power to legislate with respect to the Indian tribes as "plenary and exclusive," *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct 1628, 158 L.Ed.2d 420, superseding both tribal and state authority, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106. The Court has traced that power to multiple sources. First, the Indian Commerce Clause authorizes Congress "[t]o regulate Commerce ... with the Indian Tribes," U. S. Const., Art. I, § 8, cl. 3, and the Court has interpreted the Indian Commerce Clause to reach not only trade, but also certain "Indian affairs," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209. The Treaty Clause provides a second source of power. In sum, Congress's power to legislate with respect to Indians is well established and broad, but it is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders. Petitioners contend that ICWA impermissibly treads on the States' traditional authority over family law. But when Congress validly legislates pursuant to its Article I powers, the Court "has not hesitated" to find conflicting state family law preempted, "[n]otwithstanding the limited application of federal law in the field of domestic relations generally." *Ridgway v. Ridgway*, 454 U.S. 46, 54, 102 S.Ct. 49, 70 L.Ed.2d 39. And the Court has recognized Congress's power to displace the jurisdiction of state courts in adoption proceedings involving Indian children. *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390, 96 S.Ct. 943, 47 L.Ed.2d 106 (per curiam). Petitioners' anticommandeering challenges, which address three categories of ICWA provisions, are rejected. To succeed, petitioners must show that § 1912(d) harnesses a State's legislative or executive authority. But the provision applies to "any party" who initiates an involuntary proceeding, thus sweeping in private individuals and agencies as well as government entities. Given all this, it is implausible that § 1912(d) is directed primarily, much less exclusively, at the States. And as for petitioners' challenges to other provisions of § 1912—the notice requirement, expert witness requirement, and evidentiary standards—the Court doubts that requirements placed on a State as litigant implicate the Tenth Amendment. But regardless, these provisions, like § 1912(d), apply to both private and state actors, so they too pose no anticommandeering problem. State courts are a different matter. ICWA indisputably requires them to apply the placement preferences in making custody determinations. §1915(a)-(b). But Congress can require state courts, unlike state executives and legislatures, to enforce federal law. The Court does not reach the merits of

petitioners' two additional claims—an equal protection challenge to ICWA's placement preferences and a nondelegation challenge to § 1915(c), the provision allowing tribes to alter the placement preferences—because no party before the Court has standing to raise them.

2. ***Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, No. 22-227 (U.S. Jun. 15, 2023).***

Chapter 13 debtor filed motion to recover for alleged violations of the automatic stay, and creditors, a federally recognized Indian tribe and its admitted arms, moved to dismiss for lack of subject-matter jurisdiction. The United States Bankruptcy Court for the District of Massachusetts, 622 B.R. 491, granted motion. Debtor's direct appeal to the Court of Appeals was permitted. The United States Court of Appeals for the First Circuit, 33 F.4th 600, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Jackson, held that the Bankruptcy Code unequivocally abrogates the sovereign immunity of federally recognized Indian tribes, abrogating *In re Greektown Holdings, LLC*, 917 F.3d 451. Affirmed. Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Kavanaugh, and Barrett joined. Two provisions of the Bankruptcy Code lie at the heart of this case. The first, 11 U.S.C. § 106(a), expressly abrogates the sovereign immunity of "governmental unit[s]" for enumerated purposes. The second, 11 U.S.C. § 101(27), defines "governmental unit" as "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States ..., a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." In order for these provisions to abrogate tribal sovereign immunity, Congress "must [have made] its intent ... 'unmistakably clear in the language of the statute.'" *Financial Oversight and Management Bd. for P. R. v. Centro De Periodismo Investigativo, Inc.*, 143 S. Ct. 1176 (2023). If the statute can plausibly be read to preserve sovereign immunity, Congress has not unambiguously expressed the requisite intent. *FAA v. Cooper*, 566 U.S. 284, 290 . But Congress need not use any particular words to pass this clear-statement test. The Bankruptcy Code unequivocally abrogates the sovereign immunity of any and every government with the power to assert such immunity. Because federally recognized tribes unquestionably fit that description, the Code's abrogation provision plainly applies to them as well. Several features of the statute's text and structure point the way. To start, the definition of "governmental unit" exudes comprehensiveness. It begins with a long list of governments, varying in location, nature, and size. It then proceeds to capture subdivisions and components of every government in that list. And it concludes with a broad catchall phrase, sweeping in "other foreign or domestic government[s]." Moreover, the catchall phrase's pairing of extremes—i.e., "foreign or domestic"—appearing at the end of an extensive list unambiguously indicates Congress' intent to cover all governments in § 101(27)'s definition. The abrogation provision in § 106(a), in turn, applies to every "governmental unit" in § 101(27). It does not cherry-pick certain types of governments from that capacious list. Other provisions of the Bankruptcy Code reinforce § 106(a) and §101(27)'s plain text. To facilitate an "orderly and centralized" debt-resolution process, the Code includes a number of requirements, like the

automatic stay provision, that generally apply to all creditors. These basic requirements can be enforced against all kinds of creditors, whether the creditor is a governmental unit or not. At the same time, the Code contains limited exceptions to avoid impeding the functioning of governmental entities when they act as creditors. *See, e.g.*, § 362(b)(4). Reading the statute to carve out certain governments from the definition of "governmental unit"—as petitioners would have the Court do—risks upending the policy choices that the Code embodies. And there is no indication that Congress meant to categorically exclude certain governments from these provisions' enforcement mechanisms and exceptions. Federally recognized tribes are indisputably governments. They exercise uniquely governmental functions, and both Congress and this Court have repeatedly characterized them as governments. Accordingly, because the Bankruptcy Code unequivocally abrogates the sovereign immunity of all governments, and tribes undoubtedly count as governments, the Code unmistakably abrogates tribal sovereign immunity.

3. *Arizona v. Navajo Nation,* 143 S. Ct. 1804, No. 21-1484, No. 22-51 (U.S. June 22, 2023).
Navajo Tribe brought action against the United States Department of the Interior, the Bureau of Indian Affairs, the Bureau of Reclamation and other federal parties asserting a breach-of-trust claim arising out of the peace treaty that established the Navajo Reservation and seeking to compel the government to determine the water required to meet the needs of the Tribe in Arizona and to devise a plan to meet those needs. The States of Arizona, Nevada, and Colorado, as well as state water, irrigation, and agricultural districts and authorities, intervened against the Tribe to protect their interests in water from the Colorado River. The United States District Court for the District of Arizona, G. Murray Snow, Chief Judge, 34 F.Supp.3d 1019, granted the federal defendants' motion to dismiss for lack of subject matter jurisdiction, and, 2014 WL 12796200, denied the Tribe's motion for relief from judgment. The Tribe appealed. The United States Court of Appeals for the Ninth Circuit, Berzon, Circuit Judge, 876 F.3d 1144, affirmed in part, reversed in part, and remanded. On remand, the District Court, Snow, Chief Judge, 2018 WL 6506957 and 2019 WL 3997370, denied the Tribe's motion and renewed motion for leave to file a third amended complaint and dismissed. The Tribe appealed. The Court of Appeals, Gould, Circuit Judge, 26 F.4th 794, reversed and remanded with instructions to permit the Tribe to amend its Complaint. Certiorari was granted. The Supreme Court, Justice Kavanaugh, held that: [1] peace treaty establishing Navajo Reservation did not require United States to take affirmative steps to secure water for the Tribe; [2] language in the treaty establishing the Reservation as a "permanent home" did note mean United States agreed to take affirmative steps to secure water for the Tribe; [3] treaty provision in which United States agreed to provide the Tribe with seeds and agricultural implements did not include additional duty to take affirmative steps to secure water; and [4] United States' opposition to the intervention in lengthy Colorado River water rights litigation could not support the breach-of-trust claim. The Tribe asserts a breach-of-trust claim based on its view that the 1868 treaty imposed a duty on the United States to take affirmative steps to secure water for the Navajo To maintain such a claim here, the Tribe must establish, among other things, that the text of a treaty, statute, or regulation imposed certain

duties on the United States. See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173–174, 177–178. The federal government owes judicially enforceable duties to a tribe "only to the extent it expressly accepts those responsibilities." Whether the government has expressly accepted such obligations "must train on specific rights-creating or duty-imposing" language in a treaty, statute, or regulation.

II. OTHER COURTS

A. Administrative Law

4. *Littlefield v. United States Department of the Interior and Mashpee Wampanoag Tribe,* 2023 WL 1878470, No. 22-CV-10273-AK (D. Massachusetts, February 10, 2023).

Residents of town near land at issue sought judicial review under Administrative Procedure Act (APA) of decision of Secretary of the Interior to take into trust 321 acres of land in Massachusetts for the benefit of the Mashpee Wampanoag Tribe to establish a reservation. The Tribe intervened as defendant. The parties brought cross-motions for summary judgment. The District Court, A. Kelley, J., held that: [1] memorandum opinion of Department of Interior was reasonable interpretation of phrase "under Federal jurisdiction"; [2] Secretary's conclusion that federal government subjected Tribe to its jurisdiction, and, thus, that Tribe met definition of "Indian" under the Indian Removal Act (IRA), was not arbitrary and capricious; [3] Secretary was not arbitrary or capricious in reading historic sources, in conjunction with other evidence, to establish that Tribe was under federal jurisdiction, and, thus, that Tribe met definition of "Indian" under IRA; [4] Secretary was not arbitrary or capricious in interpreting historic sources, differently from how Department interpreted same sources in prior draft and published decisions, in concluding that Tribe was under federal jurisdiction, and, thus, that Tribe met definition of "Indian" under IRA; and [5] Secretary's decision to proclaim reservation consisting of two noncontiguous parcels of land on behalf of Tribe was not arbitrary and capricious. Defendants' motions granted, and plaintiffs' motions denied. Plaintiffs argue that the M-Opinion creates "a standardless test that practically any tribe can meet," and that it is irreconcilable with the Supreme Court's decision in *Carcieri*. *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058, 172 L.Ed. 2d 791 (2009). They view the M-Opinion's [a memorandum published by the Department of the Interior] two-part inquiry into whether the federal government had conferred jurisdiction on a tribe before 1934 and, if so, whether that jurisdiction remained extant in 1934, as contrary to *Carcieri*'s requirement that the jurisdiction-conferring event be in effect in 1934. The M-Opinion withstands scrutiny under both *Carcieri* and the *Chevron* framework. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Plaintiffs raise no meaningful challenge to the validity of the M-Opinion under the *Chevron* framework. The first step of this framework is to determine whether there is ambiguity to the term at issue—here, "under Federal jurisdiction." Justice Breyer strongly suggested that this term was ambiguous in his concurrence to *Carcieri*, (*Carcieri*, 555 U.S. 379, 398, 129 S.Ct. 1058 (Breyer,

J., concurring)), and each of the three appellate courts to have considered the term have agreed. (Citations omitted.) Turning to the second *Chevron* step, this Court agrees with the D.C. Circuit's conclusion in *Grand Ronde* that the M-Opinion's construction of "under Federal jurisdiction" is reasonable. *Confederated Tribes of Grand Ronde Comty. V. Jewell*, 830 F.3d 552, 564–65, (D.C. Cir. 2016). The historical record indicates that the Mashpee have had a robust connection to the designated lands for over four centuries. Upon review of the 2021 Record of Decision, the Court concludes that the Secretary was not arbitrary and capricious in determining that the Tribe was under federal jurisdiction in 1934 within the meaning of the IRA, nor was she arbitrary and capricious in proclaiming the designated lands as the Tribe's initial reservation. Accordingly, Defendants' Motions for Summary Judgment are granted, and Plaintiffs' Motion is denied.

5. *Harrison Ben v. Office of Navajo and Hopi Indian Relocation,* 2023 WL 2140462, No. CV-22-08032-PCT-SPL (D., Arizona, February 21, 2023).

The Navajo–Hopi Settlement Act created what is now the Office of Navajo and Hopi Indian Relocation ("ONHIR") to disburse benefits to assist with the relocation of Navajo and Hopi residents who then occupied land allocated to the other Tribe. *Bedoni v. Navajo-Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1121–22 (9th Cir. 1989). Plaintiff Harrison Ben is an enrolled member of the Navajo Nation. Plaintiff filed an Application for Relocation Benefits, which was denied by ONHIR based on a finding that he was not a head of household when he moved off the Hopi Partitioned Lands ("HPL"). Plaintiff appealed, and a hearing was held before an Independent Hearing Officer ("IHO") who denied Plaintiff's appeal and upheld ONHIR's denial of benefits, finding that at the time Plaintiff became a head of household in 1980, he was no longer an HPL resident. Here, the IHO's "Credibility Findings" as to Plaintiff's testimony were as follows: Except for applicant's testimony about his return visits to Tolani Lake [on the HPL] after 1977 which the undersigned finds to be exaggerated, applicant is a credible witness. Nowhere in the decision does the IHO explain why he found Plaintiff's testimony regarding his return visits to Tolani Lake to be exaggerated and not credible. But merely stating a conclusion contrary to Plaintiff's testimony is not a specific or cogent reason for discrediting the testimony—as emphasized by the case law cited by Plaintiff. Here, as noted, Plaintiff's testimony was confusing at times, and this Court reaches no conclusions from the record regarding when Plaintiff relocated from the HPL or became a head of household. The Court thus remands this matter for a properly supported decision giving due consideration to the evidence. Plaintiff's Motion for Summary Judgment is granted.

6. *Alturas Indian Rancheria; Wendy Del Rosa v. David Bernhardt,* 2023 WL 385176, No. 19-16885 (9th Cir. February 25, 2023).

Plaintiff Wendy Del Rosa, purporting to represent the federally recognized Alturas Indian Rancheria Tribe (Tribe) and herself (collectively, Plaintiffs), filed a Complaint for Declaratory and Injunctive Relief against members of the Department of the Interior (DOI). During intratribal

disputes regarding governance and membership, DOI chose to recognize the last undisputed governing body of the Tribe in 2012, which consisted of Wendy Del Rosa, Darren Rose, and Phillip Del Rosa, for purposes of maintaining government-to-government relations in contracting with the Tribe. Plaintiff Wendy Del Rosa, who is part of one tribal faction, asks the Court to order DOI to recognize a 2013 decision by the Tribe's governing body removing Phillip Del Rosa, who is part of the other faction, from holding voting and leadership positions in the Tribe. The 2013 decision was subsequently reversed by a different tribal governing body in 2014, led by the Phillip Del Rosa–Darren Rose tribal faction. The district court found it lacked jurisdiction because adjudicating this case would necessitate engaging in the intratribal faction dispute and essentially choosing sides among the factions. "[T]he Supreme Court has uniformly recognized that one of the fundamental aspects of tribal existence is the right to self-government." *Wheeler v. U.S. Dep't of Interior, Bureau of Indian Affs*., 811 F.2d 549, 551 (10th Cir. 1987). The federal government and federal courts have also encouraged tribal self-governance, and "[federal courts] have stated that when a dispute is an intratribal matter, the Federal Government should not interfere." *Id*. Additionally, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978), thus placing "issues of tribal membership ... generally beyond our review." *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1226 (9th Cir. 2013). Claims are therefore nonjusticiable where litigants seek "a form of relief that the federal courts cannot provide, namely, the resolution of the internal tribal leadership dispute." *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig*., 340 F.3d 749, 763 (8th Cir. 2003). Although DOI may sometimes need to determine what Tribal government to recognize in order to interact and contract with tribal governments, "even these special situations should be resolved in favor of tribal self-determination and against Federal Government interference." *Wheeler*, 811 F.2d at 552. Against the backdrop of these intratribal governance and membership disputes, the district court correctly found that it lacked subject matter jurisdiction over Plaintiffs' claims. Affirmed.

7. *Cindy Alegre, et al., v. Sally Jewell,* 2023 WL 2236932, No. 22-55070 (9th Cir. February 27, 2023).

Certain descendants of enrolled members of the San Pasqual Band (collectively, Plaintiffs) appeal the district court's grant of summary judgment in favor of the Bureau of Indian Affairs (BIA). The district court held that Plaintiffs' claims were barred by the statute of limitations. 28 U.S.C. § 2401(a). We have jurisdiction under 28 U.S.C. § 1291.The parties disagree as to when Plaintiffs' claims accrued. The BIA argues that the blood-degree decision issued on April 7, 2006, was final and judicially reviewable when issued and that Plaintiffs reasonably should have discovered that the decision made them ineligible for enrollment at some date well before September 28, 2010. Therefore, the BIA argues that Plaintiffs' claims accrued well before September 28, 2010, and the limitations period expired well before Plaintiffs filed their Complaint. Plaintiffs disagree, arguing that the limitations period did not expire before they filed

their Complaint for a wide range of reasons, including because their claims did not accrue until mid-2015, after they first received notice of the status of their enrollment applications in 2014, and had an opportunity to exhaust administrative remedies. Alternatively, Plaintiffs argue that the limitations period should be tolled for various equitable reasons. The district court did not make adequate findings regarding when Plaintiffs' claims accrued. Moreover, the district court considered only the denial of the request to correct the blood degree on April 7, 2006 and failed to clarify whether the BIA's "final agency action" or actions included the subsequent return of Plaintiffs' enrollment applications to the enrollment committee on April 21, 2006. This distinction could be significant, because unlike the Olsen letter, which was made on behalf of the Secretary and thus not subject to appeal, *see* 25 C.F.R. § 2.6(c), it is less certain whether Plaintiffs needed opportunities to exhaust administrative remedies before the return of their enrollment applications was considered a final agency action, *see Darby v. Cisneros*, 509 U.S. 137, 146 (1993); *see also* 25 C.F.R. §§ 2.6 (Finality of decisions), 2.7 (Notice of administrative decision or action). Because the district court did not clearly identify a final agency action or actions, and also failed to make a finding as to when Plaintiffs discovered, or in the exercise of reasonable diligence should have discovered, that they had been injured, we are unable to determine when any of Plaintiffs' causes of action accrued. Therefore, we vacate the district court's judgment and remand for further proceedings consistent with this disposition.

8. *LaRose v. United States Department of the Interior,* 2023 WL 2333408, No. 22-CV-1603 (PJS/LIB) (D. Minnesota March 2, 2023).

Plaintiff Arthur David LaRose, an enrolled member of the Leech Lake Band of the Minnesota Chippewa Tribe ("MCT" or "Tribe"), served as Secretary-Treasurer of the Leech Lake Band's Reservation Business Committee ("LLRBC"). LaRose intended to seek reelection in the 2022 MCT election. In February 2022, however, the MCT Election Court of Appeals ("Election Court") found that LaRose was ineligible to run for tribal office because he had previously been convicted of a felony. After unsuccessfully challenging the Election Court's decision before tribal authorities, LaRose filed this action. LaRose argues that the Election Court's decision was based on an invalid amendment to the Tribal constitution and an unlawful application of that amendment to his candidacy. LaRose's complaint sets forth two claims. He first alleges that Defendants violated the Indian Reorganization Act and MCT Constitution by certifying the results of the 2005 Secretarial election because the election lacked a "Tribal quorum of 30 percent (%) to amend a Tribal constitution." *Wadena v. Midwest Reg'l Dir.*, 47 IBIA 21, 36-37 (2008). Second, he alleges that Defendants violated the Indian Civil Rights Act ("ICRA") by retroactively applying the 2006 constitutional amendment to LaRose's 1992 conviction and barring him from running for tribal office. As best as the Court can tell, then, not a single federal court has held that being barred from running for tribal office—in and of itself—constitutes "detention" for purposes of 25 U.S.C.§ 1303. *See also Lewis v. White Mountain Apache Tribe*, No. CV-12-8073-PCT-SRB, 2013 WL 510111, at *6 (D. Ariz. Jan. 24, 2013) ("[T]he refusal to certify Petitioner as a candidate for the Tribal Council election is simply not equivalent to a

detention under § 1303."), *report and recommendation adopted*, No. CV12-8073-PCT-SRB, 2013 WL 530551 (D. Ariz. Feb. 12, 2013), *aff'd*, 584 F. App'x 804 (9th Cir. 2014). Here, even if LaRose had standing to pursue his federal claims, the Court would dismiss those claims because LaRose did not exhaust his administrative remedies.

9. *Sault Ste. Marie Tribe of Chippewa Indians v. Haaland,* 2023 WL 2384443, No. 1:18-cv-02035 (TNM) (D.C. March 6, 2023).

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

"purpose"—two extremely broad terms—in isolation. Instead, the Court interprets the phrases "for ... social welfare ... purposes" and "social welfare" in context. For these reasons, the Court will grant Interior and Defendant-Intervenors summary judgment.

10. *State of Alaska Department of Fish and Game v. Federal Subsistence Board,* 2023 WL 2487268, No. 22-35097 (9th Cir. March 14, 2023).

The Alaska Department of Fish and Game brought an action alleging that Federal Subsistence Board's (FSB) approval of tribe's special action request to open emergency hunt on federal public lands in Alaska and Alaska resident's special action request to institute partial, temporary closure of public lands in the Game Management Unit to non-subsistence users violated the Alaska National Interest Lands Conservation Act ("ANILCA") and the Administrative Procedure Act ("APA"). Tribe intervened. The United States District Court for the District of Alaska, Sharon L. Gleason, J., 574 F.Supp.3d 710, dismissed hunt challenge as moot and denied State's Motions for Temporary Restraining Order and Preliminary Injunction. State appealed. The Court of Appeals, Bough, District Judge, sitting by designation, held that: [1] State's challenge to FSB's approval of Tribe's special action request fell within mootness exception for cases capable of repetition, yet evading review, and [2] State's appeal of district court's denial of its Motions for Temporary Restraining Order and Preliminary Injunction was moot. In 2020, the FSB approved two short-term changes to hunting practices on federal public lands in Alaska. First, the FSB opened an emergency hunt for Intervenor, the Organized Village of Kake ("Kake hunt"). Second, the FSB instituted a partial, temporary closure of public lands in Game Management Unit 13 to non-subsistence users ("partial Unit 13 closure"). Plaintiff-Appellant State of Alaska Department of Fish and Game ("Alaska") brought this action against Defendants-Appellees, the FSB, and several federal officials, alleging that the changes violated the ANILCA and the APA. This Court has jurisdiction under 28 U.S.C. § 1291. Under ANILCA, the federal government, through the FSB, manages subsistence uses of fish and wildlife on federal public lands in Alaska. *See Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1189 (9th Cir. 2000); *see also* 50 C.F.R. § 100.10(a). The FSB has regulatory authority to enact special actions to open and close hunting on public lands. *See* 50 C.F.R. § 100.19; 36 C.F.R. § 242.19. In emergency situations, the FSB may immediately open or close hunting on public lands for up to sixty days, if necessary for certain permissible reasons. *See* 50 C.F.R. § 100.19(a); 36 C.F.R. § 242.19(a). The FSB may also temporarily open or close hunting on public lands for longer periods, not to exceed the current regulatory cycle. However, those temporary special actions require adequate notice and public hearing. *See* 50 C.F.R. § 100.19(b); 36 C.F.R. § 242.19(b). "Generally, an action is mooted when the issues presented are no longer live and therefore the parties lack a legally cognizable interest for which the courts can grant a remedy." *Alaska Ctr. For Env't v. U.S. Forest Serv.*, 189 F.3d 851, 854 (9th Cir. 1999). However, we may decline to dismiss an otherwise moot action if the challenged conduct is "capable of repetition, yet evading review." *Id.* This exception to the mootness doctrine is met when "(1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, and (2) there is a reasonable

expectation that the plaintiffs will be subjected to the challenged action again." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1018 (9th Cir. 2012). The plaintiff has the burden of showing that the exception applies. See *Native Vill. of Nuiqsut v. Bureau of Land Mgmt.*, 9 F.4th 1201, 1209 (9th Cir. 2021) (explaining that unlike the initial mootness question, where the defendants have the burden, the plaintiff has the burden of showing that there is a reasonable expectation that they will once again be subjected to the challenged activity). An issue evades review if the underlying action will almost certainly run its course before full litigation can be completed. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002). The FSB's authorization for the emergency hunt was limited to the sixty days permitted under the regulations. *See* 50 C.F.R. § 100.19(a); 36 C.F.R. § 242.19(a). We have determined that actions of longer duration evade review. *See e.g.*, *Native Vill. of Nuiqsut*, 9 F.4th at 1209 (winter exploration program lasting five months evaded review); *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003) (one-year time span for challenged specifications too short to allow for full litigation). Neither the government nor the Organized Village of Kake challenge this conclusion. The first prong of the mootness exception is satisfied. In its Complaint, Alaska broadly asserted that ANILCA does not confer statutory authority on the federal government, including the FSB, to open emergency hunting seasons. That claim is not based on the particular circumstances of the Kake hunt, including the status of the COVID-19 pandemic. Rather, it challenges the FSB's general action of opening an emergency hunt. Based on the evidence provided by Alaska, we conclude that there is a reasonable expectation that this challenged action will recur. First, there is evidence that the FSB has opened emergency hunts in the past. In addition, the regulation under which the FSB authorized the Kake hunt remains in effect, and the FSB has made no commitment not to rely on the regulation in the future. Alaska's claim that the FSB violated ANILCA by opening the Kake hunt without statutory authority fits within the mootness exception. The district court did not reach the merits of this claim. In general, an appellate court does not decide issues that the trial court did not decide. Assuming we have discretion here, we decline to exercise it. Alaska's claim raises a question of first impression in this circuit and requires resolution of complicated issues of statutory interpretation. From the regulations and record it is clear that the FSB will rely on new facts and analysis in responding to any future temporary closure request. Indeed, if the FSB does consider a request to temporarily close all or part of Management Unit 13 in the future, it is clear that one entirely new and significant part of its deliberations will concern the effects of the partial Unit 13 closure in 2020 through 2022. Our conclusion does not change simply because the FSB may consider data from its deliberations regarding prior Unit 13 temporary closure requests. Accordingly, the challenge to the FSB decision to partially close Unit 13 is moot. We reverse the district court's dismissal of Alaska's claim that the FSB did not have authority to open the Kake hunt and remand that claim to the District Court for further proceedings consistent with this opinion. With regard to Alaska's partial Unit 13 closure claim, we vacate the part of the district court's Order that addresses the claim and remand with instructions to dismiss that claim as moot. Each party shall bear its own costs.

11. *Prairie Band Potawatomi Nation and Miccosukee Tribe of Indians of Florida v. Yellen,* 2023 WL 2618699, No. 22-5089 (D.C. March 24, 2023).

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

12. *Shoshone-Bannock Tribes Of The Fort Hall Reservation v. Daniel-Davis,* 2023 WL 2744123, No.4:20-cv-00553-BLW (D. Idaho, March 31, 2023).

This case involves a challenge to the Blackrock Land Exchange between the United States and Defendant-Intervenor J.R. Simplot Company in southeast Idaho. Plaintiffs Shoshone-Bannock Tribes allege that the Bureau of Land Management's (BLM) decision and analysis approving the exchange is arbitrary and capricious in violation of the National Environmental Protection Act, the Federal Land Policy Management Act (FLPMA), the 1900 Act, and the Administrative Procedures Act. Before the Court are the parties' cross-Motions for Summary Judgment. Dkts. 37, 60, 61. For the reasons set forth below, the Court grants in part and denies in part the Motions. To survive APA review, BLM's decision to approve the Blackrock Land Exchange must comply with the 1900 Act. Because it does not, it is "not in accordance with law" in violation of the APA and is a breach of the federal government's trust responsibility to the Tribes. In this case, Article IV of the 1898 Cession Agreement protects the Tribes' rights to cut timber, pasture livestock, hunt, and fish on the ceded lands that remain in the public domain. The 1900 Act implements that agreement. Section 5 sets out the process for opening the residue of the ceded lands to settlement. That is, in Section 5, Congress limited how the ceded lands can leave the public domain and become privately owned. The 1900 Act imposes an affirmative trust

duty to comply with the Section 5 disposal requirements. It seems the only remedy is vacating the Record of Decision and issuing an injunction. At the same time, because the Blackrock Land Exchange was completed more than two years ago, unwinding the deal is no simple matter. Given the stakes of the matter for all parties, the Court will invite full briefing on the issue of remedy. BLM's decision to approve the Blackrock Land Exchange must also comply with FLPMA. Because it does not, it is "not in accordance with law" and violates the APA. 5 U.S.C. § 706(2)(A). It is ordered as follows: (1) Summary judgment is granted in favor of Plaintiffs on their Trust Responsibility and APA claims that BLM violated the 1900 Act; (2) Summary Judgment is granted in favor of Plaintiffs on their FLPMA claim; and (3) Summary Judgement is granted in favor of Defendants and Intervenor on all of Plaintiffs' remaining National Environmental Policy Act claims.

13. *Manley Barton, et al., v. Office of Navajo and Hopi Indian Relocation,* 2023 WL 2991627, No. CV-22-08022-PCT-SPL (D. Arizona, April 18, 2023).

Plaintiff Manley Barton is an enrolled member of the Navajo Nation. Plaintiff filed an Application for Relocation Benefits, which was denied by Office of Navajo and Hopi Indian Relocation (ONHIR) based on a finding that he was not a head of household by the time his Hopi Partitioned Lands (HPL) residency ended in May 1985. On January 13, 2016, the Independent Hearing Officer (IHO) denied Plaintiff's appeal and upheld ONHIR's denial of benefits based on a finding that, although Plaintiff became a head of household in 1985, Plaintiff's residence on the HPL ended in 1984. A Navajo applicant is eligible for benefits under the Settlement Act if he was a legal resident of the HPL as of December 22, 1974, and was a head of household at the time he moved off of the HPL. 25 C.F.R. §§ 700.147(a), 700.69(c); *Begay v. Off. of Navajo & Hopi Indian Relocation*, 305 F. Supp. 3d 1040, 1044 (D. Ariz. 2018), *aff'd*, 770 F. Appx. 801, 802 (9th Cir. 2019). The applicant bears the burden of proving both the residency and head-of-household elements. 25 C.F.R. § 700.147(b). Only the residency element is at issue in this case, as the Parties agree that Plaintiff became a head of household in 1985. Plaintiff's Motion for Summary Judgment is denied. Defendant's Cross-Motion for Summary Judgment is granted.

14. *Halverson v. Haaland,* 2023 WL 3742323, CV 22-76-BLG-SPW (D. Montana, May 31, 2023).

Before the Court is the Motion for Partial Summary Judgment filed by Plaintiff James Halverson, as personal representative of the fee estate of Jack Halverson. Plaintiff asserts it is entitled to judgment as a matter of law because the undisputed facts show Defendant Debra Anne Haaland, Secretary of the Interior, failed to record (1) a deed partitioning and conveying an 86.42% interest, or 690.54 acres, in Allotment 1809 from the United States as trust holder to the Estate of Jack Halverson ("Jack's estate"), and (2) a fee patent deed conveying Jack's estate's interest in Allotment 1809 to Jack's heir. For the following reasons, the Court denies the Motion as to Defendant's failure to record a deed partitioning and conveying the interest in Allotment 1809 to Jack's estate and grants the Motion as to Defendant's failure to record a patent deed

conveying the interest to Jack's heirs. In 2021, the BIA approved Plaintiff's request and entered into a Verified Settlement Agreement ("VSA") with Plaintiff to execute partition and the conveyances. Under the VSA, the Bureau of Indian Affairs ("BIA") was to deliver all documents needed to complete partition and conveyances of title to counsel for Jack's estate for review and approval by January 15, 2022. On or before January 17, 2022, the BIA was required to execute a deed to "convey title for the majority interest in Allotment 1809[A] to the Estate of Jack Halverson," and, on or before January 20, 2022, complete all documents necessary to convey and/or distribute title from Jack's estate to Jack's heir. The Court finds that, as a matter of law, Defendant fulfilled the VSA's requirement to record a deed partitioning and conveying an 86.42% interest in Allotment 1809 to Jack's estate according to the terms of the VSA. The Court denies the Motion on this issue. Plaintiff asserts Defendant failed to record a deed conveying Jack's estate's interest in Allotment 1809A to Jack's heir. Defendant does not dispute this so the Court grants Plaintiff's Motion on this issue.

15. ***Evelyn Salt v. Office of Navajo And Hopi Indian Relocation,* 2023 WL 4182163, No. CV-22-08139-PCT-DJH (D. Arizona, June 26, 2023).**

Diane J. Humetewa, United States District Judge. The parties have filed cross-Motions for Summary Judgment. Plaintiff Evelyn Salt seeks relief from a denial of relocation assistance benefits under the Navajo–Hopi Settlement Act by Defendant Office of Navajo and Hopi Indian Relocation ("ONHIR" or "Defendant"). The Court must decide whether Plaintiff was a resident of the Hopi Partitioned Lands ("HPL") when she became head of household in August of 1975. She was not. The Independent Hearing Officer ("IHO") issued a decision on July 8, 2016, upholding ONHIR's denial of relocation benefits. The IHO found that as of December 22, 1974, Plaintiff "was a legal resident of the Red Lake Chapter, whose cornfield was later partitioned for the use of the Hopi Indians," and on that date, Plaintiff "was living in Albuquerque, New Mexico, and attending a free vocational school." The IHO concluded that Plaintiff was not a self-supporting head of household on December 22, 1974, because "she was living in a school dormitory where her basic personal needs for food and shelter were provided by others." However, the IHO ultimately concluded that Plaintiff's legal residence transferred to Albuquerque "upon her completion of her vocational education in 1975. The 'temporarily away' policy provides that if a plaintiff temporarily left the HPL to pursue education, a plaintiff "can still establish [her] legal residency by showing substantial and recurring contacts with [her] home within the HPL." *See Tso v. Off. Of Navajo and Hopi Indian Relocation,* 2019 WL 1877360, at *4. The issue is whether Plaintiff maintained "substantial and recurring contacts" with the HPL site while attending Southwestern Indian Polytechnic Institute ("SIPI") in Albuquerque such that she was still a resident of the HPL in August of 1975 when she attained head of household. The IHO found Plaintiff's visits to Red Lake were "quixotic and arduous—a 24-hour trip each way on a Greyhound bus ... at a cost of $36.00 each time." The Court further notes Plaintiff introduced scant evidence regarding manifestations of her intent to reside on the HPL at the time she graduated from SIPI in August of 1975. Indeed, the record contains no evidence of personal

livestock ownership, grazing permits, homesite leases, or any improvements enumerated on the HPL. Plaintiff also introduced no evidence of public health records, school records, military records, employment records, mailing address records, banking records, driver's license records, or other relevant data manifesting her intent to remain or reside at the HPL site.
49 C.F.R. § 22, 278. For these reasons, the Court will deny Plaintiff's Motion for Summary Judgment and grant Defendant's Cross-Motion for Summary Judgment. The IHO's decision to deny Plaintiff's relocation benefits appeal, based on a lack of legal residence in August of 1975, was supported by substantial evidence and not arbitrary and capricious.

16. ***Louise Ray, et al., v. Office of Navajo and Hopi Indian Relocation,* 2023 WL 4761789, No. CV-22-08101-PCT-SPL (D. Arizona, July 31, 2023).**

Before the Court are Plaintiffs Louise Ray, Nellie Jackson, Ruth Begay, Johnnie Begay, and Lorraine Attakai's Motion for Summary Judgment and Defendant Office of Navajo and Hopi Indian Relocation's ("ONHIR" or "Defendant") Cross-Motion for Summary Judgment. Plaintiffs are enrolled members of the Navajo Nation. They are also siblings, each being born to George and Emily Bah Begay at some point between 1940 and 1958. (AR69). Plaintiffs allege that "their family maintained a traditional Navajo 'customary use area' that spanned what became the HPL/NPL demarcation line." Plaintiffs allege that "[t]he portion of that customary use area that extended onto what became the HPL was the family's summer camp, occupied from March or April until the first frost, generally late October." Plaintiffs contend that they were legal residents of the HPL during the requisite time period, and that they are entitled to relocation benefits. The Court finds that the Independent Hearing Officer (IHO), in relying solely on the photographs' unreliability and the Enumeration's findings, failed to support his credibility findings with substantial evidence. With respect to the photographs, the IHO observed that the photographs show Plaintiffs as young children; in 1973, however, Plaintiffs were all between the ages of 15 and 33. Thus, the IHO found that "[a] serious credibility question exists" as to whether they were actually taken in 1973 as Plaintiffs claimed. (AR614). This observation speaks only to the reliability of the photographs as evidence. It says very little, if anything, about whether the testimony presented by Plaintiffs at the Hearing was credible. In sum, the Court finds that the IHO failed to support his denial of benefits with substantial evidence because he rejected as "not credible" all of Plaintiffs' testimony related to their alleged HPL residency and because he based this negative credibility determination—in effect, the entire benefits decision—solely on the Enumeration. *See Begay v. Off. of Navajo & Hopi Indian Relocation,* 305 F. Supp. 3d 1040, 1045 (D. Ariz. 2018), *aff'd,* 770 F. Appx. 801, (9th Cir. 2019). Plaintiffs' Motion is granted, Defendant's Cross-Motion is denied, and the matter is remanded for further proceedings.

17. ***Millie Shaw v. Office of Navajo and Hopi Indian Relocation,* 2023 WL 4182197, No. 22-16168 (9th Cir., June 26, 2023).**

Millie Shaw filed a Motion for Attorneys' Fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). Shaw previously prevailed before this Court in her appeal

challenging a denial of relocation benefits under the Navajo-Hopi Land Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (1974). *See BB Shaw v. Off. of Navajo & Hopi Indian Relocation*, 860 F. App'x 493 (9th Cir. 2021). Our prior decision held that the Office of Navajo and Hopi Indian Relocation's ("ONHIR") denial of benefits lacked a basis in substantial evidence. *Id.* at 495. We remanded for an award of benefits. *Id*. Shaw argues in this appeal that the district court abused its discretion on remand in finding that, despite ONHIR's error, the Agency's position was substantially justified, and it therefore had no obligation to pay for Shaw's legal fees. Under the EAJA, a prevailing party such as Shaw is not entitled to fees if the position of the United States was substantially justified in that it had "a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988). Contrary to Shaw's argument, the district court applied the correct standard. Its conclusion that Shaw's claim was "subject to reasonable debate" closely tracks *Pierce*'s explanation that a position is substantially justified "if a reasonable person could think it correct." *Id.* Affirmed.

B. Child Welfare Law And ICWA

18. *In the matter of the Dependency of A.H., G.H., D.H., I.H.,* No. 38440-3-III, 2022 WL 11485596 (Wash Ct. App., October 20, 2022).

At issue are dependency and disposition Orders for the four named children, all of whom are Indian children for purposes of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (ICWA) and the Washington State Indian Child Welfare Act, RCW 13.38 (WICWA). Their mother appeals, challenging (1) the sufficiency of the evidence to support finding her children dependent; (2) the trial court's findings in support of continued foster care placement; and (3) a contact and reporting obligation imposed on appellate counsel by the trial court. We affirm the dependency finding, reverse the finding of active efforts and the dispositional order's foster care placement, and direct the trial court to strike unauthorized provisions of the order of indigency. We remand for further proceedings consistent with this opinion. Child Protective Services (CPS) received an intake from the Vanessa Behan center that scratches and marks were observed on the back of then-five-year-old Garrett, which he had not been able to explain. Shelby Yada, a CPS investigator, traveled to the home of Garrett's mother to ask about the injuries. Ms. Yada was told by Garrett's mother that the injuries resulted when a plastic bin in which her children had been playing broke. Ms. Yada became aware during her investigation that the mother was experiencing difficulty with transportation and ensuring the children's attendance at school and remedial programs. She offered the mother gas vouchers, bus passes, and day care referrals. It was determined that Abby and Garrett were overdue for well-child exams, which Ms. Yada requested be completed. The mother saw that they were. Washington courts treat the parallel provisions of ICWA and WICWA as coextensive unless they differ, in which case whichever "law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child ... shall apply." 25 U.S.C. § 1921; *In re Welfare of A.L.C.*, 8 Wn. App. 2d 864, 872-73, 439 P.3d 694 (2019). While our Commissioner agreed that the mother's challenges to the

shelter care orders were technically moot, she held that the "active efforts" issue, at a minimum, presented an issue of substantial and continuing public interest that, if not addressed, would escape review. For the same reason, the Washington Supreme Court granted discretionary review of these issues in *In re Dependency of J.M.W.*, which it decided on July 21, 2022. Although recognizing that WICWA's discussion of active efforts in the context of foster care placements "are not models of clarity," the Court concluded that shelter care hearings are child custody hearings under RCW 13.38.040(3) and foster care placements under RCW 13.38.040(1)(a) and (3)(a), and, "read as a whole," WICWA requires active efforts in foster care placements. *In re Dependency of J.M.W.*, 199 Wn.2d 837, 847, 514 P.3d 186 (2022). The Court nevertheless construed WICWA as allowing law enforcement and the Department to take children into protective custody under some emergency circumstances where prior active efforts are not possible or required. The record does not support the trial court's finding that the Department of Children, Youth and Families engaged in the required active efforts. We affirm the trial court's finding of dependency, vacate the dispositional Order for foster care placement, and remand for further proceedings consistent with this opinion.

19. *In the matter of the Dependency of: A.W., a Minor Child.*, 519 P.3d 262, No. 82799-5-I (WA App., Div. 1, October 31, 2022).

Shortly after A.K. gave birth to A.W., the Department of Children, Youth, and Families (Department) filed a dependency petition and sought an ex parte order allowing the Department to take A.W. into custody ("pick-up order") based on the mother's drug use during pregnancy and evidence of an inability to care for the infant. The mother's attorney contacted the court, requesting a hearing before the court, and signed the pick-up order. The trial court denied that request and signed the Order without first holding a hearing. At the subsequent shelter care hearing, the trial court denied the mother's Motion to Vacate the pick-up order but nonetheless found that shelter care was no longer necessary because of the steps she had taken to obtain drug treatment and parenting support, and it returned the child to A.K. The court subsequently dismissed the dependency proceeding. We conclude that entering a pick-up order without first holding a hearing did not violate A.K.'s due process rights. We also conclude that when the Department has reason to believe that a child is an Indian child under ICWA and Washington state Indian Child Welfare Act (WICWA) the heightened removal standard in those statutes applies to ex parte pick-up order requests. Because the Department had reason to know that A.W. is an Indian child—information not shared with the trial court—and the trial court applied an incorrect legal standard in assessing the Department's evidence at that stage of the proceeding, the trial court erred in not vacating the pick-up order. While the dependency statute allows the Department to request, and the court to order, the removal of children from their parents without a hearing, it provides numerous safeguards to ensure that the Department's request is based in fact and law and provides the parents with a prompt opportunity to address the Department's allegations, all designed to avoid an erroneous deprivation of parental rights. First, the Department must meet a high evidentiary burden before a court can issue an ex parte pick-up

order. The Department must file a petition with the court alleging that the child is dependent and that the child's health, safety, and welfare will be "seriously endangered" if not taken into custody. RCW 13.34.050(1)(a). The Department must also file an affidavit or declaration in support of the petition, setting out the "specific factual information evidencing reasonable grounds that the child's health, safety, and welfare will be seriously endangered if not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child." RCW 13.34.050(1)(b). The court may enter the order only if, based on the Department's evidence, it finds reasonable grounds to believe that the child is dependent and that the child's health, safety, and welfare will be seriously endangered if not taken into custody. RCW 13.34.050(1)(c). In *Z.J.G.*, 196 Wash.2d at 174, 471 P.3d 853, our Supreme Court explicitly stated that "ICWA provides a heightened standard for removal [of an Indian child] during emergency proceedings," comparing the "imminent physical damage or harm" language in 25 U.S.C. § 1922 to the standard for removing a child at a shelter care hearing under RCW 13.34.065(5)(a)(ii)(B). It went on to hold that when a court has "reason to know" a child is or may be an Indian child, "it must apply ICWA and WICWA standards." *Id*. The trial court here erred in concluding that A.W.'s status as an Indian child was immaterial at the pick-up order stage. Reversed.

20. *California Tribal Families Coalition v. Xavier Becerra,* 2022 WL 16716155, No. 20-cv-06018-MMC (N.D. Calif. November 4, 2022).

Plaintiffs challenge a rule issued by the Department of Health and Human Services ("HHS") on May 12, 2020, concerning a data collection system known as the "Adoption and Foster Care Analysis and Reporting System" ("AFCARS"). Specifically, Plaintiffs challenge the decision to remove from AFCARS various questions HHS had added by the 2016 Rule, *see* Fed. Reg. 90,524, namely, questions pertaining to the States' application of the Indian Child Welfare Act ("ICWA") and questions pertaining to the sexual orientation of youth, foster and adoptive parents, and legal guardians. With ICWA and the Bureau of Indian Affairs ("BIA") regulations in mind, HHS, prior to its issuance of the 2016 Rule, provided public notice that it intended to "collect data elements in AFCARS related to ICWA's statutory standards for removal, foster care placement, and adoption proceedings." *See* 81 Fed. Reg. at 20,284. Thereafter, in the 2016 Rule, HHS added a number of ICWA-related data elements to AFCARS, which elements can be summarized as follows: (1) whether the title IV-E agency conducted research to determine if a child is an "Indian child" as defined in ICWA and knows or has reason to know the child is an Indian child, *see* 81 Fed. Reg. at 90,535-36; (2) whether the child is a member of a tribe as well as whether the parents, the foster parent(s), and/or adoptive parent(s)/guardian(s) are members of a tribe, and (3) whether, during the course of any child custody, foster care, termination of parental rights, and/or adoption proceeding in which the child is or may be an Indian child, the procedures required by ICWA and BIA regulations were followed. In the 2020 Rule, HHS retained in AFCARS the ICWA-related data elements pertaining to the title IV-E [of the Social Security Act] agency's own actions, namely, data elements bearing on whether such agency has

"[r]eason to know a child is an 'Indian Child' as defined in [ICWA]" and "made inquiries whether the child is an Indian child," *see* 85 Fed. Reg. at 28,424, along with data elements pertaining to whether the child, parents of the child, foster parent(s), and/or adoptive parent(s)/guardian(s) are members of a tribe, as well as whether notice of the pendency of a state court proceeding had been given to the tribe or tribes in the manner required by ICWA, *see id*. at 28,424-25; *see also* 25 U.S.C. § 1912(a) (providing "party seeking the foster care placement of, or termination of parental rights to, an Indian child" must give notice of proceeding to "the Indian child's tribe"). The ICWA-related data elements removed from AFCARS by the 2020 Rule, *see* Fed. Reg. 282,410, were those pertaining to actions required to be reported by the agencies but taken by the state courts rather than the agencies themselves, namely, data elements bearing on whether state court proceedings were conducted in accordance with the procedures required under ICWA, i.e., proceedings, as summarized by HHS, comprising "request[s] to transfer to tribal court, denial[s] of transfer, court findings related to involuntary and voluntary termination of parental rights, including good cause findings, qualified expert witness testimony, whether active efforts were made prior to the termination/modification, removals under ICWA, available ICWA foster care/pre-adoptive placement preferences, adoption/guardianship placement preferences under ICWA, good cause and basis for good cause under ICWA, and information on active efforts." *See* 84 Fed. Reg. at 16,577. Although a court may find the issuance of a rule arbitrary and capricious where the administrative agency "only [takes] into account the costs to the [regulated entities] and completely ignore[s] the benefits that would result from compliance," *see California v. United States Bureau of Land Mgmt*., 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017), the record in the instant case, as set forth above, shows HHS did not ignore the benefits identified in comments, but, rather, stated why it concluded those benefits, when weighed against the burdens identified, did not warrant retention of all ICWA-related data elements in AFCARS. Defendants' Motion for Summary Judgment is hereby granted.

21. *Crystal Esquivel v. Fresno County Department of Social Services,* 2022 WL 17343869, No. 1:22-cv-00001-EPG (E.D. Calif. November 30, 2022).

Plaintiff alleges in her complaint as follows: on June 11, 2019, Defendant filed a Juvenile Dependency Petition concerning Plaintiff's three children. This was the third such petition filed against Plaintiff. The Petition followed an incident at a graduation ceremony for one of Plaintiff's children, an assessment of Plaintiff's home, and Plaintiff's testing positive for methamphetamine. Fresno County Superior Court held a detention hearing on June 13, 2019, and ordered Plaintiff's children to be temporarily placed in Defendant's care, custody, and control. For the following reasons, the Court concludes that Plaintiff lacks standing because, based on facts alleged in the Complaint and subject to judicial notice, she is not the parent of an "Indian child" as defined by the relevant statute. Any parent or Indian custodian from whose custody such child was removed may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913

of this title." 25 U.S.C. § 1914. Thus, Plaintiff must be a parent of an Indian child within the meaning of ICWA to bring a petition under § 1914. Plaintiff either alleges, or documents subject to judicial notice establish, the minor children are not Indian children. For example, the Eastern Band of Cherokee Indians, The Cherokee Nation, and the Pascua Yaqui Tribe each responded to Defendant's ICWA notice indicating that Plaintiff's children do not meet the definition of an Indian child. Notwithstanding the Tribes' responses, Plaintiff argues in her Complaint that the Fifth District Court of Appeal's conclusion, "[I]t is unlikely that information about [Plaintiff's] father's "aunts" or "sisters" would establish Indian ancestry for [Plaintiff's] children when the information on [Plaintiff's] father did not[,]" is inconsistent with the statutory language of ICWA. However, Plaintiff does not allege that information about these family members would show that her children could qualify as Indian children under the statute. The facts alleged do not show that the minors are, or could possibly be, Indian children under the terms of the statute, and thus Plaintiff is not a parent of an Indian child. No amount of further investigation could show otherwise. Accordingly, as Plaintiff lacks standing, the Court lacks subject matter jurisdiction over this action. It is hereby ordered that Defendant's Motion to Dismiss is granted.

22. *In re O.T. et al., v. L.H.*, 2023 WL 2058624, No. B316764 (Calif. Ct. App 2d. February 17, 2023).

Mother appeals from the November 8, 2021, findings and orders denying her petition to change court orders under Welfare and Institutions Code 1 section 388, placing her four children (minors) under the legal guardianship of their paternal grandmother, and terminating dependency jurisdiction. Mother's sole contention on appeal is that the juvenile court and the Los Angeles County Department of Children and Family Services (Department) failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. §§ 1901 et seq.) and related California statutes (Welf. & Inst. Code, §§ 224 et seq.). We conditionally reverse and remand solely for the Court to ensure compliance with ICWA and related California statutes. Petitions made allegations of risk as to all four children based on mother's mental illness, physical abuse, and father's failure to protect. The Court found no reason to know that the two younger children were Indian children. Both ICWA and California law define an " 'Indian child' " as a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4); § 224.1, subds. (a) & (b); *see In re Elizabeth M. (2018) 19 Cal.App.5th 768, 783*.) California statutory law incorporates the requirements of ICWA, and imposes some additional requirements as well. (*In re Abbigail A.* (2016) 1 Cal.5th 83, 91; *In re Benjamin M.* (2021) 70 Cal.App.5th 735, 741–742.) State and federal law require the Court to ask parties and participants at the outset of an involuntary child custody proceeding whether they have reason to know a minor is an Indian child and to "instruct the parties to inform the Court if they subsequently receive information that provides reason to know the child is an Indian child." (25 C.F.R. § 23.107(a); § 224.2, subd. (c); *see Benjamin M.*, at p. 741.) Initial inquiry also includes requiring each party to complete the parental notification of Indian status (ICWA-020)

form. (Cal. Rules of Court, rule 5.481(a)(2)(C).) State law imposes on the Department a first-step inquiry duty to "interview, among others, extended family members and others who had an interest in the child." (*In re H.V.* (2022) 75 Cal.App.5th 433, 438; *see* § 224.2, subd. (b)). Federal regulations explain that the term "extended family member is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent." 25 C.F.R. § 23.2 (2017). When there is "reason to believe that an Indian child is involved in a proceeding," further inquiry is also required. (§ 224.2, subd. (e); *In re T.G.* (2020) 58 Cal.App.5th 275, 290, fn. 14.) "We review claims of inadequate inquiry into a child's Indian ancestry for substantial evidence." (*In re H.V.*, at p. 438.) The Department concedes on appeal that the initial inquiry requirements of ICWA and related state law were not met in this case, and asks us to either conditionally affirm or reverse the juvenile court's order terminating dependency jurisdiction, with instructions limiting remand of the matter to ordering the juvenile court to ensure compliance with ICWA's requirements. We agree that the court erred in finding ICWA inapplicable, as there is no evidence in the record that the Department asked available extended family members about the possibility that minor has Indian ancestry. (*See, e.g., In re H.V., supra,* 75 Cal.App.5th at p. 438 [prejudicial error when Department fails to discharge its first step duty of inquiry]; *In re Benjamin M., supra*, 70 Cal.App.5th at p. 741 [court must ask each participant in child custody proceeding]). The juvenile court's November 8, 2021 orders terminating dependency jurisdiction under Welfare and Institutions Code section 366.26 are conditionally reversed and remanded for proceedings required by this opinion. The Court shall also order the Department to make reasonable efforts to interview available extended relatives, including maternal grandmother, maternal aunt, and paternal grandmother about the possibility that minors have Indian ancestry and to report on the results of the Department's investigation. Nothing in this disposition precludes the Court from ordering additional inquiry of others having an interest in the children. Based on the information reported, if the Court determines that no additional inquiry or notice to tribes is necessary, the orders terminating dependency jurisdiction are to be reinstated. If additional inquiry or notice is warranted, the Court shall make all necessary orders to ensure compliance with ICWA and related California law.

23. *In re S.B. v. T.B.* 2023 WL 2150755, No. F084825 (Calif. Ct. App 5d. February 21, 2023). L.A. (mother) and T.B. (father) are the parents of S.B. (born December 2019). Father appeals the juvenile court's Order terminating his parental rights pursuant to Welfare and Institutions Code section 366.26.1. Father's sole contention on appeal is that the Madera County Department of Social Services (the Department) and the juvenile court failed to comply with the inquiry requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) and related California law because extended family members were not asked about S.B.'s possible Indian ancestry and the department did not conduct a further inquiry after mother claimed membership in a tribe. The Department concedes that remand for further inquiry is necessary. Consistent with

our recent decisions in *In re K.H*. (2022) 84 Cal.App.5th 566 (K.H.) and *In re E.C.* (2022) 85 Cal.App.5th 123 (E.C.), we conclude "the error is prejudicial because neither the [department] nor the court gathered information sufficient to ensure a reliable finding that ICWA does not apply and remanding for an adequate inquiry in the first instance is the only meaningful way to safeguard the rights at issue. ([*In re A.R.* (2021)] 11 Cal.5th [234,] 252–254 [(A.R.)].) Accordingly, we conditionally reverse the juvenile court's finding that ICWA does not apply and remand for further proceedings consistent with this opinion, as set forth herein." (*K.H.*, at p. 591; *accord*, E.C., at pp. 157–158.).

24. *In re Robert F. v. Jessica G.*, 2023 WL 2905390, No. E080073 *(Calif. Ct. App. 4d. April 12, 2023*).

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

25. *In re S.S. v. Karla S.*, 90 Cal.App.5th 694, B318794, (CA Ct. App, Div 8, April 14, 2023).

County Department of Children and Family Services (the Department) commenced child protection proceeding, in which child was detained, placed with maternal aunt and uncle, and

ruled a dependent of the court. The Superior Court, Los Angeles County, found Indian Child Welfare Act (ICWA) was inapplicable and subsequently terminated mother's and father's parental rights in favor of permanent plan of adoption by maternal aunt and uncle. Mother appealed. The Court of Appeal Wiley, J., held that the Department's failure to ask paternal relatives whether child might be "Indian child," as required by statute, prejudiced Native American tribes, requiring remand. Conditionally reversed and remanded with directions.

26. *M. Y. v. Texas,* 667 S.W.3d 502, NO. 03-22-00720-CV (TX Ct. App., April 21, 2023).
Texas Department of Family and Protective Services brought action to terminate parental rights of mother, who was member of Cherokee and Blackfoot Tribes, and father, who was not a tribal member. The 395th District Court, Williamson County, Ryan D. Larson, J., terminated their parental rights, and the parents appealed. The Court of Appeals, Byrne, C.J., held that: [1] mother's testimony that she was member of Cherokee and Blackfoot Tribes triggered the presumption under Indian Child Welfare Act (ICWA) that children were Tribe members, meaning that the ICWA and its procedures applied to termination of parental rights proceeding; [2] trial court committed reversible error by applying the clear and convincing evidence standard, instead of reasonable doubt standard; and [3] Department of Family and Protective Services violated ICWA when it failed to notify Cherokee and Blackfoot tribes when it sought to terminate parental rights of mother and father. Reversed and remanded.

27. *In re Interest of Manuel C. and Mateo S. v. Amber S.,* 314 Neb. 91, No. S-22-653. (SC Nebraska, April 21, 2023).
State moved to terminate mother's parental rights to children following their adjudication as minors based on abuse and neglect allegations. The Juvenile Court, Lancaster County, Shellie D. Sabata, J., denied Indian Tribe's Motion to Intervene. Mother appealed and Tribe cross-appealed. The Supreme Court, Heavican, C.J., held that: [1] Order denying intervention was a final appealable Order, and [2] evidence that Tribe considered mother a member was insufficient to establish children's Indian status for purposes of intervention by Tribe. Affirmed. Manuel C. and Mateo S. were previously adjudicated as minors for purposes of Neb. Rev. Stat. § 43-247(3)(a), dealing with abuse and neglect allegations. A Motion to Terminate the parental rights of their mother, Amber S., was filed. The Red Lake Tribe of Chippewa Indians filed a Motion to Intervene. The Tribe cross-appeals the juvenile court's denial of the Tribe's Motion to Intervene. The questions presented by this appeal are (1) whether Amber and the Tribe appeal from a final order and (2) whether Manuel and Mateo are children for purposes of the Indian Child Welfare Act (ICWA) and the Nebraska Indian Child Welfare Act (NICWA), where their biological mother is eligible for enrollment, but not yet a member of the Tribe, and the Tribe has indicated that it considers Amber to be a member of the Tribe for purposes of ICWA. We affirm the denial of the Motion to Intervene. In denying the Motion to Intervene, the juvenile court noted that Amber was "eligible" for enrollment and had begun that process. The central dispute here is whether Amber is a member of the Tribe when the only evidence in the record was that Amber

was eligible for membership, that she had begun the enrollment process, and that the Tribe "considered" Amber to be a member for purposes of ICWA. The Tribe and Amber assert on appeal that the juvenile court and the State have incorrectly suggested enrollment is dispositive to the question of membership and that the tribe itself is the entity entitled to identify its members. We hold that evidence that the Tribe "considered" Amber a member for purposes of ICWA is insufficient. The plain language of § 43-1503(8) provides as relevant that an "Indian child" must have a biological parent who is a member of a tribe. The evidence adduced in the juvenile court shows that Amber is not currently a member of the Tribe; the children, in turn, do not have a biological parent that is a member of the Tribe. While their status may change in the future, Manuel and Mateo are not currently Indian children for purposes of ICWA and NICWA. As such, ICWA and NICWA are inapplicable, and the juvenile court did not err in denying the Tribe's Motion to Intervene. The decision of the juvenile court is affirmed.

28. *In the Matter of S.J.W. v. Oklahoma,* 2023 WL 3070621, No. 119,404 (S.C. Oklahoma, April 25, 2023).

State filed Petition to Adjudicate Indian child deprived. The District Court, Carter County, Dennis Morris, J., granted the Petition. Parents appealed. The Supreme Court, Darby, J., held that: [1] under ICWA, district court and non-member Tribe had concurrent jurisdiction over deprivation petition; and [2] district court's failure to hold adjudication hearing within 180-day statutory time period did not violate parents' right to due process. After the Carter County District Court adjudicated S.J.W., child, deprived, Parents (Appellants) appealed. S.J.W. filed a Motion to Dismiss the appeal for lack of subject matter jurisdiction. S.J.W. claims the Chickasaw Nation has exclusive jurisdiction pursuant to 25 U.S.C. § 1911(a) based on the plain language in the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 et seq., because S.J.W. resides within the Chickasaw reservation, notwithstanding the fact that S.J.W. is an Indian child and member of the Muscogee (Creek) Nation. Parents adopted S.J.W.'s argument as their first proposition of error. Alternatively, Parents argue if the district court does have jurisdiction, the trial court denied them due process in failing to complete the adjudication within the statutory time period allowed per 10A O.S. 2011, § 1-4-601(B)(2) ("If the adjudicatory hearing is delayed pursuant to this subsection, the emergency custody order shall expire unless the hearing on the merits of the petition is held within one hundred eighty (180) days after the actual removal of the child."). With respect to the first issue, we hold the district court has subject matter jurisdiction to adjudicate S.J.W. deprived. Pursuant to 25 U.S.C. § 1911(b), the State of Oklahoma shares concurrent territorial jurisdiction with an Indian child's Tribe when the Indian child is not domiciled or residing on the Indian child's Tribe's reservation. Next, we find no violation of Parents' right to due process of law as any delay was not arbitrary, oppressive or shocking to the conscience of the Court, and Parents had a meaningful opportunity to defend throughout the proceeding. Affirmed.

29. *In the Matter of: N.D.M.,* 886 S.E.2d 640, No. COA22-483 (N.C. Ct. App., May 2, 2023).
After child was adjudicated to be neglected and dependent, the Department of Social Services (DSS) filed Petition to Terminate father's parental rights to his child, who was Native American, pursuant to the Indian Child Welfare Act (ICWA). The District Court, Burke County, terminated his parental rights. Father appealed. The Court of Appeals, Collins, J., held that: [1] evidence did not support trial court's finding that DSS attempted to reach out to father on a regular basis, and [2] trial court's conclusion that DSS engaged in active efforts to prevent the breakup of child's family under ICWA was not supported by findings. Reversed and remanded.

30. *Jimmy E. v. Alaska Department of Health and Social Services,* 2023 WL 3401684, Supreme Court Nos. S-18479/18480 (SC Alaska, May 12, 2023).
After children were declared children in need of aid, Office of Children's Services (OCS) filed Petitions to terminate mother's and father's parental rights. The Superior Court, Third Judicial District, Palmer, Jonathan A. Woodman, J., terminated parental rights of both, and they appealed. The Supreme Court, Henderson, J., held that: [1] trial court had reason to know that mother's and father's children were Indian children, thus triggering Indian Child Welfare Act (ICWA); [2] father had no burden to present evidence of tribal membership in order to give trial court reason to know that children in this case were Indian children; [3] as matter of first impression, sworn testimony from OCS caseworker was not mandatory to show that OCS exercised due diligence in investigating father's claim that children were Indian children; [4] OCS did not act with due diligence in investigation as to whether mother's and father's children were Indian children and notification of tribes; [5] evidence supported findings that children were in need of aid due to mother's drug use; [6] mother failed to remedy conduct that gave rise to adjudication of children as children in need of aid; [7] evidence supported trial court's determination that OCS made reasonable efforts to enable safe return of children to home, as prerequisite to termination of parental rights; and [8] termination of mother's parental rights was in best interest of children. In holding that ICWA did not apply to Allie and Jimmy's children, the superior court emphasized Jimmy's admission during an exchange at the end of a hearing that he was not an enrolled member of a tribe and that his children were eligible to be enrolled, but were not yet enrolled. It is true that ICWA does not apply where neither the parents nor the children are members of a tribe. But Jimmy's statements in themselves are not determinative. Perhaps more importantly, treating a parent's uncertain statements as determinative in a context like this could undermine tribal sovereignty because the tribe decides who is a member. We affirm the termination of Allie's parental rights to Martha and George. We vacate the termination of Jimmy's and Allie's parental rights to Tamera and Ulysses and REMAND for further proceedings consistent with this opinion.

31. *Richman v. Native Village of Selawik,* 2023 WL 3764599, Case No. 3:22-cv-00280-JMK, (D. Alaska, June 1, 2023).

Respondent Native Village of Selawik ("Selawik") moves to dismiss Petitioner Nikki Lynn Richman's Petition for Writ of Habeas Corpus for Relief from a Tribal Court Judgment and Selawik moves for judicial notice of certain court orders. C.R. is an Alaska Native child born in 2019 to Eric Rustad and Kristen Huntington. Shortly after C.R. was born, Mr. Rustad murdered Ms. Huntington. On or about January 15, 2020, prior to his arrest, Mr. Rustad placed C.R. in Petitioner's care "with the intention that Ms. Richman should adopt the child." Mr. Rustad executed a Power of Attorney Delegating Parental Rights ("Delegation of Parental Rights"), appointing Petitioner attorney-in-fact "with respect to the care, custody, or property" of C.R. pursuant to Alaska Stat. § 13.26.020. Petitioner, a non-Native, has cared for C.R. at her home in Fairbanks, Alaska, since January 2020. At a February 25, 2020, hearing at which Petitioner was not present, the Venetie Court found C.R. to be a child in need of aid and granted Petitioner temporary physical custody over C.R. The following year, in May 2021, the Selawik Tribal Council passed a resolution seeking to transfer C.R.'s custody case from Venetie Court to the Selawik Tribal Court. C.R. was enrolled as a Selawik tribal member on January 16, 2020. On July 14, 2021, the Venetie Court referred jurisdiction over C.R.'s case to the Selawik Court. Some weeks later, the Selawik Court held a status hearing in C.R.'s case and granted Petitioner temporary custody of C.R. Petitioner alleges that the fairness of a later hearing was compromised by certain procedural due process violations, including bias, lack of adequate notice, and an inability to "call and question witnesses." At the conclusion of the hearing, the Selawik Court ordered that C.R.'s custody placement be transferred from Petitioner to Ms. Ballot (the "Custody Order"). The Superior Court declined to enforce the Custody Order, holding that Selawik failed to afford Petitioner a full opportunity to be heard and that the Selawik Court was not impartial in issuing the Custody Order. To date, C.R. continues to reside with Petitioner at her home in Fairbanks. Petitioner argues that Selawik has illegally detained C.R. under 25 U.S.C. § 1303 because the Selawik Court (1) lacks jurisdiction over the child and/or her custody matter; (2) committed myriad due process violations in issuing the Custody Order; and (3) is "not authorized nor organized in compliance with its [Indian Reorganization Act, 25 U.S.C. § 461 et seq. ("IRA")] Constitution nor the IRA." Selawik argues that the Custody Order does not "detain" C.R. under the habeas statute. The Ninth Circuit has broadly suggested—in line with *Lehman*—that § 1303 is inappropriate to challenge to child custody orders absent some other restraint on liberty. *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 102 S. Ct. 3231, 73 L. Ed. 2d 928 (1982). This Court follows the Ninth Circuit's guidance to hold that the Petition does not invoke federal habeas jurisdiction. But even if the Court was persuaded that § 1303 habeas relief is available under the narrow circumstances described in *Cobell* and *DeMent*, jurisdiction is still inappropriate here. *See U.S. ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974); *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989). *Cobell* and *DeMent* each involved a state custody order that conflicted with the tribe's custody order. Here, there is no conflicting state custody order. Petitioner's action invites the Court to venture far outside its

jurisdictional bounds. Federal court is not the proper vehicle to challenge Selawik's child custody decisions or air Petitioner's frustrations with the Selawik Court. The Motions are granted, and the Petition is dismissed without prejudice for lack of subject matter jurisdiction.

32. ***Tuluksak Native Community v. Alaska,*** **530 P.3d 359, No. S-18377 (SC Alaska, June 2, 2023).** In proceeding on petition alleging Alaska Native child was in need of aid (CINA), the Office of Children's Services (OCS) requested a hearing to place the child in an out-of-state secure residential psychiatric treatment facility. Child's Tribe, the Tuluksak Native Community, intervened. The Superior Court, Fourth Judicial District, Bethel, Terrence P. Haas, J., and William T. Montgomery, Judge Pro Tem, ordered child placed at secure residential psychiatric treatment facility. Tribe appealed the placement decision. The Supreme Court, Henderson, J., held that: [1] OCS was authorized to request hearing to place child in secure residential psychiatric treatment facility rather than proceeding under voluntary commitment statutes; [2] trial court did not err by allowing and relying on testimony of treatment provider that included other mental health professionals' opinions; [3] any error by trial court in managing discovery did not require reversal or vacatur of findings; [4] evidence was sufficient to support findings warranting child's placement in secure residential psychiatric treatment facility; [5] trial court's error in failing to apply Indian Child Welfare Act (ICWA) placement preferences was not plain error; and [6] Tribe failed to establish standing to raise due process arguments on child's behalf. We affirm the superior court's decision allowing placement of Hanson at a secure residential treatment facility. The Tribe has identified no reason the court should not have proceeded under AS 47.10.087 (.087), which allows OCS to place a minor in its custody at a facility of the type at issue. Next, because an .087 hearing is a type of CINA placement hearing, the court properly allowed certain hearsay and mental health testimony, and did not abuse its discretion in managing discovery. Further, the court made sufficient findings related to each of the .087 statutory factors. And under the circumstances, the court did not plainly err in failing to consider ICWA's placement preferences. Finally, the Tribe's constitutional arguments are unavailing. No party raised an ICWA argument before the superior court. At best, the Tribe indirectly raised the placement issue when questioning Luchansky. This brief line of questioning established only that Luchansky did not know about a list of tribally affiliated health services maintained by the Indian Health Service and that OCS relied solely on a list of facilities participating in Alaska Medicaid. Similarly, in closing argument the Tribe obliquely mentioned placement preferences by arguing under .087(a)(2) that OCS had "decided that they're not going to send any Alaskan Native kids to lower 48 Native-run facilities who don't accept Alaska Medicaid." This argument, however, was framed and characterized as a "less restrictive alternative" argument under .087(a)(2), not as an ICWA placement argument. Affirmed.

33. *State ex rel Delaware Tribe of Indians v. Nowicki-Eldridge,* 2023 WL 3945551, No. 22-787 (SC W.Va, June 12, 2023).

The Delaware Tribe of Indians ("the Tribe") sought writ of prohibition precluding the Circuit Court, Boone County, from enforcing its order denying the Tribe's Motion to Transfer underlying abuse and neglect proceedings to the District Court of the Delaware Tribe pursuant to the Indian Child Welfare Act (ICWA). The Supreme Court of Appeals, Wooton, J., held that good cause did not exist to deny Tribe's Motion to Transfer. Writ granted. Petitioner, The Delaware Tribe of Indians, seeks a writ of prohibition precluding the Circuit Court of Boone County from enforcing its September 30, 2022, order denying the Tribe's Motion to Transfer the underlying abuse and neglect proceedings to the District Court of the Delaware Tribe ("the tribal court") pursuant to the requirements of the Indian Child Welfare Act ("ICWA" or "the Act"), 25 U.S.C. §§ 1901-1963 (2021). In denying the Tribe's Motion to Transfer, the Circuit Court adopted a minority doctrine known as the Existing Indian Family ("EIF") exception to the ICWA, which posits that the Act only applies when a child is removed from his or her custodial Indian parent or from an existing "Indian family." In the alternative, the circuit court found that if the ICWA applied, good cause existed to deny the Tribe's Motion to Transfer under 25 U.S.C. § 1911(b). The Tribe challenges each of these conclusions. The circuit court erred in denying the Motion to Transfer this action to the tribal court. In arriving at a contrary conclusion, the circuit court adopted a minority doctrine, the EIF exception. This exception originated in the Supreme Court of Kansas, which explained that the ICWA is inapplicable where a child has no connection to his or her Indian parent, has not been in the custody of the Indian parent, and did not reside in a home with any other Indian family. *Matter of Adoption of Baby Boy L.*, 231 Kan. 199, 643 P.2d 168 (1982), *overruled by In re A.J.S.*, 288 Kan. 429, 204 P.3d 543 (2009). In essence, the EIF exception permits a state court to circumvent the requirements of the ICWA if the court concludes that the Indian child is being removed from "a family with [no] significant connection to the Indian community." *Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, 7 P.3d 960, 963 (Ariz. Ct. App. 2000). Although the exception was adopted and applied in approximately twenty states in the 1980s and 1990, in recent years all but seven jurisdictions presented with the exception have either repudiated it—including the very court that created it—or rejected it in the first instance. The proceeding regarding termination of the parental rights of Respondent Father was not at all advanced at the time the Tribe filed its Motion to Transfer the proceeding. Accordingly, we conclude that the circuit court clearly erred in determining that good cause existed to deny transfer of this matter to the tribal court. Writ Granted.

34. *In the Matter Of S. H. P. v. M. G. J.,* 426, A179410 (Control), A179411, (Oregon Ct. App., June 14, 2023).

Department of Human Services (DHS) brought juvenile dependency proceeding concerning two of mother's children, both of whom were Indian children within meaning of Oregon Indian Child Welfare Act (ORICWA) and federal Indian Child Welfare Act (ICWA). The Circuit Court, Jackson County, David J. Orr, J., changed permanency plans for children from reunification to

tribal customary adoption (TCA). Mother appealed, and DHS moved to dismiss appeal as moot. The Court of Appeals, Pagán, J., held that: [1] appeal was not moot; [2] record supported juvenile court's conclusion that mother failed to make sufficient progress to address DHS' concerns about domestic violence; [3] juvenile court did not improperly rely on extrinsic facts to evaluate mother's progress; [4] record supported juvenile court's conclusion that mother had not made sufficient progress for safe return of her children; and [5] record supported juvenile court's determination that DHS made active efforts to reunify mother with her children. Changes to permanency plans are governed by ORS 419B.476. At the permanency hearing, the juvenile court must determine whether DHS made "active efforts" to reunify the family and whether the parent made "sufficient progress" for the safe return of the child or children. Considering the record, and especially given the numerous services offered to mother, there is ample support for the juvenile court's determination that DHS made active efforts to reunify mother with her children. Motion to Dismiss denied; affirmed.

35. *In re Cal. E. and Cas. E. v. Demerle S. and Anthony E.*, 220930, NOS. 4-22-0930, 4-22-0931, 4-22-1053, 4-22-1054 cons. (4d. Illinois, June 16, 2023).

State filed Petitions for wardship over mother's and father's children on grounds of neglect. Following adjudication of children as wards of court and death of both mother and father, the Circuit Court granted Alaskan tribe's Motion to Transfer case to Tribe under Indian Child Welfare Act (ICWA), and then denied foster parents' subsequent Motions to Intervene as of right and to stay order granting transfer. Foster parents appealed. The Appellate Court held that: [1] good cause existed for Appellate Court to issue its decision on accelerated appeal more than 150 days from date Notice of Appeal was filed; [2] trial court was not divested of jurisdiction to consider foster parents' Motion to Stay granting Tribe's Motion for Transfer after Tribe accepted jurisdiction; [3] foster parents were parties to neglect proceeding with absolute statutory right to intervene and challenge order transferring case to Alaska tribe; [4] mother's and father's deaths did not nullify their written objections to transfer of child neglect case to Tribe; [5] ICWA did not require that mother's and father's written objections to transfer be filed after Tribe petitioned for transfer; [6] children's lack of personal connection or knowledge of their native ancestry and lack of connection to family members in Alaska who were members of tribe were not permissible factors that trial court could consider in determining whether there was good cause to deny transfer; [7] private interest factors weighed heavily in favor of Illinois, rather than Alaska, as preferred forum for child neglect proceedings; and [8] objection to transfer by children's guardian ad litem was entitled to significant, if not determinative weight, in trial court's evaluation of whether there was good cause to deny transfer. In July 2020, at the adjudicatory hearing, Demerle and Anthony executed written objections to the tribe taking jurisdiction of the case under the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq. (2018)). Also, in July 2020, the trial court adjudicated the minors neglected and made them wards of the court. In September 2020, Anthony died, and in November 2020, Demerle died. In December 2020, the State sent notice of the neglect proceedings to the Tribe, which was the Tribe's first

notice. The Tribe began participating in the neglect proceedings in February 2021 and filed a written Motion to Intervene in March 2021. In November 2021, the Tribe filed a Motion to Transfer jurisdiction to the Togiak Tribal Court pursuant to section 1911(b) of ICWA. The foster parents and the State both argue that the trial court's order transferring jurisdiction should be reversed. The statute, regulation, and guidelines make eminently clear that a trial court must deny transfer if either parent has objected to the transfer. However, the minors' lack of connection to the Tribe does not constitute good cause to deny transfer. We remand this case with directions for the trial court to (1) vacate its September 15, 2022, order transferring jurisdiction; (2) enter an order denying the Tribe's Motion to Transfer jurisdiction, consistent with this opinion; and (3) grant the foster parents' Motion to Intervene.

36. *In re H.B. v. S.B.*, 92 Cal.App.5th 711, B322472 (CA Ct. App., 8d, June 20, 2023).
Following child's adjudication as dependent, the County Department of Children and Family Services (Department) recommended termination of parental rights to child. After ordering the Department to interview all known living relatives regarding the child's possible Indian heritage and continuing the hearing on the termination of rights for approximately two months so that the Department could comply, the Superior Court, Los Angeles County, No. 19CCJP07101A, found that the Indian Child Welfare Act (ICWA) was inapplicable and terminated parental rights. Child's father appealed. The Court of Appeal, Grimes, J., held that: [1] Department was not required to inquire with child's paternal step grandmother or maternal stepsister about child's possible Indian ancestry, and [2] substantial evidence supported finding that Department's inquiry into child's possible Indian ancestry was adequate. At the November 2019 detention hearing, paternal grandmother, paternal aunt, and maternal great-grandmother were present in court. The parents were not present. The juvenile court found ICWA did not apply based on the information before it but ordered the parents to keep the Department, their counsel, and the court aware of any new information relating to possible ICWA status. Paternal grandmother, paternal aunt, and maternal great-grandmother made no statements in response to the court's ICWA finding. Later in November 2019, on the day of the arraignment hearing, father and mother filed their respective form ICWA-020's, stating they had no Indian ancestry as far as they knew. At the hearing, in addition to the parents, paternal grandmother, paternal grandfather, paternal step-grandmother, and paternal aunt were present in court. The juvenile court noted the parents' ICWA-020 forms were filed and found no reason to know H.B. was an Indian child. Thus, the question comes down to whether substantial evidence supports the juvenile court's findings that the Department's initial inquiry was adequate despite the Department failing to inquire with maternal grandfather and an unidentified paternal aunt. We conclude that substantial evidence supports the court's findings. Affirmed.

37. *In the Matter of the Dependency of R.D.*, 2023 WL 4442073, No. 39156-6-III (WA App, 3d, July 11, 2023).

Department of Children, Youth, and Families (Department) filed dependency petition alleging that mother's mental health and substance use placed child at risk. The Superior Court, Spokane County, Raymond F. Clary, J., found child dependent and entered dispositional order continuing child's out-of-home placement, ordered services for mother, and found that Indian Child Welfare Act's (ICWA) requirements had been satisfied. Mother appealed. The Court of Appeals, Pennell, J., held that: [1] chemical dependency evaluation report offered by Department constituted hearsay; [2] chemical dependency evaluation report did not fall under hearsay exception; [3] trial court's error in admitting chemical dependency evaluation report was harmless; and [4] Department failed to meet its obligation under ICWA and Washington State Indian Child Welfare Act (WICWA) to make active efforts to provide remedial services and rehabilitative programs designed to prevent breakup of Indian family. The "active efforts" requirement of ICWA is more stringent than the "reasonable efforts" standard applicable to non-ICWA/WICWA cases and requires a "higher level of engagement" from the State's social workers. *In re Dependency of G.J.A.*, 197 Wash.2d 868, 875, 489 P.3d 631 (2021). The Department is not relieved of the "active efforts" requirement simply because a parent appears uninterested or because efforts would appear to be futile. *Id*. at 875-76. Instead, the Department has an ongoing obligation to actively engage in thorough, timely, and culturally appropriate efforts at family reunification, regardless of how those efforts are received. *Id.*; *see also* 25 C.F.R. § 23.2. "A parent's lack of engagement is relevant only insofar [as it relates to] the Department's burden to prove its efforts were unsuccessful." *Id.* at 906. We reverse in part the superior court Order denying revision and vacate the juvenile court's dependency / disposition order finding the Department engaged in "active efforts" as required by ICWA and WICWA. This matter is remanded to the trial court with instructions to either immediately return R.D. to her mother or to make the statutorily required finding that returning R.D. to her mother would subject her to "substantial and immediate danger or threat of such danger." 25 U.S.C. § 1920; RCW 13.38.160.

38. *In re Delila D. v. M.T.*, 2023 WL 4677720, E080389 (CA Ct. App., 4d, July 21, 2023).

Riverside County Department of Public Social Services filed a Dependency Petition on behalf of child. The Superior Court, Riverside County, No. RIJ118579, Dorothy McLaughlin, J., declared child to be dependent, removed her from her parents' care, found that Indian Child Welfare Act (ICWA) did not apply, and terminated parents' parental rights. Mother appealed. The Court of Appeal, Slough, J., held that: [1] there is only one duty of initial inquiry by social worker as to whether child involved in dependency proceeding is an "Indian" child under ICWA, and [2] Department of Public Social Services violated statutory mandate that social worker in dependency case make the initial inquiry of available extended family members as to whether child was "Indian" child by failing to ask child's uncle. In 2018, the legislature expanded this inquiry duty as part of Assembly Bill No. 3176 (2017-2018 Reg. Sess.), which added various

new ICWA-related provisions to the Welfare and Institutions Code that became effective January 1, 2019. (Stats. 2018, ch. 833 (A.B. 3176), § 5.) At issue in this appeal is whether the initial inquiry encompasses available extended family members in every proceeding where a child is removed from home or in only those cases where the social worker takes temporary custody of the child without a warrant under exigent circumstances, as our court recently held in *In re Robert F*. (2023) 90 Cal.App.5th 492, 307 Cal.Rptr.3d 228 (Robert F.). Relying on *Robert F.*, the Department argues that because the child was not initially removed from home without a warrant, the duty to interview available to extended family members never arose. We conclude there is only one duty of initial inquiry, and that duty encompasses available extended family members no matter how the child is initially removed from home. Applying a narrower initial inquiry to the subset of dependencies that begin with a temporary removal by warrant frustrates the purpose of the initial inquiry and "den[ies] tribes the benefit of the statutory promise" of A.B. 3176. Reversed and remanded.

39. *Nygaard v. Taylor*, 2023 WL 5211646, No. 22-2277 (8th Cir., August 15, 2023).

Aarin Nygaard filed a Petition for a writ of habeas corpus in the District of South Dakota challenging the Cheyenne River Sioux Tribal Court's exercise of jurisdiction in a custody matter involving his minor daughter, C.S.N. C.S.N. is the daughter of Nygaard and Tricia Taylor. Nygaard claimed that the Tribal Court's refusal to recognize and enforce North Dakota state-court orders awarding him custody of C.S.N. violated the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A. The district court granted summary judgment to the Tribal Court after concluding that the PKPA does not apply to Indian tribes. Taylor and C.S.N. are both enrolled members of the Cheyenne River Sioux Tribe, and Nygaard is non-Indian. In March 2014, Nygaard sought "primary residential responsibility" of C.S.N. in North Dakota state court, which Taylor opposed. Following mediation, the state court entered an interim order in July 2014, providing, among other things, that Nygaard and Taylor would equally share decision-making and residential responsibility for C.S.N. during the pendency of custody proceedings. The interim order also required each parent to notify the other of his or her "intent to travel out of state" with C.S.N. "at least 24 hours in advance." On August 28, 2014, however, Taylor took C.S.N. to the Cheyenne River Indian Reservation in South Dakota without court approval and without notifying Nygaard. Nygaard promptly sought relief from the North Dakota court overseeing C.S.N.'s custody proceedings, and that court issued an ex parte order on September 12 granting Nygaard temporary custody of C.S.N. and directing Taylor to "immediately return" the child to North Dakota. On October 3, the same court found Taylor in contempt for having "abscond[ed]" with C.S.N. to South Dakota and ordered that a warrant be issued for Taylor's arrest if she failed to "turn over" C.S.N. to Nygaard within five days. Taylor did not comply with that order, and a bench warrant for her arrest was issued on October 20. A State prosecutor also charged Taylor with parental kidnapping, *see* N.D. Cent. Code § 12.1-18-05, and an arrest warrant for that charge was issued as well. Taylor subsequently filed a Petition in the Cheyenne River Sioux Tribal Court asking that C.S.N. be placed in the temporary custody of her maternal

aunt, Jessica Ducheneaux. The Tribal Court held a hearing on January 12, 2015. In an order issued the next day, the Tribal Court determined that it had "personal and subject matter jurisdiction" over C.S.N.'s custody case under tribal law and awarded custody of C.S.N. to Ducheneaux "until further orders of the court." Nygaard appealed the January 13, 2015, temporary custody order to the Tribal Court of Appeals, and that appeal was followed by several years of remands, further appeals, and additional proceedings in tribal court. The Tribal Court of Appeals held in relevant part that the PKPA does not apply to Indian tribes as a general matter. It also held that the PKPA does not apply to the Cheyenne River Sioux Tribe as a matter of tribal law, meaning that the statute did not mandate that the Tribal Court enforce the North Dakota court Orders awarding custody of C.S.N. to Nygaard. The question raised in this appeal is a matter of first impression in our circuit: whether the PKPA applies to Indian tribes. There is no dispute that, as a general matter, the Cheyenne River Sioux Tribal Court has the authority to make custody determinations involving minors like C.S.N. who are enrolled members of the Tribe. *See Ysleta Del Sur Pueblo v. Texas*, —— U.S. ——, 142 S. Ct. 1929, 1934, 213 L.Ed.2d 221 (2022) ("Native American Tribes possess inherent sovereign authority over their members and territories." (cleaned up)); *United States v. Cooley*, —— U.S. ——, 141 S. Ct. 1638, 1642, 210 L.Ed.2d 1 (2021) ("Indian tribes may ... regulate domestic affairs among tribal members ...."). We agree with the district court that the PKPA does not apply to Indian tribes. We start with the statute's text. The PKPA provides that "[t]he appropriate authorities of every State shall enforce" valid custody determinations made "by a court of another *State*." 28 U.S.C. § 1738A(a) (emphasis added). "State" is defined in turn to "mean[ ] a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States." *Id.* § 1738A(b)(8). Absent from this list are Indian tribes. This is significant because "[s]pecific Indian rights"—including the Cheyenne River Sioux Tribe's inherent sovereign authority to determine custody of its minor members, *see United States v. Cooley*, 141 S. Ct., 1638, 1642, 210 L.Ed.2d 1(2021)—"will not be deemed to have been abrogated or limited" by a federal statute "absent a 'clear and plain' congressional intent." *Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533, 535 (8th Cir. 2020). Nygarard suggests that tribes are encompassed by the PKPA's reference to "a territory ... of the United States," *id.*, because they are "located within" the United States' "geographic boundaries." But the Supreme Court has made clear that within our constitutional order, such "territories" are distinct from Indian tribes. Our conclusion that the PKPA does not apply to Indian tribes is further supported by the fact that when Congress intends for tribes to be subject to statutory full-faith-and-credit requirements, it expressly says so. The Indian Child Welfare Act (ICWA), for example—which was enacted two years before the PKPA—provides that "[t]he United States, every State, every territory or possession of the United States, and *every Indian tribe*" shall extend full faith and credit to "the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings." 25 U.S.C. § 1911(d) (emphasis added). The Full Faith and Credit for Child Support Orders Act of 1994 similarly provides that "[t]he appropriate authorities of each State ... shall enforce ... a child support order" issued "by a court of another State" and defines "State" to

"mean[ ] a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and *Indian country*." 28 U.S.C. § 1738B(a), (b)(9) (emphasis added). Further, the Violence Against Women Act of 1994 states that "[a]ny protection order issued ... by the court of one State, Indian tribe, or territory ... shall be accorded full faith and credit by the court of another State, *Indian tribe*, or territory." 18 U.S.C. § 2265(a) (emphasis added). For the reasons explained above, we conclude that the PKPA does not apply to Indian tribes. As a result, the Cheyenne River Sioux Tribal Court is not obligated under that statute to enforce the North Dakota court Orders awarding custody of C.S.N. to Nygaard. The district court properly granted summary judgment to the Tribal Court. The judgment of the district court is affirmed.

C. Contracting

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

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

Cochrane left Rosette's firm to start their own firm, Plaintiff W&C. The Pauma Band terminated Rosette's firm and hired W&C instead. The Pauma Band was highly successful in that lawsuit. In 1999, the Quechan Tribe entered into its own gaming compact with the State of California. On September 29, 2016, the Quechan Tribe hired W&C, along with its two founding partners, Williams and Cochrane, for legal advice on reducing those compact payments. The Attorney-Client Fee Agreement between the Quechan Tribe and W&C (the "Fee Agreement") had three different fee provisions: a monthly flat fee, a contingency fee, and—as an alternative to the contingency fee—a "reasonable fee" for services provided. Paragraph 4 of the Fee Agreement required the Quechan Tribe to pay a flat fee of $50,000 per month, without regard to the work performed or results obtained. On October 12, 2016, W&C, acting on behalf of the Quechan Tribe, formally requested that the State of California begin dispute resolution proceedings with the Quechan Tribe and negotiate the Tribe's gaming compact. On December 7, 2016, the Office of the Governor sent W&C a new draft compact that purported to reduce the Quechan Tribe's payment obligations by approximately $4 million annually. By June 2017, W&C believed that negotiations were nearing a conclusion. Months into the representation, the Tribal Council began having concerns about W&C's work and its cost. Shortly after being sworn in in March 2017, the new President of the Tribal Council, Keeny Escalanti, "developed concerns about the ongoing expenses W&C was charging the Tribe for what did not appear to be much work, and the length of time it was taking W&C to complete its contract negotiations with the State of California." In light of its concerns, the Quechan Tribe decided to fire W&C and hire the Rosette Defendants. Rosette's introduction to the Quechan Tribe did not come through W&C. On June 26, 2017, the six-member Quechan Tribal Council unanimously voted to retain the Rosette Defendants and terminated W&C the morning after. Escalanti and White explain that decision as follows: Because the Tribe was impressed with Mr. Rosette's experience in negotiating compacts in California, and because Rosette, LLP was willing to work for approximately 20% of the monthly fees Quechan was paying to W&C without any additional contingency fee, the Tribal Council thought it was a good idea to go forward with Rosette. The Tribe did not hire Mr. Rosette based on his litigation experience or based on his involvement in the Pauma Litigation, since no member of the Tribal Council mentioned or discussed litigation or the Pauma Litigation. In late August 2017, the Quechan Tribe, represented by the Rosette Defendants, and the State of California executed a new gaming compact, which "reduce[d] the Tribe's revenue sharing obligations by approximately four million dollars [ ] per year, and simultaneously increase[ed] the Tribe's ability to generate revenues through its Gaming Operation by providing the right to operate additional Gaming Facilities and Gaming Devices." The Tribe also agreed to make a discounted payment of $2 million to resolve approximately $4 million in missed payments under the 2006 Amendment. ECF No. 329-35 § 4.8; *see also* 4AC. There were substantive differences between the executed compact and the draft compact that W&C had sent the State on June 20, 2017. The Tribal Council was satisfied with the Rosette Defendants' work in negotiating the gaming compact for the Quechan Tribe and has engaged Rosette, LLP as the Quechan Tribe's general counsel, a position that the firm maintains to this day. In January 2018, Wilmer Hale, the

Quechan Tribe's counsel in this litigation, wrote to W&C stating that "it is not clear" whether W&C turned over the entire case file to the Quechan Tribe. W&C responded by questioning whether Wilmer Hale was in fact the Tribe's counsel because W&C "h[ad] yet to see anything confirming your representation of the Quechan Tribe." Relevant to the pending Motions, the First Amended Complaint included claims for breach of contract, breach of implied covenant, and two Lanham Act false advertising claims: the first based on the Pauma Sentence in the Rosette Bio, and the second based on a press release on the firm's website stating that Rosette was responsible for negotiating the contract between the Quechan Tribe and the State of California. The Court found that the Quechan Tribe's "failure to pay W&C the contingency fee envisioned in Section 5 of the fee agreement was not a breach of contract." The Court found that the statements that Rosette's litigation efforts were "successful" and that they resulted in $100 million in savings for Pauma were sufficiently misleading to plead a violation of the Lanham Act. There is a triable issue of material fact as to what "reasonable fee," if any, W&C has earned under Paragraph 11 beyond that which the Quechan Tribe has already paid. There is also a triable issue of material fact as to whether W&C itself materially breached the Fee Agreement by failing to ever return the client file to the Quechan Tribe, thereby excusing any nonperformance by the Quechan Tribe. Paragraph 12 of the Fee Agreement states that the Tribe "may have access to the Client's case file upon request at any reasonable time," and W&C did not comply. For the foregoing reasons, the Court hereby orders that: The Quechan Motion is granted as to W&C's claim for breach of the implied covenant of good faith and fair dealing and is otherwise denied; The W&C Motion against the Quechan Tribe is granted as to the Quechan Tribe's counterclaims for breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty, and is otherwise denied; The Rosette Motion is granted; The W&C Motion against the Rosette Defendants' is denied.

41. *San Carlos Apache Tribe v. Xavier Becerra,* 53 F.4th 1236, 2022 WL 17087827, No. 21-15641 (9th Cir. November 21, 2022).

Apache Tribe filed suit against United States Department of Health and Human Services (DHHS), Secretary of DHHS, Indian Health Service (IHS), principal deputy director of IHS, and United States, alleging, inter alia, that Secretary violated Indian Self-Determination and Education Assistance Act (ISDA) by failing to cover contract support costs (CSC) for portions of Tribe's healthcare program that were funded by revenue from third-party payors. Defendants filed Motion to Dismiss for Failure to State a Claim. The United States District Court for the District of Arizona, Neil V. Wake, Senior District Judge, 482 F.Supp.3d 932, granted the Motion. Tribe appealed. The Court of Appeals, Paez, Circuit Judge, held that under ambiguous ISDA provision, IHS was required to reimburse Tribe for CSC for healthcare activities funded by third-party revenues. Reversed and remanded. The parties agree that the CSC funding under the Funding Agreement (FA) will be calculated and paid in accordance with Section 106(a) of the ISDA. Defendants contend that the Tribe's claims are meritless because the Tribe received the amount of CSC specified by the contract, a properly calculated amount that

25 U.S.C. § 5325(a) does not override. The Court finds that this argument ignores the flexibility written into the Contract, which allows those amounts to be adjusted in the event of changes to "program bases, Tribal CSC need, [or] available CSC appropriations." A determination that the Tribe is owed CSC by statute for third-party-revenue-funded portions of its health-care program would fall under this umbrella. Additionally, because the contract incorporates the provisions of the ISDA, if that statute requires payment of the disputed funds, it controls. We proceed to determine whether the Tribe is owed those additional CSC by statute. Our conclusion departs from the only other circuit court to have considered this issue. In *Swinomish Indian Tribal Cmty. v. Becerra*, the D.C. circuit concluded that § 5325(a) does not comport with the reading that the Tribe advocates because "reimbursements for contract support costs cover activities that 'ensure compliance with the terms of the contract' conducted by the tribe 'as a contractor.'" 993 F.3d 917, 920 (D.C. Cir. 2021) (citing 25 U.S.C. § 5325(a)(2)). This ignores the plain language of the statute. As explained above, the contract and the statute both require tribes to spend their third-party revenue on healthcare services. Thus, the "cost of complying" with a contract between IHS and a tribe includes the cost of conducting those additional activities because but for conducting those activities, the Tribe would not be in compliance with the contract. Put differently, § (a)(2) does not limit CSC to activities "described in the contract" or "funded by the signatories to the contract," each of which would favor Swinomish's reading. Rather, it authorizes payment of CSC for all activities—regardless of funding source—that are required for compliance with the contract. This includes the third-party-revenue-funded portions of the program. It must be determined if CSC for the third-party-revenue-funded extensions of the Tribe's healthcare program are "directly attributable" to the contract, or are they "associated with [a] contract" between the Tribe and another "entity?" The Tribe argued that the CSC associated with third-parties revenue are "directly attributable" to the contract because but for that contract, the Tribe would not be required to bill Medicare and Medicaid—nor would it have the right to. Defendants urge us to agree with the district court, which reasoned that, although the third-party revenue at issue here was "undoubtedly 'attributable' to [the Tribe's] contract with IHS," it was not "directly attributable" to that contract. The district court reasoned that this language precluded the Tribe from collecting additional CSC. We are sensitive to the district court's careful analysis, but we disagree. We cannot conclude that the statute unambiguously follows Defendants' interpretation. Consider how insurance billing works in practice: a healthcare provider performs a procedure. The office then bills the patient's insurance. The contract requires the Tribe to do so. If insurance turns out to cover the procedure, the Tribe can keep the money. Otherwise, it's on the hook. Either way, the procedure has already been performed as required by the contract. If the Tribe keeps the money, it may spend it on further program services. This spending occurs only because the contract allows the Tribe to recover the insurance money and requires the Tribe to spend it. It is therefore not clear that this section unambiguously means that this spending is not "directly attributable" to the contract. Reversed and remanded.

42. *Merit Energy Company, LLC v. Debra Haaland,* 2022 WL 17844513, No. 21-8047 (10th Cir. December 22, 2022).

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

43. *Cully Corp. v. United States,* 2022 WL 17983329, No. 19-339C (CFC December 28, 2022).

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

From the outset, others benefited from Cully's efforts—the Air Force avoided the costs associated with remediation, the NSB obtained a long-term lease of uncontaminated property after Cully labored to redress the tainted soil left by the federal government, and the government permitted AECOM, Inc. to utilize buildings otherwise promised to Cully. Cully was rewarded for its efforts with the failure of their government to abide by its assurances, ultimately resulting in more than a decade of uncertainty and asymmetrical litigation. In any event, the losses suffered by Cully are simply not redressable by the claims it asserted before this Court. The Court finds and concludes that Cully has failed to prove damages compensable under the Fifth Amendment, as well as damages directly related to its quantum meruit claim. Therefore, the Court finds and concludes that the United States is entitled to judgment. The Clerk is directed to enter final judgment in favor of the United States pursuant to RCFC 58.

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

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

45. *Navajo Nation v. Haaland,* 57 F.4th 285, No. 22-5100 (D.C. January 13, 2023).

The Navajo Nation filed six separate lawsuits against Department of Interior (DOI) to enforce annual funding requests for Tribe's judicial system over a six-year span, under a series of self-determination contracts authorized by the Indian Self-Determination and Education Assistance Act (ISDEAA). Following consolidation of suits, the United States District Court for the District of Columbia, Tanya S. Chutkan, J., 2022 WL 834143, granted Navajo Nation summary judgment as to requests for two years and granted DOI summary judgment as to requests for remaining four years. Navajo Nation appealed. The Court of Appeals, Henderson, Circuit Judge, held that: [1] ISDEAA did not require DOI to approve four funding proposals, but [2] regulations did require DOI to approve four funding proposals. The Navajo Nation contends that

25 C.F.R. §§ 900.32-900.33, taken together, require the DOI to grant the Tribe's funding requests from 2017 through 2020. The two regulations relevant here prohibit the DOI from considering the declination criteria listed in 25 U.S.C. § 5321(a)(2) when evaluating certain proposals made by an Indian tribe. See 25 C.F.R. § 900.33 (applying prohibition to "proposals to renew term contracts"); *Id.* § 900.32 (applying prohibition to "proposed successor annual funding agreement[s]"). So long as the DOI has tied its own hands with regulations like sections 900.32 and 900.33, only the Congress, not the DOI, wields the authority to reduce a self-determination contract's funding level without the tribe's agreement. *See* 25 U.S.C. § 5368(g)(3)(B)(ii) (prohibiting the Secretary from reducing "the amount of funds required under this subchapter" "except as necessary as a result of," inter alia, "a congressional directive in legislation or an accompanying report"); S. REP. NO. 100-247, at 17 (describing the Congress's intent "to prevent tribal contract funding amounts from being unilaterally reduced by the Secretary"); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (the ISDEAA "circumscribe[s] as tightly as possible the discretion of the Secretary"). The DOI's failure to decline in a timely manner the Tribe's proposal in 2014 proved to be costly. For the foregoing reasons, we reverse the district court's order granting summary judgment to the Department of the Interior and remand to the district court for proceedings consistent with this opinion.

46. *Northern Arapaho Tribe v. Xavier Becerra,* 2023 WL 2359238, No. 21-8046 (10th Cir. March 6, 2023).

The Northern Arapaho Indian Tribe brought an action alleging that Indian Health Service (IHS) breached contract under the Indian Self-Determination and Education Assistance Act (ISDEAA) for the Tribe to operate a federal healthcare program by failing to reimburse it for overhead costs associated with setting up and administering third-party billing infrastructure, as well as administrative costs associated with recirculating third-party revenue it received. The United States District Court for the District of Wyoming, Nancy D. Freudenthal, J., 548 F.Supp.3d 1134, dismissed complaint, and Tribe appealed. The Court of Appeals, Moritz, Circuit Judge, held that: [1] Tribe's administrative expenditures associated with collecting and expending revenue obtained from third-party insurers qualified as reimbursable contract support costs, and [2] ISDEAA provision requiring that funds available to tribal health programs be expended "only for costs directly attributable to contracts, grants and compacts" did not bar Tribe's claim. Two members of the panel vote to reverse, albeit for different reasons. Judge Mortiz does so because the relevant statutory provisions are ambiguous, and the Indian canon of statutory construction resolves the ambiguity in the Tribe's favor. That is, because the Tribe presents a reasonable interpretation of the ambiguous statutes, the canon dictates that the statutes "must be construed that way." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011) (quoting *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997)), aff'd, 567 U.S. 182, 132 S.Ct. 2181, 183 L.Ed.2d 186 (2012). Judge Eid would instead reverse because the relevant statutes unambiguously support the Tribe's interpretation, making it unnecessary to resort to the

Indian canon of construction. Under either of our interpretations, the administrative expenditures associated with collecting and expending revenue obtained from third-party insurers qualify as reimbursable contract support costs. One aspect of the Tribe's argument, which the government does not dispute, is well-founded: Once a statute is determined to be ambiguous, the rule of liberal construction is more than an "ambiguity tiebreaker." Instead, when faced with ambiguity, the Tribe need not advance the best interpretation of the statute at issue, only a reasonable one. *See Ramah Navajo Chapter*, 644 F.3d at 1057; *Lujan*, 112 F.3d at 1462 (observing that "the canon of construction favoring [tribes] necessarily 'constrain[s] the possible number of reasonable ways to read an ambiguity in [the] statute'" (alterations in original) (quoting *Massachusetts v. U.S. Dep't. of Transp*., 93 F.3d 890, 893 (D.C. Cir. 1996))). Accordingly, we reverse and remand to the district court for further proceedings.

47. *Santa Ynez Band of Chumash Mission Indians of The Santa Ynez Reservation California, v. Lexington Insurance Company*, 90 Cal.App.5th 1064, 2d Civ. No. B320834 (CA Ct. App., April 27, 2023).

Insured Native American Tribe, which operated casino and resort, brought action against its "all risk" commercial property insurer, seeking declaratory relief and alleging breach of contract and of implied covenant of good faith and fair dealing after insurer denied its claim that the COVID-19 virus caused covered physical property damage to its casino and resort. The Superior Court, Santa Barbara County, No. 20CV01967, James F. Rigali, J., 2022 WL 16950461, granted insurer's motion for summary judgment. Insured appealed. The Court of Appeals, Gilbert, P.J., held that insured was not entitled to coverage under policy. Experts disagreed whether the property was permanently damaged or altered by the COVID-19 virus landing on its surface. We decided this is not a loss as provided in the insurance contract. In a motion for summary judgment, a plaintiff must show the alteration is so material that it caused specific economic damage to the property to make a sufficient property damage insurance claim. We conclude, among other things, that the Chumash Tribe did not present sufficient evidence to show that the COVID-19 virus caused physical property damage to its casino and resort so as to fall within the property damage coverage provisions of the Lexington insurance policy. The all-risk clause provided: "Subject to the terms, conditions and exclusions stated elsewhere herein, this Policy provides insurance against all risk of direct physical loss or damage occurring during the period of this Policy." The policy contained "business interruption" coverage "[a]gainst loss resulting directly from interruption of business, services or rental value caused by direct physical loss or damage, as covered by this Policy to real and/or personal property insured by this Policy, occurring during the term of this Policy." The trial court granted summary judgment in favor of Lexington. It ruled, "As a matter of California law, COVID-19 does not cause 'direct physical loss or damage' to property." We affirm.

48. *Oglala Sioux Tribe, v. United States*, 2023 WL 3606098, 5:22-CV-05066-RAL (D. South Dakota, May 23, 2023).

Plaintiff, the Oglala Sioux Tribe ("The Tribe"), is a federally recognized Indian tribe. The Tribe has roughly 51,000 enrolled tribal members and is headquartered on the Pine Ridge Indian Reservation, which encompasses approximately 3.1 million acres in southwestern South Dakota. The Tribe is a signatory and party to several treaties with the United States and brings this lawsuit against various federal Defendants seeking additional law enforcement resources the Tribe believes it was promised under those treaties and subsequent federal statutes. In recent years, communities on the Reservation have struggled with dangerous and highly addictive drugs and experienced unprecedented levels of violence and threats to public safety. The pending Motions frame the question of what, if any, duty Defendants have to fund tribal law enforcement on the Reservation. Evaluating what duty Defendants owe the Tribe requires examining the somewhat complex history between the United States and the Oglala Sioux Tribe. This Court concludes that the United States has a treaty duty unique to the Tribe to provide protection and law enforcement cooperation and support on the Reservation. Thus, this Court denies Defendants' Motion to Dismiss, that asserts there exists no such duty at all. However, the Tribe has not shown at this stage that a duty extends to entitle the Tribe to the level of funding or support that it sought in its law enforcement and criminal investigations proposals, so this Court grants only in limited part, the Tribe's Emergency Motion for Preliminary Injunction. Whether the Tribe's Amended Complaint states a cause of action hinges primarily on whether the United States owes the Tribe some duty concerning law enforcement on the Reservation and the scope of any such duty. The text of the First Bad Men Clause in the 1868 Treaty contemplates several scenarios in which the "United States will ... cause the offender to be arrested and punished according to the laws of the United States ...." The First Bad Men Clause puts law enforcement responsibility on the United States where bad men among the whites or other people subject to the authority of the United States commit any wrong upon the person or property of tribe-member Indians. This aligns with the Tribe's desire in 1868 to secure peace in tribal lands across the Great Sioux Reservation and preserve tribal members' way of life. In short, the Tribe wanted to be left alone to the extent possible and deal with the wrongful conduct of the white man as little as possible. Thus, it makes sense that the Tribe would expect the United States to assume responsibility, or at least provide support, for policing non-tribal members who entered the Reservation and committed wrongs on tribal members or their property. Put simply, the plain language of the 1868 Treaty vests the United States government with some responsibility for law enforcement on the Tribe's Reservation. The language of the 1868 Treaty is somewhat ambiguous about the extent of federal responsibility for law enforcement on the Reservation, but not so ambiguous to negate finding a treaty-based duty. Claim one seeks a Declaratory Judgment that Defendants have a duty to ensure competent and effective law enforcement on the Reservation and claim two alleges mismanagement of funds and seeks an accounting based on that same duty. In the Defendants' view, "neither the 1825, 1851, and 1868 Treaties, nor any of the statutes that Plaintiff identifies, impose a specific treaty duty to provide law enforcement

personnel or funding at the Tribe's preferred level." There is no specific treaty duty to fund law enforcement personnel at the "Tribe's preferred level," but the United States certainly owes some duty related to law enforcement to the Tribe as a signatory to the 1825 Treaty, 1851 Treaty, and 1868 Treaty. In claims three through six of the amended complaint, the Tribe invokes the Indian Self-Determination and Education Assistance Act (ISDEAA). The Tribe's Amended Complaint alleges sufficient facts to survive the Defendants' Motion to Dismiss. Indeed, those likely are cognizable claims under ISDEAA, even absent a separate treaty-based duty. The alleged public safety shortfalls on the Reservation combined with the treaty-based duty owed to the Tribe state a plausible claim that the Defendants are failing to provide the Tribe with the amount of funding that the federal government would otherwise spend to fulfill its law enforcement treaty duty on the Reservation were those responsibilities not contracted to the Tribe under ISDEAA. The Tribe's ISDEAA claims three through six of the amended complaint survive the Motion to Dismiss. However, the Tribe has not shown a likelihood of success on the merits sufficient to justify a preliminary injunction to restrain Defendants' use of a historical base amount in its allocations to direct a different service population (on which there remains a dispute of fact), or to fund the Tribe's law enforcement at the level the Tribe requested in its proposals. Plaintiff's Motion for Preliminary Injunction is granted in part and denied in part. The preliminary injunction is granted to the limited extent that this Court determines that the United States has a duty of protection, cooperation, and support of the Tribe's law enforcement, and the Defendants' may neither abandon altogether funding and support of the Tribe's law enforcement, nor act arbitrarily and capriciously, or otherwise in disregard of that duty. Defendants should reevaluate the Tribe's requested funding including the service population data and provide technical assistance to the Tribe to refine its funding requests.

49. *Swinomish Indian Tribal Community v. BNSF Railway Company,* 2023 WL 5301426, 2:15-CV-00543-RSL (W.D. Washington, July 17, 2023).

This matter comes before the Court on BNSF Railway Company's Motion to Compel Arbitration. The Federal Arbitration Act (FAA) makes agreements to arbitrate disputes "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[A] court may order arbitration of a particular dispute [, however,] only where the court is satisfied that the parties agreed to arbitrate that dispute." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010). When determining whether parties have agreed to arbitrate a particular dispute, "[t]he court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA.]'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). If the issue is whether the parties agreed to arbitrate threshold issues regarding arbitrability of a particular dispute, federal arbitration law requires courts to presume that the parties intend courts, not arbitrators, to decide whether the parties are bound by a given arbitration clause or whether an arbitration clause in a concededly

binding contract applies to a particular type of controversy. The Washington Supreme Court recently clarified "that incorporation by reference does not, in itself, establish mutual assent to the terms being incorporated" in the absence of evidence in the record that the parties to the agreement "had knowledge of and assented to the incorporated terms." *Burnett v. Pagliacci Pizza, Inc*., 196 Wn.2d 38, 49 (2020). In the circumstances presented here, neither party had access to the incorporated contract term BNSF seeks to enforce because it was not yet in existence. There is no indication that either party considered submitting, much less agreed to submit, the issue of arbitrability to the arbitrator. BNSF nevertheless argues that the Tribe agreed to arbitrate gateway issues because, under Rule 1 as it existed in 1991, the Tribe agreed that the American Arbitration Association rules "and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated." The issue, however, is whether there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. It is undisputed that the parties never negotiated, considered, or agreed to arbitrate gateway issues: the Easement Agreement and the AAA rules in force at the time are silent on the matter. As a matter of undisputed fact, the parties did not reach any agreement on delegation. In this case, the parties agreed to pursue arbitration of their on-going rental adjustment dispute before retired United States District Judge Ronald B. Leighton. They subsequently agreed to include in that arbitration the damages claims at issue here if the court were to grant BNSF's motion to compel. BNSF's Motion to Compel Arbitration is denied.

50. *Harris v. FSST Management Services, LLC d/b/a 605 Lending,* 2023 WL 5096295, Case No. 22 C 1063 (N.D. Illinois East. Dist., August 9, 2023).

This matter comes before the Court on Defendants' Motion to Dismiss. For the reasons stated herein, the Court will deny the Motion. FSST Management Services, LLC is a lending entity affiliated with the Flandreau Santee Sioux Tribe — a federally recognized Indian tribe located in Moody County, South Dakota. The controversy arises out of FSST Defendants' involvement in a lending enterprise operating through the website www.605lending.com. Defendant First Direct Mediation, Inc. ("First Direct Mediation") was responsible for collecting the loans. Plaintiff Joshua Harris filed his class action complaint on behalf of two classes pursuant to Fed. R. Civ. P. 23(a) and (b)(3). The Complaint alleges that Defendants' lending operation is what is referred to as a "rent-a-tribe" lending scheme. This scheme consists of tribal lenders' attempt to evade state and federal consumer protection laws by claiming their high-interest lending practices are owned and operated by Indian tribes and therefore entitled to tribal sovereign immunity. Defendants moved to dismiss the Complaint and compel arbitration under Fed. R. Civ. P. 12(b)(3) for improper venue in light of the mandatory arbitration provision in the loan agreement entered into between FSST and Plaintiff. Defendants argue in the alternative that they are entitled to sovereign immunity and thus immune from the suit pursuant to Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6), and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Plaintiff responds that the entire loan agreement, which implicitly includes the delegation and arbitration provisions, are unenforceable because (1) they serve as an improper prospective waiver of federal and state

rights; and (2) they are substantively and procedurally unconscionable. While neither choice-of-law provision in the Harris Agreement explicitly precludes the application of federal law, courts in other districts have condemned loan agreements under the prospective waiver doctrine where the agreement, as a whole, exhibits an attempt to evade the application of state or federal law. *Hayne Invs.*, 967 F.3d at 342 (the "practical effect" of the loan agreements' terms requiring the arbitrator to apply tribal law and render a decision consistent with tribal law was to "implicitly disavow" all other law, and to preempt the application of contrary federal law); *see also Hengle v. Treppa*, 19 F.4th 324, 339. Here, Defendants offer nothing to suggest the Tribe's law accomplishes vindication of the rights Plaintiff seeks to vindicate under federal and state law. In summary, the Court concludes the Harris Agreement is unenforceable as a prospective waiver of federal and state statutory rights, and because the Agreement is substantively and procedurally unconscionable. Thus, Defendants' Motion to Dismiss and to Compel Arbitration is denied. The parties are ordered to submit a briefing schedule for the remaining bases on which Defendants' move to dismiss.

51. *Huntley and Jackson, et al., v. Rosebud Economic Development Corporation, et al.,* 2023 WL 5186247, Case No. 22-cv-1172-L-MDD (S.D. California, August 11, 2023).

Pending before the Court are Defendant 777 Partner, LLC's ("777") Motion to Compel Arbitration and Motion to Dismiss in this putative class action. On November 29, 2019, Plaintiff Katey Huntley took out an unsecured consumer loan from Defendant Rosebud Lending LZO d/b/a ZocaLoans with a principal amount of $1,000 and an interest rate of 736.38% APR. Plaintiffs made payments on the loans, but eventually were unable to make regular payments. ZocaLoans thereafter made attempts to collect on the loans. Plaintiffs assert that Zoca falsely advertises that it is wholly owned by Rosebud Economic Development Corporation ("REDC"), a tribal corporation incorporated under the laws of the Rosebud Sioux Tribe of the Rosebud Indian Reservation, but, instead it is controlled entirely by non-tribal members. Plaintiffs aver in the Complaint that Defendant Tactical Marketing Partners ("Tactical") a non-tribal entity, obtains consumer credit reports on behalf of the business endeavor and provides that information to Defendants Zoca and 777. Non-tribal Defendant 777 purportedly provides the employees and systems that are utilized to underwrite and approve the loans made by Zoca. Plaintiffs' claim that the funding of the loan by Zoca is in name only and is intended to use Zoca's status as a tribal entity to avoid liability for the schemes' unlawful lending practices. The party seeking to compel arbitration under the FAA has the burden to show: "(1) the existence of a valid, written agreement to arbitrate; and, if it exists, (2) that the agreement to arbitrate encompasses the dispute at issue." *Ashbey v. Archstone Property Mgmt.,* 785 F.3d 1320, 1323 (9th Cir. 2015). The present case involves 777, a nonsignatory, seeking to compel a signatory, Plaintiffs', to arbitrate its claims against the nonsignatory. Under the facts as alleged 777 may enforce the arbitration agreements as non-parties under either equitable estoppel theory. Even if Defendant 777 can compel arbitration, Plaintiffs challenge the validity of the arbitration clause and claim that the Court must determine the threshold issue of arbitrability. In *Momot v. Mastro*, the Ninth Circuit

held that similar language in an arbitration provision required arbitration of arbitrability. 652 F.3d 982, 988 (9th Cir. 2011). Plaintiffs' argument fails in light of Defendants' citation to the governing provision of the Rosebud Sioux Tribe contract law. Plaintiffs challenge the Agreements on multiple grounds of unconscionability, claiming that the Agreements are procedurally unconscionable because they were contracts of adhesion, and that the Agreements are substantively unconscionable because the choice of law provision that dictates "the laws of the Rosebud Sioux Tribe" apply is an unreasonable prospective waiver of federal law as well as California state statutory protections against usurious loans. Defendant claims that the choice of law provision is not a prospective waiver of Plaintiffs statutory rights because the Agreements do not expressly waive Plaintiffs' federal statutory rights, and the 777 Defendants do not assert that Plaintiffs are barred from pursuing federal claims. Plaintiffs have not met their burden to demonstrate the Agreements are procedurally unconscionable. Plaintiffs have failed to show that the substantive law of the Rosebud Sioux Tribe is contrary to California's policy on usury, or that the arbitrator will not apply California law to those claims, therefore, the choice of law provision does not violate California's choice of law framework. For the foregoing reasons, the Court grants Defendant 777's Motion to Compel Arbitration and denies Defendant 777's Motion to Dismiss as moot.

52. *Fitzgerald et al. v. J. Wildcat Sr. et al.,* Case No. 3:20-cv-00044, 2023 WL 5345302, (W.D. Virginia, August 18, 2023).

Plaintiffs Lori Fitzgerald, Aaron Fitzgerald, Kevin Williams, Jade Singleton, and Angela Maville have filed a class action complaint against Tribal officials, Tribal employees, and a non-tribal payday lender and its owner, claiming they participated in an illegal tribal lending operation involving short-term, high interest loans. They seek damages and prospective relief for Defendants'' alleged Racketeer Influenced and Corrupt Organizations Act ("RICO") and state law violations for issuing and collecting on their high-interest loans. Around 2012 or 2013, the Lac du Flambeau Band of Lake Superior Chippewa Indians, a federally recognized Native American tribe, began partnering with non-tribal payday lenders that allegedly wished to skirt state and federal lending laws. Through these partnerships, non-tribal payday lenders have entered into agreements allowing them to oversee and collect on loans issued by lending entities owned by the Tribe. The Tribal Lending Entities have issued short-term, high interest loans to Virginia, Georgia, Maryland, and Florida residents and others over the internet. Non-tribal payday lenders allegedly believe this arrangement circumvents otherwise applicable protections deriving from state usury and licensing laws through tribal sovereign immunity. Most of the named Defendants—Wildcat, Johnson, Thompson, Allen, Stone, Bauman, Germaine, Chapman, Bell, Cobb, Graveen, and Pyawasit—serve on the Tribal Council. While the Tribal Council "retains the ultimate authority over management of all economic affairs and enterprises of the Tribe," it "has delegated some of this authority to the [LDF] Business Development Corporation," and delegated some responsibility to LDF Holdings. The Tribe has relinquished the right to control its lending entities to non-tribal payday lenders through servicing agreements.

While LDF Holdings is the parent company for the Tribal Lending Entities, each Tribal Lending Entity has entered into servicing agreements that outsource the operations and revenue to non-tribal payday lenders. Plaintiffs Williams, Singleton, and Maville entered into loan agreements with arbitration provisions. The Arbitration Provision states that an arbitrator shall apply applicable substantive law consistent with the Governing Law set forth above, and the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") and applicable statutes of limitation, and shall honor claims of privilege recognized at law. The referenced Governing Law section provides: "The laws of the Tribe and applicable federal law will govern this Agreement, without regard to the laws of any state or other jurisdiction, including the conflict of law rules of any state. You agree to be bound by Tribal law, and in the event of a bona fide dispute between you and us, Tribal law and applicable federal law shall exclusively apply to such dispute." *Id.* at 9-10. Here, the parties dispute whether a binding arbitration provision exists. Parties to an arbitration agreement may agree to have a delegation clause. This clause delegates "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate," to an arbitrator. *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S. Ct. 524, 529 (2019). But Plaintiffs have properly challenged the delegation clause's validity based on the same reasons they provide for the Arbitration Provision being unenforceable, arguing that the Arbitration Provision prospectively waives statutory rights and remedies. The Fourth Circuit has repeatedly "refused to enforce arbitration agreements that limit a party's substantive claims to those under tribal law, and hence forbid federal claims from being brought" in arbitration. *Hengle v. Treppa*, 19 F.4th 324, at 334 (4th Cir. 2021). However, the use of the phrase—"applicable federal law"—in the Governing Law section reasonably means that a potential claimant may assert any "applicable" federal claim based on the facts of his or her case. Even though the agreements do not undisputedly waive federal rights, Plaintiffs still argue that Defendants' Motions to Compel should be denied because the prospective waiver doctrine extends to arbitration agreements waiving state substantive rights and remedies. The Court agrees, in part, concluding that the delegation clause and the entire Arbitration Provision here violate public policy because the loan agreements prospectively waive the vindication of any state substantive remedies and rights in arbitration, including Plaintiffs' rights to pursue state usury claims. Therefore, they are unenforceable. Fourth Circuit precedent supports extending the prospective waiver doctrine to an arbitration provision prospectively waiving all state substantive rights. A recent Supreme Court case further supports extending the doctrine to an agreement prospectively waiving a borrower's right to pursue any state statutory remedy. In *Viking River Cruises, Inc. v. Moriana*, the Supreme Court reiterated the principle that a party who agrees to arbitrate a statutory claim "does not forgo the substantive rights afforded by the statute;" rather, "it only submits to their resolution in an arbitral forum."11 142 S. Ct. 1906, 1919 (2022). The Tribal Council and Tribal Employee Defendants move to dismiss Plaintiffs' claims, asserting: (1) that tribal sovereign immunity, or (2) alternatively, personal immunity defenses bar Plaintiffs' claims, and (3) that Plaintiffs lack Article III standing. Tribal immunity does not bar "a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." *Bay Mills Indian Cmty.,* 572 U.S. at 796. And it "does not bar state law claims for prospective

injunctive relief against tribal officials for conduct occurring off the reservation." *Hengle*, 19 F.4th at 345. But when tribal officials and employees are sued for damages in their individual capacities, courts must assess "whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, 581 U.S. 155, 161 (2017). In making this determination, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." Here, Plaintiffs seek damages for their RICO claims against the Tribal Council and Tribal Employee Defendants, in their individual capacities, based on loans issued online to them when they were located on non-tribal lands. They do not seek relief from the Tribal Treasury, nor do they seek to interfere with the Tribe's self-governance or authority. Accordingly, the Tribe is not the real party in interest and thus the Tribe's sovereign immunity is not implicated. In the alternative, Defendants assert that the Tribal Council Defendants, in their individual capacities, are immune from damage liability based on personal immunity defenses. The Tribal Council Defendants fail to meet their burden of demonstrating "that absolute immunity is essential for the conduct of the public business." *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). Defendants provide no authority for their position that absolute immunity extends to tribal officials overseeing and managing loans. Thus, the Court concludes that qualified rather than absolute immunity is sufficient to protect the Tribal Council Defendants in the exercise of their duties. The Court will defer ruling on whether the Tribal Council Defendants are entitled to qualified immunity. Contrary to Defendants' additional argument, Plaintiffs' claims against Tribal Council Defendants, in their official capacities, renders the inclusion of the Tribe and Tribal Lending Entities unnecessary under Rule 19. *See Hengle v. Asner*, 433 F. Supp. 3d 825 at 870 (E.D. Va. 2020) (finding plaintiffs' "claims against the Tribal Officials in their official capacities renders the inclusion of the Tribal Lending Entities unnecessary under Rule 19"); *Gingras v. Rosette*, No. 5:15-cv-101, 2016 WL 2932163, at *20 (D. Vt. May 18, 2016), aff'd sub nom. *Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019) (finding that the presence of the tribal officials satisfies the requirements of Rule 19 because "tribal interests may be adjudicated through *Ex Parte Young*"). The Court can award Plaintiffs' prospective relief against Tribal Council Defendants, rendering the Tribe and the Tribal Lending Entities unnecessary to accord complete relief. For the above reasons, the Court will deny Defendants' Motions to Compel arbitration of Plaintiffs Williams, Singleton, and Maville's claims. The Court will also deny the Tribal Council and Tribal Employee Defendants and Defendants Pruett and Skytrail Servicing's Motions to Dismiss for Lack of Subject Matter Jurisdiction, for failure to join a necessary party, for failure to state a claim for relief, and for lack of personal jurisdiction. In summary, all of Plaintiffs' claims will survive Defendants' Motions.

D. Employment

53. *Weiss v. Perez,* 635 F. Supp. 3d 930, Case No. 22-cv-00641, 2022 WL 1471453 (N.D. Cal. October 19, 2022).

In this case, Elizabeth Weiss, a tenured professor of physical anthropology at San Jose State University, alleges that the University has retaliated against her for her speech expressing opposition to repatriation of Native American remains. Weiss brings two claims under 42 U.S.C. § 1983 for violation of her First Amendment rights. Weiss specializes in osteology, the study of human skeletal remains. Weiss is a critic of repatriation, which is a process through which Native American remains and cultural items are returned to tribes. In 2020, she published a book titled "Repatriation and Erasing the Past," which criticizes federal and state laws that require universities and museums to return Native American remains to tribes. She argues in the book that these laws "undermine objective scientific inquiry and violate the Establishment Clause of the United States Constitution by favoring religion over science." The book generated significant criticism, with about a thousand professors and graduate students signing an open letter calling the book "anti-indigenous" and "racist." Weiss also authored an op-ed and tweet that received criticism. On August 31, 2021, she published an op-ed in The Mercury News and The East Bay Times outlining her critique of AB 275, which amended California Native American Graves Protection and Repatriation Act (CalNAGPRA). After the op-ed was published, the University received "vitriolic emails" from academics and the public demanding discipline. On September 18, 2021, Weiss posted a tweet to her Twitter account stating, "So happy to be back with some old friends" and included a photo of her holding a skull from the University's collection. In 2022, the University adopted an updated interim directive that allegedly indicates that research on the NAGPRA collection is not permitted. Weiss alleges that she is the University's only faculty member who regularly accesses skeletal remains for research. She claims that the Directive "cuts [her] out of her contractually assigned leadership responsibilities for the collection and impedes her research." First, Defendants argue the case must be dismissed under Rule 12(b)(7) for failure to join a required party. Second, they argue the case should be dismissed under Rule 12(b)(1) because Weiss lacks standing for her requested relief. Third, Defendants argue Weiss fails to state a claim under Rule 12(b)(6). Fourth, Defendants argue that all claims should be dismissed as to Defendants Sunseri and Ragland. Here, the proximity in time between Plaintiffs' book publication, op-ed, and tweet, among other things, and the alleged adverse employment actions is sufficient to plead that the speech was a "substantial or motivating factor" in the University taking those actions. There may ultimately be other justifiable explanations for the University's actions, such as the requirement to comply with NAGPRA and CalNAGPRA, but at the Motion to Dismiss, the Court looks only at whether there is a plausible inference that the actions were the result of Weiss's speech and, given the proximity in time, it finds that there is. Weiss has thus adequately alleged that her speech was a "substantial or motivating factor" in the University's actions. Defendants focus their arguments

on specific adverse employment actions alleged by Weiss. Ordered that Defendants' Motion to Dismiss is granted as to Defendants Sunseri and Ragland and denied as to all other Defendants.

54. *Colin Graham Meglitsch, v. Southcentral foundation,* No. 3:20-cv-0190-HRH, 2022 WL 16949256 (D. Alaska November 15, 2022).

Defendant is a Tribal organization under Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA). A Tribal organization under the ISDEAA includes "any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body...." 25 U.S.C. § 5304(l). Defendant has been designated by the Cook Inlet Region, Inc. (CIRI) and eleven federally recognized tribes, including the Takotna Village, to carry out federal health care programs for Alaska Natives and Native Americans. Defendant receives the federal funds that CIRI and the tribes would receive directly if they had chosen to operate their own health care programs. Plaintiff is employed as a Community Health Aide at Defendant's health clinic in Takotna, Alaska. Plaintiff has worked as a Community Health Aide in Takotna for more than ten years and lives in housing provided by Defendant. The Community Health Aide position "is a non-professional position." Plaintiff alleges that "[d]uring the last three years of his employment with" Defendant, he "worked over 15,000 hours of on-call responsibilities, for which he only received $4.00 per hour, rather than one and one half his normal rate, as is required under Federal Wage and Hour law." Plaintiff asserts a single cause of action, alleging that Defendant violated the Fair Labor Standards Act ("FLSA") by failing to properly pay him overtime for the on-call hours he worked. This case involves the first exception, whether "the law 'touches exclusive rights of self-governance in purely intramural matters[.]" *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *U.S. v. Farris,* 624 F.2d 890, 893 (9th Cir. 1980)). This exception applies "only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated." *Snyder v. Navajo Nation,* 382 F.3d 892, 895 (9th Cir. 2004). Defendant too is providing a core tribal government function, the provision of health care to Alaska Natives and Native Americans. That defendant receives payment from Medicare, Medicaid, and private insurance companies does not mean that the self-governance exception cannot apply to it. The court concludes, as a matter of law, that the FLSA, although a statute of general applicability, does not apply to Defendant's employment of Plaintiff. Defendant's Motion for Summary Judgment is therefore granted.

55. *Bitsoi v. Haaland,* Civ. No. 21-0180 JCH-JHR, 2023 WL 131052 (D.N.Mex. January 09, 2023).

On March 4, 2022, Defendant Deb Haaland, Secretary of the United States Department of the Interior, filed a Motion for Summary Judgment on Plaintiff's claims for retaliation and race, color, and age discrimination. The Court concludes that Defendant's Motion should be granted, and judgment will be entered in favor of Defendant on all counts. Plaintiff Elvira Bitsoi ("Plaintiff" or "Bitsoi") is a Navajo Native American woman with brown skin tone who was born in 1963. The Bureau of Indian Education ("BIE") hired Plaintiff as an Education Program

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

onsite visits to Grant/Pueblo schools, failing to provide resources for those schools, and failing to develop a Native Language Assessment for those schools. Defendant thus satisfied the burden to explain the actions against the Plaintiff in terms that are not facially prohibited by Title VII. *See Jones v. Barnhart*, 349 F.3d 1260, 1266 (10th Cir. 2003). Defendant's Motion for Summary Judgment is granted and all Plaintiff's claims are dismissed with prejudice.

56. *Thompson, v. Housing Authority of the Cherokee Nation, et al.,* No. CIV-22-173-JAR, 2023 WL 25339 (E.D. Okla. January 3, 2023).

This matter comes before the Court on Defendants' Motion to Dismiss Petition. Plaintiff alleges that he was an employee of Defendant Housing Authority of the Cherokee Nation ("HACN") for twenty years prior to his termination. Plaintiff further alleges that on January 30, 2020, a committee of the Cherokee Nation Tribal Council held a meeting to discuss a potential amendment of the Cherokee Nation's implementation of the Indian Child Welfare Act. Plaintiff states that his "schedule allowed for him to attend the meeting of the committee of the Cherokee Nation...." on January 30, 2020, during his lunch break. After several members of the Tribal Council voted to table action on the amendments indefinitely, Plaintiff states that he posted to social media the next morning concerning the meeting. He alleges that he "expressed his frustration" at the Tribal Council's actions, which resulted in Tribal Council members receiving "significant public criticism." Plaintiff alleges that he was actually terminated "for engaging in Constitutionally protected speech in his personal capacity by speaking publicly about matters of great public concern, involving action taken by certain members of the Tribal Council of the Cherokee Nation...." He alleges that the policy violations cited for his termination "were simply pretext for this retaliation." To prevail on a free speech claim as Plaintiff asserts in this action, he must demonstrate (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. At the very least, in order to state a plausible free speech claim, Plaintiff must set out the speech that he made. He has not done so in the Petition, only stating that he posted on social media. This level of vagueness does not meet the *Twombly*/*Iqbal* standards. *Bell Atlantic Corp. v. Twombly*, 550 U.S.544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plaintiff will be required to file an Amended Complaint to set out the facts that support the elements referenced in *Leverington* for the constitutional claims in Counts Three and Four. *Leverington v. Colorado Springs*, 643 F.3d 719, 724 (10th Cir. 2011). The Counts Five and Six – Burk and Constitutional Torts against Cooper and Tyner, Count Seven – Intentional Infliction of Emotional Distress against Defendants Cooper and Tyner, and Count Eight – Civil Conspiracy against Cooper and Tyner are hereby dismissed. Further, Plaintiff shall file an Amended Complaint providing further factual support for Counts Three and Four – against all Defendants pursuant to 42 U.S.C. § 1983.

57. *Tsosie v. N.T.U.A. Wireless LLC, et al.,* No. CV-23-00105-PHX-DGC, 2023 WL 4205127 (D. Arizona, June 27, 2023).

Plaintiff Velena Tsosie brings this action against her employer, Defendant NTUA Wireless, her former supervisor, Defendant Walter Haase, and his wife. Defendants move to dismiss the complaint under Rule 12(b)(1). Plaintiff asserts claims for violation of Title VII of the Civil Rights Act of 1964, violation of the Arizona Civil Rights Act, A.R.S. § 41-1463, assault, battery, and intentional infliction of emotional distress. Defendants move to dismiss the complaint on tribal immunity grounds. The Ninth Circuit has adopted five factors for assessing whether an entity is an "arm of the tribe" – (1) the method of creation of the entity; (2) the purpose of the entity; (3) the structure, ownership, and management, including the tribe's control over the entity; (4) the tribe's intent to share sovereign immunity; and (5) the financial relationship between the tribe and the entity. *White v. Univ. of California,* 765 F.3d 1010,1025 (9th Cir. 2014). (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)); see also *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). NTUA does not wholly own Wireless, and Wireless was not formed under the laws governing the Tribe. Other courts considering similar circumstances have declined to confer tribal immunity. See *Somerlott v. Cherokee Nation Distribs., Inc.,* 686 F.3d 1144, 1150 (10th Cir. 2012). Further, Wireless – the Delaware corporation – is the defendant in this case, not NTUA. As a Delaware company, Wireless does not enjoy NTUA's tribal immunity by virtue of being partly owned by NTUA. *McCoy v. Salish Kootenai Coll., Inc.*, 785 F. App'x 414, 415 (9th Cir. 2019). The operating agreement is silent on the Navajo Nation Council's intent to share sovereign immunity with Wireless. But the Tribe's express waiver of NTUA's immunity in the operating agreement and the fact that NTUA only partially owns Wireless imply that the Tribe did not intend to render Wireless immune. *Cf. Breakthrough,* 629 F.3d at 1193 n.15 ("[B]ecause the Casino is wholly owned by the Authority, it is logical to assume that if the Tribe intended for the Authority to have immunity from suit, it also intended for the Casino to have immunity."). Three of the five relevant factors weigh against immunity, and a fourth weighs slightly in that direction. The Court accordingly concludes that Wireless is not "an arm of [the Navajo Nation], acting as more than a mere business." *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998). Defendants' Motion to Dismiss is denied.

58. *Mestek v. LAC Courte Oreilles Community Health Center, et al.,* 72 F.4th 255 (7th Cir., June 29, 2023).

Former employee brought action against Tribal Medical Center and its employees under False Claims Act ("FCA"), alleging that health center fired her in retaliation for flagging irregularities in its billing practices that she believed reflected fraud. The United States District Court for the Western District of Wisconsin, William M. Conley, J., 2022 WL 1568881, dismissed Complaint, and employee appealed. The Court of Appeals, Scudder, Circuit Judge, held that: [1] FCA's anti-

retaliation prohibition did not abrogate tribe's sovereign immunity; [2] tribal code of law was subject to judicial notice; [3] health center was entitled to tribal sovereign immunity; and [4] employee's claims against medical center's individual employees were barred by tribal sovereign immunity. Although Mestek has not sued the Tribe itself, the Health Center is an arm of the Tribe and therefore entitled to avail itself of the Tribe's sovereign immunity. Further, the handful of individual employee Defendants also properly invoked the Tribe's immunity because Mestek sued them in their official capacities. Notice the actors that Congress named in § 3730(h)(1): "employee, contractor, or agent." Nowhere did Congress explicitly reference "Indians" or "tribes." Nor is this a statute where Congress attempted to "cover [ ] the waterfront" of governmental units by using catch-all language. *Coughlin*, 143 S. Ct. at 1695, 1700 n.7 (finding that Congress abrogated tribal sovereign immunity in certain portions of the Bankruptcy Code by using a catch-all abrogation provision covering the "United States; State; Commonwealth; District; Territory; municipality; foreign state; department; agency; or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government" (quoting 11 U.S.C. § 101(27))). To our eye, abrogation is not a close call in the False Claims Act's anti-retaliation provision. Mestek also sued five defendants in both their personal and official capacities. The district court concluded that despite the formal allegations in Mestek's Complaint, her claims implicated only these Defendants' official capacities because the relief she requested would effectively run against the Tribe—meaning sovereign immunity applied. We agree. Affirmed.

59. *Seneca v. Great Lakes Inter-Tribal Council, Inc.*, No. 22-2271, 2023 WL 4340699 (7th Cir. July 5, 2023).

Dean Seneca sued the Great Lakes Inter-Tribal Council, a non-profit consortium of Indian tribes, alleging employment discrimination. The district court dismissed the case. It correctly ruled that, like its constituent member tribes, the Council enjoys tribal sovereign immunity from suit. The Council is a non-profit composite of its member Indian tribes, which are federally recognized and own and control it. It offers government services related to community development; assistance for families, the elderly, people with disabilities, and children; oversight of health and epidemiology; and vocational training. The Council employed Seneca as director of epidemiology for under a year, discharging him in 2018. Seneca alleges that the Council fired him because of his race, color, national origin, age, sex, gender identity, and sexual orientation in violation of federal law, including Title VII of the Civil Rights Act of 1964. On appeal, Seneca asserts that the court erred for three reasons. First, it applied the wrong test when deciding that the Council enjoys sovereign immunity. Second, the Council had waived sovereign immunity. Third, shielding the Council with sovereign immunity violates his due process rights. The alternate proposed tests do not cut in favor of Seneca: The Council is a non-profit combination of its member Indian tribes, organized to provide government-like services to members of its community and their families, children, people with disabilities, and the elderly. Put simply, it is

an arm of the tribes and therefore entitled to tribal sovereign immunity. *See Mestek v. LAC Courte Oreilles Cmty. Health Ctr.*, 72 F.4th 255, at 259 (7th Cir. 2023) (adopting the arm-of-the-tribe test). Seneca's next argument—that the Council waived its sovereign immunity—also fails. First, he argues that the Council waived its immunity by agreeing to abide by Title VI of the Civil Rights Act of 1964 when it accepted federal funds. Title VI allows for judicial review of claims of discriminatory exclusion from federally funded programs. See 42 U.S.C. § 2000d-2. Even if the Council's receipt of federal funds waived its sovereign immunity under Title VI (a question we do not decide), that would not help Seneca. He asserts employment discrimination under Title VII and similar employment-protection laws, not Title VI. Seneca also argues that the Council waived sovereign immunity through its job postings. The postings stated that the Council is an equal opportunity employer and will "comply fully with all federal and state laws." This is not the required "clear waiver by the tribe" of immunity from suit. *Okla. Tax Comm'n*, 498 U.S. at 509. The job postings do not mention sovereign immunity, forums available for litigation, amenability to suit, or anything else that clearly waived the Council's immunity. Finally, Seneca argues unless we deem the Council to have waived its tribal sovereign immunity, he will have no forum to litigate the merits of his discrimination claims, which is an outcome that he asserts would violate his right to due process under the Fifth and Fourteenth Amendments. But neither the Fifth Amendment nor the Fourteenth Amendment applies to Indian tribes. *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Seneca responds by citing Public Law 280, which grants certain states criminal jurisdiction over persons in "Indian country" and opens some states' courts to civil claims arising there. 18 U.S.C. § 1162; 25 U.S.C. §§ 1321–26; 28 U.S.C. § 1360. But the Supreme Court has rejected Seneca's assumption that this law overcomes tribal sovereign immunity. *Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 892 (1986). Affirmed.

60. *Villasenor v. Torres-Martinez Desert Cahuilla Indians,* No. 22-55637, 2023 WL 4622818 (9th Cir. July 19, 2023)).

Stephen P. Villasenor, a non-Indian, appeals pro se the district court's Fed. R. Civ. P. 12(b)(1) dismissal of his action against the Torres Martinez Desert Cahuilla Indians ("Tribe"), a federally recognized Indian tribe. Villasenor alleged violations of the Fourteenth Amendment and the Indian Civil Rights Act of 1968 ("ICRA") in the Tribe's termination of his employment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo whether a Native American tribe possesses sovereign immunity, *Deschutes River All. v. Portland Gen. Elec. Co*., 1 F.4th 1153, 1158 (9th Cir. 2021), and dismissals based on sovereign immunity, *Crowe v. Or. State Bar*, 989 F.3d 714, 724 (9th Cir. 2021) (per curiam). "[A]n Indian tribe is subject to suit only where Congress has authorized the suit, or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). The Fourteenth Amendment does not constrain the actions of Indian tribes, and Congress did not abrogate tribal sovereign immunity for non-habeas suits under the ICRA. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 59 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 59 (1978); *see also Johnson v. Gila River Indian Cmty.*, 174

F.3d 1032, 1035 (9th Cir. 1999) ("The only recognized exception to a sovereign immunity defense under the ICRA is a habeas corpus action."). The Tribe has not waived sovereign immunity here. Therefore, sovereign immunity bars Villasenor's non-habeas suit. Affirmed.

61. ***Skull Valley Health Care, LLC. v. Norstar Consultants, LLC.,*** **Case No. 2:22-cv-00326, 2023 WL 4934292 (D. Utah, August 2, 2023).**

This matter is a dispute between an employer, Skull Valley Health Care and Skull Valley Health Clinic (together, SVHC) and its former employee, Defendant and Counter- and Cross Claimant, Ashanti Moritz. Before the court is SVHC and Defendant Victor Garcia's Motion to Dismiss Ms. Moritz's counter- and crossclaims. The first is a claim for wrongful termination against SVHC and all three Crossclaim Defendants. The Plaintiffs in this action are two "sister corporations," Skull Valley Health Care, LLC and Skull Valley Health Clinic, LLC. Both were formed under Utah law initially, and then converted to tribal entities. The Executive Committee of the Skull Valley Band are SVHC's managers, and "No other person or entity may manage the affairs of the [Band's] Tribal owned entities." Movants argue that Ms. Moritz's claim should be dismissed because SVHC is entitled to the Band's tribal sovereign immunity. "Tribal immunity extends to subdivisions of a tribe, and even bars suits arising from a tribe's commercial activities." *Somerlott*, 686 F.3d at 1148 (quoting *Native Am. Distrib. v. Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008)). The court concludes that SVHC is an "arm of the tribe" entitled to tribal sovereign immunity. As a result, the court lacks subject matter jurisdiction over this claim as it has been brought against SVHC. Here, Ms. Moritz also brings a cause of action against individuals for wrongful termination. As *Miller v. United States*, 992 F.3d 878 (9th Cir. 2021), observed, such claims invoke the Federal Tort Claims Act (FTCA) where statutory (here) or contractual (Miller) language specifies that for the purposes of FTCA coverage, a tribe and its employees are deemed to be employees of the federal government while performing work under the contract. No scope of employment determination has been made here, so the United States cannot be a necessary party, at least not yet. The FTCA provisions lay responsibility at the feet of the defendant-employee to seek certification. As the court has determined it lacks jurisdiction over Ms. Moritz's wrongful termination claim as pleaded against SVHC, it must dismiss this claim as pled against SVHC. Concerning Ms. Moritz's claim against the Individual Defendants, the Court does not find that the United States is a necessary party, or that these individuals are entitled to immunity, or that Ms. Moritz has failed to state her wrongful termination claim. Consequently, it does not dismiss Ms. Moritz's claim as pleaded against these three individuals. However, the Court notes that the Individual Defendants can follow the procedures in 28 U.S.C. § 2679(c) to begin the certification and substitution process, if they believe that they were acting within their scope of employment at the relevant times. The Motion to Dismiss is denied, as it concerns Ms. Moritz's wrongful termination claim as brought against Chairwoman Bear, Mr. Wash, and Mr. Garcia.

E. Environmental Regulations

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

Weston Solutions, Inc. moves for judgment on the pleadings to dismiss all claims of negligence per se stated against it. Weston Solutions, Inc.'s Motion for Judgment on the Pleadings to Dismiss Claims of Negligence Per Se at 3, Doc. 1480, filed March 7, 2022. Weston states "the regulations that Plaintiffs rely upon to support their negligence per se claims involve (1) the Occupational Safety and Health Act ("OSHA"), (2) the Federal Mine Safety and Health Act ("MSHA"), (3) the Colorado Water Quality Control Act, (4) the New Mexico Hazardous Waste Act, (5) the Clean Water Act, and (6) the National Contingency Plan." A recent opinion from the Colorado Court of Appeals discusses negligence per se under Colorado law: "[N]egligence per se provides that certain legislative enactments such as statutes and ordinances can prescribe the standard of conduct of a reasonable person such that a violation of the legislative enactment constitutes negligence." *Lombard v. Colo. Outdoor Educ. Ctr., Inc.,* 187 P.3d 565 (Colo. 2008). It occurs "when the defendant violates a statute adopted for the public's safety and the violation proximately causes the plaintiff's injury." *Scott v. Matlack, Inc*., 39 P.3d 1160 (Colo. 2002). "To recover, the plaintiff must also demonstrate that the statute was intended to protect against the type of injury she suffered and that she is a member of the group of persons the statute was intended to protect." *Id.* To form a basis for a negligence per se claim, a statute or regulation must also indicate an intent to create civil liability. Not every statute or ordinance will be held to establish a duty and a standard of care under the negligence per se doctrine. For example, we declined to hold that a statute requiring the industrial commission to inspect workplaces created a legally cognizable duty to employees. *Quintano v. Industrial Comm'n*, 178 Colo. 131, 495 P.2d 1137 (1972). Thus, as recognized in *Bittle v. Brunetti, supra*, 750 P.2d at 59, imposing liability would do violence to people's reasonable expectations. Weston states: "The Navajo Nation and State of New Mexico ("Sovereign Plaintiffs") do not explicitly make a claim for negligence per se, but their pleadings strongly implicate the theory ... to the extent that Sovereign Plaintiffs contend a violation of OSHA regulations conclusively establish a claim for negligence, these are claims sounding in negligence per se and must be dismissed for the same reasons set forth below." Plaintiffs concede that OSHA, MSHA, and the National Contingency Plan ("NCP") are inapplicable as to their negligence per se claims. The Court dismisses the Allen and McDaniel Plaintiffs' claims of negligence per se based on the OSHA, MSHA, and the NCP. The Court dismisses the Allen and McDaniel Plaintiffs' claims of negligence per se based on the Colorado Water Quality Control Act ("CWQCA"), the New Mexico Hazardous Waste Act ("NMHWA"), and the federal Clean Water Act ("CWA"). While the CWQCA, NMHWA and CWA relate to public safety to some extent, their primary purposes are to protect the quality of the water and the environment. The CWQCA, NMHWA, and CWA impose an obligation for the benefit of the public at large, rather than for individuals. The CWQCA, NMHWA, and CWA do not expressly provide for imposition of civil liability on violators and do not indicate an intent to create civil

liability. Consequently, under Colorado law, the CWQCA, NMHWA, and CWA cannot serve as the basis for negligence per se claims. The Allen and McDaniel Plaintiffs also base their negligence per se claims on the federal Clean Water Act which states: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA provides that: any citizen may commence a civil action on his own behalf— (1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. The district courts shall have jurisdiction to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title. 33 U.S.C. § 1365(a). The "primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act." *Lockett v. E.P.A.*, 319 F.3d 678, 684 (5th Cir. 2003). Section 1365 is the CWA's citizen suit provision and is the sole avenue of relief for private litigants seeking to enforce certain enumerated portions of the statute. *See* 33 U.S.C. § 1365 (1994). Section 1365 permits private citizens to enforce specified provisions of the CWA by conferring upon them the right to sue parties alleged to be in violation of "(A) an effluent standard or limitation" or "(B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a); *see also id.* at § 1365(f) (defining "effluent standard or limitation" as used in subsection (a)). The Supreme Court's decision in *Sea Clammers*, and this court's decision in *Walls v. Waste Resource Corp*., 761 F.2d 311 (6th Cir.1985), preclude us from implying a private right of action under any provision of the CWA other than § 1365, including the provisions cited in Plaintiffs' Complaint. The Court dismisses the Allen and McDaniel Plaintiffs' negligence per se claims based on the CWA because the primary purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, the CWA does not create a private cause of action and this Court cannot imply a private right of action. The Court grants Weston's Motion to dismiss the negligence per se claims of the Allen and McDaniel Plaintiffs. Further, the Court denies Weston's Motion to Dismiss the negligence per se claims of the Navajo Nation and the State of New Mexico as moot.

63. *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers,* 636 F. Supp. 3d. 33, 2022 WL 5434208 (D. D.C. October 7, 2022).

This consolidated action arises from the United Army Corps of Engineers' (the "Corps") issuance of a permit to Intervenor-Defendant Enbridge Energy, Limited Partnership ("Enbridge"), authorizing Enbridge to discharge dredged and fill material into waters of the United States under Section 404 of the Clean Water Act and to cross waters protected by the Rivers and Harbors Act in its replacement of sections of the Line 3 oil pipeline in Minnesota. Plaintiffs Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth,

Sierra Club, and Friends of the Headwaters (collectively, "Plaintiffs") allege that the Corps' decision to issue these permits violated the National Environmental Policy Act ("NEPA"), the Clean Water Act ("CWA"), the Rivers and Harbors Act, and the Corps' permitting regulations. Presently, before the Court are the parties' cross-Motions for Summary Judgment. Upon consideration, the Court concludes that the Corps complied with its obligations to assess the environmental consequences associated with its permits to Enbridge. To determine whether a federal action will "significantly" affect the quality of the environment, the agency must consider the "context and intensity" of the proposed action and must address both "direct" and "indirect" caused by the proposed action. 40 C.F.R. §§ 1508.8; 1508.27. Indirect effects include those "caused by the actions and are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R. §1508.8(b). Before the Corps issues a Section 404 permit, it must determine that there is "no practicable alternative" to the proposed activity "which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). Intervenor-Defendant Enbridge sought the permits challenged by Plaintiffs in this action to replace portions of its "Line 3" oil pipeline, which transports crude oil from Edmonton, Alberta to Superior, Wisconsin, traversing portions of North Dakota and Minnesota. Originally constructed in the 1960s, "Existing Line 3" suffers from corrosion and integrity issues, including a "large number of identified pipe defects and anomalies." Replacement Line 3 would also enable Enbridge to transport a higher capacity of crude oil than Existing Line 3 was transporting once Enbridge reduced its capacity. Red Lake Band Plaintiffs argued that preliminary injunctive relief was appropriate based on claims that the Corps had failed to adequately address the effects of potential oil spills, alternative construction routes, and alternative construction methods in granting Enbridge necessary permits to proceed with the construction of Replacement Line 3. Concluding that Red Lake Band Plaintiffs failed to carry their burden of demonstrating a likelihood of success on the merits and irreparable harm, the Court denied their Motion for Preliminary Injunction. Many of the NEPA deficiencies identified by Plaintiffs hinge on two overarching arguments: first, that the Corps improperly limited the scope of its NEPA review to effects connected to the construction-related activities authorized by its permits (as opposed to effects connected with the construction and operation of the entire pipeline); and second, that the Corps improperly relied on the State Environmental Impact Statement. The Corps' implementing regulations direct that its NEPA review must "address the impacts of the *specific activity* requiring a [Department of the Army] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. pt. 325, App. B, § 7(b)(1) (2020) (emphasis added in original). The Court is satisfied that the scope identified by the Corps was appropriate in light of the activities authorized by its permit. The Corps' Environmental Assessment explained that its consideration of the "range of alternatives" was limited to the "route corridor designated by MPUC" because the Corps "does not regulate the siting of pipelines." Otherwise put, the route approved by the state agency was the corridor in which Enbridge [was] legally obligated to construct the project under Minnesota law. Where, as here, a federal agency is "not the sponsor of a project," its "consideration of

alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting ... of the project." *City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994). Plaintiffs argue that the Corps' analysis of alternatives, potential "degradation" of waters of the United States, and its public interest review was insufficient. For the reasons discussed, the Court disagrees and finds that the Corps' discussion satisfies CWA and the associated implementing regulations. The Court concludes that the Corps complied with its obligations under the CWA to consider practicable alternatives, address whether discharged dredged or fill material would cause significant degradation to the waters of the United States and evaluate appropriate public interest factors. Accordingly, the Corps is entitled to summary judgment as to Plaintiffs' CWA claims. The Court denies Plaintiffs' Motions for Summary Judgment.

64. *Oklahoma, v. United States Department of the Interior,* 640 F. Supp. 3d. 1110, 2022 WL 16838032 (W.D. Okla. November 9, 2022).

For decades, Oklahoma has regulated surface coal mining and reclamation operations within its borders, including on land that was previously understood–for more than a hundred years–to lie within the former boundaries of disestablished Indian reservations. That understanding was upended when the Supreme Court ruled that the Creek Reservation in eastern Oklahoma had never been disestablished. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Applying the same reasoning, the Oklahoma Court of Criminal Appeals subsequently recognized the continued existence of the Choctaw Reservation and the Cherokee Reservation. *Hogner v. State*, 500 P.3d 629 (Okla. Crim. App. 2021); *Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021). The question presented in this case is whether Oklahoma may continue to regulate surface coal mining and reclamation operations within these reservations. The Office of Surface Mining Reclamation and Enforcement, a subdivision of the Department of Interior, answered that question in the negative, concluding that the Surface Mining Control and Reclamation Act ("SMCRA") prohibited Oklahoma from regulating surface mining and reclamation operations on Indian land. The Court concludes that Oklahoma was not likely to succeed on the merits of its claims because the SMCRA precludes state regulation of surface mining and reclamation operations on Indian lands. The result the Court reaches today is compelled primarily by a straight-forward application of the Federal Surface Mining legislation to Indian lands–a situation contemplated by the express provisions of that federal law. SMCRA expressly prohibits inconsistent regulations, but not those that are more stringent than its minimum standards. SMCRA provides that a state "which wishes to assume exclusive jurisdiction" over surface coal mining and reclamation operations "shall" submit a state program to the Secretary for approval. 30 U.S.C. § 1253(a). This is the only mechanism by which a State may assume regulatory jurisdiction; the procedures are mandatory. Oklahoma contends that given its long-exercised regulatory authority over surface mining on the reservations, these same equitable principles should preclude Office of Surface Mining and Reclamation Enforcement from stripping Oklahoma of its regulatory control over the lands involved here. The Court is not the least bit

critical of the State for advancing this argument, given that the ancient land transfers underlying the claims in *Sherrill*, *Cayuga*, and *Oneida* violated the Nonintercourse Act and equity still worked to bar those claims. *City of Sherrill N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Oneida Indian Nation of N.Y v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010). But the relief sought in those cases was different than the relief requested here. *Sherrill* and its progeny concerned attempts to rekindle tribal sovereignty or obtain relief based on a tribe's right to possess the land. This case does not involve those types of disruptive remedies but is instead about the interpretation and application of a federal statute. Oklahoma seeks to continue regulating surface coal mining and reclamation operations on land within the exterior boundaries of the Creek Reservation, Choctaw Reservation, and Cherokee Reservation, as it has done for several decades. However, state regulation of these activities on Indian land is now precluded by SMCRA. Accordingly, Federal Defendants' Cross-Motion for Summary Judgment is granted.

65. *In re Gold King Mine Release in San Juan County, Colorado, August 5, 2015,* No. 1:18-md-02824-WJ, 2023 WL 2914718 (D.N.M. April 12, 2023).

States and Navajo Nation filed suit against Environmental Protection Agency (EPA) and EPA's contractors, claiming violation of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and asserting state law tort damages claim against contractors stemming from gold mine spill that occurred while conducting environmental remediation work, thereby releasing acid mine drainage and heavy metals that contaminated river and tribal land. Contractor moved for summary judgment to dismiss tribe's claim as preempted by CERCLA. The District Court, William P. Johnson, Chief Judge, held that: [1] CERCLA's limitation on use of natural resource damages applied to tribe, but [2] tribe's restorative damages claims were not preempted by CERCLA. Motion granted in part and denied in part. The Navajo Nation argues that the plain language of Section 107(f)(1), as codified at 42 U.S.C. § 9607(f)(1), places limits on the use of damages by the United States and States but does not place limits on the use of damages by Indian tribes because it excludes references to Indian tribes. The version of the statute codified in the United States Code is inconsistent with the version in the United States Statutes at Large because the codified version does not contain the language in the Statutes at Large which places limits on the use of damages by Indian tribes. "[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent." *United States v. Welden*, 377 U.S. 95, 98 n.4, (1964) (quoting *Stephan v. United States*, 319 U.S. 423, 426, (1943)). Although CERCLA sets forth a comprehensive mechanism to clean up hazardous waste sites, "Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination." *New Mexico v. General Elec. Co.*, 467 F.3d at 1244, 1246, 1247-48 n.36 (indicating that tort theories of recovery may not be completely preempted for injuries that are "separate and apart from injury to the [resource]"). Weston has not shown that the restorative programs damages claims are natural resource damage claims the recovery of which would be

subject to the restriction that they be used only to restore, replace, or acquire the equivalent of the damaged resource. The Court grants Weston's Motion to the extent it seeks a judgment that the limitations on CERCLA natural resource damages apply to Indian tribes. The Court denies Weston's Motion to the extent that it seeks a judgment that the Navajo Nation's restorative damages claims are preempted by CERCLA.

66. *Bad River Band of The Lake Superior Tribe of Chippewa Indians of The Bad River Reservation, v. Enbridge Energy Company, Inc.*, 19-cv-602-wmc, 2023 WL 4043961 (W.D. Wisconsin, June 16, 2023).

The Bad River Band of the Lake Superior Tribe of Chippewa Indians brought this action against Enbridge Energy to enjoin the continued operation of Enbridge's Line 5 crude oil and natural gas liquids ("NGLs") pipeline through the Bad River Reservation in Northern Wisconsin based on the risk of its failure constituting a public nuisance. The Band also seeks damages and injunctive relief for Enbridge's continuing to operate Line 5 in trespass on portions of the Reservation for which certain, longstanding rights of way have now expired. At summary judgment, the Court decided that Enbridge was in trespass and unjustly enriched by operating the pipeline on twelve land parcels owned in whole or in part by the Band for which the rights of way had expired and dismissed Enbridge's counterclaims for breach of contract. (Dkt. #360.) However, the Court concluded that there were genuine disputes of material fact relating to the Band's public nuisance claim and request for injunctive relief, leaving four, primary factual disputes to be decided at trial: (1) whether Enbridge's operation of Line 5 on the Reservation constitutes a public nuisance at its crossing of a meander on the Bad River, where the greatest risk of a pipe failure currently exists within the Band's tribal territory; (2) if so, what form of injunctive relief, if any, should be imposed to abate that nuisance and address Enbridge's trespass; (3) what additional remedies, if any, should be imposed on Enbridge based on the court's findings as to liability; and (4) whether Enbridge was entitled to any relief on its remaining counterclaims. After reviewing relevant expert reports, deposition designations, and other voluminous, additional written submissions by the parties, the court held a six-day bench trial in October 2022 on these remaining issues. Shortly after the trial, the court issued an opinion and order: (1) denying Enbridge's request for declaratory and injunctive relief on its remaining counterclaims; and (2) directing the parties to meet and confer on specific issues relating to the Band's public nuisance claim, including attempting to agree on a shutoff and purge plan for Line 5 at the Bad River meander. The Court concludes that a rupture of Line 5 at the Bad River meander would unquestionably be a public nuisance. The Court orders Enbridge to adopt a more conservative shutdown and purge plan. In addition, concerning the Band's trespass claim, the Court awards $5,151,668 to the Band in profits-based damages for Enbridge's past trespass. Going forward, the Court will also order Enbridge to continue paying the Band, according to the formula set forth below, for each quarter that Line 5 operates in trespass on the twelve allotment parcels. Finally, the Court will enjoin Enbridge to remove its pipeline within three years from any parcel within the Band's tribal

territory on which it lacks a valid right of way and to provide reasonable remediation at those sites.

67. *Narragansett Indian Tribe v. Pollack,* Cv Action No. 22-2299 (RC), 2023 WL 4824733 (D. D.C., July 27, 2023).

The Narragansett Indian Tribe, acting by and through the Narragansett Indian Tribal Historic Preservation Office, brings this action against Stephanie Pollack, in her capacity as acting Administrator of the Federal Highway Administration ("FHWA" or the "Agency"), and several Rhode Island defendants—the State itself, its Department of Transportation, and Claire Richards, the Executive Counsel of the Rhode Island Office of the Governor, challenging actions they allegedly took in connection with a highway project in Rhode Island. The National Historic Preservation Act ("NHPA"), codified at 54 U.S.C. §§ 300101 et seq., requires that federal agencies "take into account" the preservation of historic sites when implementing federal projects. State Defendants and the Agency separately move to dismiss. Because the only contacts between Ms. Richards and the District of Columbia. Alleged by the Tribe fall squarely within the government contacts exception, they do not provide a basis for the Court to exercise personal jurisdiction over her. However, the Tribe adequately alleges that correcting the alleged failure to consult with the Tribe could change the substance of the second Programmatic Agreement's mitigation measures. The Tribe pleads enough here. It adequately alleges a procedural injury in the form of the Agency's failure to engage in the required consultation with the Tribe under 36 C.F.R. § 800.14(f) in developing the second Procedural Agreement. *Cf. Wildearth Guardians*, 738 F.3d at 306 ("Vacatur of the [agency] order would redress [plaintiffs'] injuries because, if the [agency] is required to adequately consider each environmental concern, it could change its mind about authorizing the lease offering."); *Lemon*, 514 F.3d at 1315 ("[I]f the Secretary had taken into account the effect of the new ... redevelopment plan he might have placed conditions on the transfer of the land ... that might have ameliorated what plaintiffs see as damage to an historic site they visit and enjoy"). The Tribe has standing to pursue its claim as to the execution of the second Procedural Agreement. For the foregoing reasons, State Defendants' Motion to Dismiss is granted, the Agency's Motion to Dismiss is granted in part and denied in part, and the Tribe's Motion to Supplement the Administrative Record is denied.

F. Fisheries, Water, FERC, BOR

68. *Metlakatla Indian Community v. Dunleavy,* 48 F. 4th 963, 2022 Daily Journal D.A.R. 9661, No. 21-35185, 2022 WL 4101799 (9th Cir. September 8, 2022).

Metlakatla Indian Community, who were descendants of the Tsimshian people indigenous to the Pacific Northwest brought action against state of Alaska and Alaskan officials, alleging that Alaska's limited entry program for commercial fishing illegally restricted Community members' right to fish outside the reservation boundaries, and seeking declaratory and injunctive relief. The United States District Court for the District of Alaska, John W. Sedwick, Senior District Judge,

2021 WL 960648, granted defendants' Motion to Dismiss for failure to state a claim. Community appealed. The Court of Appeals, Fletcher, Circuit Judge, held that as a matter of first impression, statute creating reservation preserved for the Community and its members an implied right to non-exclusive off-reservation fishing for personal consumption and ceremonial purposes, as well as for commercial purposes, and Alaska's limited entry program for commercial fisheries violated Community's implied off-reservation fishing rights. Reversed and remanded.

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

Plaintiffs are residential users of water in Bernalillo, Sandoval, and San Juan Counties. One Plaintiff relies on a domestic well, while the others rely on municipal water sources or water supplied by various tributaries. The Plaintiffs claim that the Defendants, all sued in their official capacity only, "have not complied with or enforced" a myriad of federal laws. The USA Motion to Dismiss (MTD) asserts that none of the statutes cited by Plaintiffs expressly waive the sovereign immunity of the United States for this case, and the McCarran Amendment does not apply because this case does not constitute a "comprehensive adjudication of water rights[.]" The Navajo MTD also seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction based on tribal sovereign immunity. With respect to the USA MTD, Plaintiffs assert that this case falls within the McCarran Amendment's waiver of immunity as a case involving the "administration of water rights." The McCarran Amendment does not provide a waiver of sovereign immunity applicable to this case. Because Plaintiffs failed to allege an applicable basis upon which to waive sovereign immunity, the Court grants the USA MTD and dismisses all claims against the federal Defendants for lack of subject matter jurisdiction based on sovereign immunity. The Court also grants the Navajo MTD and dismisses all claims brought against Defendants Shebala and Zeller on the basis of tribal sovereign immunity. Here, the requested remedy is a Declaratory Judgment stating the meaning of federal water law. Such a remedy does not necessitate prospective action by or restraint of the individual officials named as Defendants. Instead, any plausible remedy would operate directly on the Navajo Nation and would be an affront to its sovereign interests and water rights. Thus, *Ex parte Young* is an unavailable route around tribal sovereign immunity. *Ex parte Young*, 209 U.S. 123 (1908). For the reasons explained above, the Court grants each of the Motions to Dismiss based on sovereign immunity and dismisses all claims against the Defendants for lack of subject matter jurisdiction.

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

This Matter comes before the Court on a Motion to Intervene filed by nonparty Fish Northwest on October 5, 2020. Fish Northwest is a non-profit organization representing individual salmon harvesters. Its purpose is to "ensure responsible fair, and equal fishing with the treaty tribes," which it says is "being significantly harmed by the Washington State Department of Fish and Wildlife's [FNW] failure to ensure equitable sharing [of] the harvestable salmon resource per the '*Boldt* Decision' set forth in *United States v. Washington*." Dissatisfied with recent salmon

fishing seasons provided by Washington State's regulations, FNW seeks to become a party to this case. Once a party, FNW intends to invoke the Court's continuing jurisdiction and initiate a new subproceeding challenging the current parties' salmon management and allocation activities, with the stated objective of ensuring that "non-treaty fishers of Washington are ... allowed to harvest their fair share of the salmon and steelhead resources of Washington." The State of Washington argues this Motion must be denied under the law of the case. The Court agrees. This Court has repeatedly concluded that individual fishermen do not have a legal interest in the fish and shellfish they desire to harvest and thus have no ability to intervene. Management of fisheries that are the subject of *United States v. Washington* lies with the co-managers—the tribes and the State. The facts presented in this Motion to Intervene do not alter the Court's prior analysis. The Court need not restate legal arguments from its prior Orders on this subject. The Motion to Intervene filed by nonparty Fish Northwest is denied.

71. *In re Klamath River Basin Litigation,* 637 F. Supp. 3d 1369, MDL No. 3048, 2022 WL 5409032 (U.S. J.P.M.L. October 4, 2022).

Plaintiff in the District of Oregon *Klamath Irrigation District* action moves under 28 U.S.C. § 1407 to centralize this litigation in the District of Oregon or, alternatively, in the District of Nevada or the District of New Mexico. This litigation consists of two actions pending in the Northern District of California and five actions pending in the District of Oregon. The Federal Parties, the Yurok Tribe, the Klamath Tribes, and the Oregon Water Resources Department oppose centralization. Alternatively, they suggest either the Northern District of California or the District of Oregon as the transferee district. We conclude that centralization is not necessary for the convenience of the parties and witnesses or to further the just and efficient conduct of the litigation. These seven actions involve different aspects of the operation of the Klamath Project, a federal reclamation project that provides water for irrigation in southern Oregon and northern California, and, in particular, releases of water from Upper Klamath Lake in Oregon to the Klamath River downstream of the Project. While these actions involve the same bodies of water and many of the same parties, the differences are striking. More importantly, these actions will not entail significant discovery or particularly complex pretrial proceedings. These actions primarily involve legal questions, in particular the determination of the Bureau of Reclamation's obligations under the Endangered Species Act to protect certain species of fish in Upper Klamath Lake and the Klamath River; the Bureau of Reclamation's ("the Bureau") obligations to release water for tribal religious ceremonies; and the Bureau's obligation under the Reclamation Act, 43 U.S.C. § 383, to abide by the Oregon Water Resources Department's declaration of water rights in the Klamath Basin Adjudication. In short, these actions already are being conducted in a coordinated fashion, such that many of the most important legal questions will be resolved in short order. Centralization at this juncture would only delay these adjudications and increase the procedural complexity of an already complex litigation. In this instance, therefore, it seems to us that these cases can be more effectively and efficiently advanced, and resolution achieved more quickly, without centralization. The Motion for Centralization of these actions is denied.

72. *United States v. Washington,* No. C70-9213RSM, 2022 WL 18010361 (W.D. Wash. December 30, 2022).

This matter comes before the Court on Upper Skagit Indian Tribe's Motion for Judgment on Partial Findings under Fed. R. Civ. P. Rule 52(c). Intervenor Tulalip Tribe has filed a Partial Joinder in this Motion. Petitioner Stillaguamish Tribe ("Stillaguamish") clearly opposes this Motion. An eight-day bench trial was held in this subproceeding, No. 17-3 starting on March 21, 2022, and eventually ending on June 7. The only legal issue at trial was whether the historical evidence and expert testimony, and all reasonable inferences drawn therefrom, demonstrate by a preponderance of the evidence, that Stillaguamish customarily fished the Claimed Waters (including the waters of Deception Pass, Skagit Bay, Penn Cove, Saratoga Passage, Holmes Harbor, Possession Sound, and Port Susan) at and before treaty times. The instant Motion argues the Stillaguamish failed to present any evidence during its case-in-chief from which the Court can conclude that Stillaguamish customarily fished from time to time at and before treaty times in any of the marine waters at issue. "Customarily fished" means something very specific in this case. It means more than may have fished, could have fished, or even definitely fished on a rare occasion. Furthermore, "at and before treaty times" clearly requires evidence of fishing at treaty times. Evidence of fishing in the hundreds of years prior to treaty times, alone, is insufficient. The Court deferred ruling on this Motion and proceeded with trial, hearing from several witnesses and requesting the parties answer a list of questions with supplemental briefing. Ultimately, however, the Court has found it can grant the instant Motion without addressing the various tangential questions or evidence presented after Stillaguamish's case-in-chief. Moreover, the Court is firmly convinced that this subproceeding needs to be focused on the singular issue above, and that it would be procedurally inappropriate to even attempt to reach legitimate conclusions on every possible question raised at trial based on the scant historical evidence that is available. The Court is convinced that this subproceeding, and future subproceedings, should not serve as an invitation to continually re-analyze issues that have been decided over the past 50 years. The findings of fact and conclusions of law below are not intended to overturn any previously decided fact or law in this case. Absent a new and truly significant anthropological discovery, the Court will be disinclined to reassess "Usual and Accustomed" ("U&A") issues going forward on this limited record. The Court finds that it need not rule on the credibility of witnesses given the reliance on expert testimony in this case. Although the Court disagrees with certain conclusions of the expert witnesses, there were no credibility issues with their testimony. The existing record in this case, prior to trial, included substantial evidence of Stillaguamish River fishing but did not include any substantial evidence of fishing activity in the marine waters now at issue. The report and testimony of Dr. Friday did not provide any direct evidence, indirect evidence, nor any reasonable inference of marine fishing activity by the Stillaguamish at treaty time. Evidence was presented about the distinction between the Stillaguamish and the Qwadsak people, or the Qwadsak area. Ultimately, this evidence was inconclusive and insufficient to establish, by a preponderance of the evidence, marine fishing activity by the Stillaguamish in Port Susan. Evidence was presented of shell middens located in the Qwadsak area by Harlan

Smith. There was not sufficient evidence in the record to establish when the shell middens were created or who created them. Evidence was presented of Stillaguamish people intermarrying with neighboring tribal groups, and it seems every other Salish tribe did the same. This did not include direct evidence, indirect evidence, nor any reasonable inference of usual and accustomed marine fishing activity by the Stillaguamish. Evidence was presented that Stillaguamish tribal members traveled north to Victoria, British Columbia and south to Olympia, Washington. This did not include direct evidence, indirect evidence, nor any reasonable inference of marine fishing activity by the Stillaguamish. The Court has carefully considered the testimony of Dr. Friday and the other evidence presented and concludes that, although there is ample evidence that the Stillaguamish were a river fishing people during treaty times, the evidence is insufficient to demonstrate by a preponderance of the evidence that they fished "customarily...from time to time" in saltwater, or that the marine areas at issue were their "usual and accustomed" grounds and stations. That is the standard that was not met here. The Court agrees with Upper Skagit Tribe that "[i]n order to prove U&A in the marine waters of Saratoga Pass, Penn Cove, Holmes Harbor, Skagit Bay, Port Susan, and Deception Pass, the law of the case requires that Stillaguamish do more than proffer evidence of (potential) village locations, (infrequent) travel, or (possible) presence in an area." The strongest evidence presented by Dr. Friday was that Stillaguamish traveled over the marine area between Olympia, Washington and Victoria, British Columbia. But travel alone does not satisfy the requirement of evidence of marine fishing under the law of the case. To permit evidence of travel alone to prove U&A could readily unravel all that has been established previously in the lengthy history of this case. Efforts by Dr. Friday and counsel for Stillaguamish to interpret this travel as an opportunity for fishing relies too heavily on speculation. The non-travel evidence presented by Stillaguamish, including the presence of villages, is ultimately insufficient to satisfy the above standards. Given all of the above, the Court will grant this Motion and deny Stillaguamish's request to expand its U&A. The Upper Skagit Indian Tribe's Motion for Judgment on Partial Findings under Rule 52(c), is granted.

73. *Sauk Suiattle Indian Tribe v. City of Seattle,* 56 F. 4th 1179, No. 22-35000, 2022 WL 17999429 (9th Cir. December 30, 2022).

Sauk-Suiattle Indian Tribe brought action in state court against the City of Seattle ("City"), seeking declaration that city's operation of dam without fish passage facilities violated the Federal Constitution, the State Constitution, and State common law, and seeking injunction either prohibiting City from operating dam or requiring City to provide fishway. Following removal, the United States District Court for the Western District of Washington, Barbara Jacobs Rothstein, J., 2021 WL 5200173, denied Tribe's Motion to Remand, and, 2021 WL 5712163, granted City's Motion to Dismiss for lack of subject matter jurisdiction. Tribe appealed. The Court of Appeals held that: [1] complaint raised substantial question of federal law, as required for removal based on federal question jurisdiction; [2] exercise of supplemental jurisdiction over state-law claims was proper; [3] Complaint was subject to Federal Power Act (FPA) section vesting exclusive jurisdiction in federal courts of appeals over all objections to Federal Energy

Regulatory Commission (FERC) orders; and [4] dismissal, rather than remand, was warranted under futility exception to remand requirement. In 1995, almost twenty years after City submitted its application for a renewed license, FERC issued an order granting City a new thirty-year license to operate the Project. The Order explained that both the Department of Commerce and the Department of the Interior were parties to the Settlement Agreement in which they had agreed "that all issues concerning environmental impacts from relicensing of the Project, as currently constructed, are satisfactorily resolved by [the Settlement Agreement]." Thus, the FERC Order contained no fishway requirement. FERC did, however, reserve its authority to require fish passage in the future, should circumstances warrant. The Tribe did not seek rehearing or appeal of the FERC Order. In July 2021, the Tribe filed the operative Amended Complaint against City in Washington state court, seeking only declaratory and injunctive relief under Washington's Declaratory Judgments Act. The Complaint alleged that the Gorge Dam "blocks the passage of migrating fish" and thus its "presence and operation" without fishways violates several laws: the 1848 Act establishing the Oregon Territory and the 1853 Act establishing the Washington Territory ("Congressional Acts"); the Supremacy Clause of the United States Constitution; the Washington State Constitution, which purportedly incorporates the Congressional Acts; and Washington nuisance and common law. 28 U.S.C. § 1447(c) states that a district court shall remand a removed case when it concludes that it lacks subject matter jurisdiction. But our precedent recognizes a futility exception to that requirement. "A narrow 'futility' exception to this general [remand] rule permits the district court to dismiss an action rather than remand it if there is 'absolute certainty' that the state court would dismiss the action following remand." As a three-judge panel, we are compelled to apply the futility exception unless it is "clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). But the Tribe has not argued that the futility exception has been overruled, and we decline to consider the issue *sua sponte*. The District Court correctly declined to remand because the Complaint raises substantial federal questions. It also properly determined that it lacked subject matter jurisdiction under section 313(b) of the FPA, which vests exclusive jurisdiction in the federal courts of appeals. Finally, it was proper for the District Court to dismiss the case under the futility exception to § 1447(c)'s remand requirement. While there may be valid policy reasons for the futility exception, it is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute, apparent anomalies or not. We therefore encourage our Court to reconsider and abandon the futility exception in an appropriate case. Affirmed.

74. *Yurok Tribe v. U.S. Bureau Of Reclamation,* 2023 WL 1785278, No. 19-cv-04405-WHO (N.D. California, February 6, 2023).

The Yurok Indian Tribe and fisheries associations filed suit against Bureau of Reclamation ("Bureau"), challenging River Project Plan ("Plan" or "the Plan") and biological opinion (BiOp) assessing Plan's impacts on threatened and endangered species under Endangered Species Act (ESA). The court granted relief and stayed the matter. After the Oregon Water Resources

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

75. *Sauk-Suiattle Indian Tribe v. City of Seattle,* 25 Wn. App. 2d 741, 2023 WL 2362747, No. 83862-3-I (Ct. App. Washington Div 1, March 6, 2023).

Sauk-Suiattle Indian tribe brought action against the City of Seattle ("City" or "Seattle"), alleging that City's promotional campaign alleging that hydroelectric project produced green power was deceptive and violated the Consumer Protection Act (CPA) and created a private and public nuisance interfering with the Tribe's use and enjoyment of its property right to fish on the Skagit River. The Superior Court, King County, Adrienne McCoy, J., dismissed. Tribe appealed. The Court of Appeals, Mann, J., held that: [1] City was exempt from the CPA; [2] City's statements were mere puffery that could not give rise to nuisance per se; and [3] Tribe's allegations were sufficient to state a claim for private and public nuisance. The Tribe explained that the harm is not limited to animus from local persons, but also that its brand and reputation associated with the fishery resource is broadly connected to public perception and reputation of the Skagit for sustainable fisheries: "Plaintiff Sauk-Suiattle Indian Tribe participates in commercial fishery, as well as hunting and gathering in the Skagit ecosystem, with its tribal reputation and brand inherently connected to public perception and reputation of the health, environmental responsibility and sustainability of the Skagit ecosystem, including the viability of

its species and the management of the river system by major actors such as Defendant Seattle." The Tribe is arguing that the City's greenwashing statements undermine the Tribe's valuable property interest in the fishery resources and their right to its quiet enjoyment by misrepresentations that cause animus in the form of harassment and diminished support of the Tribe through public opinion. While it is true that proximate cause can be severed by the intervening acts of third parties, that is a factual question not fit for dismissal under Fed. Civ. R. 12(b)(6). The Tribe sufficiently alleged a causal connection between the City's statements and its own harm. Assuming the facts alleged in the complaint are true, the Tribe sufficiently alleged a claim for private and public nuisance. Affirmed in part and reversed and remanded in part.

76. *City of Fernley v. Conant,* 2023 No. 22-15400, No. 22-15603, 2023 WL 2549792 (9th Cir., March 8, 2023).

The Truckee Canal runs for thirty-one miles through western Nevada, from the Derby Diversion Dam on the Truckee River to the Lahontan Reservoir. Nearly twenty-seven miles of the Canal are unlined, allowing water to seep through the Canal and recharge the underlying aquifer. After the Canal breached in 2008, the Bureau of Reclamation ("Reclamation") conducted studies to identify repairs that would ensure the long-term structural safety of the Canal. Reclamation selected an alternative that involves adding an impermeable lining to more than twelve miles of the Canal. The City of Fernley ("the City") alleges that it will be harmed by the chosen alternative because the lining will reduce recharge of the aquifer, on which the City relies for its municipal water. Intervenors David Stix and Deena Edmonston, who own private wells and a permitted groundwater right of use, raise similar allegations. The District Court dismissed all claims on jurisdictional grounds. The City of Fernley and Intervenors (collectively, "Plaintiffs") timely appeal. The District Court correctly dismissed Plaintiffs' claims for violation of the National Environmental Policy Act ("NEPA"). Because NEPA does not include a private right of action, the Administrative Procedure Act ("APA") provides Plaintiffs' cause of action, if any. Here, Plaintiffs allege only interests in the use of the aquifer as a water source. We have previously held that a statutory claim under NEPA existed where municipalities alleged environmental harms, including harm to water quality. See *City of Davis v. Coleman,* 521 F.2d 661, 671 (9th Cir. 1975) (relying on the plaintiff's allegations that development facilitated by a new freeway interchange "may adversely affect the *quality* and quantity of the city water supply because of increased use and the danger of contamination by industrial wastes" (emphasis added in original)); *Churchill County v. Babbitt,* 150 F.3d 1072, 1076, 1079 (9th Cir.) amended and superseded on denial of reh'g, 158 F.3d 491 (1998) (referencing the plaintiff's allegations of "fire hazards, airborne particles, erosion, unknown changes to the underground water supply system, and reduced quality of local drinking water," and adverse effects on "groundwater levels and *quality*" (emphasis added)). But Plaintiffs' Complaints allege only diminution of the water supply, that is, quantity alone. The loss of the ability to consume natural resources is an economic injury, not an environmental injury. The scope of Plaintiffs' water rights is, as noted above, a question of state law. Plaintiffs cite no precedent under Nevada law holding that a

groundwater right extends to a right to continued seepage. Additionally, Plaintiffs' request for a Declaratory Judgment of their water rights in this forum is inconsistent with Nevada's system of water rights adjudication. Nevada law requires comprehensive adjudication of water rights involving all users. Nev. Rev. Stat. § 533.240(1). Although we lack jurisdiction over Plaintiffs' declaratory judgment claims, our holding does not prevent them from asserting their water rights claims in other proceedings, consistent with state law. Affirmed in part and reversed in part.

77. ***Hoopa Valley Tribe v. United States Bureau of Reclamation,*** **Case No. 1:20-cv-01814-JLT-EPG, 2023 WL 2617322 (E.D. California, March 23, 2023).**

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

78. ***Gila River Indian Community v. Bowman,*** **No. CV-20-00103-TUC-SHR, 2023 WL 2633614 (D. Arizona, March 24, 2023).**

Pending before the Court are Motions for Summary Judgment filed by Plaintiff Gila River Indian Community and Defendants Gilligan Bowman, Blanca Bowman, Samuel Lunt, and Julee Lunt. For the following reasons, the Court grants the Community's Motion and denies Defendants' Motion. This matter is related to nearly a century of litigation concerning water rights subject to the Globe Equity Decree No. 59 ("Decree") entered by this Court in 1935 to govern the

distribution of Gila River water among the Gila River Indian Community (the "Community"), the San Carlos Apache Tribe, and various other landowners. *United States v. Gila Valley Irrigation Dist*., 859 F.3d 789, 794 (9th Cir. 2017). "Parties to the Decree are entitled to divert water from the River for the 'beneficial use' and 'irrigation' of land in accordance with the specified priorities." *Id.* The Arizona Supreme Court has explained: The Decree was intended to resolve all claims to the Gila River mainstem. The United States included as defendants in the Globe Equity litigation all those with claims to the mainstem of the Gila River, and the Decree includes all water rights theories that the parties could have asserted. Thus, as to the mainstem of the Gila River, the Decree is comprehensive. *In re Gen. Adjudication of All Rts. to Use Water In Gila River Sys. & Source*, 212 Ariz. 64, 127 P.3d 882, 902 (2006). Here, the Community filed suit against a variety of landowners in March 2020, alleging their Decree rights are forfeited pursuant to A.R.S. § 45-141(C) because they failed to use the water for a period of five years or longer. Since 2017, Gilligan and Blanca Bowman have owned three parcels near the Gila River known as the "Bowman Parcels," which have Decree rights. The last time the Bowman Parcels were irrigated to grow a crop of any kind was in 1983 or earlier, and the only reason the Bowmans have not been farming on or irrigating the parcels is because the Gila River washed them out in 1983, rendering the land unsuitable for farming. Since 2018, Samuel and Julee Lunt have owned parcels near the Gila River known as the "Lunt Parcels," which have Decree rights. A series of floods in 1993 and 1994 moved the Gila River channel onto the Lunt Parcels, cutting a deep gully through the field and damaging the Lunt Parcels extensively. When the Complaint in this case was filed in 2020, Arizona law provided specified reasons that were "sufficient cause for nonuse." The issue here is simply whether this Court deems Defendants' reasons for not using the water are sufficient to "warrant nonuse" under the catchall exception. The Court concludes the Bowmans' reasons for not using their water for almost forty years at the time of this Order do not warrant nonuse under A.R.S. § 45-189(E)(8). Although the 1983 flood was certainly beyond their control, the Bowmans have not provided sufficient evidence showing their nonuse is temporary, nor have they provided a reason that warrants nonuse under § 45-189(E)(8). The Court concludes the Lunts' nonuse is not warranted under § 45-189(E)(8) because their reasons are not consistent with beneficial use. Like the Bowmans, the Lunts' parcels were rendered unfarmable through no fault of their own. Unlike the Bowmans, who are waiting for an unpredictable, speculative flood, the Lunt Parcels have sat for over fifteen years unirrigated because the Lunts and their predecessor did not rehabilitate them and put them back into production sooner. Accordingly, the Community's Motion for Summary Judgment is granted, and Defendants' Motion is denied.

79. *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe,* 66 F.4th 766, No. 21-35985 (9th Cir., May 1, 2023).

Upper Skagit Indian Tribe brought action alleging that order establishing off-reservation treaty fishing rights did not authorize Sauk-Suiattle Indian Tribe to open salmon fisheries on Skagit River. The United States District Court for the Western District of Washington, Ricardo S.

Martinez, United States District Judge, 2021 WL 4972343, entered Summary Judgment in Plaintiff's favor, and Defendant appealed. The Court of Appeals, Ikuta, Circuit Judge, held that order did not authorize Sauk-Suiattle Indian Tribe to open salmon fisheries on Skagit River. Exhibits two exhibits are informative. The first exhibit, USA-29, p. 13, refers to an expert report prepared by Dr. Barbara Lane regarding the fisheries of the Sauk Tribe (the Lane Report). Finding of Fact 131 is materially identical to Dr. Lane's Conclusion Five in the Lane Report. The second exhibit, "Ex. MS-10, p. 3, l. 1-6," refers to an excerpt from the testimony of James Enick, a member of the Sauk Tribe. According to the Sauk Tribe, the excerpt indicates that the Sauk Tribe fished "[w]herever the people were," meaning wherever tribal members lived, and that the Sauk Tribe lived "[u]p and down the Skagit River." We disagree. Enick's testimony does not state that the Sauk Tribe fished on the mainstem of the Skagit River, and so is not evidence that the river was part of the Sauk Tribe's Usual and Accustomed areas ("U&As"). Moreover, in identifying the Sauk Tribe's fishing areas elsewhere in his testimony, Enick states that the Sauk Tribe fished "mostly on the Sauk River, the whole river, and all of the streams coming into the river." This testimony is consistent with Finding of Fact 131, which also includes the Sauk River and a tributary to the River. We conclude that Judge Boldt did not intend to include the Skagit River in the Sauk Tribe's U&As. *See Tulalip Tribes,* 794 F.3d at 1133. Because there is no ambiguity as to Judge Boldt's intent, we affirm the District Court's holding that the Upper Skagit Tribe was entitled to Summary Judgment.

80. *United States v. Michigan,* 68 F. 4th 1021, No. 22-1946 (6th Cir., May 23, 2023).

United States, State of Michigan, and federal recognized Indian tribes entered into the Decree governing regulation of Great Lakes fisheries. After Decree expired, parties entered into negotiations for a new decree. A Coalition representing private sport fishing, boating, and conservancy groups moved to intervene. The United States District Court for the Western District of Michigan, Paul L. Maloney, J., denied Motion, and the Coalition appealed. The Court of Appeals, Thapar, Circuit Judge, held that the District Court did not abuse its discretion in determining that Coalition's Motion was untimely. For nearly three years, seven sovereigns have been embroiled in negotiations over who gets to manage the Great Lakes fisheries. The merits of those negotiations aren't before us, only an antecedent question of civil procedure: is the Coalition to Protect Michigan Resources ("the Coalition") entitled to intervene in those negotiations just as the parties are approaching a deal? Under our precedent, the answer is no. Even after the Court indefinitely extended the 2000 Decree, the parties continued to act as if they were close to resolution. Indeed, they proposed a successor decree less than four weeks after the court extended the deadline. And the Court is set to adjudicate any remaining objections to that decree in the coming months. Thus, no matter how you look at it, "the court's previously identified 'finish line' ... was fast approaching" when the Coalition moved to intervene. If the successor decree is ultimately unlawful or otherwise suggests that Michigan failed to protect this public resource, the proper remedy would be for the District Court to give the Coalition the right to appeal that decree. But the Coalition's concerns haven't materialized yet and it hasn't shown

that the District Court abused its discretion when it dismissed its Motion to Intervene as untimely. For these reasons, we affirm.

81. ***In Re: Klamath Irrigation District,*** **No. 22-70143, 2023 WL 3810030 (9th Cir., June 5, 2023).** After United States Bureau of Reclamation removed irrigation district's motion, in underlying action in Oregon court involving Oregon Water Resources Department's (OWRD) determination of water rights in Klamath Basin, for preliminary injunction against Reclamation's release of water from lake in compliance with tribal water rights and Endangered Species Act (ESA), and after the United States District Court for the District of Oregon, 2022 WL 1210946, denied irrigation district's motion to remand, irrigation district filed petition for writ of mandamus in the Court of Appeals, seeking to compel district court to remand its Motion for Preliminary Injunction to Oregon state court. The Court of Appeals held that: [1] Oregon court did not have prior exclusive jurisdiction over challenges to federal reserved water rights under ESA and held by tribes; [2] irrigation district had other adequate means to attain desired relief; and [3] mandamus was not necessary to prevent irrigation district from suffering damage or prejudice that could not be corrected on appeal. Disputes over the allocation of water within the Klamath Basin in southern Oregon and northern California, particularly during the recent period of severe and prolonged drought, have prompted many lawsuits in this and other courts. In this episode, Klamath Irrigation District ("KID") petitions for a writ of mandamus to compel the district court to remand KID's Motion for Preliminary Injunction to the Klamath County Circuit Court in Oregon. The Motion had originally been filed by KID in that Oregon court but was removed to federal district court by the U.S. Bureau of Reclamation ("Reclamation"), a federal agency within the U.S. Department of Interior. Reclamation was identified by KID as the respondent for KID's motion. A requirement for obtaining mandamus relief is a determination by us that the district court's order was clearly erroneous as a matter of law. We conclude that the district court's order was not clearly erroneous. As a result, we deny the petition and decline to issue the writ. Here the Klamath County Circuit Court did not have jurisdiction over the Tribes' rights implicated by KID's Motion because the Tribes' rights at issue were not governed by Oregon law and were not subject to the KBA.3,4 *See Baley*, 942 F.3d at 1323, 1340–41. The McCarran Amendment, 43 U.S.C. § 666, "waives the United States'' sovereign immunity for the limited purpose of allowing the Government to be joined as a defendant in a state adjudication [or administration] of water rights." *United States v. Adair*, 723 F.2d 1394, 1400 n.2 (9th Cir. 1983). It does not "authorize private suits to decide priorities between the United States and particular claimants[.]" *Metro. Water Dist. v. United States*, 830 F.2d 139, 144 (9th Cir. 1987), aff'd sub nom. *California v. United States, 490 U.S. 920* (1989). Nor does it expand a state court's subject matter jurisdiction or empower a state to adjudicate rights beyond its jurisdiction, which, at bottom, is what KID's motion for a preliminary injunction seeks to do. See *United States v. Dist. Ct. in and for Eagle Cnty.*, 401 U.S. 520, 523 (1971). The dissent's focus on in rem jurisdiction because the water is stored in Upper Klamath Lake is not entirely misplaced, but it seems myopic for two reasons. First, under the dissent's logic a state could control all surface water

within its borders by damming outflows, thereby attaining in rem jurisdiction over the pooled resource, which is essentially the position KID takes here. Such a result is antithetical to the Supreme Court's interpretation of the term "river system" within the McCarran Amendment to mean one "within the particular State's jurisdiction[,]" which confines a state's adjudication to its own borders. *See Eagle Cnty.*, 401 U.S. at 523. Second, the dissent overlooks the forum shopping at the heart of KID's petition. KID and other similarly situated parties have not succeeded in previous federal lawsuits. *See, e.g.*, *KID I*, 489 F. Supp. 3d 1168, aff'd, *KID II*, 48 F.4th 934, 947; *Patterson*, 204 F.3d 1206, 1213–14; *Baley*, 942 F.3d 1312; *Yurok Tribe*, --- F.Supp.3d at ——, 2023 WL 1785278, at *6; *Kandra*, 145 F. Supp. 2d 1192. Petition denied.

82. *Unkechaug Indian Nation v. New York Department Of Environmental Conservation,* 18-CV-1132, 2023 WL 4054525 (E.D. New York, June 16, 2023).

Unkechaug Indian Nation (the "Nation") and Harry B. Wallace (collectively, "Plaintiffs") bring this action pursuant to 25 U.S.C. § 2201 and Fed. R. Civ. P. 65 seeking a permanent injunction and declaratory judgment against the New York State Department of Environmental Conservation ("NYSDEC") and Basil Seggos, the NYSDEC Commissioner (collectively, "Defendants"). In the Complaint filed on February 21, 2018, Plaintiffs allege NYSDEC's regulations unlawfully interfere with Plaintiffs' fishing rights in designated Reservation areas and in customary fishing waters. Specifically, Plaintiffs argue their fishing rights are protected by treaty and enforceable against NYSDEC, NYSDEC's regulations are preempted by federal law, and NYSDEC's regulations interfere with tribal self-government and impair Plaintiffs' freedom of religious expression. For the reasons stated below, Defendants' Motion for Summary Judgment is granted, and Plaintiffs' Motion for Summary Judgment is denied. The Unkechaug Indian Nation is recognized under both federal and New York state law. New York State's effort to conserve the American eel (Anguilla rostrata) species is at the heart of this case. The American eel represents an important resource for both biodiversity and human use. This species possesses significant ecological, cultural, and commercial value and has therefore been the subject of increasingly stringent protection at the federal and state level. The Atlantic States Marine Fisheries Commission ("ASMFC" or "the Commission"), a congressionally authorized interstate regulatory body comprised of scientists and marine policy experts, controls much of the species' oversight protection. Despite the efforts of the Commissions and its Member States, ASMFC reports compiled in 2012 and 2017 confirmed the species' population continued to decline. Indeed, the rate of the American eel's population decline has worsened in recent years due to the emergence of a lucrative overseas trade in the species, which has further spurred overfishing. This Court need not determine the bounds of the Nation's customary fishing rights in order to find, as it does, Plaintiffs' fishing rights are not without limits. It is well-established that States may impose and enforce certain regulations on such rights. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204–05, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (stating, even when there exists a binding treaty between the Federal Government and an Indian nation—which is notably not the case here—"Indian treaty-based usufructuary rights do not

guarantee the Indians 'absolute freedom' from state regulation."). Indeed, where, as here, the state seeks to regulate in the interest of conservation, the Supreme Court has "repeatedly affirmed state authority" to regulate Indian fishing rights. *See Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 682 (1979); *Antoine v. Washington*, 420 U.S. 194, 207–08 (1975); *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398 (1968)); accord *Herrera v. Wyoming*, 587 U.S. ——, 139 S. Ct. 1686, 1695, 203 L.Ed.2d 846 (2019) ("States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation."). As there is no agreement, no treaty, and no custom upon which Plaintiffs can establish their purported right to "fish freely" anywhere they so choose, the Court finds there is no basis upon which to base a federal preemption claim premised on 25 U.S.C. § 232. The Supreme Court has consistently held states may impose reasonable, nondiscriminatory regulations on off-reservation lands in the interest of conservation necessity. Indeed, the Supreme Court in *Puyallup Tribe* expressly dealt with this issue. 391 U.S. 392 (1968). There, the Court held while Washington State could not "qualify" the Tribe's right to fish—guaranteed to them by a federal treaty, the Treaty of Medicine Creek—the State could nevertheless regulate the manner in which the Puyallup fished. *Id.* at 398 (the Treaty granted the Puyallup "the rights to fish 'at all usual and accustomed places.'"). Specifically, the Court held "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Id.* This same applies here.

83. *Buchanan v. Water Resources Department of the State of Oregon,* Case No. 1:23-cv-00923-CL, 2023 WL 5093879 (D. Oregon, August 9, 2023).

These consolidated cases come before the Court on Petitioners' request for judicial review of Respondent OWRD's July 2023 Orders Denying Stays. In March 2023, the Klamath Tribes, pursuant to their state-determined Tribal claims, made a call for regulation and requested enforcement of their water rights as to the lake levels in the Upper Klamath Lake ("UKL"). After investigating and verifying the Tribes' call, the Oregon Water Resources Department ("OWRD") issued final regulation orders to Petitioners, who hold junior rights to divert water from UKL. The final orders regulated off Petitioners' water use until October 31, 2023, or until otherwise notified. In May 2023, Petitioners filed their petitions for judicial review pursuant to ORS § 536.075(1). The filing of those petitions automatically stayed enforcement of the final orders. Petitioners now seek review of OWRD's Orders Denying Stays. For the reasons that follow, OWRD's Orders Denying Stays are affirmed. Oregon follows the doctrine of prior appropriation of water rights. *Teel Irrigation Dist. v. Water Res. Dep't,* 323 Or. 663, 666–67(Or. 1996). Under this doctrine, "diversion and application of water to a beneficial use constitute an appropriation and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and actually used. The appropriator first in time is prior in right over others upon the same stream." *Baley,* 942 F.3d at 1320. The Klamath

Tribes' federal reserved rights exist independently of state law. *See Klamath Irrigation Dist*., 489 F. Supp. 3d at 1179 ("[Tribal treaty] rights are federal reserved water rights not governed by state law." (quoting *Baley*, 942 F.3d at 1340)). However, the Ninth Circuit left quantification of the Tribes' water and fishing rights to the State of Oregon. On March 1, 2023, the Klamath Tribes, with the concurrence of the BIA, placed a call for enforcement of the Tribes' State-determined water right claims under the ACFFOD. After receiving the Tribes' call, OWRD verified that the elevation of UKL fell below the required level under KA 622. OWRD therefore determined that the call was validated and junior rights on streams tributary to UKL or junior water rights to divert water directly from UKL should be regulated off to prevent further decreases in UKL elevations. OWRD's interpretation of "harm" in "substantial public harm" is within the range of discretion allowed by the more general policy of the statute. OWRD noted that the Tribes' determined claim KA 622 authorizes minimum lake levels in UKL "to establish and maintain a healthy and productive habitat to preserve and protect the Tribes' hunting, fishing, trapping and gathering rights[.]" Viewing the record as a whole, substantial evidence existed for OWRD to reasonably determine that junior appropriators' water diversions would result in harm to the Tribes. For the reasons set forth above, OWRD's July 2023 Orders Denying Stays are affirmed.

G. Gaming

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

This matter comes before the Court on Shoalwater Bay Tribe's Motion for Limited Intervention. Shoalwater Bay Tribe ("the Tribe") seeks to intervene in this action for the limited purpose of moving to dismiss under Federal Rules of Civil Procedure 12(b)(7) and 19. Plaintiff Maverick Gaming LLC ("Maverick") opposes the Tribe's Motion. The Court grants the Tribe's Motion and directs the Tribe to file its motion to dismiss no later than September 30, 2022. This litigation concerns compacts between twenty-nine federally recognized tribes ("Washington Tribes") and the state of Washington entered under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and the Revised Code of Washington § 9.46.360 ("the Compacts"). The Compacts permit Washington Tribes to offer most forms of "casino-style gaming (known as 'class III' gaming under the IGRA)," most of which are legally prohibited for other non-tribal entities. Recent amendments to several of these Compacts ("the Compact Amendments") also allow multiple Washington Tribes to offer sports betting at their casinos, although it remains illegal for other casinos throughout the state. Maverick sued the United States as well as associated federal and Washington state officials under the Administrative Procedures Act and 42 U.S.C. § 1983, alleging that the Compacts and Compact Amendments create a "gaming monopoly," in violation of the IGRA, the Constitution's guarantee of equal protection, and the Constitution's anti-commandeering doctrine. Maverick filed its Complaint with the United States District Court for the District of Columbia; however, on April 28, 2022, the Court transferred the case to the Western District of Washington. Common questions of fact

clearly exist in this case given that the Tribe argues it is an indispensable party to litigation that implicates its interests in gaming compacts with the State of Washington to which it is a party. Moreover, Plaintiff does not rebut the Tribe's assertions that its motion to dismiss shares common questions of law and fact to Plaintiff's claims. Plaintiff fails to show intervention will cause undue prejudice or delay. The Court finds and orders that Shoalwater Bay's Motion to Intervene is granted.

85. *Cherokee Nation v. United States Department of the Interior,* No. 20-2167 (TJK), 2022 WL 17177622 (D.D.C. November 23, 2022).

Plaintiffs are four Native American tribes who each operate casinos in Oklahoma under a tribal-gaming compact with Oklahoma under the Indian Gaming Regulatory Act. In their operative complaint, they seek to have set aside four tribal-gaming compacts for casino operations that four other Native American tribes in Oklahoma submitted to the Secretary of the Department of the Interior for approval, which were approved by inaction by operation of law. Oklahoma's model tribal gaming compact contained a term specifying that it expired automatically on January 1, 2020. However, that term also specified that any such compact would "automatically renew" for successive fifteen-year terms under certain conditions. Plaintiffs allege that the Secretary's failure to consider whether the compacts were not legally "entered into" or were otherwise contrary to the IGRA before no-action approving them violated the IGRA under § 706(2). Both Federal Defendants and Chairman Woommavovah move to dismiss Plaintiffs' claims against them—for Federal Defendants, counts one through seven; and for Chairman Woommavovah, counts one through eight to the extent they challenge the Comanche Nation's compact—for lack of standing. Federal Defendants facially challenge Plaintiffs' standing. Chairman Woommavovah mainly facially challenges the Plaintiffs' standing but also tries to challenge it factually. Federal Defendants' facial challenge partly succeeds—Plaintiffs have failed to plausibly allege that they have standing to challenge the no-action approvals of the United Keetoowah Band's and Kialegee Tribal Town's compacts. But that challenge comes up short in part because Plaintiffs have plausibly alleged that they have standing to challenge the no-action approvals of the Comanche Nation's and the Otoe-Missouria Tribe's compacts. In counts one, two, three, and eight, the Plaintiffs allege that the compacts are entirely illegal and invalid because they were not legally "entered into" as required by IGRA. To pursue these claims, Plaintiffs must plausibly allege that at least one of them suffered an injury in fact, that is fairly traceable to the challenged action—the Secretary's no-action approval, in counts one through three; and Defendant Tribal Leaders' actions under the allegedly invalid compacts, in count eight—and that is likely redressable, assuming Plaintiffs prevail on each of these counts. Plaintiffs allege that a portion of Oklahoma in which the Kialegee Tribal Town might be able to obtain land under its compact for class III gaming through the trust-acquisition process is in the Citizen Potawatomi Nation's territory. And they allege that this possibility "threatens" the Citizen Potawatomi Nation's "jurisdictional integrity and sovereignty." Granted, an "actual infringement [ ]" of a tribe's "sovereignty" can constitute a "concrete injury sufficient to confer

standing." But an "abstract injury" to such sovereignty "is not sufficient to confer standing." *See West Virginia v. U.S. Dep't of Health & Human Servs.*, 145 F. Supp. 3d 94, 102 (D.D.C. 2015). Further, any state-law dispute between the Governor and others about whether the compacts were validly "entered into" was resolved—at least for the time being and for the Secretary's purposes—during the forty-five-day review period. For all these reasons, it is hereby ordered that: Federal Defendants' Motion to Dismiss is granted in part and denied in part.

86. *Alturas Indian Rancheria, v. Newsom,* No. 2:22-cv-01486-KJM-DMC, 2023 WL 3025225 (E.D., April 20, 2023).

Plaintiff Alturas Indian Rancheria ("Alturas") brings this action against Defendants Gavin Newsom and the State of California, challenging the Defendants' negotiating position with respect to a new tribal-state compact. Alturas claims defendants did not negotiate the compact in good faith as required by the federal Indian Gaming Regulatory Act (IGRA) and did not offer a materially identical compact as required by state law. Defendants move to dismiss Alturas' state law claims, arguing those claims misconstrue the relevant state law and have no legal basis. In response, Alturas moves for summary judgment on the state law claims. Those state law claims present a matter of first impression. Because Alturas cannot state a claim under the relevant state law, the court grants the defendants' motion and dismisses Alturas' sixth and seventh claims with prejudice. As a result, the court also denies as moot Alturas' cross-motion for summary judgment on those claims. There are two parts to the lawsuit. The first addresses IGRA. Before the adoption of IGRA, states did not have civil regulatory authority over tribal gaming activities in Indian country. IGRA allows states to play a role in regulating gaming by negotiating tribal-state compacts. Alturas argues defendants did not negotiate in good faith, stating five claims for relief under IGRA. The second part invokes California Government Code section 12012.25. Alturas alleges that the defendants violated section 12012.25 because they did not execute a materially identical tribal-state compact. Defendants concede Alturas' first five claims allege sufficient facts to support cognizable claims under IGRA. However, they argue Alturas' sixth and seventh claims are predicated on a misinterpretation of section 12012.25. Defendants contend this state law only provides a ratification process. In contrast, Alturas' sixth and seventh claims presume the state law requires the Governor to submit a materially identical compact to the legislature. The statute's unambiguous meaning is confirmed by its structure and other provisions. Subdivision (d) states the Governor is "the designated state officer responsible for negotiating and executing, on behalf of the state," tribal-state compacts. If subdivision (b) intended to limit the Governor's authority to negotiate and execute materially identical compacts, then the legislature would not have omitted such a limitation from subdivision (d), which expressly addresses the scope of the Governor's authority. In sum, Section 12012.25(b) does not create a tribal entitlement. Alturas' sixth and seventh claims are dismissed.

87. *Chicken Ranch Rancheria of Me-Wuk Indians v. California,* 65 F.4th 1145, No. 21-15751 (9th Circuit, April 25, 2023).

Indian tribes filed an action against California under the Indian Gaming Regulatory Act (IGRA) arising from California's alleged failure to engage in good faith negotiations of a tribal-state gaming compact for high-stakes Las Vegas-style casino gambling. The United States District Court for the Eastern District of California, Anthony W. Ishii, Senior District Judge, 530 F.Supp.3d 970, granted summary judgment for tribes. California appealed. The Court of Appeals, 42 F.4th 1024, affirmed. Thereafter, tribes moved for attorney fees for litigating the appeal. The Court of Appeals, Bress, Circuit Judge, held that: [1] sovereign immunity did not bar tribes' request for attorney fees; [2] federal law applied to issue of attorney fees; and [3] tribes were not entitled to attorney fees. Motion denied. The tribes ask for attorneys' fees under California law. We hold that because the Plaintiffs prevailed on a federal cause of action, they are entitled to attorneys' fees only if federal law allows them. Because it does not, we deny the tribes' fee request. We have long held that "[i]n a pure federal question case brought in federal court, federal law governs attorney fees." *Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 940 (9th Cir. 2009) (*citing Bass v. First Pac. Networks, Inc.*, 219 F.3d 1052, 1055 (9th Cir. 2000)). And under federal law, which follows the so-called "American Rule," "absent statute or enforceable contract, litigants pay their own attorneys' fees." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 257 (1975); *see also Peter v. Nantkwest, Inc.*, 589 U.S. ——, 140 S. Ct. 365, 370–71 (2019); *Baker Botts L.L.P. v. ASARCO L.L.C.*, 576 U.S. 121, 126 (2015). The IGRA is, of course, a federal statute. In *Chicken Ranch I,* our jurisdiction was thus based on a federal question. 25 U.S.C. § 2710(d)(7)(A)(i); 28 U.S.C. § 1331. And IGRA contains no provision for attorneys' fees. Because the tribes brought a claim only under IGRA, California law does not govern their fee request. And because federal law does not provide for fee shifting here, the Tribes' motion for attorneys' fees must be denied.

88. *Corrales, Jr., v. California Gambling Control Commission, et al.,* D080288, 2023 WL 4419286 (CA Ct. App. 4d, June 23, 2023).

The attorney brought action against the Gambling Control Commission and two competing factions of the California Valley Miwok Tribe, including his former client who was the disputed leader of the Tribe, seeking to recover his legal fees purportedly owed by the Tribe from the Tribe's Revenue Sharing Trust Fund (RSTF) money. The Superior Court, San Diego County, No. 37-2019-00019079-CU-MC-CTL, Ronald F. Frazier, J., dismissed the lawsuit and denied the attorney's post-judgment Motions for New Trial and Relief from Default. Attorney appealed. The Court of Appeal, Irion, J., held that: [1] the trial court lacked subject-matter jurisdiction; [2] allegations did not support the attorneys' ostensible agency theory; [3] the trial court lacked subject-matter jurisdiction to decide if the attorney could recover fees under principles of quantum meruit; and [4] trial court's reference to Tribe's sovereign immunity, which was not raised in the Motion to Dismiss, did not warrant a new trial. In six previous opinions, we have addressed issues arising from litigation caused by the ongoing leadership and membership

dispute of the California Valley Miwok Tribe (the Tribe). Most of our prior opinions related to the money in the Indian Gaming Revenue Sharing Trust Fund (RSTF) that the Tribe is entitled to receive every quarter. Among other things, we previously determined that the California Gambling Control Commission (the Commission) is entitled to hold the Tribe's RSTF money in trust, rather than releasing it to the Tribe, until the Tribe's leadership and membership dispute is settled, and the Commission is able to identify a tribal representative to receive the funds. (CVMT 2014, supra, 231 Cal.App.4th 885, 180 Cal.Rptr.3d 499.) Specifically, we approved of the Commission's decision to withhold the RSTF money from the Tribe until the federal Bureau of Indian Affairs (BIA) signals that it believes the tribal membership and leadership dispute has been resolved by establishing a government-to-government relationship with a tribal leadership body for the purpose of entering into a contract for benefits under the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. § 5301 et seq.; ISDEAA), otherwise known as a 638 contract. Affirmed.

89. *West Flagler Associates, Ltd., v. Haaland,* 71 F.4th 1059, No. 21-5265 (D.D.C. Ct. App., June 30, 2023).

Casinos brought action under the Administrative Procedure Act (APA) alleging that Interior Secretary's decision to allow gaming compact permitting tribes to offer online sports betting throughout the state violated the Indian Gaming Regulatory Act's (IGRA) Indian lands requirement. The United States District Court for the District of Columbia, Paul L. Friedman, Senior District Judge, 573 F.Supp.3d 260, denied the tribe's Motion to Intervene and entered summary judgment in the casinos' favor. Tribe and Secretary appealed. The Court of Appeals, Wilkins, Circuit Judge, held that: [1] Secretary's decision not to act on compact was consistent with IGRA; [2] the compact did not violate federal Wire Act; [3] Secretary was not required to disapprove compact on the ground that it violated Unlawful Internet Gambling Enforcement Act (UIGEA); and [4] the Secretary's approval of compact did not violate the Fifth Amendment's equal protection guarantee. The District Court denied the tribe's Motion to Intervene, finding that it was a required party but that the Secretary adequately represented its interests in this litigation, and therefore the litigation could proceed in the tribe's absence in equity and good conscience. Because the tribe will suffer minimal to no prejudice in light of this Court's ruling on the merits, we affirm the denial of the Motion to Intervene on alternate grounds. Here, there is little practical difference between a Rule 19 dismissal on the one hand and a judgment for the Secretary on the other. Both would keep the 2021 Compact, the relief that the tribe ultimately seeks. In fact, the tribe did not shy away from expressing its views on the merits of this case; it filed an amicus brief explaining why it believes the District Court erred in vacating the Compact. While the ability to file an amicus brief is never per se "enough to eliminate prejudice," *Wichita & Affiliated Tribes v. Hodel,* 788 F.2d 765, 775 (D.D.C. 1986), the tribe's brief lessens whatever prejudice it would suffer from having this issue resolved favorably in its absence. In reaching this conclusion, we do not discount or take the tribe's "substantial interest" in its sovereign immunity lightly, *see Republic of Philippines v. Pimentel,* 553 U.S. 851, 868–69 (2008). Still, we

ultimately find that any infringement on that immunity is "remote" and "theoretical" in these unique circumstances. Because Rule 19's guiding "philosophy ... is to avoid dismissal whenever possible[,]" we find that the practical benefits of deciding this case on the merits outweighs any prejudice to the tribe. We vacate the opinion below, and the District Court is directed to enter judgment for the Secretary. We affirm the denial of the tribe's Motion to Intervene.

90. *Kansas, v. United States Department of the Interior,* No. 21-3097, 2023 WL 4307478 (10th Cir., July 3, 2023).

The State of Kansas, several government entities, and two Native American tribes brought an action challenging the administrative decision of the Secretary of the Department of the Interior and Assistant Secretary for the Bureau of Indian Affairs to acquire ten-acre parcel of land in trust for the benefit of Wyandotte Tribe, that was purchased with funds legislatively allocated to buy new land for Wyandotte Tribe and to allow Wyandotte Tribe to conduct gaming on the land. The United States District Court for the District of Kansas, Holly L. Teeter, J., 2021 WL 1784557, granted the Secretary and Bureau's motion to strike the State's accounting report and agreed with the Secretary and Bureau's decision to acquire the parcel in trust and allow Wyandotte Tribe to conduct gaming on the land. State appealed. The Court of Appeals, Phillips, Circuit Judge, held that: [1] district court did not abuse its discretion in striking State's accounting report affidavit as extra-record evidence; [2] the Secretary did not act arbitrarily and capriciously in taking ten acre parcel of land in trust for benefit of Wyandotte Tribe that was purchased with funds legislatively allocated to buy new land for Wyandotte Tribe; [3] facts established in previous litigation involving Wyandotte Tribe's purchase of tract of land did not render the Secretary's determination arbitrary and capricious to acquire ten acre parcel of land in trust; [4] the Secretary adequately explained any needed departure from policy and thus the Secretary's determination was not arbitrary and capricious to acquire ten acre parcel in trust; [5] the Secretary took ten acre parcel of land in trust for benefit of Wyandotte Tribe, as required to meet Indian Gaming Regulatory Act's settlement-of-a-land-claim exception to permit the Tribe to conduct gaming operations on the land; [6] the Secretary acquired ten acre parcel of land in trust under a settlement of a land claim, as required to meet Indian Gaming Regulatory Act's settlement-of-a-land-claim exception to permit Tribe to conduct gaming operations on the land; and [7] ten acre parcel of land was taken in trust by the Secretary as part of the settlement of a land claim for the benefit of Wyandotte Tribe, as required to meet Indian Gaming Regulatory Act's settlement-of-a-land-claim exception to permit the Tribe to conduct gaming operations on the land. Affirmed.

91. *St. Monica Development, et al., v. Gabrielino-Tongva Tribe, et al.,* B302377, B308161, 2023 WL 4397158 (CA Ct. App. 2d, July 7, 2023).

In 1994, the State of California recognized the Gabrielinos as "the aboriginal tribe of the Los Angeles Basin." In early 2000, Stein approached Tongva Tribe descendant Sam Dunlap, about obtaining federal recognition to facilitate a casino gaming operation in Los Angeles. Stein represented himself as a sophisticated transactional lawyer experienced in tribal gaming and

financing. Stein and Dunlap courted a Gabrielino faction led by Jim Velasquez (the Coastal faction). The Coastal faction is the predecessor to the Gabrielino-Tongva Tribe (the Tribe). In 2006, the California Legislative Counsel issued an opinion to Senator Vincent that the Tribe was not a state-recognized tribe, and even if it were, a state-recognized tribe could not engage in gaming without federal recognition. The opinion stated in a footnote, "The state of California may recognize a tribe that is not federally recognized, but it has not done so." The opinion expressly concluded, "The Legislature has no power to authorize a non-federally recognized Indian tribe to operate slot machines, lottery games, and banking and percentage card games in California, even if the state gives the tribe the designation of a state-recognized tribe." Ultimately, a three-phase trial was held in the Superior Court of Los Angeles County on three consolidated cases arising from contracts to develop casino gaming for the Tribe. Appellants Jonathan Stein and St. Monica Development Company, LLC (SMDC), appeal from the judgment after trial in favor of the respondent Tribe and individual Defendants: lobbyist Richard Polanco, attorney Elizabeth Aronson, and Tribal Council members Sam Dunlap, Virginia Carmelo, Martin Alcala, Edgar Perez, Shirley Machado, and Adam Loya. On appeal, Stein and SMDC contend: (1) the trial court's statement of decision is not entitled to deference, because the court did not make any of the changes suggested by Stein and SMDC; (2) the trial court's findings are not supported by the evidence, including findings of an attorney-client relationship between Stein and the Tribe, a right to rescission of the contract between SMDC and the Tribe based on Stein's violation of the California Rules of Professional Conduct, fraud, intentional interference with contract, tortious interference with prospective economic advantage, conversion, breach of the covenant of good faith and fair dealing, attorney malpractice, and breach of fiduciary duty; (3) the compensatory damages awarded were too speculative and incorrectly calculated; (4) the punitive damages awarded were not supported by evidence of Stein's net worth; and (5) the trial court erred by finding Stein and SMDC dismissed their claims against the Tribe prior to trial, and by failing to adjudicate claims in their cross-complaint against the individual defendants. The Court concludes the statement of decision is entitled to the usual consideration on appeal. The trial court's finding that an implied attorney-client relationship existed between Stein and the Tribe, which allowed for rescission of the agreement based on Stein's violation of professional rules, is supported by substantial evidence, as are the court's findings of fraud and conversion. The compensatory damages awarded were not overly speculative, but the calculation was incorrect. The amount must be reduced from $20,411,067.23 to $19,161,067.23, which was the maximum amount supported by the evidence. The trial court concluded that Stein was estopped from objecting to punitive damages based on a lack of evidence of his net worth because he failed to provide credible evidence of his net worth in discovery, and no error has been shown. The trial court's finding that Stein and SMDC dismissed their claims against the Tribe was supported by substantial evidence, and despite the dismissals, Stein and SMDC were permitted to try their claims against the Tribe and the individual defendants in full. As modified, the judgment is affirmed.

92. *No Casino In Plymouth, v. National Indian Gaming Commission,* No. 22-15756, 2023 WL 4646113 (9th Cir., July 20, 2023).

No Casino in Plymouth (NCIP) and several members appeal from the district court's Order granting Judgment on the Pleadings in favor of the government on each of NCIP's six claims. In sum, the law of the circuit doctrine forecloses three of NCIP's six claims. *See In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017). One of NCIP's claims fails on the merits, and NCIP has waived its remaining two claims. NCIP purports to challenge the Department of the Interior's ("DOI's") approval of the Ione Band of Miwok's ("Ione Band's") tribal gaming ordinance in 2018. But in substance, three of NCIP's claims (Claims One, Three, and Four) turn on challenges to DOI's earlier 2012 Record of Decision ("2012 ROD") taking land into trust in Plymouth, California, for the benefit of the Ione Band and approving the use of certain lands for tribal gaming. In a prior appeal, we considered and rejected the claims and legal theories NCIP now attempts to resuscitate in the instant appeal. *See County of Amador v. U.S. Dept. of the Interior*, 872 F.3d 1012 (9th Cir. 2017); *see also NCIP v. Zinke*, 698 Fed. App'x 531 (9th Cir. 2017) (mem.) (dismissing NCIP's prior appeal on standing grounds). "Under our law of the circuit doctrine, a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so." *Zermeno-Gomez*, 868 F.3d at 1052 (internal quotation marks omitted). We reject NCIP's second claim, which contends that the 2012 ROD violated the Appointments Clause because it was approved by an Acting Assistant Secretary of Indian Affairs who was not nominated by the president and confirmed by the Senate. Assuming without deciding that the Assistant Secretary as a permanent position is a Principal Officer, the Acting Assistant Secretary remained an Inferior Officer because he was charged "with the performance of the duty of the superior for a limited time and under special temporary conditions." *United States v. Eaton*, 169 U.S. 331, 343 (1898); *see also Morrison v. Olson*, 487 U.S. 654, 672 (1988). NCIP has waived consideration of the two constitutional claims (Claims Five and Six) it attempts to raise on appeal. In proceedings before the district court, NCIP alleged that the government's 2012 ROD and 2018 approval of Ione Band's tribal gaming ordinance violated the Equal Protection Clause of the Fifth Amendment and the Tenth Amendment. On appeal, NCIP raises identical arguments but refashions those claims into Bivens claims—oddly suing individual Defendants in their personal capacities yet, seeking injunctive relief to rescind actions taken in Defendants' official capacities. Affirmed.

H. Jurisdiction, Federal

93. *Queens, LLC v. Seneca-Cayuga Nation,* 635 F. Supp. 3d 1199, 2022 WL 7074271 (N.D. Okla. October 12, 2022).

Vendors brought action against the purchaser, tribe, for breach of contract arising from failure to make payments on the purchase price for multiple lakefront businesses. Vendors brought a Motion for Determination of whether federal court subject-matter jurisdiction existed. Holdings: The District Court, William P. Johnson, J., held that: First, vendors' attempt to file a case for

breach of contract in federal court despite vendors' belief that jurisdiction was not proper was not a Rule 11 violation; second, federal question jurisdiction did not exist over vendors' claim against purchaser; and third, diversity jurisdiction did not exist over vendors' claim against purchaser. Ordered accordingly.

94. *James Van Nguyen v. Patricia Foley,* No. 21-3735, 2022 WL 16631180 (8th Cir. November 2, 2022).

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

95. *Murray Dines v. Laura Kelly,* No. 2:22-cv-02248-KHV-GEB, 2022 WL 16762903 (D. Kan. November 8, 2022).

Murray Dines has filed suit against the Governor and the Attorney General of the State of Kansas in their official capacities. Pursuant to 42 U.S.C. § 1983, the Plaintiff alleges that the Defendants are violating federal laws regulating hemp production and seeking injunctive and declaratory relief. Specifically, the Plaintiff asks the Court to declare that federal law preempts portions of the Kansas Commercial Industrial Hemp Act ("Kansas Hemp Act"), K.S.A. § 2-3901 et seq., and the Kansas Controlled Substance Act, K.S.A. § 65-4101 et seq., which purport to criminalize the sale and possession of certain hemp products. Until recently, federal law prohibited the growth and cultivation of hemp. In 2014, however, President Barack Obama signed into law the Agricultural Act of 2014 ("2014 Farm Act"), which allowed states and research institutions to

cultivate industrial hemp for research purposes without approval from the Drug Enforcement Administration. Pub L. No. 113-79, § 7606. In 2018, President Donald Trump signed a new farm bill—the Agriculture Improvement Act of 2018 ("2018 Farm Act")—which repealed and replaced the 2014 Farm Act. Subtitle G of the 2018 Farm Act permits and regulates hemp production by licensed hemp producers. To the extent a state or tribal plan is not approved, the Secretary establishes a plan for the production of hemp in that state or territory. *Id.* §1639q(a)(1). The Kansas CSA regulates the manufacture, importation, exportation, possession, use and distribution of certain substances in Kansas. The 2018 Farm Act focuses on power and methods reserved to the Secretary of Agriculture for enforcement and regulation of the state, Indian, and Department of Agriculture plans for hemp production. Such a delegation of authority is evidence that no private right of action was intended. The 2018 Farm Act does not create a private right for the plaintiff to possess and sell hemp and hemp products under Section 1983 or as an implied cause of action under the 2018 Farm Act itself. Therefore, defendants' Motion to Dismiss is sustained.

96. *Archambault v. United States of America,* 3:22-CV-03002-RAL, 2022 WL 17818657 (D.S.D. November 18, 2022).

In January 2019, on the Rosebud Indian Reservation, Jacob Archambault Spotted Tail was shot and killed during an encounter with two Rosebud Sioux Tribe police officers. Jacob's mother, Charlee Archambault, alleges that the officers violated her son's constitutional rights and that she and Jacob's estate are entitled to damages. For the reasons set forth below, this Court grants the Motions to Dismiss all § 1983 claims as well as any claims against the United States and "Unknown Supervisory Personnel" of the United States. This Court stays the remaining *Bivens*-based claim against the named tribal police officers pending exhaustion of any available tribal court remedy. Resolution depends on three issues: (1) Whether Plaintiff's suit against the Officers is in fact, against the Rosebud Sioux Tribe as a sovereign entity and consequently barred by tribal sovereign immunity; (2) Whether *Bivens* or 42 U.S.C § 1983 extends a cause of action against the Officers on the alleged facts; and (3) Whether this Court should require Plaintiff to exhaust any remedies in Rosebud Sioux Tribal Court before exercising jurisdiction. When a lawsuit is brought against tribal employees in their individual capacities, courts are instructed to "look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, 581 U.S. 155, 162 (2017). Given the overlapping claims alleged here and guided in part by the Eighth Circuit's approach in *Stanko*, this Court considers it appropriate to address whether Plaintiff has plausibly alleged a claim upon which relief can be granted against the Officers under *Bivens* or § 1983 without fully deciding the tribal sovereign immunity question. See *Stanko*, 916 F.3d at 698 (focusing on whether plaintiff stated a plausible claim). Plaintiff rests her claims on 42 U.S.C. § 1983 and *Bivens*. Tribes and in turn their tribal officers thus are as a general rule not state actors. There is no action under color of state law when tribal law enforcement officers employed by a tribe under a 638 contract respond to a dispatch call on the reservation about a tribal member having caused a disturbance and then

pursue the tribal member on the reservation leading to a confrontation and use of deadly force. "[T]o state an actionable *Bivens* claim, a plaintiff must show (1) a violation of a constitutional right, (2) committed by a Federal actor, (3) who acted with the requisite culpability and causation to violate the constitutional right." This is not the first time a plaintiff has invoked *Bivens* to sue a tribal officer working under a 638 contract. *See Boney v. Valline*, 597 F. Supp. 2d 1167, 1183–1186 (D. Nev. 2009) (after initially denying motion to dismiss, granting summary judgment refusing to allow *Bivens* action against a tribal law enforcement officer based on 638 contract where tribal law enforcement officer was enforcing tribal law against a tribe member on tribal territory); *Ten Eyck*, 463 F. Supp. 3d at 989 (allowing a *Bivens* claim to proceed against the tribal officer because tribal officer was assisting state law enforcement off tribal land, and absent the 638 contract, tribal police did not otherwise have authority to so assist). The Supreme Court has quite recently reemphasized that "recognizing a cause of action under *Bivens* is a disfavored judicial activity." *Egbert*, 142 S. Ct. at 1803 (cleaned up and citations omitted). In general, whether a court should recognize a *Bivens* action is at least a two-step inquiry: A *Bivens* cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate special factors counseling hesitation in the absence of affirmative action by Congress. The second is when defendants show that Congress has provided an alternative remedy that it explicitly declared as a substitute for recovery directly under the Constitution and viewed as equally effective. Here, Archambault is a tribal member, involved in an incident on tribal land, with tribal police responding, pursuing, and shooting him on the Reservation. In a case that so deeply touches the sovereign interests of the Rosebud Sioux Tribe, the "[p]romotion of tribal self-government and self-determination" presents the question of whether this Court should stay the case to allow the Rosebud Tribal Court to "evaluate the factual and legal bases" underpinning Plaintiff's claims before this Court proceeds to determine whether any *Bivens* claims can proceed to trial against the Officers. The Officers both contend that Plaintiff could have brought a claim in Rosebud Sioux Tribal Court but failed to do so. Perhaps the tribal court case will obviate any *Bivens* claim or case here. Counts Two, Three, and Four alleging § 1983 violations are dismissed without prejudice to filing claims in the Rosebud Sioux Tribal Court. Even taking all of Plaintiff's allegations as true, there is nothing to suggest that any government officials other than Officer Romero and Officer Antman were involved in what led to Jacob Archambault's death. Ordered that this case is stayed to allow Plaintiff to exhaust tribal court remedies, which this Court expects Plaintiff to promptly do.

97. *Lula Williams v. Matt Martorello,* 59 F.4th 68, No. 21-2116 (4th Cir. January 24, 2023). Borrowers who took out small-dollar high-interest loans from payday lenders formed under tribal laws of Lac Vieux Band of Lake Superior Chippewa Indians (LVD) brought a putative class action against lenders created by a tribe and non-Native American individual who was allegedly both de facto head and primary beneficiary of LVD's lending operations as part of the alleged "Rent-a-Tribe" scheme. Borrowers sought declaratory judgment that loan contracts were void and unenforceable under Virginia law and public policy and alleged violation of Racketeer

Influenced and Corrupt Organizations Act (RICO), violation of Virginia's usury statute, and unjust enrichment. The United States District Court for the Eastern District of Virginia, Robert E. Payne, Senior District Judge, 329 F. Supp. 3d 248, denied Motion to Dismiss for lack of subject matter jurisdiction. Defendants filed interlocutory appeal. The Court of Appeals, Gregory, Chief Judge, 929 F. 3d 170, reversed and remanded. After remand, the District Court, Payne, Senior District Judge, dismissed tribal entities for lack of subject matter jurisdiction, found material misrepresentation by individual defendant, 2020 WL 6784352, determined that borrowers did not waive right to participate in a class action against individual defendant, 2021 WL 2930976, and certified class, 339 F.R.D. 46. Defendant's petition for permission to appeal was granted. The Court of Appeals, Agee, Circuit Judge, held that: [1] District Court permissibly reconsidered previous factual findings and found misrepresentation by Defendant; [2] individual Defendant was not affiliated entity under loan agreement waiving right to bring class action against affiliated entities; [3] as a matter of first impression, prospective waiver doctrine rendered unenforceable borrowers' waiver of right to bring class action; and [4] District Court did not clearly err in determining that common questions of law or fact predominated over questions affecting only individual members. Affirmed.

98. *Stimson Lumber Company v. The Coeur D'Alene Tribe,* No. 2:22-cv-0067-DCN, 2023 WL 2354888 (D. Idaho March 2, 2023).

Plaintiff Stimson Lumber Company ("Stimson") and Defendant Coeur d'Alene Tribe (the "Tribe") are parties to a lease agreement ("Lease"). That Lease permitted Stimson to operate a sawmill on the Tribe's land in Benewah County, Idaho. It also granted Stimson an option to purchase the mill at the end of the full lease term for no extra cost—the past rent payments were to constitute the sale price. The Lease contains a dispute resolution clause, including a forum selection clause by which the parties "submit" to the jurisdiction of this Court and forego all other tribunals: "The Parties agree that any disputes concerning, relating to, or arising out of this Agreement present a federal question. With respect to any Proceeding each Party irrevocably submits to the exclusive jurisdiction of the United States District Court for the District of Idaho. Each Party hereby irrevocably waives any objection which it may have at any time to the venue of any Proceedings brought in the United States District Court for the District of Idaho, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court should not exercise its jurisdiction or should defer to some other judicial or administrative tribunal, whether federal, state, or tribal." Stimson sued the Tribe before this Court, claiming diversity jurisdiction and alleging breach of contract, unjust enrichment, and conversion. Stimson moved for a preliminary injunction to prevent the Tribe from harassing the mill workers or beginning eviction proceedings. The Court granted the motion and issued an injunction. Later, however, when the Tribe raised subject matter jurisdiction, the Court found that there was no diversity between the parties and dismissed the case. *Stimson Lumber Co. v. Coeur d'Alene Tribe,* 2022 WL 3446084 (D. Idaho Aug. 16, 2022). Stimson now files a second iteration of the same suit. This time it

claims federal question jurisdiction and seeks a declaratory judgment that, "Section 19.3.2. [the Lease's forum selection clause] is enforceable against the Tribe; therefore, the Tribe's court does not have jurisdiction to resolve the disputes regarding the Parties rights and duties under the Agreement." The mere fact that an Indian tribe or individual is party to a case does not create federal question jurisdiction. *Newtok Vill. v. Patrick*, 21 F.4th 608, 616 (9th Cir. 2021). "Nor is there any general federal common law of Indian affairs." *Id.* In fact, the Ninth Circuit has held that "federal common law does not cover all contracts entered into by Indian tribes because that might open the doors to the federal courts becoming 'a small claims court for all such disputes.'" *Id.* (quoting *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 714–15 (9th Cir. 1980)). Suits for breach of contract do not, as a rule, entail a federal question. *Kokkonen*, 511 U.S. at 381. Parties cannot contractually oust courts of jurisdiction they would otherwise have. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972). Nor can they contractually consent to subject matter jurisdiction that would not otherwise exist. *Kolbe v. Trudel*, 945 F. Supp. 1268, 1270 (D. Ariz. 1996). The Lease—not a tribal court judgment—creates Stimson's cause of action. And a substantial question of federal law is not a necessary element of Stimson's complaint. Stimson seeks a declaration that "Section 19.3.2. is enforceable against the Tribe; therefore, the Tribe's court does not have jurisdiction to resolve the disputes regarding the Parties rights and duties under the Agreement." It asks the Court to decide whether tribal court is an appropriate forum, not under federal law, but under the dispute resolution clause of the Lease. Because federal law does not create the cause of action, and because a substantial question of federal law is not a necessary element of Stimson's well-pleaded complaint, the Court lacks subject matter jurisdiction over the case and must dismiss.

99. *Mandan, Hidatsa And Arikara Nation, V. United States Department Of The Interior, Et Al.*, 66 F.4th 282 (D.C. April 21, 2023).

Indian tribes brought action against United States Department of the Interior regarding royalties for mineral extraction in bed of Missouri River running through reservation. State which had issued oil and gas leases in riverbed filed Motion to Intervene as of right. The United States District Court for the District of Columbia, Amy Berman Jackson, J., 2022 WL 19568607, denied Motion. State appealed. The Court of Appeals, Randolph, Senior Circuit Judge, held that: [1] Department was no longer faithful representative of state's interest after initially being an ally; [2] state claimed interest related to property that was the subject of the tribes' action; and [3] District Court's disposition could, as a practical matter, impair or impede state's ability to protect its claimed property interest. To put the case succinctly, the state claims that it owns the bed of Missouri River running through the Reservation. The tribes' Complaint asserts that the tribes, not the state, own the riverbed. An affidavit of North Dakota's Director of Mineral Management, executed in 2020, stated that North Dakota had issued approximately 255 oil and gas leases to the Missouri Riverbed within the Reservation's boundaries and that the lessees were withholding royalty payments pending resolution of this dispute. As of 2020, the state estimated that the withheld payments were in excess of $116 million. In August 2020 when North Dakota

became aware of the tribes' lawsuit in the federal district here, the State filed an "emergency" motion to intervene. Invoking Federal Rule of Civil Procedure 24(a)(2) and claiming a proprietary and sovereign interest in the riverbed, the State claimed a right to intervene. The tribes opposed the state's Motion on the ground that the Interior Department would adequately protect the state's interest in the riverbed and its minerals. (At the time, the position of the Interior Department was the same as the state's, that the state owned the Missouri Riverbed.) The district court granted the state's Motion to Intervene, thus making the state a party in the case. By 2022, with the case still pending, the Administration had changed, and a new Interior Solicitor was in office. This Solicitor withdrew his predecessor's 2020 opinion and declared in an opinion (M-37073) that the riverbed and its minerals belonged to the tribes. The Interior Department informed the district court of the new Solicitor opinion and stated that Interior's Bureau of Indian Affairs had recorded title to the disputed lands in its Office of Land Titles and Records as held by the United States in trust for the Tribes. With agreement of the Tribes, the Interior Department, and North Dakota, the district court dismissed as moot Counts I and II, and part of Count IV. The Tribes, now joined by the Interior Department, filed oppositions to the state's continuing as a party. In response, the state moved again to intervene with respect to the remaining Counts. This time the district court denied the state's intervention motion, a ruling that is now the subject of the state's appeal. The district court's ruling was mistaken. As then-Judge McConnell held for the court in *Southern Utah Wilderness Alliance v. Bureau of Land Management,* 425 F.3d 735 (10th Cir. 2005), Interior lacks "authority to adjudicate legal title to real property," which "is a judicial, not an executive function." Reversed and remanded.

100. *Gilliland v. Barteaux,* Case No. 22-CV-0257-JFH-JFJ, 2023 WL 3066122 (N.D. Oklahoma, April 24, 2023).

Petitioner sought habeas relief under the Indian Civil Rights Act (ICRA), challenging criminal charges for embezzlement against her in Cherokee Nation Tribal Court. Cherokee Nation judge, attorney general, and special prosecutor moved to dismiss. The District Court, John F. Heil, III., J., held that the petitioner was not "in custody" for purposes of ICRA, and thus, the district court lacked subject matter jurisdiction. Motion granted. Gilliland resigned from her position as Executive Director of the Cherokee Nation Foundation ("CNF"), a non-profit organization, in 2013. Three years later, the Cherokee Nation filed a criminal complaint against Gilliland in Cherokee Nation District Court, charging her with nine counts of embezzlement. In August 2016, Gilliland surrendered to tribal authorities, was arraigned on the complaint, entered a plea of not guilty, and was released on her own recognizance with no bond required. In August 2018, before trial, Gilliland moved to Poland with her husband, a Polish citizen, and their two children. A federal court does not have jurisdiction to adjudicate a § 1303 habeas petition unless the petitioner is "in custody" "by order of an Indian tribe." 25 U.S.C. § 1303. However, the petitioner does not need to be in physical custody to satisfy this requirement. Instead, "[a] petitioner is in custody for purposes of the [habeas] statute if he or she is subject to 'severe restraints on [his or her] individual liberty.' A severe restraint is one "not shared by the public

generally." *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). In sum, the Court finds that Gilliland is not "in custody," "detained," or otherwise subject to "severe restraints on her individual liberty" given that she made a deliberate choice to move out of the United States while criminal charges are pending against her and the only relevant "detention order" she identifies is the March Arrest Warrant that requires her to post a cash bond only if she is arrested following her deliberate choice to return to the United States. Dismissed.

101. *United States v. Peneaux*, 3:22-CR-30105-RAL, 2023 WL 3613035 (D. South Dakota, Central Div., May 2, 2023).

Defendant moved to dismiss indictment charging him with possession of firearm by person convicted of misdemeanor crime of domestic violence, arguing that his prior tribal court convictions for domestic abuse did not qualify as misdemeanor crimes of domestic violence. The District Court, Roberto A. Lange, Chief Judge, held that: [1] categorical approach applied to determine whether defendant's prior tribal court convictions had "use of physical force" as element to qualify as misdemeanor crimes of domestic violence, and [2] offense of domestic abuse under Rosebud Sioux tribal law was not "categorically" a misdemeanor crime of violence, and, thus, defendant's prior tribal court convictions could not serve as predicate offenses. Federal law prohibits the possession of a firearm by a person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). Defendant Hunter Peneaux pleaded guilty to domestic abuse in Rosebud Sioux Tribal Court on three separate occasions. A grand jury later indicted him for violating § 922(g)(9). Peneaux now moves to dismiss the indictment, arguing that his tribal court convictions do not qualify as misdemeanor crimes of domestic violence because they did not have "as an *element,* the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii). Under the sometimes-frustrating analysis required by the Supreme Court, this Court must dismiss Peneaux's indictment. Peneaux's motion challenges whether his convictions under RSTLOC 5-38-2 have "as an *element*, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii) (emphasis added). RSTLOC 5-38-2 is alternatively phrased; it criminalizes "1. purposely or knowingly caus[ing] bodily injury to a family member or household member; *or* 2. purposely or knowingly caus[ing] apprehension of bodily injury in a family member or household member." (emphasis added). The parties agree that purposely or knowingly causing bodily injury satisfies the § 921(a)(33)(A)(ii) physical force requirement but that causing mere apprehension of bodily injury would not. At the bottom, both the text and structure of RSTLOC 5-38-2 and the records of conviction are inconclusive on whether the statute sets forth alternative means or elements. Because 5-38-2 covers conduct that would not necessarily involve the use of physical force—namely, causing apprehension of bodily injury—the offense is not "categorically" a misdemeanor crime of domestic violence, and Peneaux's prior convictions cannot serve as predicate offenses. This Court therefore grants Peneaux's motion to dismiss.

102. *United States v. Wicahpe George Milk,* 66 F.4th 1121, No. 21-3722 (8th Cir. May 3, 2023).

The defendant was convicted in the United States District Court for the District of South Dakota, Jeffrey Viken, Chief Judge, and Karen E. Schreier, J., of conspiracy to distribute a controlled substance, firearm possession by a convicted felon, and obstruction of justice. Following the denial of the defendant's subsequent motion to dismiss the case for lack of jurisdiction, and the denial of his Motion for a New Trial, 2021 WL 3775166, Defendant appealed. The Court of Appeals, Kelly, Circuit Judge, held that: [1] deputy had probable cause to stop the vehicle in which defendant was riding; [2] district court could order suppression of work-product protected materials seized from Defendant's jail cell, rather than dismissal of indictment, as remedy for the Sixth Amendment violation; [3] bill of particulars was not warranted with respect to the drug conspiracy charge; [4] severance of counts was not warranted; [5] statute under which defendant was charged with obstruct of justice was not unconstitutionally vague as applied to him; [6] evidence was sufficient to support defendant's convictions; and [7] sentence enhancement for maintaining a premise for the purpose of manufacturing or distributing a controlled substance was warranted. A jury convicted Wicahpe Milk of conspiracy to distribute 500 grams or more of a substance containing methamphetamine, possession of a firearm as a convicted felon, and obstruction of justice. Milk, who is Native American and an enrolled member of the Oglala Sioux Tribe, contends that the district court lacked jurisdiction because (1) he was convicted of crimes that are not enumerated under the Major Crimes Act, 18 U.S.C. § 1153,4 and (2) under the General Crimes Act, 18 U.S.C. § 1152, the alleged unlawful acts in this case occurred on the Pine Ridge Reservation and only involved American Indian people. But Milk's arguments are foreclosed by precedent. As we have recognized, federal laws of general application—that is, "those in which [the] situs of the offense is not an element of the crime"—apply on Indian reservations, even to offenses committed by an Indian person against the person or property of another Indian person. *United States v. Wadena*, 152 F.3d 831, 841 (8th Cir. 1998). And while Milk further contends that the district court lacked jurisdiction under the Fort Laramie Treaty, this argument, too, is foreclosed by precedent. *See United States v. Jacobs*, 638 F.3d 567, 568 (8th Cir. 2011) (recognizing that we have previously "rejected similar challenges to federal subject matter jurisdiction based upon allegations the United States failed to comply with purported jurisdictional prerequisites in the Fort Laramie Treaty."). We affirm the judgment of the district court.

103. *Steiner v. Kempster,* Case No. C22-5526-RJB-SKV, 2023 WL 4138348 (W.D. Wash., May 10, 2023).

This is a civil rights action proceeding under 42 U.S.C. § 1983. Plaintiff Edward J. Steiner is a state prisoner who is currently confined at the Washington State Penitentiary in Walla Walla, Washington. Plaintiff alleges Defendant Brent Kempster, a police officer with the La Push Police Department ("LPPD"), violated Plaintiff's Fourth Amendment rights by using excessive force to detain him on August 22, 2021, in the Lonesome Creek Store in La Push, Washington.

Defendant Kempster filed the present Motion to Dismiss, arguing the Court lacks subject-matter jurisdiction over this case because Defendant Kempster was not acting under color of state law at the time of the alleged incident—a jurisdictional requirement for a § 1983 claim. Defendant Kempster detained Plaintiff under Section 13.7.4 of the Quileute Tribe's Law & Order Code. Following this detention, a Clallam County sheriff's deputy arrived and transported Plaintiff to Clallam County Jail. Plaintiff was charged, prosecuted, and convicted in Clallam County Superior Court with Assault in the Third Degree—Law Enforcement Officer and Harassment (Bodily Injury). To establish subject-matter jurisdiction over Plaintiff's § 1983 claim, Plaintiff must demonstrate that Defendant Kempster was acting under color of state law at the time of the alleged incident of excessive force. *West*, 487 U.S. at 49. In other words, Plaintiff must demonstrate that Defendant Kempster was exercising power granted to him by the state. *See Johnson*, 113 F.3d at 1117. Because the undisputed evidence demonstrates that Defendant Kempster was exercising power given to him by the tribe and not the state, Plaintiff has failed to make such a showing. Plaintiff argues that Defendant Kempster charged him with violations of Washington law. While it is true that Plaintiff was tried and convicted under Washington law, it was Clallam County—not Defendant Kempster, the LPPD, or the Quileute Tribe—that charged and prosecuted him. Defendant Kempster only detained Plaintiff under Quileute tribal law. Because the evidence demonstrates that Defendant Kempster acted under the color of tribal law, not state law, Plaintiff cannot maintain a § 1983 claim against him. As a result, this matter should be dismissed for lack of subject-matter jurisdiction.

104. *Hogshooter v. Cherokee Nation,* No. CIV 23-137-RAW, 2023 WL 3391411 (E.D. Oklahoma, May 11, 2023).

This civil rights action was filed pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Plaintiffs are four pro se pretrial detainees in the Delaware County Jail and the "Prisoners of Cherokee Nation." The defendants are the Cherokee Nation, a federally recognized tribe located in Tahlequah, Oklahoma; Chuck Hoskins, Jr., Chief of the Cherokee Nation; Sara Hill, Attorney General of the Cherokee Nation; and Lisa Garcia, Assistant Attorney General of the Cherokee Nation. Plaintiffs allege that since April 30, 2021, they have been denied access to the courts and timely initial arraignments. They also complain about delays in setting bond, entering pleas, Miranda rights announcements, and counsel appointments. Some prisoners' crimes allegedly have a penalty of only three to ten days in a city jail, so the delays are especially damaging. Plaintiffs' have brought this action under *Bivens*, 403 U.S. 388 (1971). *Bivens* "provides a private action for damages against *federal officers* who violate certain constitutional rights." *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (citations omitted) (emphasis added). In this case, however, none of the Defendants are federal officers. They are, instead, an Indian tribe and officials of that tribe. To the extent Plaintiffs' want to properly present their claims against the Cherokee Nation or tribal officials regarding delays in their arraignments, setting of bond, plea hearings, and other procedures in their criminal cases, they may file individual petitions for a writ of habeas corpus in federal court pursuant to the Indian

Civil Rights Act ("ICRA"), 25 U.S.C. 1303. Section 1303 provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." Petitioners are advised that "[a]ll federal courts addressing the issue mandate that two prerequisites be satisfied before they will hear a habeas petition filed under the ICRA: [t]he petitioner must be in custody, and the petitioner must first exhaust tribal remedies." *Chegup v. Ute Indian Tribe of Uintah and Ouray Rsrv.*, 28 F.4th 1051, 1060-61 (10th Cir. 2022) (quoting Cohen's Handbook of Federal Indian Law § 9.09 (2017)); see also *Valenzuela v. Smith*, 699 F.3d 1199, 1205-07 (10th Cir. 2012) (discussing tribal exhaustion rule). Accordingly, this action is dismissed.

105. *Jackson, Jr., v. Blackfeet Enrollment Office,* Cause No. CV 23-22-GF-BMM, 2023 WL 3626433 (D. Montana, GF Div., May 24, 2023).

On May 15, 2023, Plaintiff Roy Wayne Jackson, Jr. (Jackson) filed a document purporting to be a civil rights complaint. Jackson is a Texas state prisoner proceeding pro se. He is currently serving a life sentence without the possibility of parole with the Texas Department of Criminal Justice. Jackson alleges Defendant violated his Fourteenth Amendment right to equal protection and that he is being denied his privileges and immunities. Specifically, Jackson asserts he has attempted to contact the Blackfeet Enrollment Office but that the Enrollment Office refuses to contact him in return. Jackson believes he should now be "grandfathered" into tribal enrollment. Contrary to Jackson's belief, the Indian Civil Rights Act does not confer jurisdiction in the present case. Section 1301, et seq., of Title 25 of the United States Code is known as the Indian Civil Rights Act (ICRA). In enacting the ICRA, Congress established a set of statutory protections for Indians against their tribal governments, roughly parallel the constitutional rights identified in the Bill of Rights of the United States Constitution. See *Wasson v. Pyramid Lake Paiute Tribe*, 782 F. Supp. 2d. 1144, 1147 (D. Nev. 2011). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), however, the U.S. Supreme Court held Congress did not provide for a private cause of action for violations of the ICRA against the tribe or its officers, except for one type of claim-habeas corpus challenges to one's detention. In the instant matter, Jackson does not bring a claim for habeas relief under Section 1303 of the ICRA. Jackson instead seeks damages and injunctive relief, not release from custody. Further, he is not currently in the custody of the tribe. Accordingly, his suit is not authorized and this Court lacks jurisdiction to entertain a claim alleging violations of the ICRA. Jackson's petition must be dismissed.

106. *Brooks, et al. v. Branham,* Case No. 6:22-cv-00033, 2023 WL 3761183, (W.D. Virginia, June 1, 2023).

Members of Monacan Indian Tribe brought an action against Monacan Tribal officials, whose members alleged were not properly elected or appointed Tribal officials, claiming that members were denied payments from federal funds to the Tribe through actions of Tribal officials against the will of Tribal Government, and seeking declaratory and injunctive relief. Tribal officials moved to dismiss. The District Court, Norman K. Moon, Senior District Judge, held that Tribe

members' claims were intra-tribal disputes over which the district court did not have subject-matter jurisdiction. The Plaintiffs' Complaint and claim, as pleaded, depend upon their view that Defendants are unlawfully preventing the funds' delivery because Defendants are not the lawfully elected Chief and leaders of the Monacan Tribe under tribal bylaws—an internal tribal dispute the resolution of which lies squarely beyond the federal court's competence—and thus, the Court concludes that it lacks jurisdiction over the case and must dismiss. Congress recognized the Monacan Indian Tribe in the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017. Pub. L. 115-121, 132 Stat. 40 (Jan. 29, 2018) ("Recognition Act"), § 503. In the Amended Complaint (the "complaint"), Plaintiffs cite several "sources of funding for tribal members." These include (1) the "Native American Housing and Assistance Act of 1996," which Plaintiffs state "grant[s] housing and related development funds to a Federally recognized tribe," (2) the "Snyder Act of 1921," and "subsequent legislation," which "delivers health services to a federally recognized tribe," (3) Title V of the CARES Act, which "granted federally recognized tribes funds for unbudgeted expenditures made in response to Covid-19," and (4) the American Rescue Plan Act of 2021, by which "funds were granted to the Monacan Indian Nation to strengthen support for vital public services and help retain jobs." The Court lacks jurisdiction over Plaintiffs' claims because they present paradigmatic "intra-tribal disputes." Indeed, it is hard to conceive of more quintessentially internal tribal disputes than those raised by Plaintiffs and integral to their claims. And the Fourth Circuit has been clear— "It is well established that a federal court has no jurisdiction over an intra-tribal controversy." *Crowe v. E. Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1233 (4th Cir. 1974). Principal among these internal tribal disputes is that Plaintiffs' complaint and claims raise a non-justiciable "internal tribal leadership dispute." *See In re Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003); *Motah v. United States*, 402 F.2d 1, 2 (10th Cir. 1968). Motion granted.

107. *Buena Vista Rancheria Of Me-Wuk Indians v. Pacific Coast Building Products, Inc.*, No. 2:23-cv-00168 WBS CKD, 2023 WL 4007716 (E.D. Calif., June 14, 2023).

The Buena Vista Rancheria of Me-Wuk Indians ("plaintiff") brought this action against Pacific Coast Building Products, Inc., PCBP Properties, Inc., and H.C. Muddox (collectively "defendants"), asserting claims for nuisance and trespass under federal common law. Before the Court is the Defendants' Motion to Dismiss. Plaintiff occupies the Buena Vista Rancheria — a 67.5-acre Rancheria property in Amador County. Plaintiff describes the Rancheria as "the Tribe's cultural epicenter, source for economic development, and natural resource management." Within the boundaries of the Rancheria is the Harrah's Northern California casino (the "Casino"), drinking and wastewater treatment plants, a cultural center, two homes, a Tribal office, the Tribal cemetery, traditional gathering places, and a federally recognized wetland preserve. Defendant PCBP Properties, Inc. owns 114.27 acres of surface mining property known as the "Berry Mine" on the PCBP Property. (Mot. at 8.) The Berry Mine is directly adjacent to the east of the Tribe's Rancheria. Portions of the PCBP Property have been used for mining

intermittently since at least 1976. On or about September 13, 2022, Defendants informed the Plaintiff that they intended to expand its surface clay mining operation on the PCBP Property to a 40.1-acre section. Defendants informed the Plaintiff of their belief that they could begin new mining operations on an area of the PCBP Property located less than 250 feet from the Rancheria boundary at any time and without County approval. The Plaintiff alleges numerous harms will flow from the Defendants' new mining operation, including that the operation will: (1) create significant noise and vibration; (2) reduce the number of guests coming to the Casino; (3) cause health risks to the Tribe as well as the Casino's employees and guests; (4) impact air quality; (5) impact groundwater and federally protected wetlands; and (6) disturb or destroy grave-like structures and other objects of cultural patrimony. Defendants seek to dismiss the Complaint on the ground that Plaintiff's claims are not prudentially ripe under Rule 12(b)(1). The ripeness doctrine prevents premature adjudication where a case has had no concrete impact on the parties. Here, the Defendants' ability to commence their new mining operation is contingent on approval of the mining project application by the County and review by the U.S. Army Corps of Engineers. Because approval of the new mining project is not yet final, the Plaintiff's claims seeking to enjoin the project are not ripe. *See Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 780 (9th Cir. 2000) ("The core question is whether the agency has completed its decision-making process ....") (citation omitted). The Plaintiff is free to refile their Complaint if and when the Defendants' project is approved by the County and the Corps of Engineers or if the Defendants should take any actions for mining the PCBP Property inconsistent with the Court's understanding of the administrative prerequisites for such actions as expressed in this Order. Dismissed.

108. *United States v. McGirt,* 71 F. 4th 755, No. 21-7048 (10th Cir. June 20, 2023).

Defendant was convicted in the United States District Court for the Eastern District of Oklahoma, John F. Heil, III., J., of two counts of aggravated sexual abuse in Indian country and one count of abusive sexual contact in Indian country. Defendant appealed and filed a pro se Motion to File a Supplemental Brief. The Court of Appeals, Hartz, Circuit Judge, held that nonconstitutional error was not harmless, as to instructing jury that non-hearsay prior inconsistent statements of government's witnesses, given under penalty of perjury at an earlier trial, could be admitted only for impeachment and not as substantive evidence. Reversed and remanded; Motion granted. In the Supreme Court, McGirt argued that because his alleged crimes took place on the Creek Reservation and he is an enrolled member of a tribe, the State of Oklahoma lacked jurisdiction to prosecute him. The Supreme Court agreed, and his state convictions were overturned, but he was later indicted in federal court and convicted by a jury on two counts of aggravated sexual abuse in Indian country and one count of abusive sexual contact in Indian country. He was sentenced to concurrent life sentences on each count. First, he claims the district court erred in instructing the jury that it could consider prosecution witnesses' prior inconsistent sworn testimony only for impeachment purposes and not as substantive evidence. Second, he contends that the district court erred in calculating his guideline offense level on the

abusive-sexual-contact count based on USSG § 2A3.1 (the guideline for criminal sexual abuse) rather than USSG § 2A3.4 (the guideline for abusive sexual contact). We reverse and remand to the district court for a new trial because of the incorrect instruction. We, therefore, need not address the sentencing issue. We reject Mr. McGirt's jurisdictional arguments. Of most importance to this appeal, the defense introduced 28 excerpts from the transcripts of the testimony of B.C., Ms. Kuswane, and Ms. Blackburn at the 1997 state-court preliminary hearing and trial. The testimony in these excerpts was inconsistent with the witnesses' 2020 federal court testimony. At the jury instruction conference, the district court proposed its own instruction limiting the jury's use of prior inconsistent statements to impeachment. Defense counsel objected to the Court's proposed instruction twice, but the Court overruled the objections. Although this Court has not addressed the issue in a published opinion, the great weight of authority treats a prior assertion of a fact as inconsistent with a present assertion of a lack of memory for purposes of Federal Rule of Evidence 801(d)(1)(A). Thus, the only issue before us is whether the error in instructing the jury was harmless. Because reversal is required under the *Kotteakos* test, we need not decide whether the error here should be evaluated under the harmlessness test for constitutional errors, which is more favorable to a defendant. Because we reverse Mr. McGirt's convictions, we need not reach his argument regarding error at sentencing. Reversed and remanded for new trial.

109. *Adams, Sr. v. Baker,* CV 23-32-H-SHE, 2023 WL 4105183 (D. Montana, Helena Div., June 21, 2023*).*

Plaintiff Michael P. Adams, Sr. (Adams), without counsel, brought suit on May 15, 2023, alleging that the Defendants' arrest of Adams on the Fort Peck Indian Reservation and transportation of him to Lewis & Clark County Detention Center was illegal because the State of Montana did not have jurisdiction to execute a search warrant on the tribal lands where Adams resided. 'The *Younger* abstention doctrine bars Adams' claims. Federal courts cannot interfere with pending state criminal proceedings, absent extraordinary circumstances which create a threat of irreparable injury. An irreparable injury does not exist if plaintiff's defense of the criminal case may eliminate the claimed threat to the plaintiff's federally protected rights. All criteria for *Younger* abstention are met in this case. First, this matter is ongoing, second, Adams' criminal proceedings implicate Montana's important interest in upholding order and integrity of its criminal proceedings. And third, Adams has not demonstrated an inability to raise his constitutional challenges in his state proceedings. He may raise his claims at trial or, if necessary, on appeal. *Younger* abstention requires the case be dismissed.

110. *Hooper v. City of Tulsa,* 71 F.4th 1270, No. 22-5034 (10th Cir. June 28, 2023).

Member of Choctaw Nation convicted of municipal violation brought action challenging municipal court's denial of his Application for Post-Conviction Relief and seeking a declaratory judgment that the city lacked jurisdiction over municipal violations committed by its inhabitants in Indian country. The United States District Court for the Northern District of Oklahoma,

William P. Johnson, J., 2022 WL 1105674, dismissed the Complaint, and the plaintiff appealed. The Court of Appeals, McHugh, Circuit Judge, held that: [1] Plaintiff had standing to bring action; [2] it would take judicial notice of city's petition for incorporation and original charter; [3] Curtis Act's jurisdictional grant did not apply to city; and [4] district court lacked jurisdiction over Plaintiff's appeal of municipal court's denial of his Petition for Post-Conviction Relief. In addition to abolishing tribal courts and forcing allotment of tribal land, Section 14 of the Curtis Act provided a path for municipalities in the Indian Territory to incorporate, hold elections, levy taxes, operate schools, and pass and enforce ordinances based on Arkansas law. Curtis Act, § 14, 30 Stat. 495, 499–500 (1898). Section 14 allowed municipalities to incorporate according to chapter twenty-nine of Mansfield's Digest and provided that all inhabitants of appropriately organized municipalities would be eligible to vote and subject to the municipalities' laws. *Id*. Because, by its plain text, Section 14 of the Curtis Act no longer applies to Tulsa, the district court erred in granting Tulsa's Rule 12(b)(6) Motion to Dismiss Mr. Hooper's declaratory judgment claim. Reversed and remanded.

111. *Wilson v. Department of Interior*, 5:23-cv-5041, 2023 WL 4238898 (D.S.D. Western Div., June 28, 2023).

Pending before the Court is the Plaintiff's Complaint against several federal and tribal government agencies. In addition to the Department of Interior, Bureau of Indian Affairs, and Oglala Sioux Tribe Council, she names the Oglala Sioux Tribe Cannabis Commission and others. She has filed a Motion for In Forma Pauperis status and a Motion for Appointment of Counsel. Plaintiff theorizes that Oglala Sioux Tribe leaders have engaged in an "intergenerational strategy and intergenerational information sharing," resulting in their "owning most of the fee lands in Oglala County, which is 99% illegal Indian trust patents stolen by Pine Ridge Agency Bureau of Indian Affairs Realty Office workers since at least 1950 and perhaps further back to 1934 ....". These allegations are serious but are not supported with anything approaching the "who, what, where, when, and how" standard of *Ascente*. 9 F. 4th at 845. Tribal law and policy are matters to be determined by the tribe in the first instance. *Sac & Fox Tribe*, 439 F.3d at 835. Therefore, when an individual tribal member seeks federal court intervention in what appears to be a matter of internal tribal policy, the court proceeds with caution. As one court recently explained, federal question jurisdiction is not created simply because "a case involves an Indian party or contract or tribal or individual Indian property, or ... arises in Indian country." *Whalen v. Oglala Sioux Tribe Executive Officers*, 2021 WL 4267654, *2 (D.S.D. 2021) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.04[1][a] (Nell Jessup Newton ed., 2012)). In this case, as discussed below, Plaintiff's lawsuit must be dismissed for at least three reasons: tribal sovereign immunity, standing, and failure to meet pleading requirements. Therefore, Plaintiff's claims against the tribal Defendants are dismissed based on sovereign immunity and failure to comply with Rule 9(b).

112. *United States v. Peshlakai,* No. 21-cr-01501-JCH, 2023 WL 4235671 (D.N.M, June 28, 2023).

The United States charged Defendant Rumaldo Peshlakai with possessing a firearm after a felony conviction. See 18 U.S.C. § 922(g)(1). This opinion addresses three pretrial motions. First, Mr. Peshlakai seeks dismissal because he argues that the felon-in-possession statute interferes with his treaty-based right to hunt and protect livestock. Second, Mr. Peshlakai claims that FBI agents did not adhere to the Navajo Nation's federal-detainer statute, so the FBI agents arrested him without jurisdiction. Because Mr. Peshlakai was never in Navajo custody for a violation of Navajo law the FBI agents did not violate the federal-detainer statute. Third, the United States asked to call Forensic Expert Jerrilyn Conway about DNA evidence without also calling four other biologists who worked on the case. The Court defers ruling on the admissibility of Examiner Conway's testimony or the recognition of her as an expert. Three background facts underlie the felon-in-possession charge and the Court's jurisdiction. First, in 2001, Mr. Peshlakai was convicted of felony assault. Second, the present case's events occurred within the exterior boundaries of the Navajo Reservation. Third, Mr. Peshlakai and his wife, C.P., are enrolled members of the Navajo Nation. On September 23, 2021, C.P. called the Navajo Police Department ("NPD") dispatch. She reported that Mr. Peshlakai assaulted her, kidnapped their four children, and fled in a truck with a firearm. Mr. Peshlakai argues that the felon-in-possession statute does not extend to the Navajo Nation. His argument rests on three premises. First, Mr. Peshlakai contends that the felon-in-possession statute is silent on its application to Indians in Indian country. Mr. Peshlakai claims that the 1868 Treaty between the United States and the Navajo Nation guarantees Mr. Peshlakai a right to possess a firearm for hunting and protecting livestock. The Tenth Circuit rejected this argument in *United States v. Fox*, 573 F.3d 1050, 1055 (10th Cir. 2009). The Tenth Circuit reasoned that just as all citizens may forfeit their constitutional rights by committing a felony, so too members of Indian Tribes may forfeit their treaty rights. *See id.* at 1054. This Motion is denied. Mr. Peshlakai carries the burden to show that officers' actions implicated the Fourth Amendment. *See United States v. Goebel*, 959 F.3d 1259, 1265 (10th Cir. 2020). Mr. Peshlakai does not meet his burden of proving that the FBI agents violated the federal-detainer statute. The Navajo statute's first section limits its scope: the statute does not apply to every Indian subject to a federal investigation. Rather, the statute is limited to Indians detained by the Navajo Department of Corrections. When FBI Agent Curtis Imming interviewed Mr. Peshlakai, Mr. Peshlakai was not previously in Navajo Nation custody for violating Navajo law. His federal arrest, therefore, does not implicate the Navajo Nation's federal-detainer statute. The Court will thus, also deny his Motion to Suppress.

113. *Ferguson, CDCR #BS-9872, v. Hittle,* Case No.: 3:23-cv-1128-GPC-KSC, 2023 WL 4305122 (S.D. Calif., June 30, 2023).

Plaintiff Tyrell Ferguson, while incarcerated at the California City Correctional Facility ("CCCF") in California City, California, and proceeding pro se, has filed a civil rights Complaint

("Compl.") pursuant to 42 U.S.C. § 1983. Ferguson claims Sycuan Police Officers conducted an illegal search of his person and arrested him while he was at the Sycuan Hotel and Casino. Ferguson arrived at the Sycuan Hotel and Casino on September 22, 2019. He alleges Defendant Sycuan Officer Brandon Hittle approached him and informed him it was "illegal to smoke or bring marijuana on the reservation." Ferguson denied possessing marijuana and informed Hittle that he had smoked marijuana before he arrived at the hotel and casino. Ferguson alleges Hittle grabbed his arm, placed handcuffs on him, and conducted a search of his person and his backpack. Hittle found twenty-eight grams of methamphetamine and "book[ed] [Ferguson] in the county jail" for possession of drugs. Ferguson seeks $150,000 in compensatory damages and $3,000,000 in punitive damages. To the extent Ferguson seeks to hold the tribe liable, the tribe is not subject to suit under § 1983. *See Inyo Cty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 708 (2003) ("Native American tribes, like States of the Union, are not subject to suit under § 1983."). Thus, the Court concludes Ferguson's Complaint must be dismissed *sua sponte* for failing to state a claim upon which § 1983 relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). However, because Ferguson is proceeding pro se, the Court will grant him an opportunity to amend now that he has been provided "notice of the deficiencies in his complaint." *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

114. *Shoshone-Bannock Tribes, And Fort Hall Business Council, v. Vanir Construction Management, Inc.*, Case No. 4:23-cv-00160-REP, 2023 WL 4706007 (D. Idaho, July 24, 2023).

Before the Court is the Plaintiffs Shoshone-Bannock Tribes and Fort Hall Business Council's Motion for Remand. This is a breach of contract action. In 2015, Defendant and Plaintiffs executed an agreement for Defendant to oversee the design and construction of a casino expansion project within the boundaries of the Fort Hall Reservation. That contract contained a clause placing exclusive jurisdiction over all disputes arising from the contract in the Shoshone-Bannock Tribal Court. Further, the contract disclaimed any waiver of tribal sovereign immunity. Pursuant to the contract, Defendant acted as Plaintiff's owner-representative during the design and construction process of "phase II" of the on-reservation casino expansion project. Suffice to say, the project was plagued with difficulties. Ormund Builders, Inc. ("OBI") filed three arbitration demands against Plaintiffs relating to Defendant's alleged mismanagement of the project. The arbitration panel eventually found in OBI's favor, awarding it $2,937,622.42 against Plaintiffs on October 30, 2019. The Plaintiffs subsequently filed a Complaint against Defendant in Shoshone-Bannock Tribal Court in May of 2020, seeking to recover damages allegedly caused by Defendant's negligence and breach of the underlying contract for construction management services. Defendant then filed a Notice of Removal with this Court on April 7, 2023. The Defendant alleges that removal is proper because this Court has diversity jurisdiction under 28 U.S.C. § 1332. The removal statute is strictly construed against removal and "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance."

Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). The Defendant cites no case – and the Court has found none – in which a court has held that an action was removable from a tribal court under § 1441. Indeed, although not many courts have addressed the question, those that have uniformly hold that actions initiated in tribal court are not within the ambit of the removal statute. In sum, no legal authority supports Defendant's reading of § 1441. The plain language of § 1441 – and unlike the Price-Anderson Act, the absence of congressional intent to the contrary – does not include tribal courts. This action was improvidently removed, requiring a remand to Shoshone-Bannock Tribal Court. Plaintiffs' Motion for Remand is granted.

115. *Crow Tribe Of Indians v. Repsis,* No. 21-8050, 2023 WL 4696801 (10th Cir. July 24, 2023).

This appeal presents the latest phase in a long-running dispute between the Crow Tribe of Indians (the "Tribe") and the State of Wyoming ("Wyoming") over the Tribe's treaty hunting rights. In 1992, the Tribe brought a Declaratory Action against Wyoming Game and Fish officials to determine whether the 1868 Treaty with the Crows—which provides that the Tribe "shall have the right to hunt on the unoccupied lands of the United States"—afforded it an unrestricted right to hunt in the Bighorn National Forest. Relying on a line of prior Supreme Court cases interpreting Indian treaties, the District Court for the District of Wyoming held in *Crow Tribe of Indians v. Repsis (Repsis I)*, 866 F. Supp. 520 (D. Wyo. 1994), that Wyoming's admission as a state extinguished the Tribe's treaty hunting rights (the "Statehood Holding"). On direct appeal in *Crow Tribe of Indians v. Repsis (Repsis II)*, 73 F.3d 982 (10th Cir. 1995), we affirmed the district court's Statehood Holding. Alternatively, we held that the Bighorn National Forest was "occupied," so the Tribe's treaty hunting rights would not have applied to the area in question (the "Occupation Rationale"), and also reasoned that Wyoming could have justified its restrictions on hunting due to its interest in conservation (the "Conservation Necessity Rationale"). Nearly 25 years later, the Supreme Court decided *Herrera v. Wyoming*, 587 U.S. —— —, 139 S. Ct. 1686, 203 L.Ed.2d 846 (2019), in response to Wyoming's attempts to prosecute a tribe member for hunting in Bighorn National Forest. Crucially, the Court held that Wyoming's admittance to statehood had not extinguished the Tribe's treaty rights and that Bighorn National Forest was not categorically "occupied." On remand, Wyoming continued its efforts in *Herrera* to prosecute the Tribe's member, arguing in part that the defendant could not assert a treaty right to hunt in Bighorn National Forest because *Repsis II* continued to bind the Tribe and its members through the doctrine of issue preclusion. Exercising jurisdiction under 28 U.S.C. § 1291, we conclude that the district court abused its discretion when it held that it lacked the authority to review the Tribe's Motion for Post-Judgment Relief. However, because we believe the district court is better positioned to decide whether to grant Rule 60(b) relief on the merits, we vacate the district court's decision and remand the case for further proceedings.

116. *United States v. Budder,* No. 22-7027, 2023 WL 5006704 (10th Cir. August 7, 2023).

Just months after Defendant Jeriah Budder, an enrolled member of the Cherokee Nation, killed David Jumper, the Supreme Court made clear in *McGirt v. Oklahoma*, 591 U.S. ——, 140 S. Ct.

2452, 207 L.Ed.2d 985 (2020) that the land where the shooting occurred was on an Indian reservation. Under the Major Crimes Act, 18 U.S.C. § 1153, murder or manslaughter allegedly committed by an Indian in Indian country (which includes Indian reservations, *see* 18 U.S.C. § 1151(a)) in Oklahoma must be tried in federal court rather than state or tribal court. After *McGirt*, Defendant successfully moved to dismiss state charges that had been filed against him, and he was instead charged in the United States District Court for the Eastern District of Oklahoma, where a jury convicted him of voluntary manslaughter. The Defendant now claims that he was denied the due process of law guaranteed by the United States Constitution because the retroactive application of *McGirt* to his case stripped him of Oklahoma's law of self-defense, which he says is broader than the analogous defense permitted by federal law. He contends that at the time he shot Mr. Jumper, less than three months before *McGirt* was decided, he would have believed that he would be tried for his crime in state court, where Oklahoma's self-defense law would have been available to him. The Defendant says he had no fair warning that he was committing a crime properly tried in federal court. Importantly, Defendant claims prejudice from being tried in federal court, arguing that he was disadvantaged by the retroactive application of McGirt to his case because Oklahoma's self-defense law is broader than its federal analogue. On Defendant's (and the district court's) account of Oklahoma law, "a person is justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary to: a) prevent death or great bodily harm to himself; or b) to terminate or prevent the commission of a forcible felony against himself." Indeed, Defendant notes, the jury that convicted him of voluntary manslaughter at his federal trial answered in the negative a special interrogatory asking whether it would have convicted him had Oklahoma's self-defense law, as it was explained to the jury, governed. However, in light of our decision in *Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017), nearly three years before the defendant killed Mr. Jumper, we think there was ample notice that Oklahoma's practice violated federal law. We affirm the Defendant's conviction. The court appropriately applied federal law. The contours of Oklahoma law on voluntary manslaughter are irrelevant.

117. *Pollard et al, v. Johnson et al,* 23-cv-135-wmc, 2023 WL 5221533 (W.D. Wis., August 15, 2023).

This case arises out of a decision by the Lac du Flambeau Band of the Lake Superior Chippewa Indians to place blockades on four roads within the Lac du Flambeau Indian Reservation, which provide access to property and homes on the Reservation owned by non-Indians. Although the Town of Lac du Flambeau had been maintaining the roads for several years, neither the town nor individual property owners have a valid, right-of-way easement on those roads, at least according to the tribe. Plaintiffs are a group of individuals who use those roads to access their homes, each of which is located within the Reservation's boundaries. In apparent acknowledgment that the tribe would be immune from suit, Plaintiffs named as Defendants the twelve individual members of the Lac du Flambeau Tribal Council. Plaintiffs have failed to plead a viable federal cause of action, and the court declines to exercise supplemental jurisdiction over their state law claims.

The land on which the roads were built is owned by the United States in trust for the Lac du Flambeau Tribe. In the 1960s, the Bureau of Indian Affairs granted 50-year right-of-way easements on the roads to various individuals under the Indian Right-of-Way Act, 25 U.S.C. §§ 323–28. These easements were later assigned to the Town of Lac du Flambeau. Although the town has maintained these roads as public for several years, its right-of-way easements on all four roads expired between 2011 and 2018, and the easements have not been renewed. In their Amended Complaint, Plaintiffs assert the following claims: (1) a declaratory judgment that the Defendants' barricades violate the Federal-Aid Highway Act, 23 U.S.C. § 101 et seq., the Tribal Transportation Program, 23 U.S.C. §§ 201–202, and implementing regulations at 25 C.F.R. Part 170; (2) anticipated private nuisance; (3) anticipated public nuisance; and (4) implied easement. The Plaintiffs also filed a Motion for a Preliminary Injunction. After the Plaintiffs filed this lawsuit, the tribe also asked the BIA to remove the four roads from the federal Tribal Transportation Program's National Tribal Transportation Facilities Inventory and to act on behalf of the Tribe to pursue remedies against the town for trespass. After determining that the tribe had never received public funding for those roads, the BIA removed them from the NTTFI. The United States subsequently filed a trespass action against the Town of Lac du Flambeau, asserting claims for trespass and ejectment under the Indian Right-of-Way Act. Given Congress's straightforward statement of purpose and the lack of a congressionally authorized right of action, plaintiffs cannot rely on the Federal-Act Highway Act or Tribal Transportation Program to establish federal-question jurisdiction. Having identified no viable federal claim and Plaintiffs' state law claims not falling under the Grable exception, the Court must dismiss their federal claim for lack of subject matter jurisdiction. At this relatively early stage of litigation, the Court also declines to exercise supplemental jurisdiction over plaintiffs' state law claims, 28 U.S.C. § 1367(c), and having no subject matter jurisdiction over their remaining state law claims in this case, Plaintiffs' Motion for a Preliminary Injunction will be dismissed as moot. Defendant's' Motion to Dismiss is granted.

118. *Spivey v. Chitimacha Tribe of Louisiana,* No. 22-30436, 2023 WL 5274419 (5th Cir., August 16, 2023).

Former chief financial officer (CFO) for an Indian tribe's casino filed a state court action against tribe, casino, and tribal council members alleging that he was falsely criminally prosecuted and terminated from his CFO position after his involvement with the payment of bonuses to a casino employee. After removal, the United States District Court for the Western District of Louisiana, Robert R. Summerhays, J., 2022 WL 2292827, adopted the report and recommendation of Carol B. Whitehurst, United States Magistrate Judge, 2022 WL 2298420, and denied the CFO Motion to Remand and dismissed the Complaint. CFO appealed. The Court of Appeals, Oldham, Circuit Judge, held that: [1] district court was required to remand the case to state court once it determined it lacked subject matter jurisdiction; [2] as a matter of first impression, when the district court determines that it lacks subject matter jurisdiction over the removed case, it must remand even though it thinks it futile; and district court lacked authority to dismiss Complaint

with prejudice. After the magistrate judge made her recommendation, Spivey filed a materially identical complaint in Louisiana state court before the federal court entered the dismissal order. The Defendants removed, and Spivey moved to remand. The magistrate judge recommended denying Spivey's remand motion and that the claims should be dismissed with prejudice" because Spivey's complaint was "essentially identical to the previous complaint filed in federal court" and "[a]ll claims are barred by tribal immunity." The parties don't dispute that tribal sovereign immunity bars Spivey's claims against the tribe, the casino, and the tribal council members in federal court. The question is what a district court should do when determining that it lacks subject matter jurisdiction over a removed case. Here, the district court committed two independent errors. First, it held that remanding the case would be futile because the Tribe's sovereign immunity would bar the state courts (like the federal ones) from adjudicating the suit. Second, the district court dismissed Spivey's claims with prejudice. The district court's with-prejudice dismissal is reversed, and the case is remanded with instructions to remand it to state court.

119. *McElderry v. Lake County*, Case No. CV-23-46-M-DLC, 2023 WL 5310395 (D. Mont., August 17, 2023).

This matter comes before the Court on an Amended Petition filed by Adrian McElderry seeking habeas corpus relief pursuant to 28 U.S.C. 2254. McElderry is a convicted state prisoner proceeding pro se. This Court is empowered to bypass a procedural issue in the interest of judicial economy when the claim fails on the merits. *See Flournoy v. Small*, 681 F. 3d 1000, 1004 n. 1 (9th Cir. 2012). McElderry asserts that he was never legally under state jurisdiction and should have been under federal jurisdiction. In support of this contention, McElderry points out that he was an enrolled tribal member, his offense was committed on tribal land, he resided in tribal housing, and the victim was also a tribal member. Thus, he believes that the State of Montana had no jurisdiction to prosecute him. In an attachment to his Amended Petition, McElderry asserts that Lake County never legally introduced Public Law 280 to the Flathead Indian Reservation. Further, relying upon *McGirt v. Oklahoma*, 140 S. Ct. 2454 (2020), McElderry claims the state lacked jurisdiction to prosecute an enrolled tribal member on tribal land. Public Law 280 affirmed certain states broad jurisdiction to prosecute state-law offenses committed by or against Indians in Indian country. 18 U.S.C. § 1162; *see also Oklahoma v. Castro-Huerta*, 142 S Ct. 2486, 2499 (2022). Of the seven Indian reservations in Montana, the only tribes to have met the requirements set forth in PL–280 are the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Indian Reservation. Thus, under present state law, Montana properly exercised jurisdiction over McElderry's criminal activity on CSKT land. Additionally, McElderry's reliance upon *McGirt* is misplaced. There, the United States Supreme Court reversed the state court conviction of a member of the Seminole Nation who committed crimes on reservation land against another tribal member. *McGirt*, 140 S. Ct. 2459-60 (2020). That case concerned whether McGirt's crimes were committed on reservation land, subject to the Major Crimes Act, 18 U.S.C. § 1153. In *McGirt*, the Supreme Court concluded that the Creek

Nation's reservation in eastern Oklahoma was never de-established by Congress, such that it remained "Indian Country" under the MCA, and only the federal government and tribal courts have jurisdiction to try "any Indian" for conduct committed on land reserved for the Creek Nation. But McElderry has not presented any legal argument supporting a finding of exclusive federal or tribal jurisdiction over CSKT's land. In short, McElderry has failed to establish that he is in custody violating the Constitution or laws of the United States. See 28 U.S.C. § 2254(a). Accordingly, he is not entitled to federal habeas relief. The Court also finds that McElderry has not made a substantial showing of the denial of a constitutional right. Therefore, a certificate of appealability will not issue in this action.

120. ***Harvey v. AK Chin Indian Community,*** **No. 22-16875, 2023 WL 5348823 (9th Cir., August 21, 2023).**

TL Harvey appeals pro se from the district court's judgment dismissing his 42 U.S.C. §§1983 and 1985 action alleging claims arising from his arrest. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6) on the basis of the applicable statute of limitations. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). We affirm. The district court properly dismissed Harvey's action as untimely because Harvey's action was filed more than two years after his claims accrued. *See TwoRivers*, 174 F.3d at 991-92 (explaining that federal courts apply the forum state's statute of limitations applicable to personal injury claims for § 1983 claims, but that federal claims accrue "when the plaintiff knows or has reason to know of the injury which is the basis for the action"); *Marks v. Parra*, 785 F.2d 1419, 1420 (9th Cir. 1986) (establishing that Arizona's two-year personal injury statute of limitations applies to § 1983 claims); *Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 712 (9th Cir. 1993) (forum state statute of limitations governs § 1985 claims). Affirmed.

I. Religious Freedom

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

The plaintiff, Joe Baltas, has commenced a civil rights action asserting claims related to time spent incarcerated at Connecticut Department of Correction ("DOC") prisons between 2016 and 2019. The Plaintiff's Complaint included eighteen causes of action. However, many of these claims have already been dismissed or severed from this case. The Plaintiff's claim asserts that Warden Mulligan, Captain Robles, Commissioner Semple, Deputy Commissioner Rinaldi, and DA Quiros violated his First Amendment right to the free exercise of religion by not permitting him to attend congregational religious services or otherwise engage in the meaningful practice of his Native American religion, while placed in Administrative Segregation ("AS"). In responding to the Defendants' Motion for Summary Judgment, the Plaintiff concedes that he could practice his Native American faith while placed in AS in some (in his view insufficient) respects. For example, the Plaintiff could participate in smudging rituals and keep a "medicine bag" in his cell.

Plaintiff also concedes that he was permitted to keep religious texts in his cell but claims that unreasonable size and weight restrictions on books effectively precluded him from possessing religious literature. The parties disagree about whether Plaintiff ever notified prison officials at Northern that he adhered to the Native American religion. Based on the Plaintiff's opposition to summary judgment, it appears his free exercise claim principally relates to his inability to participate in congregational "Native American Circle" services and sweat lodge ceremonies. By the Defendants' admission, no inmates placed in AS may participate in such joint worship. To the extent that the Plaintiff takes issue with his inability to participate in sweat lodge ceremonies while placed in AS, the current group of Defendants enjoy qualified immunity for much the same reason that Warden Falcone and DA Quiros have qualified immunity protecting them against the Plaintiff's claim that he was wrongly deprived of sweat lodge access while at Garner. Second Circuit precedent does not establish a constitutional right to inmate sweat lodge access to accommodate the practice of the Native American religion. And to the extent such a right does exist, it likely does not extend to inmates placed in AS. In support of his argument that he should have been permitted to participate in group religious activities while placed in AS, the Plaintiff cites *Mawhinney v. Henderson*, 542 F.2d 1 (2d Cir. 1976). There, the Second Circuit held that "not every prisoner in segregation can be excluded from [group worship]; because not all segregated prisoners are potential troublemakers; the prison authorities must make some discrimination among them." *Mawhinney*, 542 F.2d at 3. The court in *Mawhinney* reversed the district court's dismissal of the plaintiff's free exercise claim and noted that "an evidentiary hearing will establish what policies concerning religious practices exist [ ] and whether officials had a reasonable basis for limiting [the plaintiff's] participation at group services." *Id.* It is not clear what sort of administrative findings prison officials needed to have made to place the *Mawhinney* plaintiff on segregated status, which in Mawhinney's case was "punitive segregation," not administrative segregation. In this case, we know that Plaintiff's AS placement necessarily reflected a judgment by DOC officials—following a hearing—that his "behavior or management factors pose[d] a threat to the security of [a] facility or a risk to the safety of staff or other inmates and that [he could] no longer be safely managed in general population." Administrative Directive 9.4(3)(B). So, one could reasonably argue that DOC officials made an individualized determination that Plaintiff was a "potential troublemaker." And, in *LeReau v. MacDougall*, the Second Circuit held that it did not violate the First Amendment's Free Exercise Clause to prohibit inmates deemed "unruly" from attending group worship. *LeReau v. MacDougall*, 473 F.2d 974, 979 (1972); see also *Matiyn v. Henderson*, 841 F.2d 31, 37 (2d Cir. 1988) (rejecting free exercise claim of an inmate in administrative segregation who asserted that his confinement prevented him from engaging in congregational religious services because the confinement was "for reasons related to legitimate penological objectives.") The Court is not suggesting that Defendants have a free hand to impose a blanket ban on group worship on all inmates placed in AS. Such a ruling might rub against Second Circuit precedent requiring particularized findings of necessity before New York State Department of Correctional Services (DOCS) officials may prohibit inmates placed in "keeplock" from attending congregational

services. *See Salahuddin v. Goord*, 467 F.3d 263, 277 (2d Cir. 2006) (inmate's placement in keeplock for conspiring to assault another inmate who was housed at a different prison did not support prohibition from participation in congregational religious services); *but see Salahuddin v. Jones*, 992 F.2d 447, 449 (1993) (inmate's placement in keeplock for fighting with another inmate sufficient to support prohibition from participation in congregational religious services). Because existing Supreme Court and Second Circuit precedent does not bar prison officials from prohibiting all inmates placed in AS (who have, by definition, been deemed dangerous or disruptive) from attending group worship, Defendants are entitled to qualified immunity on Plaintiff's AS free exercise claim. The following claims are dismissed in their entirety: (1) the First Amendment retaliation claims relating to the placement of Inmate Blair in a recreation cage beside the Plaintiff's cage; (2) the First Amendment free exercise of religion claims relating to the Plaintiff's confinement both at Garner and in AS; (3) the Eighth Amendment deliberate indifference to medical needs claims; (4) the Eighth Amendment excessive force claim; and (5) the Fourteenth Amendment due process claims. The following claims will proceed as specified: (1) the First Amendment retaliation claims relating to the Plaintiff's transfer to MacDougall will proceed against Warden Erfe and DA Quiros; (2) the Eighth Amendment deliberate indifference to mental health needs claims will proceed against Warden Mulligan and Captain Robles; and (3) the Eighth Amendment conditions of confinement claims related to Plaintiff's placement in AS will proceed against Commissioner Semple, Deputy Commissioner Rinaldi, Warden Mulligan, and Captain Robles; this claim will also proceed against DA Quiros but only to the extent that it implicates the nutritional adequacy of Plaintiff's food.

122. *Larissa Waln v. Dysart School District,* 54 F.4th 1152, No. 21-15737 (9th Cir. December 9, 2022).

Graduating public high school student who was an enrolled member of the Sisseton Wahpeton Oyate Native American Tribe brought § 1983 action against the school district alleging violations of the Free Exercise Clause, Free Speech Clause, and Equal Protection Clause, arising from the district's purportedly selective enforcement of dress-code policy prohibiting students from decorating their graduation gown or cap. The United States District Court for the District of Arizona granted the District's Motion to Dismiss for failure to state a claim. Student appealed. The Court of Appeals held: 1) student stated a claim for violation of the Free Exercise Clause; 2) students permissibly made allegations as to the enforcement of policy at other graduation ceremonies on information and belief; 3) students stated a claim for violation of Free Speech Clause; and 4) school district's asserted compelling interest was insufficient to satisfy strict scrutiny at the pleading stage. Reversed and remanded. The Dysart School District, located in Phoenix, Arizona, has a graduation policy that prohibits students from decorating their graduation caps. Plaintiff Larissa Waln—an enrolled member of the Sisseton Wahpeton Oyate, a Native American tribe—asked the District to accommodate her religious practice by allowing her to wear an eagle feather on her cap during high school graduation. The District declined Plaintiff's request on the grounds that the policy permits no exceptions. The Plaintiff arrived at

graduation wearing an eagle feather, and District officials prohibited her from attending. But that same day, the District permitted other students to wear secular messages on their graduation caps. The Plaintiff long has participated in traditional and cultural practices of her Native American heritage and often participates in Native American religious ceremonies. An important part of her religious beliefs is the sacred nature of eagle feathers. In her religion, eagles have a special connection with God, and their feathers are considered sacred objects. The Plaintiff's "eagle plume was blessed in a religious ceremony." "Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District." *Kennedy*, 142 S. Ct. at 2426. As noted, the District must satisfy "strict scrutiny," showing that "its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end." *Id.* Taking the allegations in the Complaint as true, as we must, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the District cannot meet its burden. Reversed and remanded.

123. *King v. Calderin, et al.*, 2023 WL 3182656, Case No. 2:21-cv-01452-CDS-BNW (D. Nev., May 1, 2023).

Incarcerated pro se Plaintiff Lionel King—who is Native American—brings this civil-rights lawsuit against three High Desert State Prison (HDSP) officials for violating his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), the First Amendment's free-exercise clause, and the Fourteenth Amendment's equal-protection clause. He moves on an emergency basis for a Preliminary Injunction, seeking to require prison officials to provide him with a common fare diet based on his sincerely held spiritual and religious beliefs. The Defendants oppose King's Motion based on their contention that he does not demonstrate entitlement to such relief. They maintain that under the administrative regulations of the Nevada Department of Corrections (NDOC), "Native American faith group members do not have special dietary requirements." Because the Court finds that the Winter factors weigh in his favor, King is entitled to the injunctive relief he seeks. Under RLUIPA, ["'[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution' unless the burden furthers 'a compelling governmental interest,' and does so by 'the least restrictive means.'" *Id.* at 712 (quoting U.S.C. § 2000cc-1(a)(1)-(2)). RLUIPA must be "construed broadly in favor of protecting an inmate's right to exercise his religious beliefs." *Warsoldier v. Woodford*, 418 F. 3d 989, 995 (9th Cir. 2005). The Defendants do not directly address the sincerity of King's beliefs, neither explicitly challenging nor accepting it. Without any evidence that King actually ate ramen or any other products that the Defendants believe "contradict [ ] his position that he needs an earth[-]based diet," based on the evidence before me, I find that King is sincere in his religious beliefs. The Defendants contend that "King is not going to be able to succeed on his common fare diet claims because denial of the common fare diet to a member of a religious faith group that is not authorized to receive it is not a substantial burden on the exercise of his religion." This is precisely the kind of reasoning that RLUIPA was enacted to prevent. It is well established that "RLUIPA bars inquiry into whether a particular belief or

practice is central to a prisoner's religion[.]" *Cutter*, 544 U.S. at 725 n.13. Because the right at issue is King's First Amendment right to exercise his religion freely, he has established irreparable harm. I also order that the Defendant's counsel must show cause why King was denied the common fare diet despite the court's recent rulings in cases like *Guardado v. Dzurenda*, 2022 WL 867234 (D. Nev. Mar. 22, 2022), which also involved a Native American prisoner at HDSP who was denied the common fare diet and was ultimately granted injunctive relief. In their response to the show-cause order, the defendants must also identify how they will update their administrative regulations and any other relevant internal processes to ensure that Native American prisoners are not denied the common fare diet in similar circumstances in the future. It is ordered that King's emergency Motion for a Preliminary Injunction is granted.

J. Sovereign Immunity

124. *Klamath Irrigation District v. U.S. Bureau of Reclamation*, 48 F. 4th 934, No. 20-36020, 2022 Daily Journal D.A.R. 9638, 2022 WL 4101175 (9th Cir. September 8, 2022).

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

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

Backcountry Against Dumps ("Backcountry") asserts that the approval of a lease between the Campo Band of Diegueno Mission Indians ("The Band") and Terra-Gen Development Company ("Terra-Gen") by the Bureau of Indian Affairs violated various environmental statutes. The Band intervened for the limited purpose of moving to dismiss, and the district court dismissed the complaint for failure to join a required party under Federal Rule of Civil Procedure 19. We affirm. A party is "required" and "must be joined" in an action if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may [ ] as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). Backcountry does not challenge the district court's determination that the Band cannot be joined because of its sovereign immunity. The district court correctly concluded that disposing of this action could implicate the Band's economic and sovereign interests. The Complaint seeks to vacate the BIA's decision approving the lease agreement, and a successful outcome for the plaintiffs would affect not only the Band's rights

under the agreement but also investments made in reliance on the agreement and expected jobs and revenue. *See Diné*, 932 F.3d at 853. The suit also implicates the Band's sovereignty, which "is tied to its very ability to govern itself, sustain itself financially, and make decisions about its own natural resources." *Id.* at 856. Even though the lawsuit only facially challenges the federal defendants' environmental review processes, that interest is implicated. *See id.* at 852–53; *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 945 n.2 (9th Cir. 2022). Backcountry argues that the federal defendants and Terra-Gen adequately represent the Band's interests. However, "while Federal Defendants have an interest in defending their own analyses that formed the basis of the approvals at issue, here they do not share an interest in the outcome of the approvals." *Diné*, 932 F.3d at 855; *see also Klamath*, 48 F.4th at 945. Even assuming that Terra-Gen shares the same interest as the Band in defending the lease, it does not share the Band's sovereign interest in self-governance and use of its natural resources. *See Diné*, 932 F.3d at 856.The district court also did not err in declining to apply the public rights exception, which allows certain actions that "transcend the private interests of the litigants and seek to vindicate a public right" to proceed without all required parties. *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). "[T]he question at this stage must be whether the litigation threatens to destroy an absent party's legal entitlements." *Diné*, 932 F.3d at 860. Because this action seeks to vacate the lease's approval, it threatens the Band's legal entitlements. Affirmed.

126. *Numa Corporation v. Diven*, No. 22-15298, 2022 WL 17102361 (9th Cir. November 22, 2022).

NUMA Corporation and Cedarville Rancheria of Northern Paiute Indians ("Tribe"), a federally recognized Indian tribe, appeal the bankruptcy court's Order Imposing Sanctions under 11 U.S.C. § 362(k)(1) for violation of the automatic stay in the Chapter 13 bankruptcy proceedings of debtor Jason Diven. We review de novo whether a Native American tribe possesses sovereign immunity, *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1158 (9th Cir. 2021), and whether Congress has abrogated a tribe's sovereign immunity, *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004). We also review de novo the bankruptcy court's conclusions of law. *See In re Brace*, 979 F.3d 1228, 1232 (9th Cir. 2020). We affirm. Indian tribes are "separate sovereigns pre-existing the Constitution" and possess common-law sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–58 (1978). "[A]n Indian tribe is subject to suit only where Congress has authorized the suit, or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 754 (1998). Congressional abrogation must be "unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (citation omitted). Section 106(a) of the Bankruptcy Code abrogates the sovereign immunity of a "governmental unit" with respect to, as relevant here, the Code's automatic stay provision. 11 U.S.C. § 106(a). The statute defines "governmental unit" as any "foreign or domestic government." 11 U.S.C. § 101(27). In *Krystal Energy*, we held squarely that the definition of "governmental unit" includes tribes and that section 106(a) of the Bankruptcy Code unequivocally abrogates tribal sovereign immunity. 357 F.3d at 1057–58. *Krystal Energy*

controls here. Because Congress abrogated tribal sovereign immunity with respect to the automatic stay provision, the Tribe cannot assert sovereign immunity to avoid sanctions for violation of the automatic stay. We need not and do not decide whether the Tribe waived its sovereign immunity by filing a proof of claim in this instance. Affirmed.

127. *Acres Bonusing, Inc., v. Ramsey,* No. 19-cv-05418-WHO, 2022 WL 17170856 (N.D. Calif. November 22, 2022).

Plaintiffs James Acres and Acres Bonusing, Inc. entered into a contract with the Blue Lake Casino & Hotel—a tribally-owned entity of the Blue Lake Rancheria ("Blue Lake"), a federally recognized tribe—to provide a gaming platform for Blue Lake's casino. The deal allegedly went south, and the Blue Lake Casino & Hotel brought suit against the Plaintiffs in tribal court. The Plaintiffs allege that the prosecution of the tribal suit and related actions gave rise to claims for misuse of process, breach of fiduciary duty, fraud, and racketeering activity. Of the seventeen Defendants originally named in Plaintiffs' Complaint, all but two have been dismissed with prejudice. The final two Defendants, Arla Ramsey and Thomas Frank, now move to dismiss the First Amended Complaint for failure to state a claim and several different immunities. It is not plausible that the alleged acts of these Defendants (such as paying the tribal court judge who also was an attorney for Blue Lake for services rendered or verifying discovery responses) constitute bribery or state any of the four claims asserted. Both Defendants are shielded by personal immunity defenses: Ramsey is entitled to qualified immunity and discretionary act immunity, and Frank is entitled to qualified immunity and the protection of the litigation privilege under California law. As a result, all claims against both Defendants are dismissed. Plaintiffs assert that tribal officials acting under the color of tribal law are not entitled to the protection of qualified immunity. However, "Tribal officials, like federal and state officials, can invoke personal immunity defenses." *Ninth Circuit Op*., 17 F.4th at 915; *cf. State Court Case*, 72 Cal. App. 5th at 431 ("Although tribal officials sued in their individual capacities cannot seek protection under the tribe's sovereign immunity, they may nonetheless be immune from suit under the distinct defense of official (or personal) immunity."). The Supreme Court has made clear that personal immunity defenses may protect tribal governmental officials. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1292 n.2 (2017) (acknowledging tribal defendant's personal immunity defense but finding that the "defense [was] not properly before [the Court]" given the procedural posture of the case). Many courts have applied qualified immunity to tribal officials in Section 1983 cases. *See, e.g., Maxwell v. Cnty. of San Diego*, 714 F. App'x 641, 644 (9th Cir. 2017) (affirming grant of summary judgment to tribal paramedics based on qualified immunity); *Bressi v. Ford*, 575 F.3d 891, 899 (9th Cir. 2009) (affirming grant of summary judgment to tribal police officers based on qualified immunity). Both caselaw and policy instruct that tribal officials may be entitled to assert a qualified immunity defense. Ramsey is entitled to qualified immunity for her discretionary payments of Marston's legal and judicial bills on behalf of Blue Lake. Frank is also entitled to qualified immunity for his discretionary actions. Although there is sparse precedent regarding tribal officials, courts have considered questions of immunity for government

employees under state and federal common law for decades. As a result, the Court was guided by the general principles regarding immunity for government employees undertaking discretionary acts set forth under the state and federal common law discussed below. Because all of the allegations concerning Frank involve his work in the *Tribal Court Case*, they fall within the protection of the litigation privilege. *Silberg*, 50 Cal. 3d at 212. Plaintiffs allege that Frank verified written discovery and executed supporting declarations in Tribal Court Case was copied on a demand letter sent to ABI and "arranged to bring Blue Tribal Court Case before the tribal court." These prelitigation and litigation activities are squarely encompassed by the litigation privilege. The Court found that personal immunity defenses shield both defendants: Ramsey is entitled to qualified immunity and discretionary act immunity, and Frank is entitled to qualified immunity and the protection of the litigation privilege under California law. As a result, all claims against both Defendants are dismissed without leave to amend.

128. *Cayuga Nation v. Dustin Parker,* 5:22-cv-00128 (BKS/ATB), 2023 WL 130852 (N.D. N.Y. January 9, 2023).

Plaintiff Cayuga Nation, through its governing body, the Cayuga Nation Council, brings this action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–1968. The Cayuga Nation generally alleges that Defendants Dustin Parker, Nora Weber, Jose Verdugo, Jr., Andrew Hernandez, Paul Meyer, Iroquois Energy Group, Inc., Justice for Native First People, LLC, C.B. Brooks LLC, and John Does 1–10, are engaged in an unlawful scheme to co-opt the Nation's sovereign rights, erode its business and customer base, and steal its revenues "through the illegal sale of untaxed and unstamped cigarettes and marijuana, and various other merchandise" on the reservation. Defendants are alleged to have committed a pattern of racketeering activities under § 1961(1), including trafficking in contraband cigarettes (18 U.S.C. §§ 2341–2346), money laundering (18 U.S.C. § 1956), engaging in monetary transactions in property derived from specified unlawful activity (18 U.S.C. § 1957), and distributing or possessing a controlled substance (21 U.S.C. § 841). The Court permitted Plaintiff's investment of racketeering income claim under § 1962(a) to move forward. *Cayuga Nation v. Parker* ("*Cayuga Nation I*"), No. 22-cv-128, 2022 WL 3347327, at *12, 2022 U.S. Dist. LEXIS 144120, at *35 (N.D.N.Y. Aug. 12, 2022). All Defendants have answered the Complaint. Parker, Weber, and Hernandez (the "Parker Defendants"), Meyer, Justice for Native First People, LLC, and C.B. Brooks LLC (the "Meyer Defendants") have filed counterclaims against Cayuga Nation alleging breach of sublease breach of commercial lease; specific performance; trespass; tortious interference with contract; conversion; trespass to chattels; and violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. In addition, the Parker Defendants and Meyer Defendants have filed Third-Party Complaints against third-party defendant Clint Halftown, alleging tortious interference with contract, trespass, conversion, trespass to chattels, and violation of the Computer Fraud and Abuse Act. As a sovereign nation, the Cayuga Nation is free to conduct "certain economic activity on [its] own reservations free from interference by the State, including with regard to the application of state tax obligations."

One of these economic activities is the manufacture and sale of "Cayuga brand" and "other 'native brand'" cigarettes on the reservation. The Cayuga Nation "is engaged in several business enterprises, including owning and operating convenience stores called Lakeside Trading on the Nation's land." Lakeside Trading stores "sell tobacco-related products, such as unstamped cigarettes and marijuana." "Shortly after seizing certain personal property, Halftown, using the Cayuga Nation as a cover, opened a new Lakeside Trading convenience store at the East Bayard Property and began selling the Pipekeepers' inventory." The Cayuga Nation moves to dismiss the Parker and Meyer Defendants' counterclaims on the ground that the doctrine of sovereign immunity bars them. Defendants respond that the Cayuga Nation waived its immunity when it initiated the present action and that the counterclaims are permissible under the "immovable property" and "recoupment" exceptions to sovereign immunity. "As 'domestic dependent nations,' federally recognized tribes possess 'the common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Cayuga Indian Nation of New York v. Seneca Cnty., New York*, 978 F.3d 829, 835 (2d Cir. 2020) ("Cayuga III") (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014)). The Meyer Defendants argue that the "immovable property exception" to sovereign immunity applies. "Generally speaking, [the immovable property] exception refers to a common law doctrine that curtails sovereign immunity in legal actions contesting a sovereign's rights or interests in real property located within another sovereign's territory." *Cayuga III*, 978 F.3d at 834. The Supreme Court has yet to determine whether the immovable property exception applies to tribal sovereign immunity. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018). Further, even if applicable, the parties have not addressed how the immovable property exception would apply where, as here, it appears that 126 East Bayard Street is located within the bounds of the Cayuga Nation reservation. *See Phillips*, 981 F.3d at 170 (finding that "[e]ven if the exception applied to tribal sovereign immunity generally, it would not apply here, where it is undisputed that the Nation did not purchase the 19.6 Acre Parcel in 'the character of a private individual' buying lands in another sovereign's territory"). Finally, Defendants argue that their counterclaims fall within the recoupment exception to sovereign immunity, arguing that the counterclaims "arise out the same transaction or occurrence and can be limited to a set-off against the Cayuga Nation's claimed RICO damages," and are therefore permissible claims for recoupment for which sovereign immunity has been waived. The Cayuga Nation replies that because the counterclaims do not rise from the same transaction or occurrence as its RICO claim and because Defendants seek affirmative relief, "Defendants[']' attempt to recast them as recoupment claims in an effort to get around the Nation's sovereign immunity" fails. The Court agrees in part. The Second Circuit has "construed the transaction or occurrence standard liberally, generally not requiring an absolute identity of factual backgrounds ... but only a logical relationship between them. "The Defendants' counterclaims arise from the same time period as Plaintiff's claims: their allegations revolve around the Cayuga Nation's enforcement action against the alleged racketeering enterprise at 126 Bayard Street. The Defendants challenge, inter alia: "the forcible entry onto the real property, forcible eviction of the sub-tenant (Dustin Parker) and forcible ouster of the leaseholder (Meyer

Defendants).” At this stage of the proceedings, absent further briefing regarding damages recoverable by Cayuga Nation under § 1962(a), the Court cannot find, as a matter of law, that the trespass to chattels and conversion claims fail to state valid claims for recoupment. The Parker Defendants argue that their trespass to chattels claim concerns the Cayuga Nation’s alleged possession of their computers and access “the computers to obtain key personal and financial data against the Parker Defendants.” While a “claim for trespass to chattels overlaps with a claim for conversion,” that does not appear to be a basis for dismissal at this stage. *Lavazza Premium Coffees Corp. v. Prime Line Distribs. Inc.*, 575 F. Supp. 3d 445, 475 (S.D.N.Y. 2021) (explaining that there is a cause of action for trespass when a defendant “merely interfered with plaintiff’s property” and a cause of action for conversion when the plaintiff’s “dominion, rights, or possession” is the basis for the action) (citation omitted). This Court has not found any decisions dismissing claims for trespass to chattels as duplicative of claims for conversion at the motion to dismiss stage. The Court has, by contrast, found decisions permitting both types of claims to proceed. *See, e.g., DeAngelis v. Corzine*, 17 F. Supp. 3d 270, 283 (S.D.N.Y. 2014) Accordingly, the Cayuga Nation’s motion to dismiss for failure to state a trespass to chattels or conversion claim is denied. Clint Halftown moves to dismiss the Third-Party Complaints on the ground that, as a governmental official, all claims against him are barred by sovereign immunity. Defendants oppose dismissal, arguing that Halftown “cannot seek shelter within tribal immunity” where, as here, he acted “outside the scope of his delegated authority.” A litigant “cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants’ official or representative capacities and the complaint does not allege, they acted outside the scope of their authority.” *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Sun v. Mashantucket Pequot Gaming Enter.*, 309 F.R.D. 157, 162 (D. Conn. 2015) (“Tribal sovereign immunity also ‘extends to all tribal employees acting within their representative capacity and within the scope of their official authority.’” (quoting *Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.*, 221 F. Supp. 2d 271, 278 (D. Conn. 2002)). Here, Defendants offer no allegations that would allow a plausible inference that Halftown was acting in his individual capacity with respect to the eviction of Defendants from 126 East Bayard Street and seizure of property. Therefore, it is ordered that Plaintiff’s Motion to Dismiss the counterclaims is denied as to Defendants’ claims of conversion and trespass to chattels, to the extent their claims seek recoupment, and is otherwise granted in its entirety and all counterclaims, except the claims of conversion and trespass to chattels to the extent they seek recoupment, are dismissed.

129. *Seneca Nation v. Hochul,* 58 F. 4th 664, No. 20-4247-cv (2nd Cir. January 26, 2023).

The Seneca Nation brought an action against New York State officers and New York State Thruway Authority, seeking an injunction requiring Defendants to obtain valid easement for a portion of thruway with a toll road situated on tribal land or, in the alternative, an order enjoining Defendants from collecting tolls on subject portion of the thruway. The United States District Court for the Western District of New York, Lawrence J. Vilardo, J., 484 F.Supp.3d 65, rejecting

the report and recommendation of Hugh B. Scott, United States Magistrate Judge, 2018 WL 6682265, denied the Motion to Dismiss. Defendants applied for interlocutory appeal. The Court of Appeals, Walker, Circuit Judge, held that: [1] collateral estoppel did not bar Nation's action; [2] action fell within *Ex parte Young* exception to Eleventh Amendment immunity; and [3] exception to *Ex parte Young* doctrine for actions that were the functional equivalent of a quiet title action did not apply. Defendants argue that the lawsuit does not allege an ongoing violation of federal law but only that the 1954 grant of the easement violated federal law. We disagree. To be sure, the invalidity of the easement is critical to Plaintiff's case, but this suit is concerned with the ongoing effect of the invalidity. The complaint alleges that the Nation is suffering and will continue to suffer irreparable harm because its property will continue to be invaded without authorization. It contends that Defendants' continuing operation of the Thruway without a valid easement violates the federal treaties and laws establishing the Reservation and, in particular, the Canandaigua Treaty of 1794, which states that the land of the Seneca Nation is to be the property of the Seneca Nation which shall not be disturbed. Defendants also argue that the lawsuit falls within an exception to the *Ex parte Young* doctrine outlined by the Supreme Court in *Idaho v. Coeur d'Alene Tribe of Idaho*. We disagree. In *Coeur d'Alene Tribe*, a tribe sought to bring an *Ex parte Young* lawsuit to establish its entitlement to the exclusive use, occupancy, and right to quiet enjoyment of certain submerged lands that, while within the boundaries of the tribe's reservation, had been claimed and governed by Idaho for centuries. The tribe also sought declaratory relief that all Idaho laws and regulations were invalid as applied to that land. The Court concluded that the tribe's suit was "the functional equivalent of a quiet title action ... in that substantially all benefits of ownership and control would shift from the State to the Tribe," the Eleventh Amendment bars such an action by a tribe against a state. It then held that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." The "particular and special circumstances" that led the court to conclude that the tribe could not proceed in *Coeur d'Alene Tribe* are not present here. This case is not the functional equivalent of a quiet title action. Here, the Nation holds fee title to the land in question, and New York State's only interest is a possessory one granted by the permanent easement. There is a difference between possession of property and title to property, and a court may properly find under *Ex parte Young* that an official has no legal right to remain in possession of property, thus conveying all the incidents of ownership to the plaintiff, but without 'formally divesting the State of its title. In addition, the Nation does not contend that the State's laws and regulations do not apply to the land in question. The present action is thus even further removed from the *Coeur* d'Alene *Tribe*, in which the tribe sought relief ... extinguishing state regulatory control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. Therefore, the quiet title exception to *Ex parte Young* outlined by the Court in *Coeur d'Alene Tribe* has no application here. Accordingly, the lawsuit falls under the *Ex parte Young* exception to the Eleventh Amendment. Thus, neither collateral estoppel nor the Eleventh Amendment bars the Nation from proceeding in this case. Affirmed.

130. *Haney v. Mashpee Wampanoag Indian Tribal Council, Inc.,* 102 Mass.Appt.Ct. 1110, 22-P-346 (Ct. App. Massachusetts, February 15, 2023).

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

Officer of Aquinnah, 443 Mass. at 12. Even if the defendants are subject to the regulatory authority of the State regarding its natural resources, the plaintiff cites no legal authority for the proposition that a private citizen is permitted to file a civil lawsuit to enforce compliance. *See Shepard v. Attorney Gen.*, 409 Mass. 398, 400 (1991) ("[T]he rights asserted by the [plaintiff] are not private but are in fact lodged in the Commonwealth as it may proceed to enforce its laws." Affirmed.

131. *Darden v. Vines, Civil Action No.* 6:22-cv-0404 Lead, 6:22-cv-1398, 2023 WL 2773633 (W.D. La., March 1, 2023).

This civil rights action arises from alleged malicious prosecution and abuse of process that resulted in Plaintiff being criminally charged with and prosecuted for felony theft, computer fraud, and obstruction of justice. Plaintiff, a former employee of Cypress Bayou Casino, was elected Tribal Council Chairman of the Chitimacha Tribe of Louisiana in June 2015. The laws of the Chitimacha Tribe of Louisiana allegedly prohibit council members from working in the Casino or receiving any payments from the Casino. After his election as Chairman, Plaintiff allegedly received a bonus payment from the Casino for his former employment as a director, and the Council allegedly did not oppose the payment. After the Tribal Gaming Commission received a complaint about "misappropriation of bonus monies," Plaintiff and two others were criminally charged with felony theft, computer fraud, and obstruction of justice. The Defendants (collectively, "Tribal Council Defendants") pursued the charges with the Office of the District Attorney for the 16th Judicial District of Louisiana in St. Mary Parish. Plaintiff alleges that Defendants used the prosecution to oust him as Chairman of the Tribal Council and to pursue their own personal gains. This lawsuit was originally one of three filed by Plaintiff, with suits filed in this court, state court (now removed to this court), and Chitimacha Tribal Court. After the Tribal Council Defendants filed Motions to Dismiss in both suits before this court, but before opposition was due, the two suits were consolidated. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Plaintiff claims that, during the events at issue in this matter, the Tribal Council Defendants "were acting outside the scope of Tribal Council authority. When determining whether the sovereign is the real party in interest and thus, whether sovereign immunity bars the suit, "courts may not simply rely on the characterization of the parties in the complaint but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis v. Clarke*, 581 U.S. 155, 162 (2017). The facts, as pled by Plaintiff, indicate that the Tribal Council Defendants acted within the authority delineated by the Constitution and Bylaws of the Chitimacha Tribe of Louisiana. Defendants' actions fall within the Tribe's criminal jurisdiction and investigatory authority, which it concurrently shares with the State. Plaintiff's claims grounded in the amendment to the tribe's Constitution and Bylaws are really against the tribe, not the Tribal Council Defendants, and as such, are barred by sovereign immunity. Unlike the defendant *Lewis v. Clarke*, the Tribal Council Defendants in the present matter were members of the tribe's governing body acting within their authority as the tribe's representatives to the state.

To rule on the propriety of the Tribal Council Defendants' decisions to pursue investigation and trial of Plaintiff's actions, to cooperate and coordinate with the state during the investigation and prosecution, to allow amendments to tribal law, and to reduce Plaintiff's salary would be to "circumvent tribal sovereign immunity" and pass judgment on tribal governance decisions. Therefore, the Tribal Council, not the Tribal Council Defendants individually, is the real party in interest. Because the Tribal Council, an arm of the tribe, is the real party in interest in this suit, the claims against the Tribal Council Defendants are barred by sovereign immunity. *Id*. at 1290. For the reasons stated, it is recommended that the Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) be granted in part.

132. *Lustre Oil Company v. Anadarko Minerals, Inc.*, No. DA 22-0034, 2023 WL 2802294 (Sup. Ct. Montana, April 6, 2023).

Oil and gas company brought an action against the tribal mineral limited liability company (LLC) and oil and gas well operator, seeking to quiet title and to invalidate LLC's interests in oil and gas leases operated within Indian reservation. The District Court of the Seventeenth Judicial District, County of Valley, Yvonne G. Laird, J., granted a Motion to Dismiss for lack of jurisdiction, failure to join necessary and indispensable parties, and failure to state a claim on which relief could be granted after determining that LLC had sovereign immunity, and oil and gas company appealed. The Supreme Court, Baker, J., held that LLC was not immune from suit as an arm of the tribe. The District Court found A&S Mineral Development Company, LLC to be an arm of the Assiniboine and Sioux Tribes entitled to sovereign immunity. Lustre Oil argues in the alternative: (1) that the District Court "failed to utilize well-established law from the Tenth Circuit" when it found that A&S could be an arm of the tribes despite its incorporation under Delaware law; (2) that the District Court improperly applied the Ninth Circuit's balancing test to determine that A&S was an arm of the tribes; and (3) that the District Court erred when it found that the tribes did not waive A&S's sovereign immunity. We decline to adopt a firm rule that would automatically bar an entity incorporated under state law from claiming tribal sovereign immunity, but we agree with Lustre Oil that the District Court did not properly weigh the relevant jurisdictional factors when it concluded that A&S was an arm of the Assiniboine and Sioux Tribes. On March 9, 2009, through their Tribal Executive Board, the tribes authorized the formation of the A&S Mineral Development Company, LLC ("A&S"), incorporating it under the laws of Delaware. The tribes formed A&S to develop oil and gas resources on the tribes' behalf. One such endeavor by A&S was to act as a holding company for the tribes' interest in the Fort Peck Energy Company, LLC. Anadarko Minerals, Inc., a private company, operated oil and gas well leases on privately owned land within the exterior boundaries of the Reservation. In 2018, after spilling approximately 600 barrels of oil and 90,000 barrels of water produced within the reservation, Anadarko assigned those oil and gas leases to the tribes as part of a settlement agreement with the tribes and the United States Environmental Protection Agency. The Tribal Executive Board revived A&S in 2020 to develop the leases the tribes acquired from this settlement agreement. Lustre Oil filed an action against A&S seeking to quiet title and to

invalidate A&S's interests in forty-one of the fifty-seven oil and gas leases A&S operates within the Reservation. Lustre Oil alleged that it obtained valid interests to those leases from a third-party lease broker after Anadarko let the leases expire prior to transferring the lease interests to A&S. Lustre Oil urges this Court to follow the Tenth Circuit's decision in *Somerlott v. Cherokee Nation Distributors Inc.*, 686 F.3d 1144 (10th Cir. 2012), and categorically bar an entity from claiming tribal sovereign immunity if incorporated under state law. However, state incorporation alone does not abrogate an entity's immunity. In this case, the tribes' choice to incorporate A&S under Delaware law—thereby subjecting it to state laws allowing limited liability companies to sue and be sued—coupled with the tribes' stated intent to keep A&S a separate and distinct entity for liability purposes, including for the management of the leases at issue, convinces us on de novo review that the District Court erred in its legal conclusions when it weighed and balanced the factors and determined that A&S is immune from suit in this case as an arm of the tribe. We reverse and remand the case for further proceedings.

133. *Blossom Old Bull v. United States,* CV 22-109-BLG-KLD, 2023 WL 3098327 (D. Mont., April 26, 2023).

Defendant Pamela Klier moves to dismiss the Second Amended Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). Klier's Motion to Dismiss for lack of subject matter jurisdiction is granted for the reasons stated below. Plaintiff Blossom Old Bull is the surviving mother and personal representative of the Estate of Braven Glenn, who died in a motor vehicle crash on November 24, 2020, while being pursued at high speeds by tribal police on the Crow Indian Reservation, including Klier. At all pertinent times, Klier was acting within the course and scope of her employment as a tribal police officer. Old Bull commenced this action against Defendant, the United States of America October 2022 and later amended her complaint to add Klier as a defendant. The Second Amended Complaint includes claims under 42 U.S.C. § 1983, a claim for violating the Montana Constitution, and a state law negligence claim. The Ninth Circuit has held that "[t]ribal sovereign immunity 'extends to tribal officials when acting in their official capacity and within the scope of their authority.'" *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (quoting *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002)). Because the Second Amended Complaint alleges that Klier was at all times acting within the scope of her employment as a tribal police officer, and it appears that Klier is sued only in her official capacity, Klier is entitled to tribal sovereign immunity. This Court does not have subject matter jurisdiction over the claims asserted against her. Klier's Rule 12(b) Motion to Dismiss for lack of subject matter jurisdiction is granted, and Klier is dismissed from this action.

134. *Dakota Metal Fabrication, v. Parisien,* Case. No. 3:22-cv-174, 2023 WL 3344277 (D.N.D., East Div., May 10, 2023).

Defendants James Parisien, the Turtle Mountain Band of Chippewa Indians Tribal Employment Rights Ordinance ("TERO") Office, Turtle Mountain Band of Chippewa Indians (the "Tribe"), Turtle Mountain Tribal Court, and Tribal Appellate Court (collectively, the "Defendants") filed three motions: (1) a Motion to Dismiss for Lack of Jurisdiction under Federal Rule of Civil Procedure 12(b)(1), (2) a Motion to Dismiss for Failure to State a Claim under Federal Rule of Civil Procedure 12(b)(6), and (3) a Motion for Hearing. This dispute centers on the enforceability of TERO regulations and tax assessment against non-Indians who contracted to perform metal work as a part of a construction project for a pre-kindergarten and wrestling facility (the "Project") for Belcourt Public School District # 7 ("School District"). Hanson is the owner of Dakota Metal, and both are non-Indian. The Defendants are four tribal government entities and at least one individual. The tribal government entities are the TERO Office, the Tribe, the Turtle Mountain Tribal Court, and the Turtle Mountain Court of Appeals. As alleged, the Project is located on "trust property" within the exterior borders of the Turtle Mountain Indian Reservation. The School District advertised without notice that the metalwork may be subject to a TERO tax. According to the Complaint, after being awarded the bid, "Parisien and TERO began enforcing the TERO laws and regulations by levying a TERO tax on Plaintiffs for [their] successful bid amount." The amount of the TERO tax was $44,640. Dakota Metal and Hanson refused to pay the tax. Instead, they filed an action in Turtle Mountain Tribal Court "arguing Defendants lacked personal and subject matter jurisdiction to regulate or tax [them]." Ultimately, after an appeal of a decision by the Turtle Mountain Tribal Court, the Turtle Mountain Tribal Appellate Court concluded the TERO office "had jurisdiction to regulate and tax non-Indians[.]" Id. After exhausting their administrative remedies, Dakota Metal and Hanson filed this action. Here, the issue is sovereign immunity and whether all the Defendants are immune from suit. This question was squarely addressed in this Court's prior order in the first case. *See Hanson v. Parisien*, 473 F. Supp. 3d 970 (D.N.D. 2020). For the same reasons articulated in that order, sovereign immunity shields the four tribal government entities. This Court lacks jurisdiction over those Defendants, and the Motion to Dismiss for Lack of Jurisdiction is granted as to those Defendants. The question remains whether sovereign immunity shields the TERO Director from this lawsuit. Sovereign immunity "extends to tribal officials who act within the scope of the tribe's lawful authority." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019) (citing *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994)). Like their federal and state counterparts, though, tribal officials remain subject to suit under the longstanding sovereign immunity exception articulated in *Ex parte Young*, 209 U.S. 123 (1908). *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014). The Complaint seeks to prospectively prevent the TERO Director from enforcing the TERO tax. *See Kodiak Oil & Gas*, 932 F.3d at 1132. On these facts, sovereign immunity does not shield the TERO Director from the declaratory and injunctive claims here, and the Motion to Dismiss for Lack of Jurisdiction as to the TERO Director is denied. The ultimate question of whether the

TERO Director has the authority to impose the TERO tax on Dakota Metal and Hanson implicates the exclusion doctrine, Merrion, and *Montana v. United States*, 450 U.S. 544 (1981) (articulating the presumption against tribal regulatory authority over non-members, with two exceptions). The analysis under those cases is highly dependent on, among other things, the status of the land where the Project was constructed, as the complaint alleges the land is "trust property," not "tribal property." It also implicates the contract between Dakota Metal and Hanson and the School District, but the contract is not yet in the record. Put simply, resolving these questions at this stage of the litigation is premature. Thus, the Defendants' Motion to Dismiss for Failure to State a Claim is denied.

135. *Slate v. Makes Cents, Inc.*, Case No. 22-C-4165, 2023 WL 3504931 (N.D. Ill., East Div., May 17, 2023).

DeAndre Slate filed this putative class action on August 9, 2022, alleging that Makes Cents, Inc. and Uetsa Tsakits, Inc., as well as related entities and individuals, are in the business of extending loans at exorbitant interest rates by contracting with Native American tribe that is beyond the reach of Illinois usury and consumer protection laws. He seeks damages for violation of the Illinois Interest Act and treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964. Defendants have moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) on the basis that MaxLend is an arm of the Mandan, Hidatsa, and Arikara Nation ("the Tribe" or "the Nation"), a federally-recognized sovereign American Indian tribe located in North Dakota. Slate seeks discovery before responding to the pending motions relating to whether the Defendants are actually an arm of a Native American tribe and whether the arbitration clause in his loan agreement is valid. The motion for discovery is granted in part and denied in part. The pending motion to dismiss, motion to compel arbitration, and motion to strike class allegations are denied without prejudice. Sovereign immunity is a threshold issue that may be decided before proceeding to the merits. As with any affirmative defense, the Defendant bears the burden of proof and, unless the plaintiff pleads himself out of court, "[he] is not required to negate an affirmative defense in his complaint." *Tregenza v. Great American Communications Co.*, 12 F.3d 717, 718 (7th Cir. 1993). Under a leading case, *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010), the relationship between the tribal sovereign and its commercial subdivision must be "sufficiently close to properly permit the entity to share in the tribe's immunity." *Id.* at 1183. This is a mixed question of law and fact. *Id.* at 1181. Although the Seventh Circuit has not addressed the discovery issue presented here, Plaintiffs point to several similar cases where courts have allowed discovery at the motion to dismiss stage, albeit based on the assumption that the outcome determined the court's jurisdiction. Plaintiff is allowed to take discovery limited to factors relevant to the Defendants' claim of sovereign immunity. Defendants' motions are denied without prejudice to renewal after the designated magistrate judge has closed threshold discovery.

136. Seminole Tribe of Florida v. Manzini, No. 4D22-3077, 2023 WL 3856423 (FL Ct. App. 4d, June 7, 2023).

Petitioner, Seminole Tribe of Florida (the "Seminole Tribe" or the "Tribe"), Petitions for a Writ of Prohibition to prohibit the trial court from proceeding further with a negligence action filed against it, asserting sovereign immunity. After a hearing on the Seminole Tribe's Motion to Dismiss based on sovereign immunity, the trial court entered an order abating the negligence action until a specific date rather than dismissing the action. Subsequently, the trial court stayed the abatement order pending this Court's review. As a federally recognized Indian tribe, the Seminole Tribe is entitled to sovereign immunity over all claims unless such immunity is abrogated by Congress or waived by the Seminole Tribe. In 2010, the Seminole Tribe entered a gaming compact with the State of Florida ("the Compact") that provides a limited waiver of sovereign immunity for individuals claiming to have been injured at one of the Seminole Tribe's gaming facilities if claimants follow the Compact's specific procedures. The Compact's Section VI.D. pertains to tort remedies for patrons injured at a Seminole Tribe casino. When the Respondent submitted the February 2022 claim form, he had not yet contracted COVID-19. As a result, the Respondent filed the common law negligence count in the Second Amended Complaint without providing any pre-suit notice to the Seminole Tribe of the claim and without observing the Compact's required one-year period for pre-suit investigation and settlement procedures. Accordingly, (1) the presuit notice of the claim was not properly provided under the procedures outlined in the Compact; and (2) the negligence count was filed before the one-year period during which the Tribe was entitled to investigate and try to resolve the claim without the necessity of suit. Having determined the record does not show the Seminole Tribe waived sovereign immunity as to the Respondent's common law negligence count, we grant the petition and prohibit the trial court from proceeding further in the suit below as to that count or any amended count asserting negligence regarding COVID-19.

137. *Garfield County, Utah v. Biden,* Case No. 4:22-cv-00059, 2023 WL 5180375 (D. Utah, August 11, 2023).

Plaintiffs filed separate Amended Complaints. They collectively allege: (1) President Biden violated the Antiquities Act ("the Act") with the Bears Ears National Monument Proclamation (BENM) and the Grand Staircase-Escalante National Monument Proclamation (GSENM) (collectively "Proclamations") and (2) all Federal Defendant agencies are adversely affecting Plaintiffs through (a) the Bears Ears National Monument and Grand Staircase-Escalante National Monument interim memoranda which Plaintiffs allege are "final agency actions," and (b) the denial of permits, which Plaintiffs also allege are "final agency actions." The process for a President to establish or enlarge a national monument under the Antiquities Act is two-fold. "The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." Then the President "may reserve[s] parcels of land as a part of the national monuments." These

parcels "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. This rule bars Plaintiffs' claims. Before deciding if the Proclamations are unlawful, the Court must decide if they can be reviewed by a court. They cannot. Judicial review requires a waiver of sovereign immunity, which is not present. Plaintiffs also allege that the Memoranda written by the Bureau of Land Management constitutes "final agency action" according to the Administrative Procedures Act. They do not. Plaintiffs do not have standing to allege a denial of a permit because they were not harmed. Plaintiffs allege that President Biden violated the Act by enlarging the BENM and GSENM with the Proclamations. These are statutory—not constitutional—claims, similar to those in *Dalton v. Specter*. In that case, the President had recently received the authority to close a Philadelphia naval shipyard "pursuant to the Defense Base Closure and Realignment Act of 1990, "[t]he decision to close the shipyard was the end result of an elaborate selection process prescribed by the 1990 Act. After receiving the Commission's report, the President was required to "decide whether to approve or disapprove" the recommendations. If the President approved the recommendations, "the President must submit the recommendations...to Congress." Respondents filed their action under the Administrative Procedure Act and the 1990 Act, alleging the Commission's recommendations were faulty. The Supreme Court held that the claims were statutory because the President was "said to have violated the terms of the 1990 Act by accepting procedurally flawed recommendations." The claims in this case are also statutory. President Biden is accused of violating the Antiquities Act with his Proclamations that enlarge GSENM and BENM. The claims target the President's actions under the statute. Therefore, they are statutory claims, and judicial review is unavailable. Rather than making constitutional challenges, Plaintiffs argue that § 702 of the APA waives the Federal Government's sovereign immunity. Plaintiffs fail to acknowledge the Franklin v. Massachusetts ruling by the Supreme Court in 1992, which distinguished the APA term "agency" from "the President." The Supreme Court held that "[t]he President is not an agency within the meaning of the [APA]." The Memoranda do not meet the three requirements for "final agency action" to determine if agency action is final depends on (1) whether its impact on a plaintiff is "direct and immediate"; (2) whether the action "mark[s] the consummation of the agency's decision making (sic) process"; and (3) whether the action is "one by which rights or obligations have been determined, or from which legal consequences will flow." The Memoranda—almost identical to one another in text—(1) do not have a direct and immediate impact on Plaintiffs; (2) are not the end of the BLM's decision-making process; and (3) do not establish rights, obligations, nor legal consequences. In spite of the sincere and deeply held view of the Plaintiffs, there is no relief for them in this action. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to

review. President Biden's judgment in drafting and issuing the Proclamations as he sees fit is not an action reviewable by a district court. Federal Defendants' and Tribal Nations' Motions to Dismiss are hereby granted with prejudice.

K. Sovereignty, Tribal Inherent

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

The Mille Lacs Band of Ojibwe ("Band"), a federally recognized Indian tribe, and its law-enforcement officials brought an action under the Declaratory Judgment Act for declaratory and injunctive relief against the county, county attorney, and county sheriff, alleging that the county's policies purporting to limit tribe's law-enforcement authority in county violated federal law. The tribe and its officials moved for summary judgment, and the county attorney and sheriff moved to dismiss claims against them in their individual capacity. The District Court, Susan Richard Nelson, J., held that the tribe's federally delegated law-enforcement authority applied within the tribe's Indian country, which consisted of all lands within the boundaries of the Mille Lacs Indian Reservation, as established by an 1855 treaty between the Minnesota Chippewa Tribe and the United States. With respect to non-Indian suspects, except as otherwise authorized by federal law, the tribe's inherent sovereign law-enforcement authority included the authority to temporarily detain and investigate a suspect for a reasonable period of time until the suspect could be turned over to a jurisdiction with prosecutorial authority. Still, it did not include the authority to arrest the suspect, and it was also subject to the provisions of the Indian Civil Rights Act. This matter is before the Court on the Plaintiffs' Motion for Summary Judgment Awarding Declaratory and Injunctive Relief and Defendants Joseph Walsh and Donald Lorge's Motion for Summary Judgment. The Court grants in part and denies in part Plaintiffs' Motion, and grants in part denies in part and denies as moot in part Defendants Walsh and Lorge's Motion. As to the geographic scope of the Band's federally delegated law enforcement authority, the Deputation Agreement between the Band and the federal government makes clear that Band officers who are deputized as SLECs possess the authority "to enforce federal laws in Indian country" and are "authorized to assist the BIA in its duties to provide law enforcement services and to make lawful arrests in Indian country within the jurisdiction of the Tribe or as described in section 5." Turning to the geographic scope of the Band's inherent law enforcement authority, the Band argues that such authority encompasses the entire Reservation, and Cooley's recognition of tribal law enforcement authority is not specifically limited to "public rights-of-way within a reservation patrolled by tribal police." The Court recognizes that in *Cooley*, 141 S. Ct. at 1642–45, the Supreme Court held that a tribal police officer has the inherent authority when the tribe's health or welfare is threatened, "to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law." Pursuant to the Supreme Court and other judicial authority, the Band asserts that it maintains inherent law enforcement authority to investigate violations of tribal, state, and federal

law within the Reservation. However, regarding non-Indians, it limits such authority to temporarily detaining and investigating a suspect for a reasonable time before conveying the suspect to the appropriate prosecutorial authority. The Band appears to assert that its general authority over Indians may include, among other things: (1) carrying and using a gun; (2) patrolling roads within the Reservation; (3) making traffic and investigative stops; (4) taking statements; (5) conducting searches and gathering and retaining evidence; and (6) detaining, investigating, and arresting suspects. The Court finds that the Band is entitled to declaratory relief as follows: (1) the Band's inherent and federally delegated law enforcement authority extends to all lands within the Mille Lacs Reservation; (2) such authority includes the authority to investigate violations of federal and state criminal law, consistent with *Cooley*, 141 S. Ct. at 1643–45, and *Terry*, 400 F.3d at 579–80; and (3) with respect to non-Indians, in addition to the authority to detain and turn over violators to jurisdictions with prosecutorial authority, the Band has the authority to investigate violations of federal and state criminal law. Defendants' actions were unlawful. Among other things, the geographic scope of the Opinion and Protocol improperly limited the Band's inherent law enforcement authority to trust lands, having defined "Indian country" as such (Opinion at 14), when Indian country is comprised of all land within the Reservation. 18 U.S.C. § 1151; *Cabazon Band*, 480 U.S. at 208 n.5, 107 S.Ct. 1083. This Court has ruled that the Reservation's boundaries remain as they were under Article 2 of the Treaty of 1855. Defendants also acted unlawfully in prohibiting band officers from investigating violations of state law, even on trust lands. To the extent the temporary cooperative agreement currently in place limits the geographic scope of the Band's inherent law enforcement authority to only trust lands, it is also unlawful. Further, to the extent the temporary cooperative agreement limits the Band's inherent law enforcement authority inconsistent with this ruling, such limitations are also unlawful. Accordingly, the Court grants in part and denies in part the Plaintiffs' Motion for Summary Judgment as it relates to declaratory relief.

139. *United States v. Kills Warrior,* 5:19-CR-50163-JLV, 5:22-CR-50066-JLV, 2023 WL 5018567 (W.D. S.D., April 26, 2023).

Donald Morris Kills Warrior filed Motions to Dismiss the charges of Failure to Register in the above-captioned matters. In 2007, Kills Warrior was prosecuted in Oglala Sioux Tribal Court for sexual assault. The sexual assault occurred on the Pine Ridge Reservation. Kills Warrior and the victim are both Indian persons. On November 20, 2007, Kills Warrior was indicted federally for the same conduct. *United States v. Kills Warrior*. He was sentenced to 30 months imprisonment and five years supervised release. This conviction was not appealed, vacated, or otherwise challenged in any way. Because Kills Warrior was convicted for Abusive Sexual Contact, he is required to register under the Sex Offender Registration and Notification Act (SORNA). 18 U.S.C. § 2250(a), and 34 U.S.C. § 20911. The Double Jeopardy Clause provides that no person may be tried more than once for the same offense. "This guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they

seek." *Currier v. Virginia*, 138 U.S. 2144, 2149 (2018). These protections do not apply if a subsequent prosecution is pursued by a "separate sovereign," even if the offenses are identical. *Denezpi v. United States*, 142 U.S. 1838, 1844–45 (2022). The issue for this Court is whether the tribe's authority to prosecute tribal members on tribal land came from its inherent authority or from authority delegated to it by the federal government. The Oglala Sioux Tribe and the federal government are two independent sovereigns; therefore, the dual sovereignty doctrine permits successive tribal and federal prosecutions for the same conduct without offending the Double Jeopardy Clause. Therefore, Kills Warrior's Motions to Dismiss is recommended to be denied.

140. *WPX Energy Williston, LLC. v. Fettig,* No. 22-2020, No. 22-2025, 2023 WL 4308905 (8th Cir. July 3, 2023).

Oil and gas well operator, which was granted rights-of-way by Bureau of Indian Affairs, brought action, seeking Preliminary Injunction to enjoin tribal court action brought by landowners, alleging operator breached smoking ban, from proceeding. The United States District Court for the District of North Dakota, Daniel L. Hovland, J., 2022 WL 1572097, granted a Preliminary Injunction. Tribal court and judge appealed. The Court of Appeals, Colloton, Circuit Judge, held that the operator did not exhaust tribal court remedies before bringing federal action. The district court erred when it concluded that WPX Energy need not exhaust its tribal court remedies because the tribal district court had an opportunity to determine its own jurisdiction. Although the tribal district court determined that it had jurisdiction over the rights-of-way dispute, the MHA Nation Supreme Court has not issued a decision in WPX Energy's appeal. "Until appellate review is complete, the [tribal courts] have not had a full opportunity to evaluate the claim and federal courts should not intervene." WPX Energy argues that the tribal court plainly lacks jurisdiction in light of *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019). There, this court held a tribal court lacked jurisdiction over a suit concerning oil and gas leases between companies and tribal members on allotments of land on the Fort Berthold Reservation. The court explained that federal law controlled "nearly every aspect" of the oil and gas leasing process. Without venturing a decision on the ultimate jurisdictional issue here, we conclude that the question is not frivolous or directly controlled by Kodiak. While right-of-way grants are governed by federal law, see 25 U.S.C. §§ 323-328; 25 C.F.R. §§ 169.101, 169.102, 169.107, the dispute here arises from the alleged violation of a condition that the parties independently negotiated. For these reasons, the district court's Order granting a Preliminary Injunction is vacated, and the case is remanded with directions to dismiss the Complaint without prejudice for failure to exhaust tribal court remedies.

141. *Turpen v. Muckleshoot Tribal Court,* Case No. C22-0496-JCC, 2023 WL 4492250 (W.D. Wash. July 12, 2023).

This matter comes before the Court on the parties' Cross-Motions for Summary Judgment. Katherine Arquette Turpen ("Ms. Turpen") is an enrolled member and elder of the Muckleshoot Indian Tribe. Plaintiff, a non-Indian, was an employee of the tribe from approximately 2005 to

2018. The Turpens were married in King County, outside the Muckleshoot Indian Reservation ("Reservation"), in May 2014. Prior to their marriage, they lived on the Reservation in a home leased to Ms. Turpen by the Muckleshoot Housing Authority. In June 2014, the couple purchased a home outside the Reservation in Auburn, Washington. The Turpens resided there for several years until they separated in 2021. Due to Ms. Turpen's status as a tribe member, the couple received financial assistance for the purchase of the home. In April 2015, the Turpens, acting as a married couple, executed a deed of trust and payback agreement, which provided that the tribe would help pay for the home if it remained the principal residence of Ms. Turpen for at least 15 years. On March 16, 2021, Ms. Turpen filed a petition for dissolution of the marriage in the Muckleshoot Tribal Court. On March 19, the tribal court issued a temporary restraining order, granting Ms. Turpen possession of the Auburn residence and ordering Plaintiff to remove himself from the premises, pending a hearing on the Dissolution Petition set for March 30. The Plaintiff claims he was never served and did not receive actual notice of the pending hearing until an acquaintance told him about it. On March 31, Plaintiff and Ms. Turpen attended a hearing at the tribal court. According to Plaintiff, he objected to the tribal court's jurisdiction at the hearing but had his objection ignored. On April 15, Plaintiff's current counsel filed a Notice of Appearance with the Tribal Court. Subsequently, Plaintiff filed a Response to the Dissolution Petition, challenging the tribal court's jurisdiction over the matter. On April 22, Plaintiff filed a Petition for Dissolution of the marriage in King County Superior Court. The Tribal Court denied Plaintiff's Motion to Dismiss and determined it had subject matter jurisdiction to dissolve the marriage because Ms. Turpen is a tribe member and that it had personal jurisdiction over Plaintiff because of "his transactions with the Muckleshoot Tribe and [Ms. Turpen]." This Court notes that "[i]ndian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 899 (9th Cir. 2019)). While this exercise of tribal power generally does not extend to the activities of nonmembers of the tribe, the Supreme Court has created two so-called Montana exceptions to this rule. *See Montana v. United States*, 450 U.S. 544, 565 (1981). Here, the plaintiff entered a consensual relationship with Ms. Turpen, a Tribe member. Prior to the marriage, they lived together on the Muckleshoot Reservation leased to Ms. Turpen by the tribe. The couple then moved to a home off the reservation, also leased by the tribe. Subsequently, when the couple purchased a home, they received substantial assistance, including an income-based grant for the down payment and loan assistance for the mortgage, which provided that the tribe would subsidize their housing so long as Ms. Turpen lived there. It is also not lost on the Court that Plaintiff worked for the tribe for over ten years. Based on these undisputed facts, Plaintiff entered into a consensual relationship with the tribe. For the foregoing reasons, the Court denies Plaintiff's Motion for Summary Judgment and grants Defendants' Motion for Summary Judgment on all of Plaintiff's claims. Accordingly, the Complaint is dismissed with prejudice.

142. *Greenville Rancheria v. Martin et al.*, C096097, 2023 WL 4483434, (CA Ct. App. 3d, July 12, 2023).

American Indian tribe filed a verified emergency complaint asserting trespass claim and seeking injunctive relief against the newly elected chairperson and other Defendants, all of which stemmed from the allegation that the Defendants had entered the tribe's administrative and medical offices and refused to leave even though the remaining members of the tribal council had ordered them to do so and had removed newly elected chairperson's authority as chairperson. The Superior Court, Tehama County, No. 21CI000234, Jonathan W. Skillman, J., dismissed the complaint for lack of subject-matter jurisdiction. Tribe appealed. The Court of Appeal, Robie, J., held that: [1] when determining whether a tribal leadership dispute existed, the Court would decline to defer only to the Bureau of Indian Affairs (BIA) recognition of tribal authority; [2] a tribal leadership dispute did not exist; [3] Public Law 280 did not preclude California state courts from having subject-matter jurisdiction over the dispute; and [4] remand was warranted. Plaintiff Greenville Rancheria (Greenville) is a sovereign Indian tribe that owns in-fee administrative and medical offices (property) in the City of Red Bluff. Following a contested election, Defendant Angela Martin was elected as Greenville's chairperson, which included the authority to act as Greenville's chief executive officer. After her election, Martin, along with approximately 20 people, including Defendants Andrea Cazares-Diego, Andrew Gonzales, Hallie Hugo, Elijah Martin, and Adrian Hugo, entered the property and refused to leave despite the remaining members of the tribal council ordering them to leave and removing Martin's authority as chairperson under Greenville's constitution. Given the defendants' failure to vacate the property, Greenville filed a verified emergency complaint for trespass and injunctive relief. The trial court granted Greenville a temporary restraining order but later gave the defendant's motion to dismiss the complaint for lack of subject matter jurisdiction. Greenville appeals. We agree with Greenville that no tribal leadership dispute exists. While the Bureau has not corresponded with Greenville specifically acknowledging the settlement of a leadership dispute, as was the case in *Timbisha*, supra, 678 F.3d at pages 937 to 938, the Bureau is in receipt of the resolution suspending Martin's authority under Greenville's constitution and appointing Rios as interim chairperson. As a result, the Bureau began communicating with Greenville through Rios as chairperson. While not determinative, as in Timbisha, Rios's documented status with the Bureau is entitled to some deference. Ultimately, nothing calls into question the current tribal council's authority to act on behalf of Greenville as a sovereign nation. Thus, we assume the resolution suspending Martin of her authority as chairperson is valid under Greenville's constitution, as is the resolution ordering the defendants to vacate the property. While Martin may challenge Greenville's removal of her as chairperson through the Bureau, that potentiality does not serve to dilute Greenville's sovereignty today. Bypassing the resolutions, the tribal council, i.e., Greenville, ordered that to the extent Defendants' claims to leadership or defenses to trespass rest on tribal law, the issues must be resolved against them. Here, we are presented with a tribal chairperson removed from power through the acts of tribal council members empowered to act on behalf of the tribe. Martin claims only that she was denied due

process, and Martin may be right. But we are not the forum to entertain such a claim, and we must defer to Greenville's determination of the dispute. (*See Timbisha*, supra, 678 F.3d at pp. 938-939; *see also Goodface*, supra, 708 F.2d at p. 339.) To conclude, we lack jurisdiction over property disputes between tribal members on nontribal lands, which would limit tribal members' access to state court, especially considering California courts have subject matter jurisdiction pursuant to Public Law 280 over property disputes between tribal members on tribal trust lands. (Section 1360.) Consequently, the state court has jurisdiction to hear Greenville's dispute against defendants regarding land it owns in fee simple that is not held in trust by the federal government. The judgment is reversed.

L. Tax

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

Indian tribe brought action against state officials for declaration that federal law preempted imposition of statewide excise tax on gross receipts of non-tribal contractor for services performed in renovating and expanding tribe's gaming casino located on reservation. The United States District Court for the District of South Dakota, Karen E. Schreier, J., 325 F.Supp.3d 995, entered summary judgment for tribe, and state appealed. The Court of Appeals, 938 F.3d 941, reversed and remanded. Following bench trial, the District Court, Schreier, J., 496 F.Supp.3d 1307, entered judgment in tribe's favor, and state appealed. The Court of Appeals, Shepherd, Circuit Judge, held that: (1) Indian Gaming Regulatory Act (IGRA) did not impliedly preempt tax, and (2) Indian Trader Statutes did not preempt tax. Reversed and remanded with instructions.

144. *Ute Mountain Ute Tribe v. Arizona Department of Revenue,* 254 Ariz. 410, No. 1 CA-TX 22-0004 (Ct. App. Arizona D.1, January 10, 2023).

The Ute Mountain Ute Tribe and the Weeminuche Construction Authority (WCA), a federal contractor owned by the Ute Mountain Ute Tribe, sought review of a determination from the Department of Revenue, which assessed Arizona's transaction privilege tax against the taxpayer for earnings from three construction projects on Navajo and Hopi reservations. The Arizona Tax Court, No. TX2021-000365, Danielle Viola, J., granted the Department's Motion to Dismiss for Failure to State a Claim. The Ute Mountain Ute Tribe and the taxpayer appealed. The Court of Appeals, Campbell, J., held that: [1] federal law did not preempt the Department's assessment of Arizona's transaction privilege tax; [2] proceeds from construction projects performed on Native American reservations were not exempt from Arizona's transaction privilege tax; and [3] any reliance the taxpayer had on the Department's tax ruling was unreasonable as to preclude its claim for equitable estoppel. Nearly twenty years after *White Mountain Apache v. Bracker*, in *Blaze*, the United States Supreme Court revisited the scope of state taxing authority over business conducted on tribal land and held that a state may impose taxes on the proceeds derived

from a nontribal contractor's federal contract for construction work on a Native American reservation. 526 U.S. at 34. Distinguishing *Bracke*r, the Supreme Court held that applying a balancing test is proper only when the proceeds at issue derive from a nontribal entity's direct transaction with the tribe or tribal members. Stated differently, the Supreme Court clarified that *Bracker's* balancing test is inapplicable when a state seeks to tax a transaction between the federal government and a nontribal contractor. *Blaze* expressly and unambiguously sets out a bright-line standard upholding state taxing authority over the proceeds derived from all federal contracts. The appellants argue that *Blaze* is inapplicable here because the Bureau, in contracting with the WCA, was not "acting in the interest of the federal government" but "as and for" the Navajo and Hopi Tribes. As such, the appellants assert that there is no meaningful distinction between these facts and those of a "direct contractor-to-tribe arrangement," unquestionably governed by *Bracker's* balancing test. While pronouncing the bright-line rule, the Supreme Court in *Blaze* acknowledged that tribes may choose "to advance their interests" under the Indian Self-Determination and Education Assistance Act by "enter[ing] into a self-determination contract 'to plan, conduct, and administer programs or portions thereof, including construction programs.'" 526 U.S. at 38 (quoting 25 U.S.C. §. Like *Blaze*, here, the Navajo and Hopi Tribes did not enter into self-determination contracts to plan, conduct, and administer their own construction programs. Because the federal government retained contracting responsibility, the bright-line standard favoring taxation of federal contracts applies. Affirmed.

145. *Harold Measintubby and Nellie Measintubby v. Shelly Paulk,* No. 22-cv-59-EFM, 2023 WL 1448026 (D. Okla., January 30, 2023).

Members of the Choctaw Nation filed action against the Chairperson and members of the Oklahoma Tax Commission (OTC) in their official capacities, seeking declaratory and injunctive relief prohibiting Defendants from assessing, levying, and collecting Oklahoma state taxes upon members' income and seeking recovery of state incomes taxes paid under protest. The Defendants moved to dismiss. The District Court, Eric F. Melgren, J., held that: [1] Tax Injunction Act (TIA) barred members' claim for injunctive relief; [2] assessment of interest and penalties on delinquent taxes were part of "tax" for purposes of TIA; [3] members did not have standing to seek injunctive relief regarding imposition of non-monetary penalties; [4] the TIA applied to the claim for declaratory judgment that the Choctaw Nation was Indian Country for purposes of preempting Oklahoma's state taxation; [5] the TIA applied to members' refund claim; and [6] the TIA deprived federal district court of jurisdiction over subject matter of members' suit. The plaintiffs, as enrolled members of the Choctaw Nation, seek declaratory and injunctive relief prohibiting the defendants from assessing, levying, and collecting Oklahoma state taxes (including penalties and interest) upon their income. They rely primarily on the Supreme Court decision in *McGirt v. Oklahoma* and its progeny from the Oklahoma courts, under which much of eastern Oklahoma constitutes "Indian Country" for the purposes of the federal Major Crimes Act. Based on this ruling/case/decision, they argue that their income should be exempt from taxation under the rule that, without congressional authorization or a

cession of jurisdiction, the state is generally without power to tax reservation lands or reservation Indians. Defendants argue that the TIA deprives this Court of subject matter jurisdiction to grant any of the relief requested by Plaintiff, including with respect to interest and penalties. Plaintiffs' request for injunctive relief barring the OTC from assessing state taxes on income earned by Plaintiffs within the Choctaw Reservation, as it is now recognized for the purposes of federal criminal law, is exactly the type of relief the TIA forbids the court from awarding. "[A]n injunction is clearly a form of equitable relief barred by the TIA." The Court considers the Plaintiffs' request for declaratory relief to fall within the purview of the TIA as well. Dismissed.

146. *HCI Distribution, Inc. v. Hilgers*, 8:18-CV-173, 2023 WL 3122201 (D. Neb., April 27, 2023).

Tobacco companies, which were subsidiaries of a tribal company wholly owned by the Winnebago Tribe, brought action against the Nebraska Attorney General and Interim Tax Commissioner seeking declaration of rights and injunctive relief, alleging that Nebraska could not enforce its tobacco escrow and bond requirements for sale of tobacco products in Nebraska against tribal tobacco companies because companies were subsidiaries of the Winnebago Tribe. The parties cross-moved for Summary Judgment. The District Court, John M. Gerrard, Senior District Judge, held that: [1] escrow and bond requirements of Nebraska's statutes governing tobacco sales within the state were penalties, not taxes; [2] Nebraska's escrow and bond requirements for tobacco companies to sell tobacco products in Nebraska were not preempted by Indian Trader Statutes; [3] Nebraska could enforce its escrow and bond requirements for sale of tobacco products on the Omaha Reservation by tobacco companies owned by the Winnebago Tribe; [4] Nebraska's escrow and bond requirements for sale of tobacco products in Nebraska were direct regulation of tribal tobacco companies; [5] the Winnebago Tribe's sale of tobacco products on the Winnebago Reservation through tribal tobacco companies was on-reservation conduct for purposes of whether Nebraska could enforce its escrow and bond requirements; and [6] Nebraska's interest in protecting public health by regulating tobacco sales in Nebraska through escrow and bond requirements was not an "exceptional circumstance" that would justify enforcing requirements against tribal tobacco companies that were owned by the Winnebago Tribe. For tobacco products sold on the Winnebago Reservation, the Court will grant the relief sought by the Plaintiffs. But for tobacco products sold anywhere else in Nebraska, including on the Omaha Reservation, the state may enforce its tobacco regulations. From the *Sebelius* factors, it is clear that the escrow and bond requirements are penalties, not taxes. The Plaintiffs' arguments that the regulations are a tax are unconvincing. The Plaintiffs even refer to the escrow statutes as a "punitive tax agreement," recognizing the strong scienter element of the escrow and bond requirements. This "punitive" nature is a key indicator that the regulations are penalties, not taxes. Both sales on the Omaha Reservation and sales on the Winnebago Reservation are subject to the *Bracker* balance: sales on the Omaha Reservation are on-reservation conduct by a non-member, and sales on the Winnebago Reservation are on-reservation activities of a tribal business. These distinctions significantly change the balancing analysis. The Defendants and

their successors are permanently enjoined from enforcing the escrow and bond payment requirements for sales by the Plaintiffs on the Winnebago Reservation.

147. *Sauk-Suiattle Indian Tribe, v. Ryser,* Case No. C22-01723-RSM, 2023 WL 3435294(W. D. Wash., May 12, 2023).

This matter comes before the court on Defendant's, John Ryser's, Motion to Dismiss under Rule 12(b)(6). For the reasons stated below, the Court grants this Motion and dismisses the Plaintiff's claims with leave to amend. Plaintiff is a federally recognized tribal nation. Defendant is the Director of the Washington State Department of Revenue. Plaintiff seeks "declaratory and injunctive relief enjoining defendant Ryser and those acting at his direction or control from subjecting it to imposition of Washington State Retail Sales Taxes upon products purchased by plaintiff and its members for delivery to, and for use and consumption within, the Sauk-Suiattle Indian Reservation." The tribe and its members regularly purchase items online for delivery to the reservation. Defendant collects sales tax for such sales. The sales tax money goes to provide services at the state and local government level; no such services are provided to the Sauk-Suiattle Reservation. Defendant allows visitors from states which do not impose a sales tax, such as Oregon, to obtain a sales tax refund simply by providing proof of residency. Plaintiff and its members can also qualify for such a refund, but Defendant requires that any goods purchased be delivered by the seller to the Tribe's reservation. This subjects plaintiffs to delivery fees not required for Oregon residents, and the fees often exceed any benefit of the refund. The Amended Complaint contains no clear causes of action or violations of law until its very last sentence. The conduct of Defendant is simply titled "discrimination." Defendant states, "[I]t is now clear that the Tribe's real challenge is to the Department's refund process, but the Tribe has not pleaded any facts alleging that it or its members actually availed themselves of this process and were denied a refund." The Court agrees with Defendant that the tribe has failed to state a claim under Rule 12(b)(6). There are insufficient facts to plausibly allege a claim that the Defendant's tax refund process violates any law; e.g., the tribe has not pled that it or its members actually availed themselves of this process and were denied a refund. The Amended Complaint also fails to adequately plead violations of the only other laws cited, 42 U.S.C. § 1981 and § 1982. The Court questions whether all of these claims can be cured. The tribe does not appear to be alleging that it was improperly denied a refund or that the refund process should not exist. The only clear allegation is that its members should not be required to have internet purchases delivered to the reservation to obtain the sales tax refund. However, when the tribe or its members go beyond the reservation to make a purchase, they are subject to sales tax just like any other Washington resident would be, and there is no clear allegation that such treatment violates the law. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). The tribe appears to argue that it and its members should be able to buy things online, have them delivered off reservation, and qualify for the refund or that it and its members should be able to buy things in person off the reservation and qualify for the refund. Either way, such a situation would appear to run afoul of existing law. Plaintiff's claims are dismissed with leave to amend.

148. *Bibeau v. Commissioner of Internal Revenue,* T.C. Memo. 2023-66, Docket No. 11483-20L (US Tax Ct., May 24, 2023).

Taxpayer, who was enrolled member of the Chippewa Tribe and who practiced law on reservation, petitioned for review after Commissioner of Internal Revenue sent notice of determination that sustained IRS decision to levy taxpayer's property to collect unpaid self-employment tax liability. The tax court held that: [1] Commissioner's notice of determination was valid; [2] taxpayer had the right to challenge tax liability at collection due process (CDP) hearing and before Tax Court; [3] taxpayer's wife was not party to action; [4] particular treaty between Chippewa Tribe and the United States did not grant taxpayer tax exemption; and [5] purported lack of treaty in which the tribe permitted United States to tax tribe members did not exempt taxpayer from federal income taxation. Frank Bibeau is an enrolled member of the Chippewa Tribe who lives and practices law on the Leech Lake Reservation in Minnesota. In a treaty with the United States, the Chippewa kept the right to "hunt, fish, and gather the wild rice" on their traditional lands. Bibeau says this is really the right to "food, clothing and shelter and travel, whereby the new canoe is the automobile." He argues that this means that income from his law practice is tax exempt. When it comes to exemptions from tax, however, the Supreme Court has stated "that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, [Indians] are subject to the payment of income taxes as are other citizens." *Capoeman*, 351 U.S. at 6. This means that the absence of tax terms from a treaty does not imply that the Indians reserved their right to be free of taxation—instead, it means that an exemption from taxation does not exist. In other words, "tax exemptions are not granted, by implication, to Indians." *Jourdain*, 71 T.C. at 990. The Court found for the Commissioner and held that Bibeau's self-employment income is taxable.

M. Trust Breach & Claims

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

Defendants United States of America (the "Government"), Dr. Jose Ortiz ("Ortiz"), Dr. Richard Foutch (Foutch), and AB Staffing Solutions, L.L.C. (AB Staffing) have filed two Motions to Dismiss for Lack of Jurisdiction. Defendants seek dismissal on the basis that the statute of limitations and administrative exhaustion requirements deprive the Court of subject matter jurisdiction, or, in the alternative, that Plaintiffs have failed to allege a claim upon which relief can be granted. Michael Running Crane (Michael) presented to the Indian Health Services (IHS) Blackfeet Community Hospital (BCH) on November 6, 2019, complaining of chest pains. Ortiz and Foutch allegedly sent Michael home without diagnosing his injuries, providing relief for symptoms, or referring him out for specialized care. Michael returned to BCH on November 14, 2019, complaining of continued pain in his chest. Michael died at the hospital that same day, allegedly due to a cut in his aorta that IHS providers failed to diagnose or treat. The statutory

definition of "employee of the government" includes "officers or employees of any federal agency." 28 U.S.C. § 2671. The term "federal agency" excludes "any contractor with the United States." "Courts have construed the independent contractor exception to protect the United States from vicarious liability for the negligent acts of its independent contractors." Contract physicians qualify as independent contractors rather than federal government employees for Federal Tort Claims Act (FTCA) claim purposes. Ortiz and Foutch worked during the relevant time period as contract employees for IHS through Defendant AB Staffing. The Court agrees that the FTCA's immunity waiver does not extend to claims against the Government arising from the conduct of Ortiz and Foutch in light of their status as contract physicians. 28 U.S.C. § 2671; *Carrillo*, 5 F.3d at 1304–05. Sovereign immunity thereby bars Running Crane's claims against the Government arising from the acts or omissions of Ortiz and Foutch. The Montana Medical Legal Panel Act (MMLPA) prohibits plaintiffs from filing a medical malpractice claim against a health care provider in any court before first filing an administrative claim with the Montana Medical Legal Panel (MMLP). Mont. Code Ann. § 27-6-701s. A plaintiff may seek judicial review only after the MMLP renders its decision. The MMLPA does not apply, however, to any claim against a full-time health care provider employed by a federal agency. *Id.* § 27-6-103(a)(ii). Running Crane argues that he reasonably believed that Ortiz and Foutch worked as federal government employees based on their employment during the relevant time period at BCH, a federal governmental entity. Running Crane contends that he pursued a good-faith FTCA claim under the reasonable belief that the FTCA—and not the MMLPA—applied to Ortiz and Foutch. Running Crane timely filed an FTCA claim with the Department of Health and Human Services (DHHS) against the Government on behalf of his brother's estate on January 21, 2021. This filing fell comfortably within the two-year statutes of limitations imposed by both the FTCA and the MMLPA. 28 U.S.C. § 2401(b); Mont. Code Ann. § 27-2-205. DHHS responded to Running Crane's FTCA claim seven weeks later, on March 11, 2021, when it requested additional evidence. Running Crane alleges that he promptly responded to DHHS's request but did not receive any further response from the agency. DHHS's eventual determination letter makes no mention of the employment status of Ortiz or Foutch. The Court applies equitable tolling to Running Crane's claim. Defendants' Motions to Dismiss are denied. Running Crane's case is stayed pending exhaustion of his claims before the MMLP.

150. *Leatrice Tanner-Brown v. Debra Haaland,* 2022 WL 16528397, No. 21-565 (D.C.D.C. October 28, 2022).

Personal representative of estate of the minor child of former slaves of Native American tribe, and company that was formed for the vindication of the rights and interests of emancipated slaves, brought putative class action against the Secretary of the United States Department of the Interior and the Assistant Secretary for Indian Affairs at the Interior Department, in their official capacities, seeking an accounting relating to alleged breaches of fiduciary duties concerning land allotted to the minor children of former slaves of Native American tribes. The District Court granted Defendants' Motion to Dismiss for lack of Article III standing. Section of 1908 act

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

151. *Lonnie Two Eagle v. United States of America,* 57 F.4th 616, No. 20-1683 (8th Cir. January 11, 2023).

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

152. *Gilham, v. United States,* 164 Fed. Cl. 1, No.22-728L (Fed. Cl., January 23, 2023).

Participant in the Conservation Reserve Program (CRP), an enrolled member of the Blackfeet Tribe, brought action against the Government under the Tucker Act for breach of trust and fiduciary duties, and violation of its duties under the Administrative Procedure Act (APA), alleging the Bureau of Indian Affairs' (BIA) failed to help participant perform maintenance on Indian trust land pursuant to CRP contracts. Government filed Motion to Dismiss for lack of subject-matter jurisdiction. The Court of Federal Claims, Richard A. Hertling, J., held that: [1] court lacked jurisdiction over claim for violation of APA; [2] participant failed to plausibly allege that regulatory or statutory source existed to establish BIA's duty to fulfill terms of CRP contracts, as required for claim for breach of trust; [3] claim for violation of APA accrued when participant's CRP contracts were terminated; and [4] claim for breach of trust accrued when participant's CRP contracts were terminated. The Plaintiff, Monti Pavatea Gilham, is an enrolled member of the Blackfeet Indian Tribe. The Plaintiff leased Indian trust land on the Blackfeet Reservation in Montana. The Plaintiff enrolled her leased trust land under two contracts in the CRP, a program administered by the Farm Service Agency (FSA) within the United States Department of Agriculture (USDA). The CRP contracts were co-signed by the BIA in its capacity as trustee of the tribal land. In the CRP, participants like the plaintiff are paid to maintain their land according to mutually-agreed conservation plans. After placing her leased tribal land in the CRP, the Plaintiff became a victim of severe physical domestic abuse. As a result of this abuse, the Plaintiff alleges she was unable to perform the maintenance required by the CRP contracts. The plaintiff's CRP contracts were therefore terminated prematurely. After the termination of her CRP contracts, the plaintiff sought and received equitable relief from the USDA from certain early-termination penalties. She was absolved from having to repay CRP fees previously paid to her under the CRP contracts. The BIA did not assist the Plaintiff either in performing the required maintenance under the CRP contracts or in obtaining equitable relief from the USDA. Plaintiff sued the United States both for the BIA's failure to help the Plaintiff perform the maintenance required under the CRP contracts and for its failure to help her obtain equitable relief from the USDA. The plaintiff alleges that the defendant's failures to assist her violated the APA. The Plaintiff also alleges that the Defendant's failure to help perform the required maintenance breached the trust and fiduciary duties owed to the plaintiff, as a member of an enrolled tribe, pursuant to the CRP contracts co-signed by the BIA. The Plaintiff's APA claim must be dismissed because it is not based on a money-mandating statute. Recognizing the inability to rest a money-mandating claim on the APA, the Plaintiff argues that under the "Trust Doctrine," damages may be presumed in this case because the plaintiff is an Indian. The trust doctrine affords the Plaintiff no relief for two reasons. First, as the name implies, the trust doctrine does not apply to an APA claim because a claim for a breach of trust is itself a claim for money damages. *See* Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity,* 39 TULSA L. REV. 313, 316–17 (2003). Even if the trust doctrine applied to an APA claim, the trust doctrine cited by the Plaintiff only applies if a statute or regulation establishes the fiduciary responsibility on which the breach-of-trust claim is

premised. *United States v. Navajo Nation ("Navajo II"*), 556 U.S. 287, 301, 129 S.Ct. 1547, 173 L.Ed.2d 429 (2009) (noting that trust principles are only relevant if a plaintiff identifies "rights-creating or duty-imposing statutory or regulatory prescriptions ... and if that prescription bears the hallmarks of a conventional fiduciary relationship") (cleaned up). There is also no jurisdiction over the Plaintiff's Indian trust claim because the Plaintiff fails to invoke a statute or regulation as the source of the alleged trust responsibilities. *Brown v. United States* is instructive on the jurisdictional requirement to allege a statutory or regulatory basis for a breach-of-trust claim. 86 F.3d 1554 (Fed. Cir. 1996). In *Brown*, the Secretary, while not a signatory of the lease, had the authority under federal law to negotiate or dictate lease terms, or even direct that payment be made to the BIA. The Federal Circuit described this authority as so wide as to cause the Indian lessors to have been "[d]ispossessed of the [sic] all the conventional incidents of ownership touching the power to lease their land ...." *Id.* at 1562. Here, the Plaintiff has not alleged that she was in any way "dispossessed" of her land by a comprehensive regulatory scheme, as the plaintiffs in *Brown* were when trying to engage in commercial leasing. Instead, the Plaintiff chose to enroll her land in the CRP, a voluntary government program, and chose to forgo any non-conforming activity that she and her family may have otherwise engaged in on this land. Crucially, unlike in *Brown*, the Plaintiff has not identified any regulatory or statutory source for any alleged duty. Specifically, the Plaintiff has not identified a regulatory or statutory source for the BIA's alleged duty to fulfill the terms of the CRP contracts when the Plaintiff was unable to do so, despite the alleged failure to fulfill this duty being the crux of her breach-of-trust claim. Even if a contract could create fiduciary duties enforceable under an Indian breach-of-trust claim, the Plaintiff has failed to state a claim on which relief can be granted because on their face the CRP contracts do not create such duties. Plaintiff has not identified any contract provision as the source of the trust duties that she alleges were violated. The Defendant's motion to dismiss is granted because the Plaintiff has not invoked appropriate money-mandating substantive law to support jurisdiction under the Tucker Act. The Court of Federal Claims has no jurisdiction over the plaintiff's APA claim. The Plaintiff's claim for breach of trust also must be dismissed because the plaintiff has not identified a statute or regulation as the source of the alleged fiduciary responsibilities.

153. *Cherokee Nation v. U.S. Department of the Interior,* No. 19-cv-2154-TNM-ZMF, 2023 WL 2914173 (D.D.C., February 10, 2023).

The Cherokee Nation (the Nation) sued the U.S. Department of the Interior and other federal defendants (the Government) for an accounting of its assets, which the United States holds in trust. Judge McFadden referred this matter to a magistrate judge for full case management, including discovery and potentially dispositive motions, pursuant to Local Civil Rules 72.2 and 72.3. The Nation moved for Summary Judgment, seeking an order that the administrative record produced by the Government—including the Tribal Reconciliation Project Report prepared by Arthur Andersen (the AA Report), associated background documents, and subsequent periodic financial statements—does not contain an accounting that satisfies the Government's duty to

account to the Nation. The Government cross-moved for summary judgment arguing that the Nation's claims fail as a matter of law. The undersigned recommends that Plaintiff's Motion for Partial Summary Judgment be granted in part and denied in part and that Defendants' Cross-Motion for Summary Judgment be denied. The Nation raises two non-APA claims arising from its status as a trust beneficiary and the 1994 Act. *See Cherokee Nation v. Dep't of Interior, 19-cv-2154*, 2021 WL 3931870, at *1 (D.D.C. Sept 2, 2021). Courts interpret the 1994 Act independently from the APA. In *Cobell v. Babbitt (Cobell I)*, the first blockbuster trust accounting litigation, Judge Lamberth noted that although the Government sought "from the beginning to constrain the plaintiffs' claims to the APA, ... such a characterization simply d[id] not comport with the facts alleged." 30 F. Supp. 2d 24, 33 (D.D.C. 1998). The Government argues that the statute of limitations expired six years after the AA Report was "deemed received" by the Nation. Thus—as Judge McFadden previously indicated—the statute of limitations only begins after the trust is repudiated. *See Cherokee Nation v. Dept of the Interior*, No. 19-cv-02154, 2020 WL 224486, at *3. The Government's reliance on receipt of the AA Report to prove knowledge of repudiation fails. The statute provides that "[t]he Secretary *shall* account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe ... deposited or invested pursuant to § 162a." 25 U.S.C. § 4011(a) (emphasis added). Reconciliation reports are distinct from a trust accounting. The concept of an accounting has a specific meaning in trust law. *See Fletcher v. United States*, 730 F.3d 1206, 1210 (10th Cir. 2013). A trust accounting "frequently refers to the report of all items of property, income, and expenses prepared by a personal representative, trustee, or guardian and given to heirs, beneficiaries, or the probate court." The question then is why Congress separately enacted §§ 4011 and 162a. These two provisions would be rendered meaningless if they called for the same "accounting" as §4044. The Government insists that § 4011 applies only to prospective accounting, while § 4044 applies only to retrospective accounting. This reading is inconsistent with the legislative history of § 4011 described above. And it is unsupported by the plain text. Section 4011 uses the term "account" in reference to the "Responsibility of [the] Secretary to account." By contrast, § 4044 limits "accounting" to its mandate for reconciliation reports, and the term is only used in reference to what account holders are required to attest regarding such reports. *See* 25 U.S.C. § 4044(2)(A). The AA Report failed to meet congressional goals set out in § 4044, which directed "as full and complete accounting as possible of the account holder's funds to the *earliest possible date*." 25 U.S.C. § 4044(2)(A) (emphasis added). The Government concedes that it had accounting information available "covering various pre-1972 time periods." But the AA Report only covered the 1972 to 1992 period. The Court recommends: granting the Plaintiff's claims as to the AA Report in that it does not meet the 1994 Act.

154. *Halverson v. Haaland,* No. CV 22-76-BLG-SPW, 2023 WL 2561219 (D. Mont. March 17, 2023).

Defendant Debra Anne Haaland (Defendant) moves to dismiss this matter. Defendant argues that the United States has not waived sovereign immunity, so the Court does not have subject matter

jurisdiction, and that Plaintiff James Halverson, as personal representative for the fee estate of Jack Halverson, failed to join a necessary party. Plaintiff disagrees, contending that the Court has jurisdiction under the Mandamus Act. For the following reasons, the Court denies Defendant's Motion. Jack Halverson was an enrolled member of the Crow Tribe. Jack's mother, Dalia, was an original allottee to trust land adjacent to Allotment 1809, located in Yellowstone County, Montana. Jack inherited his mother's land and purchased fractional interests in Allotment 1809. Eventually, Jack came to hold an 86.42% interest in Allotment 1809. The other interest holders in Allotment 1809 are the Crow Tribe, Estate of Michelle Walking Bear, and Estate of Penny Powers. In 2015, Jack filed with the Bureau of Indian Affairs (BIA) a Petition for Partition of Allotment 1809 pursuant to 25 U.S.C. § 378, which grants the BIA the authority to partition allotments and issue patents or deeds for the portions of the allotment set aside for the petitioner. In reviewing Jack's petition, the BIA required him to obtain a federally-approved surveyor's Certificate of Survey (COS), which generated the legal descriptions and boundaries for Jack's interest after partition, consistent with the BIA Title Records. The BIA denied Jack's petition multiple times on the grounds that Jack purchased his interest in Allotment 1809 from other trust holders, rather than acquiring them as an heir. However, a 1981 U.S. Solicitor's Directive actually allowed partition for allotments acquired by purchase, not just by heirs. Jack, and subsequently his estate after he died in 2019, did not receive the 1981 directive until 2021 when his estate appealed the partition denials to the Interior Board of Indian Appeals and received the BIA's administrative record. Shortly thereafter, the BIA reversed course and entered a Verified Settlement Agreement (VSA) granting partition. Under the VSA, the BIA was to deliver all documents needed to complete partition and conveyances of title to counsel for Jack's estate for review and approval by January 15, 2022. On or before January 17, 2022, the BIA was required to execute deeds to "convey title for the majority interest in Allotment 1809[A] to the Estate of Jack Halverson," and, on or before January 20, 2022, complete all documents necessary to convey and/or distribute title from Jack's estate to his heir. On January 18, 2022, the BIA recorded trust deeds supposedly in furtherance of the VSA and grant of partition. Plaintiff alleges that the BIA did not provide the deeds to Plaintiff for approval prior to their recording and that errors exist in the deeds, including the legal description and the identity of the grantor. Effectively, Plaintiff argues, the deeds did not actually partition Plaintiff's property. Here, an actionable fiduciary duty exists for analogous reasons as found in *White Mountain Apache.* 537 U.S. 465, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003).). First, it is uncontroverted that the United States holds Plaintiff's land in trust for the benefit of Plaintiff, who is an Indian. (Doc. 18-1 at 6-17; Doc. 1-5 at 2). "[T]he law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.'" *Lincoln v. Vigil*, 508 U.S. 182 (1993) (quoting *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987)). Further, Defendant has the exclusive power to partition Plaintiff's land because of its status as trust land, further conferring onto Defendant "pervasive control" over both the resource and the specific disposition requested here. *Marceau v. Blackfeet Housing Authority*, 540 F.3d 918, 922 (9th Cir. 2008) (citing *Mitchell I* and *Mitchell II*). Defendant argues that the partition statute's discretionary

language governs the mandamus analysis, preventing the Court from finding that the statute confers a nondiscretionary duty on Defendant. However, Defendant's analysis overlooks the fact that Defendant affirmatively exercised that discretion to grant partition, so the procedural posture that the plain language of the statute contemplates is not the procedural posture here. Defendant's contentions also ignore the unique layer added to the mandamus analysis by Plaintiff's status as an Indian and the land's status as held in trust. Considering both these facts, the Court finds Plaintiff alleged an actionable breach of trust claim under the Mandamus Act, which provides the Court with the requisite jurisdiction to hear Plaintiff's case. Ordered that Defendant Debra Anne Haaland's Motion to Dismiss is denied.

155. *Pueblo Of Jemez v. United States of America,* No. 20-2145, 2023 WL 2591515 (10th Cir. March 22, 2023).

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

established aboriginal title to Banco Bonito by 1650 and (2) that its aboriginal title has not been abandoned by the Jemez Pueblo or extinguished by the United States, the Jemez Pueblo continues to hold aboriginal title to Banco Bonito. Jemez Pueblo also argues that the district court abused its discretion in denying its Rule 59(e) motion for reconsideration as to its claim to the Paramount Shrine Lands. This argument is meritless. We, therefore, reverse the district court on the Banco Bonito issue and remand with instructions to enter judgment consistent with this opinion.

156. *Swinomish Indian Tribal Community v. BNSF Railway Company,* No. C15-0543RSL, 2023 WL 2646470 (W. D. Wash., March 27, 2023).

The only Issue to be determined in this phase of the proceedings is whether BNSF's admitted trespass over the Swinomish Reservation between September 2012 and May 2021 was willful, conscious, and knowing. By a preponderance of the evidence, the Court finds that BNSF and the tribe continued to discuss the potential for amending the Easement Agreement to allow more cars and trains to cross the Reservation. At no point did the tribe approve BNSF's unilateral decision to transport unit trains across the Reservation, agree to increase the train or car limitations, or waive its contractual right of approval. BNSF clearly wanted an agreement that would increase shipping volumes across the easement, but it knew that it did not have such an agreement at the time and was affirmatively seeking the tribe's approval. In September 2015, this court denied BNSF's motion to dismiss or stay on the ground that the tribe's claims implicate BNSF's common carrier obligations and were subject to the primary jurisdiction of the Surface Transportation Board (STB). In 2017, the court issued rulings regarding 'BNSF's preemption arguments, finding that state law claims would be preempted, but the tribe's federal claims were not. An interlocutory appeal followed, and the Ninth Circuit affirmed in March 2020. It is undisputed that BNSF's intentional crossings of the Reservation exceeded the conditions and restrictions imposed by the Easement Agreement. It has, therefore, trespassed on Indian lands and is liable for the damages caused by its overburdening of the easement. Restatement (Second) of Torts § 163 comment b and §164 (1965). If a defendant is a willful trespasser, the owner is entitled to recover from him the value of any profits made by the entry. Restatement (Second) of Torts § 929, comment c. (1979). The parties agree that the burden is on BNSF to establish that it acted in good faith and that its trespass, while intentional, was not conscious, willful, and knowing. 87 C.J.S. Trespass § 81. BNSF has taken the position that there were "mistakes, misunderstandings, questionable legal judgment and bad luck, but no bad faith." Having reviewed the exhibits, heard the testimony of the witnesses, and considered the arguments of counsel, the Court disagrees. Thus, the tribe is entitled to equitable remedies, including the recovery from BNSF of profits made by the unlawful entry. Restatement (Second) of Torts § 929, comment c (1979); *U.S. v. Santa Fe Pac. R. Co.,* 314 U.S. 339 (1941). The extent to which equity supports disgorgement will be determined in the next phase of the trial.

157. *LaDeaux v. United States,* 3:20-CV-03007-RAL, 2023 WL2743878 (S.D. Central Div., March 31, 2023).

Plaintiffs, Michael LaDeaux's estate and its personal representative Gregory Demarrias, Sr., sued Defendant United States of America under the Federal Tort Claims Act (FTCA). Plaintiffs claim that Rosebud Sioux Tribe (RST) Officer Kelli Wooden Knife (Wooden Knife), while allegedly acting in her scope of employment and driving negligently, struck and killed Michael LaDeaux (LaDeaux) with her patrol vehicle on October 1, 2017. After discovery closed, Defendant filed a Motion to Dismiss for Lack of Jurisdiction and Motion for Summary Judgment, arguing that because Wooden Knife was not acting within the scope of her employment or carrying out functions authorized under the 638 contract, this Court lacks jurisdiction over the claim due to sovereign immunity. Defendant further argues that LaDeaux's conduct constituted "contributory negligence more than slight" under state law entitling Defendant to summary judgment. Because Wooden Knife was off duty at the time and because LaDeaux's negligence was more than slight in comparison to Wooden Knife's negligence as a matter of law, this Court grants the Motion to Dismiss and the Motion for Summary Judgment. In a "FTCA negligence case, whether the employee was acting within the scope of employment is a threshold jurisdictional issue." *Two Eagle v. United States*, 57 F.4th 616, 621 (8th Cir. 2023). Such a determination is entirely separate from whether the employee was acting negligently. The issue framed by the motion to dismiss is whether Officer Wooden Knife was acting in the scope of her employment and furthering the purpose of the 638 contract at the time of the accident. *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1005 (9th Cir. 2014). Such a determination is a two-step approach focusing on whether the alleged activity is furthered in the relevant federal contract and whether the actions fall within the scope of employment under state law. Here the two questions are closely related. The purpose of the 638 contract at issue for law enforcement services is to have the Rosebud Sioux Tribe hire and equip police officers and other staff to enforce law and promote public safety on the Rosebud Indian Reservation. Wooden Knife was hired as an RST officer under the contract, was in a patrol car, and presumably was still in uniform. However, Wooden Knife was clocked out at the time of the accident and was headed to drop off an energy drink to a friend and then headed home. Until she actually stopped and turned around to check on Guerue's vehicle and abandoned her aim of dropping off the energy drink and heading home, she was not furthering the purpose of the 638 contract. The second inquiry is whether under state law the employee was acting within the scope of employment. Under South Dakota law, if an employee is coming or going from work, the employer is not liable because "it is inherently unfair to penalize an employer by imposing unlimited liability ... for the conduct of its employees over which it has no control and from which it derives no benefit." Ordered that the United States' Motion to Dismiss for Lack of Jurisdiction and Motion for Summary Judgment is granted.

158. *Greene, v. United States,* No. 22-1064, No. 22-1185, 2023 WL 3072565 (Fed. Cl. April 25, 2023).

Plaintiffs in this consolidated matter are members of the Cherokee Nation who are incarcerated in Oklahoma. They claim that pursuant to rights granted in treaties between the United States and the Cherokee Nation their convictions by the State of Oklahoma were unlawful. Before the Court is the Government's Motion to Dismiss. Plaintiffs allege that under two treaties between the Cherokee Nation and the United States—the Treaty with the Cherokee of 1835 (known as the Treaty of New Echota) and the Treaty with the Cherokee of 1866 (known as the Treaty of Washington)—they are not subject to the criminal jurisdiction of the State of Oklahoma. Plaintiffs argue that because they were wrongfully prosecuted and incarcerated by the state, those treaties entitle them to compensation from the federal government. The Court concludes that the treaty provisions cited in Plaintiffs' Complaints are not money-mandating and thus do not provide a basis for the Court's jurisdiction. Nor can the other treaty provisions identified in response to the Government's Motion save Plaintiffs' claims from dismissal, as the provisions are either not money-mandating or bear no relevance to Plaintiffs' allegations. The Court grants the Government's Motion.

159. *Mound v. United States,* No. 22-1721, 2023 WL 3911505 (8th Cir. June 9, 2023)

Motorists who suffered serious injuries, and the estates and heirs of the motorists who died, when cars drove into gap in a road caused when heavy rains collapsed a culvert in a road on the Standing Rock Reservation sued the United States under the Federal Tort Claims Act (FTCA), alleging that the Standing Rock Sioux Tribe, which contracted with Bureau of Indian Affairs (BIA) to maintain roads within the Reservation, negligently failed to warn motorists of unsafe road conditions. The United States District Court for the District of North Dakota, 2022 WL 1059471, granted the government's motion to dismiss, holding that it lacked subject matter jurisdiction under the FTCA's discretionary function exception. Plaintiffs appealed. The Court of Appeals held that: [1] the tribe had discretion over whether to warn motorists of unsafe road conditions, as required for application of discretionary function exception to FTCA, and [2] the tribe's decision not to post warning signs was susceptible to policy analysis, and thus plaintiffs' action was barred under FTCA's discretionary function exception. The Standing Rock Sioux Tribe contracted with the BIA to maintain the roads within the Standing Rock Reservation. The contract provided that the tribe would "preserve, upkeep and restore" roads "within available funding." The "frequency and type of maintenance" would "be at the discretion of the [tribe], taking into consideration traffic requirements, weather conditions and the availability of funds." In 2014, the tribe identified a culvert—a structure that channels water under a road—as a potential maintenance project. In 2018, based on an engineering assessment, the tribe decided to replace the culvert. Because its existing contract did not authorize funding for the project, the tribe sought a new contract with the BIA. Before the new contract was finalized, heavy rains collapsed the culvert, leaving a large gap in the road. Four cars drove into the gap and plunged into the water. Trudy Peterson and James Vander Wal were swept downstream and died. Evan

Thompson and Steven Willard suffered serious injuries. The United States moved to dismiss. *See Hinsley v. Standing Rock Child Protective Servs.,* 516 F.3d 668, 672 (8th Cir. 2008) (explaining that under the FTCA, "[t]ort claims against [contracting] tribes ... are considered claims against the United States"). The district court granted the motion, holding that it lacked subject matter jurisdiction under the FTCA's discretionary function exception. In *Walters v. United States,* we held that the discretionary function exception shielded the government from suit "[b]ecause the applicable regulations expressly required the BIA to consider the availability of funds in deciding whether to perform maintenance on its roads." 474 F.3d 1137, 1140 (8th Cir. 2007). Because we lack subject matter jurisdiction under the FTCA's discretionary function exception, we affirm.

160. *L.B. v. United States Bureau of Indian Affairs, CV*-18-74-BLG-SPW, 2023 WL 5036852 (D. Mont., August 8, 2023).

Before the Court are the parties' competing Motions for Summary Judgment. Plaintiff L.B. asserts that summary judgment in her favor is appropriate because the undisputed facts demonstrate that Defendant Bullcoming was acting in the course and scope of his employment when he violated L.B.'s civil rights. On October 31, 2015, Bureau of Indian Affairs-Office of Justice Services (BIA-OJS) officer Dana Bullcoming was on-duty, patrolling the Northern Cheyenne Indian Reservation. BIA-OJS dispatch received a call from L.B., who was reporting her mother for driving home after the pair had been drinking together. Bullcoming found L.B.'s mother at an apartment, confirmed she was not driving and then drove to L.B.'s residence. Bullcoming spoke with L.B. and told her that he might have to call social services and take L.B. in for child endangerment because of her intoxication around her children. L.B. told Bullcoming that she did not want to go to jail or lose her job. The two walked to Bullcoming's patrol car, where Bullcoming administered a breathalyzer test to L.B, which confirmed her intoxication. Bullcoming told L.B., "Something needs to be done about this," and she responded, "Like what do you mean? Like sex?" Bullcoming responded, "Yes." L.B. and Bullcoming then had unprotected sex. As Bullcoming left, L.B. asked him if he was working the next night and told him he "should stop by again." L.B. became pregnant from the encounter and had a child. The United States prosecuted Bullcoming for Deprivation of Rights Under Color of Law, 18 U.S.C. § 242 and secured a guilty plea and conviction for that offense. L.B.'s claim is limited in scope by the Federal Tort Claims Act (FTCA), which requires her to show that the tortious act was caused by the wrongful act of an employee of the Government acting within the scope of his employment. 28 U.S.C. § 1346(b)(1). Whether an employee was acting within the scope of his employment is determined by the laws of the state where the act occurred. *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996). Only the state's respondeat superior principles are incorporated; other theories of vicarious liability are not within the FTCA's sovereign immunity waiver. *Primeaux v. United States*, 181 F.3d 876, 878 (8th Cir. 1999); *Pierson v. United States*, 527 F.2d 459, 464 (9th Cir. 1975). Here, a tortious act occurs within the scope of employment if the act was authorized by the employer or was incidental to the performance of an authorized act.

Brenden v. City of Billings, 470 P.3d 168, 173 (Mont. 2020). Here, the act is incidental to the performance of an official act. Bullcoming arrived at L.B.'s home in response to L.B.'s request for service regarding her mother. This satisfies the first prong of the course and scope test. Then, the Court must examine whether Bullcoming was at least partially motivated by his subjective belief that he was furthering the BIA's interests when he sexually assaulted L.B. Bullcoming testified unequivocally at his deposition that he had sex with L.B. solely to serve his personal ends. Application of the Restatement (Second) of Agency § 229 factors also mandates a result in the United States' favor. Sexual assault is not an act commonly done by BIA officers. It is ordered that the United States' Cross-Motion for Summary Judgment is granted. Further ordered that L.B.'s Motion for Summary Judgment is denied.

N. Miscellaneous

161. *Lower Brule Sioux Tribe v. Lyman County, 625 F. Supp. 3d 891*, 3:22-cv-03008-RAL, 2022 WL 4008768 (D.S.D. September 2, 2022).

Plaintiffs Neil Russell, Stephanie Bolman, and Ben Janis are members of the Lower Brule Sioux Tribe (the Tribe) and registered voters in Lyman County, South Dakota. The Tribe, Russell, Bolman, and Janis (collectively Plaintiffs) filed a Motion for Preliminary Injunction to Compel Defendants Lyman County, the Lyman County Board of Commissioners (the Commission) and its individual members, and Lyman County Auditor Deb Halverson (collectively Defendants) to implement a new redistricting plan for Lyman County commissioner elections. In short, this case centers on the delayed implementation of redistricting plans for Lyman County commissioner elections that the Commission adopted after the Tribe raised a Voting Rights Act (VRA) concern; the original plan adopted by the Commission was to be fully implemented in 2026 but an amended plan adopted by the Commission after this Court's initial opinion would implement changes to address VRA concerns in 2024. Both plans leave the 2022 county commissioner elections undisturbed. Plaintiffs allege that, without relief extending to the 2022 Lyman County commissioner elections, the voting power of tribal members will be diluted in violation of § 2 of the VRA, 52 U.S.C. § 10301. This Court determines that Plaintiffs are likely to succeed on the merits of their claim and grants the motion for preliminary injunction to a limited extent. The Plaintiffs have shown a likelihood of satisfying the *Gingles* factors. The first factor—that the Tribal members on the Reservation are sufficiently large and geographically compact to constitute a majority in a single district—is indisputable. Indeed in 2006, the United States Court of Appeals for the Eighth Circuit recognized that the Native American population of South Dakota is "geographically compact" "[b]ecause of the well-documented history of discrimination against Native-Americans and the nature of the reservation system[.]" *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1016 (8th Cir. 2006). And the redistricting plan set forth in the Ordinance drew District 1 around a population that was 92.53% Native American, easily demonstrating that Native Americans in the County are geographically compact enough "to constitute a majority in a single-member district." *Bone Shirt*, 461 F.3d at 1018. The second *Gingles* factor—that Tribal

members on the Reservation are "politically cohesive"—is borne out by the data in Plaintiffs' expert report. For instance, in the 2020 elections for President, U.S. Senate, State Senate, State House of Representatives, and Public Utilities Commissioner, over 80% of Native voters in Lyman County voted for Native-preferred candidates. The lone exception was in a U.S. House of Representatives race where the Native American-preferred candidate received about 60% of the Native American vote. *Id.* Lyman County election results in the 2018, 2016, and 2014 races are not far different in showing strong political cohesion in the Lyman County Native American vote. The third *Gingles* factor—that white residents of Lyman County vote "sufficiently as a bloc to enable [them] usually to defeat the minority's preferred candidate" for the Commission—likewise is borne out by historical data. *Bone Shirt*, 461 F.3d at 1018. Professor Collingwood testified consistently with his expert report during the motion hearing that voting in Lyman County was highly polarized, with a voting polarization rate of 82% from 2014 to 2020. The data underscores how racially polarized voting in Lyman County is. Plaintiffs have made a strong preliminary showing that the *Gingles* factors are satisfied. This Court next considers the totality of the circumstances, including the "Senate factors," to determine whether Plaintiffs are likely to succeed on the merits of their claim. Plaintiffs assert many of the Senate factors support their claim, including: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements; ... (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; ... [and] (7) the extent to which members of the minority group have been elected to public office in the jurisdiction. *Bone Shirt*, 461 F.3d at 1021–22. Plaintiffs also claim that the Commission was not responsive to the Tribe during the redistricting process. Rather than adopt the Tribe's preferred plan, the County went to the state legislature to amend South Dakota law to allow implementation of a novel hybrid redistricting plan, causing a delay for when Tribal members would likely be able to elect their preferred commissioners. The second Senate factor strongly favors the Plaintiffs. Professors Collingwood and Walker's report showed 82% voter polarization in Lyman County, leading them to conclude that Native American votes were diluted in at-large elections. There are a few things this Court simply cannot get past. First, no party seems to think, as this Court tends to believe, that the court's proposed remedial plan is feasible. Indeed, the Plaintiff's' attorney during the August 23 hearing when asked by this court about the Plaintiffs' position on it stated: "The Plaintiffs, for purposes of the injunctive relief, are willing to accept Defendants' contention that the time now is too short to tinker with the election." And Plaintiffs' attorney later affirmed that they "are willing to accept [Defendants'] contention that any tinkering, you know, beyond just canceling the election would not be possible at this point." Second, the Commission made a material change in adopting a revised redistricting plan through the New Ordinance after this

Court's prior Opinion and Order to address in part the VRA issue. Third, five of the six candidates who filed petitions to run for Lyman County commissioner on the November of 2022 ballot are parties to this case and no party supports such an option, which might signal hardship perceived by the candidates through such a revision in the election now. Fourth, this Court just cannot gauge how much of a genuine concern the remaining unverified addresses are for assuring that the voters can be sorted properly into the Reservation-district and non-Reservation district to receive the proper ballot on election day. This Court is entirely dissatisfied with leaving the 2022 Lyman County commissioner elections unchanged and does so only because of the remedial plan adopted by the Commission to solve the VRA issue two years earlier than did its original Ordinance. This Court recognizes that this decision does not address the VRA issues with the 2022 election. This Court, however, proposed a remedy to do so that no party supported or defended, leaving this Court questioning its feasibility. A limited preliminary injunction thus will issue to ensure some VRA protection of Native American voting in future Lyman County commissioner elections. Ordered that Plaintiffs' Motion for Preliminary Injunction is granted to the extent that Defendants are enjoined from modifying its New Ordinance adopted after this Court's prior Opinion and Order by which Defendants adopted a revised redistricting plan to resolve the VRA issues two years earlier than its original Ordinance and that, notwithstanding any interpretation of South Dakota law to the contrary, the redistricting plan in the New Ordinance shall be carried out for Lyman County commissioner elections until possible redistricting after the 2030 census.

162. ***Turtle Mountain Band of Chippewa Indians v. Howe,*** **Case No. 3:22-cv-22, 2023 WL 28686770 (D.N.D. East. Div., April 10, 2023).**

Defendant Michael Howe, as Secretary of State of North Dakota (the Secretary), moves for summary judgment on the Plaintiffs' Section 2 claim under the Voting Rights Act (VRA), 52 U.S.C. § 10301. Plaintiffs Turtle Mountain Band of Chippewa Indians (Turtle Mountain), Spirit Lake Tribe (Spirit Lake), and Collette Brown (together, the Plaintiffs) oppose the motion. This case arises from the redrawing of certain North Dakota legislative districts pursuant to redistricting legislation and whether certain redistricting changes in that legislation violate Section 2 of the VRA. Article IV, Section 2 of the North Dakota Constitution requires the state legislature to redraw the district boundaries of each legislative district after the Census. After the federal government released its 2020 Census data to the states, North Dakota Governor Doug Burgum convened a special session of the North Dakota Legislative Assembly to redistrict. Prior to the 2021 redistricting, the Turtle Mountain Indian Reservation was its own state legislative district (district 9), as was Spirit Lake (district 23). From 1990 until the 2021 redistricting, district 9 elected a Native American candidate to the North Dakota Senate and two Native American candidates to the North Dakota House of Representatives. The 2021 redistricting legislation changed those districts by dividing district 9 into two single-representative subdistricts, 9A and 9B (9A contains most of the Turtle Mountain Indian Reservation, with the remainder in district 9B), and separating Spirit Lake from the counties it previously shared a

district with and placing it in district 15 (neighboring district 9). This case challenges those changes and alleges the changes dilute the voting strength of Native American voters in Turtle Mountain, Spirit Lake, and surrounding areas, in violation of Section 2 of the VRA. The Plaintiffs assert that a Native American supermajority was packed into district 9A, while the remaining Native American population was cracked across neighboring districts 9B and 15. And because of this cracking and packing, white voters in those districts (9B and 15) now generally defeat Native American voters' preferred candidates. In *Thornburg v. Gingles*, 478 U.S. at 50-51, the United States Supreme Court identified three preconditions (also known as the *Gingles* factors) that must be initially satisfied to proceed with a Section 2 voter dilution claim: (1) The minority group ... is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) [t]he minority group ... is politically cohesive; and, (3) [t]he white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances—...usually to defeat the minority's preferred candidate. The Secretary's challenges to the proposed remedial districts amount to factual disputes that cannot be resolved on summary judgment. On this record, there is a genuine issue of material fact as to the first *Gingles* precondition, so summary judgment cannot be granted. On this record, there is also a genuine dispute of material fact as to whether the third *Gingles* precondition has been met, precluding summary judgment. Based on the above, and on all the files, records, and proceedings in this case, the Secretary's Motion for Summary Judgment is denied.

163. *Sandmann v. New York Times Company,* 78 F. 4th 319, 2023 WL 5274469, Nos. 22-5734/5735/5736/5737/5738 (6th Cir., August 16, 2023).

A high school student brought actions against news organizations alleging that their reports of incident between him and a Native American drummer defamed him. The United States District Court for the Eastern District of Kentucky, William O. Bertelsman, J., 617 F.Supp.3d 683, entered summary judgment in the organizations' favor. The student appealed, and appeals were consolidated. The Court of Appeals, Stranch, Circuit Judge, held that: (1) district court did not abuse its discretion in determining that law of the case doctrine did not preclude it from revisiting, on summary judgment, the issue of whether allegedly defamatory statements were fact or opinion; and (2) drummer's statements were nonactionable opinions. On January 18, 2019, then-sixteen-year-old Nicholas Sandmann and his classmates had an interaction with a Native American man named Nathan Phillips by the Lincoln Memorial in Washington, D.C. Video of the incident went viral, and national news organizations, including the five Defendants (Appellees, or News Organizations) published stories about the day's events and the ensuing public reaction. Sandmann sued, alleging that the Appellees' reporting, which included statements from Phillips about the encounter, was defamatory. The district court granted the News Organizations' joint motion for summary judgment, finding that the challenged statements were opinion, not fact, and therefore nonactionable. Sandmann appealed. Phillips's statements are opinion, not fact. In making this finding, we are not engaging in speculation or reading improper inferences into Phillips's statements, as the dissent suggests. Rather, we are engaging

in the task required of us: a legal interpretation of Phillips' statements in their context within the News Organizations' articles. The statements' opinion-versus-fact status is "not a question for the jury." *Cromity v. Meiners*, 494 S.W.3d 499,504 (Ky. Ct. App. 2015).). Because the statements are opinion, they are protected by both the Constitution and Kentucky law, and they are nonactionable. The district court did not err in so concluding. Affirmed.

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