JUDICIAL UPDATE
2000-2001 FEDERAL CASE LAW
ON AMERICAN INDIANS

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UNITED STATES SUPREME COURT

This term, the Supreme Court will review five cases affecting Indian country. As of the date of submission of this paper, only one has been decided. Several may be decided in the interim.

Cert. Petitions Granted

1. ***C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma***, No. 00-292. No opinion available from Court of Civil Appeals of Oklahoma, Second Division Argued: March 19, 2001. The issue presented is whether an Indian tribe waived its sovereign immunity by entering into a construction contract that did not expressly address sovereign immunity but contained a clause agreeing to binding arbitration. The contract was executed off-reservation and concerns a construction project that is also off-reservation.

2. ***Nevada v. Hicks***, No. 99-1994. Case below, 196 F.3d 1020 (9th Cir. 1999). Argued: March 21, 2001. For summary of opinion below, see paragraph 75.

3. ***Chickasaw Nation v. United States***, No. 00-507. Case below, *Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000). Argument: unscheduled (as of April 16, 2001). For summary of opinion below, see paragraph 79.

4. ***United States v. Idaho***, No. 00-189. Case below, 210 F.3d 1067 (9th Cir. 2000). Argued: April 23, 2001. For summary of opinion below, see paragraph 40.

5. ***Atkinson Trading Company, Inc. v. Shirley***, No. 00-054. Case below, 210 F.3d 1247 (10th Cir. 2000). Argued: March 27, 2001. For summary of opinion below, see paragraph 69.

Cases Decided

6. ***Department of the Interior v. Klamath Water Users Protective Association***, No. 99-1871, 121 S. Ct. 1060 (March 5, 2001). Nonprofit association of water users brought action against Department of the Interior under Freedom of Information Act seeking documents submitted by Indian tribes at request of Department in course of administrative and adjudicative proceedings regarding water rights allocation. The U.S. District Court for the District of Oregon granted Departments motion for summary judgment, and association appealed. The Ninth Circuit, 189 F.3d 1034, reversed. Certiorari was granted. The Supreme Court, Justice Souter, held that, without regard to whether Freedom of Information Act exemption for inter- or intra-agency memoranda or letters is broad enough to reach documents authored, not by employee of agency, but by independent

contractor acting as consultant, exemption did not protect from disclosure documents that were submitted by Indian tribes at request of Department of Interior in course of administrative and adjudicative proceedings in which tribes had direct interest. Affirmed.

OTHER FEDERAL COURTS[1]

The federal courts have decided numerous cases affecting Indian Country in the years 2000 and 2001. The following is a summary of selected cases.

A. Administrative Law

1. ***Anderson v. Babbitt***, No. 98-36150, 230 F. 3d 1158 (9th Cir. 2000). Will contestant appealed order of Interior Board of Indian Appeals affirming in part administrative law judges denial of her motion for summary judgment in probate proceeding. The U.S. District Court for the Western District of Washington dismissed action. Contestant appealed. The Ninth Circuit held that: (1) exhaustion requirement established by Interior regulation does not bar filing of colorable due process claim in federal court regarding pending Indian probate proceedings; (2) contestants claim was not colorable claim for due process; and (3) IBIA did not fail to act, so as to give rise to federal court jurisdiction in absence of final agency action. Affirmed.

2. ***Pueblo of Sandia v. Babbitt***, Nos. 98-5428 and 98-5451, 231 F.3d 878 (D.C. Cir. 2000). Pueblo sought review of opinion issued by Solicitor of Interior denying request by Pueblo for corrected survey. The U.S. District Court for the District of Columbia vacated Solicitors opinion and remanded case to Interior Department for agency action consistent with courts opinion. On federal appellants motion to dismiss appeals, the D.C. Circuit held that district courts order did not end the litigation and was not appealable. Appeals dismissed.

3. ***Rosebud Sioux Tribe v. Gover***, No. 99-3003, 104 F. Supp. 2d 1194 (D.S.D. 2000). Plaintiff developed plans to build and operate hog-production facility on tribal trust lands. Local Bureau of Indian Affairs officials approved the lease but other officials in the Department of the Interior voided it based on alleged violations of the National Environmental Policy Act and the National Historic Preservation Act. The district court found that decision to void the lease was arbitrary and capricious and granted plaintiffs motion for a preliminary injunction enjoining the Department of Interior from interfering with the project because the Department did not demonstrate that (1) the environmental assessment required by the National Environmental Policy Act failed to raise a substantial environmental issue, or (2) the local Bureau of Indian Affairs officials failed to take a hard lookat the project.

4. ***Utah v. United States Department of The Interior***, No. 99-4104, 210 F.3d 1193 (10th Cir. 2000). State of Utah brought action against Bureau of Indian Affairs challenging BIAs refusal to permit state to participate in process between Indian tribe and storage corporation for approving lease of tribal land for storage of nuclear waste. Storage corporation intervened. The district court concluded that State lacked standing and granted BIAs motion for summary judgment. State appealed. The Tenth Circuit held that action was not ripe for review since, inter alia, State would have opportunity to raise its environmental concerns during review and licensing process conducted by Nuclear Regulatory Commission. Affirmed.

B. Alaskan Native Claims Settlement Act

5. ***Bay View, Inc. v. United*** *States*, No. 00-5097, 46 Fed. Cl. 494 (2000). Native village corporation brought suit alleging that an amendment of the Alaska Native Claims Settlement Act constituted a taking of plaintiffs property, a breach of trust, and a breach of contract. On defendants motion to dismiss, the Court of Federal Claims held that: (1) amendment to the ANCSA that exempted net operating loss revenues from the Acts sharing requirement did not constitute a taking of village corporations property, as corporation had no property interest in those revenues; (2) any breach of trust claim based on ANCSA was not within jurisdiction of the Court of Federal Claims, as ANCSA is not a money-mandating statute; and (3) allegations that amendment constituted a breach of contract or amendment failed to state a claim. Motion granted.

6. ***Doyon, Ltd. v. United States***, No. 97-5049, 214 F.3d 1309 (Fed. Cir. 2000). Regional corporation challenged imposition of alternative minimum tax on income realized by affiliating with other profitable corporations and using net operating losses to shelter profits of the other corporation. The Court of Federal Claims upheld the tax but the Federal Circuit reversed, holding that the special tax provision at issue prohibits the IRS from using any statute or principal of law to deny the benefit or use of losses incurred. The money received by the Regional Corporation was a congressionally recognized benefit.

C. Contracting

7. ***United States ex. rel. Crow Creek Sioux Tribe v. Hattum Family Farms***, No. 00-1691, 237 F.3d 919 (8th Cir. 2000). Robert Hattum and Hattum Family Farms performed custom farmwork for the Crow Creek Sioux Tribe on tribal land. The Tribe brought a qui tam action against Hattum, seeking to set aside certain crop liens, to require an accounting of payments Hattum received from the Tribe, and to recover for damages to tribal land. In a counterclaim, Hattum sought damages for unpaid salaries, amounts due under the farming agreements, unjust enrichment, and breach of contract. The district court partially granted the Tribes motion for summary judgment, concluding the contracts were void under 25 U.S.C. ' 81 because the Secretary of the Interior had not approved

them. See *United States ex rel. Crow Creek Sioux Tribe v. Hattum Family Farms*, 102 F. Supp. 2d 1154, 1163-64 (D.S.D. 2000). The district court also concluded the crop lien was void and found Hattums affirmative defenses of estoppel, waiver, unjust enrichment, and breach of contract without merit. On appeal, Hattum challenged the district courts application of 25 U.S.C. ' 81 to the contracts and the courts finding that Hattums affirmative defenses were meritless. Affirmed.

D. Employment

8. ***Dionne v. Shalala***, No. 98-3510, 209 F.3d 705 (8th Cir. 2000). Plaintiff, a public health nurse with the Indian Health Service and a member of the Turtle Mountain Band of Chippewa, alleged Title VII race and national origin discrimination in the assignment of her classification grade. The district court granted summary judgement for the Secretary, finding that plaintiff presented a prima facie case of disparate treatment, but the Secretary articulated a nondiscriminatory reason for the grading assignment. The Eighth Circuit affirmed.

9. ***Yukon-Kuskokwim Health Corp. v. NLRB***, No. 99-1440, 234 F.3d 714 (D.C. Cir. 2000). Nonprofit health corporation controlled by Alaska Native tribes petitioned for review of, and National Labor Relations Board cross-applied for enforcement of, NLRB order finding that hospital operated by corporation was not exempt from National Labor Relations Act. The D.C. Circuit held that: (1) NLRB did not act arbitrarily in determining that exemption from NLRA coverage for states or political subdivisions did not apply to Indian tribes with respect to activities conducted off reservations, and (2) NLRBs rejection of corporations argument, that it was exempt from NLRA because it operated federal hospital pursuant to government-to-government contract authorized by Indian Self-Determination Act (ISDA), ignored NLRBs obligation to address and to minimize conflict with any statutory regime other than NLRA with which disparity was claimed. Enforcement denied. Remanded.

E. Environmental Regulation

10. ***Arizona Public Service Co. v. Environmental Protection Agency***, Nos. 98-1196, 98-1203, 98-1206, 98-1207 and 98-1208, 211 F.3d 1280 (D.C. Cir. 2000). On petitions for review of an order of the Environmental Protection Agency. In 1990, Congress passed a compendium of amendments to the Clean Air Act. This case concerns amendments that specifically address the power of tribes to implement air quality regulations under the Act.Petitioners challenge the Environmental Protection Agencys regulations, promulgated in 1998, implementing the 1990 Amendments. *See* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81). EPA appropriately construed the CAA; petitioners dismissed. Note: on April 16, the Court denied certiorari in *Michigan v. EPA*, No. 00-746 (April 16,

2001), which effectively permits *Arizona Public Service v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), to stand.

11. ***Cantrell v. City of Long Beach***, 2000 WL 33152061, 241 F.3d 674 (9th Cir. Feb. 5, 2001). The Ninth Circuit held that the appellants had standing to challenge the adequacy of the Navys Environmental Impact Statement under NEPA, but did not establish taxpayer standing sufficient to bring their state law claims in federal court.

12. ***HRI, Inc. v. EPA***, Nos. 97-9556, 97-9557, 198 F.3d 1224 (10th Cir. 2000). Mining company and New Mexico Environment Department petitioned for judicial review of Environmental Protection Agencys decision to implement, pursuant to Safe Drinking Water Act, direct federal underground injection control program on certain New Mexico lands. Department also challenged EPAs decision to implement direct federal UIC program on adjoining lands considered by EPA to be Indian country. The Tenth Circuit held that: (1) EPAs decision to treat landsjurisdictional status as "in dispute" was ripe for review; (2) EPAs reconsideration of prior determination that certain lands were Indian country for SDWA purposes was new decision triggering new limitations period; (3) EPA acted reasonably in asserting jurisdiction over disputed lands under regulations providing for non substantial UIC program revisions; (4) EPA could find that Indian country status of lands was disputed despite prior state adjudications to the contrary; and (5) one land parcel at issue qualified as Indian country. Petitions for review dismissed; issue remanded.

13. ***Metcalf v. Daley***, No. 98-36135, 214 F.3d 1135 (9th Cir. 2000). Appeal of summary judgment in favor of appellees and the Makah Indian Tribe. Appellants argued that in granting the Makah authorization to resume whaling, the federal defendants violated NEPA by preparing an Environmental Assessment that was both untimely and inadequate, and declining to prepare an EIS. In addition, appellants challenge the district courts denial of their motion to compel production of administrative record material, as well as their motion to supplement the administrative record. Reversed and remanded.

14. ***Okanogan Highlands Alliance v. Williams***, Nos. 99-35537, 99-35538, 236 F.3d 468 (9th Cir. 2000). Environmental groups and Indian tribes brought action challenging adequacy of final environmental impact statement and record of decision prepared by United States Forest Service in connection with proposed gold mine in national forest. The U.S. District Court for the District of Oregon 1999 upheld Forest Services decision, and plaintiffs appealed. The Ninth Circuit held that, inter alia, discussion of mitigating measures in EIS was adequate and Forest Service did not violate trust obligations to tribes. Affirmed.

F. Exhaustion of Tribal Court Remedies

15. ***Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority***, No. 99-1828, 207 F.3d 21 (1st Cir. 2000). Non-Indian contractor brought contract, fraud, and conversion action against tribal housing authority arising from contract for work outside of reservation. The district court dismissed action. Contractor appealed. The First Circuit held that although district court lacked diversity jurisdiction, had federal question jurisdiction to determine extent of tribal courts jurisdiction over contractors claims. The First Circuit further held that defense predicated on tribal sovereign immunity was susceptible to direct adjudication in federal courts, without reference to the tribal exhaustion doctrine; tribe waived sovereign immunity with respect to contractors claims; and contractor would be required to exhaust tribal remedies.Vacated and remanded.

16. ***Petrogulf Corporation v. ARCO Oil & Gas Company***, No. CIV.A. 00-B-34, 92 F. Supp. 2d 1111 (D. Col. 2000). Owner of working interest in gas field sued mineral lessee on adjoining Indian trust land for mineral trespass and misrepresentations to state commission. On defendants motion to dismiss, the district court held that plaintiff was required to exhaust tribal remedies before suing in federal court. Motion granted.

G. Fisheries, Water, FERC, BOR

17. ***City of Tacoma v. FERC***, No. 99-1192, 99-1193, 99-1143, 99-1218, 99-1229, 99-1341, 00-1001, 00-1032, 00-1040, 2000 WL 1683468 (D.C. Cir 2000) (unpublished opinion; only Westlaw cite available). Order remanding to FERC for consideration of ESA issues in hydroelectric project relicensing proceeding.

18. ***Conservation Law Foundation v. Federal Energy Regulatory Commission*****,** Nos. 99-1035, 99-1159, 99-1161 & 99-1162, 216 F.3d 41 (D.C. Cir. 2000). The Department of the Interior and the Environmental Protection Agency, conservation groups, and the Penobscot Indian Nation petition for review of the Federal Energy Regulatory Commissions relicensing of a hydroelectric project in north-central Maine. The issues presented go mainly to the adequacy of the Commissions consideration of the various factors governing license renewals. The Commission gave sufficient attention to these factors and carefully explained its conclusions. Petitions denied.

19. ***Klamath Water Users Protective Assoc.v. Patterson***, No. 98-35708, 191 F.3d 1115 (9th Cir. 2000). Water users association and other irrigators sued United States Bureau of Reclamation and dam operators successor based on contract between Bureau and operator governing dams management. Successor filed counterclaim, seeking declaration of rights with respect to irrigatorsstanding under contract. Parties cross-moved for summary judgment. The district court, 15 F. Supp. 2d 990, granted declaratory judgment to Bureau and successor. Irrigators appealed. On petition for rehearing and rehearing en banc, the Ninth Circuit held that:(1) irrigators were not third-party beneficiaries to contract; (2) government retained overall control over dam; (3) Bureau had

authority to direct dam operations to comply with Endangered Species Act; and (4) Bureau had authority to direct dam operations to comply with Tribal rights. Affirmed; petitions for panel rehearing and for rehearing en banc denied.

20. ***Lower Elwha Band of SKlallam v. Lummi Indian Tribe***, No. 98-35964, 235 F.3d 443 (9th Cir. 2000). In proceedings to adjudicate fishing rights reserved by 1855 Treaty of Point Elliott, Lower Elwha Band of SKLALLAM, Jamestown Band of SKLALLAM, Port Gamble Band of SKLALLAM, and Skokomish Indian Tribe sought determination that Lummi Indian Tribe was violating 1974 opinion in *United States v. Washington* by fishing in areas outside its adjudicated usual and accustomed grounds and stations. Following entry of summary judgment order in 1990 determining that 1974 opinion did not intend to include disputed areas within Lummi Tribes usual and accustomed grounds and stations, the U.S. District Court for the Western District of Washington dismissed action. Plaintiff tribes appealed. The Ninth Circuit held that:(1) summary judgment order was not final order; (2) district courts determination that reconsideration of 1990 order was barred by law of the case doctrine did not insulate such order from review; (3) district court did not improperly rely on evidence that had not been before court at time of Washington decision; (4) Lummi Tribes usual and accustomed fishing grounds and stations did not include Strait of Juan de Fuca or mouth of Hood Canal; (5) Lummi Tribes usual and accustomed fishing grounds and stations included Admiralty Inlet; and (6) district court did not abuse its discretion in concluding that law of the case doctrine barred it from reconsidering its 1990 decision. Affirmed in part and reversed in part.

21. ***Muckleshoot Indian Tribe v. Lummi Indian Nation***, No. 99-36224, 234 F.3d 1099 (9th Cir. 2000). Following remand in Indian fishing rights case, 141 F.3d 1355, the U.S. District Court for the Western District of Washington entered order from which Lummi Nation appealed. The Ninth Circuit held that: (1) finding in a 1974 decision that Lummis fishing waters extended south "to the present environs of Seattle" meant that the fishing grounds ended where those environs began, and (2) there was no error in relying on a statement by a geography expert as to where the northern environs of Seattle were located at the time of the prior decision. Affirmed.

22. ***United States v. Muckleshoot Indian Tribe***, No. 99-35960, 235 F.3d 429 (9th Cir. 2000). The Puyallup, Suquamish, and Swinomish Indian Tribes sought determination regarding extent of Muckleshoot Indian Tribes saltwater usual and accustomed fishing area. The U.S. District Court for the Western District of Washington entered summary judgment in favor of Puyallup, Suquamish, and Swinomish Tribes. Muckleshoot Tribe appealed. The Ninth Circuit held that Muckleshoot Tribes saltwater usual and accustomed fishing area, as determined by 1974 decision in *United States v. Washington*, did not include any areas outside Elliott Bay.Affirmed.

23. ***United States v. Washington***, No. 99-35104, 235 F.3d 438 (9th Cir. 2000). State of Washington sought determination that fish caught by Chehalis Indian Tribe on its reservation should be attributed to Quinault Tribe and other Tribes that had signed 1859 Treaty of Olympia, rather than to State, for purposes of equitably allocating fishing rights between signatory Tribes and State under such Treaty. The U.S. District Court for the Western District of Washington entered summary judgment in favor of Quinault Tribe. State appealed. The Ninth Circuit held that fish caught by Chehalis Tribe would be attributed to State, notwithstanding that Chehalis Tribes reservation had been established by executive order rather than by treaty. Affirmed.

H. Gaming

24. ***Casino Resource Corporation v. Harrahs Entertainment, Inc***., No. 99-2822, 243 F.3d 435 (9th Cir. March 13, 2001). Consultant sued entertainment company after company and Indian tribe terminated their gaming development and management contracts, asserting claims for breach of contractual and fiduciary duties and tortious interference with contractual and prospective economic advantage. The U.S. District Court for the District of Minnesota dismissed on preemption grounds. Consultant appealed. The Ninth Circuit held that claims were not preempted by Indian Gaming Regulatory Act. Reversed and remanded.

25. ***Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt***, No. Civ. A. 99-2517(JHG), 116 F. Supp. 2d 155 (D.D.C. 2000). Tribe sought judicial review of determination by Secretary of Interior that gaming was prohibited on particular parcel of land. On cross-motions for summary judgment, the district court held that: (1) exception to statutory prohibition against gaming on land acquired into trust after October 17, 1988, allowing gaming on adjacent parcels, was not applicable, but (2) exception for land taken into trust as part of restoration of federal recognition was not limited to land taken into trust at time of tribes restoration.Motions denied; case remanded.

26. ***Diamond Game Enterprises, Incorporated v.Reno***, Nos. 98-5516 & 99-5345, 230 F.3d 365 (D.C. Cir.2000). Tribe and manufacturer of gaming device sought declaratory and injunctive relief against Attorney General and others relating to classification of device under Indian Gaming Regulation Act (IGRA). Other tribes and states intervened. On cross-motions for summary judgment, the district court, 9 F. Supp. 2d 13, held that device was Class III gaming apparatus, and plaintiffs appealed. The D.C. Circuit held that the device should be classified as a Class II "electronic aid" rather than as a Class III "facsimile." Reversed and remanded with instructions.

27. ***Kansas ex rel. Graves v. United States***, No. Civ.A. 99-2341-GTV, 86 F. Supp. 2d 1094 (D. Kan. 2000). State sought judicial review of determination by Department of the Interior that parcel was Indian land. On plaintiffs motion for preliminary injunction and defendants motion to dismiss, the district court held

that: (1) Quiet Title Act did not apply, and (2) finding that parcel was Indian land, within meaning of Indian Gaming Regulation Act, was arbitrary and capricious. Plaintiffs motion granted; defendants motion denied.

28. ***Melius v. National Indian Gaming Commission,*** 2000 WL 1174994 (D.D.C. 2000) (unpublished opinion; only Westlaw cite available). Plaintiff sued the National Indian Gaming Commission under the Freedom of Information Act, the Privacy Act, the Administrative Procedure Act, and the Fifth Amendment to the U.S. Constitution. Plaintiff moved for disclosure of certain documents, damages, a review of the National Indian Gaming Commission determination that he was an unsuitable candidate for a management contract, and declaratory and monetary relief. Defendant moved for summary judgment. The district court granted the motion for summary judgment on some counts and denied it on others.

29. ***Sault Ste. Marie Tribe of Chippewa Indians v. Engler***, No. 1:90-CV-611, 93 F. Supp. 2d 850 (W.D. Mich. 2000). State moved to compel compliance with consent judgment that had settled dispute between State and Indian tribes. The district court held that tribesexclusive right to operate electronic games of chance ended, and hence their obligation under consent decree to pay portion of net proceeds to State terminated, when compacts allowing non-party tribes to operate games in State became effective. Motion denied.

30. ***Sokaogon Chippewa Community v. Babbitt***, No. 00-1137, 214 F.3d 941 (7th Cir. 2000). Appeal of St. Croix Chippewa Indians of Wisconsin, proposed intervenor appealed district courts refusal to permit intervention, either of right or by permission, in litigation between the Sokaogon Chippewa Community Mole Lake Band of Lake Superior Chippewa, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, and the Red Cliff Band of Lake Superior Chippewa Indians, and the U.S. Department of the Interior. Affirmed.

31. ***World Touch Gaming, Inc. v. Massena Management, LLC***, No. 99-CV-2214, 117 F. Supp. 2d 1249 (M.D. Ala 2000). Seller and lessor of gaming equipment sued Indian tribe, its casino, and casino management company for breach of contract. On defendantsmotion to dismiss, the district court held that: (1) tribe and casino were immune from suit, and (2) tribe and casino were indispensable parties. Motion granted.

I. Land Claims

32. ***Alaska v. United States***, 213 F.3d 1092 (9th Cir. 2000). State of Alaska brought quiet title action against United States, claiming title to riverbed of three remote wilderness rivers: the Kandik, the Nation, and the Black.Under the equal footing doctrine of the Submerged Lands Act of 1959, the riverbeds belong to the State if the rivers were navigable at statehood but to the United States if the rivers were unnavigable at statehood.District court held: (1) The U.S. asserted a claim to the navigability of the Kandik River and the Nation River but not the Black River,

and (2) Native lands are excluded from this claim. The court of appeals affirmed that the U.S. asserted a claim to the Kandik and the Nation but reversed the district court with respect to the Black on the grounds that it had no jurisdiction to hear the claim. Affirmed in part and reversed and remanded in part.

33. ***Banner v. United States***, 238 F.3d 1348 (Fed. Cir. Jan. 29, 2001). Former lessees of portions of Allegany Reservation brought Fifth Amendment takings and due process action against United States, contending that Seneca Nation Land Claims Settlement Act extinguished their right to renew leases and their right to own improvements on leased land. The Court of Federal Claims, 44 Fed. Cl. 568, entered summary judgment in favor of United States. Former lessees appealed. The Federal Circuit held that: (1) lesseesclaims that Act extinguished their right to renew leases were barred under doctrine of collateral estoppel, and (2) lesseesownership interest in improvements reverted to Nation upon expiration of 99-year leases. Affirmed.

34. ***Bay Mills Indian Community v. Western United Life Assurance Co.,*** No. 99-1036 (6th Cir. 2000). Bay Mills Indian Community filed a complaint asserting an interest in a parcel of property within the county. Bay Mills alleged various federal constitutional and statutory violations in connection with the 1884 ouster from the property of its predecessors in interest, two aboriginal Chippewa bands, and sought either equitable title to the property or damages equal to its value and damages for the loss of the use and enjoyment of the land since 1884. The defendants, individuals and entities currently possessing various interests in the property, moved to dismiss the action under Federal Rules of Civil Procedure 12(b)(7) and 19 for failure to join an indispensable party, the Sault Ste. Marie Tribe of Chippewa Indians. The district court granted the defendantsmotion and dismissed the plaintiffs complaint. Affirmed.

35. ***Cayuga Indian Nation of New York v. Pataki***, Nos. 80-CV-930, 80-CV-960, 83 F. Supp. 2d 318 (N.D.N.Y. 2000). Indian tribe sought compensation for the fact that, through two separate transactions with the State, they were dispossessed of their ancestral land in violation of the Indian Trade and Intercourse Act and had remained out of possession of that land for the past 204 years. Upon partiesmotions to exclude expert testimony on damages issue, the district court held that: (1) expert testimony of real estate appraiser proffered by tribal plaintiffs was not admissible since his proffered testimony did not satisfy the reliability and relevancy considerations identified in *Daubert*, and (2) although real estate appraisers proffered by state and federal governments admitted to developing their respective valuation methodologies for first-time use in the case, their expert testimony satisfied the reliability and relevancy considerations of *Daubert*, and thus, was admissible. Order in accordance with opinion.

36. ***Cermak v. Babbitt***, No. 00-1098, 234 F.3d 1356 (Fed. Cir. 2000). Descendants of member of Mdewakanton Band of Sioux Indians sued Department of the Interior, claiming that Department had wrongfully deprived them of their rights in parcels

of land that had been assigned to member in 1944 through issuance of Indian Land Certificates. The U.S. District Court for the District of Minnesota determined that it lacked jurisdiction and transferred case to United States Court of Federal Claims. Descendants appealed to the Eighth Circuit, which transferred appeal. The Federal Circuit held that: (1) jurisdictional statute for Court of Federal Claims, and statute providing that district courts had subject matter jurisdiction over certain claims against United States, constituted waivers of sovereign immunity with respect to claim for damages, but not with respect to claim for injunctive relief; (2) statute conferring on district courts jurisdiction over actions involving Indiansrights to allotments did not provide district court with jurisdiction; and (3) Court of Federal Claimslack of jurisdiction to order equitable relief for descendants did not preclude transfer of action to Court of Federal Claims, absent basis for district court jurisdiction over equitable claim. Affirmed.

37. ***Harrington v. Babbitt***, No. 99-36121, 2000 WL 1599095 (9th Cir. 2000) (unpublished opinion; only Westlaw cite available). Appeal from the U.S. District Court for the District of Oregon. Pro se litigant appealed the district court's dismissal of his ' 1983 action alleging entitlement to mineral rights as frivolous. The comprehensible portion of Harrison's complaint, which the court construed liberally, alleged that the Klamath Tribe, of which Harrison is a member, is entitled to mineral rights to most of southern Oregon and northern California based on an 1864 treaty; that the Department of the Interior is keeping this entitlement secret; that the tribe itself refuses to pursue these rights; and that therefore, Harrington is entitled to them. Affirmed.

38. ***Karuk Tribe of California v. United States***, Nos. 99-5002, 99-5003, 99-5006, 209 F.3d 1366 (Fed. Cir. 2000). Karuk Tribe of California, Yurok Indian Tribe, and individual Indians brought actions against United States, claiming that 1988 Hoopa-Yurok Settlement Act that partitioned Hoopa Valley Reservation effected Fifth Amendment taking of their property interests. Hoopa Valley Tribe was permitted to intervene on side of United States. The Court of Federal Claims entered summary judgment in favor of United States and Hoopa Tribe, and plaintiffs appealed. The Federal Circuit held that plaintiffs did not possess compensable vested property interest in reservation and partition of Reservation thus was not unconstitutional taking. Affirmed.

39. ***San Xavier Development Auth. v. Charles***, No. 99-16158, 237 F.3d 1149 (9th Cir. Jan. 29, 2001). As lessee of allotted Indian land, nonprofit development corporation chartered by Tohono Dodham Indian Nation sued trailer home sales company to terminate sublease. The U.S. District Court for the District of Arizona dismissed action. Lessee appealed. The Ninth Circuit held that subleased land was not subject to Nonintercourse Acts requirement that purchase of lands from Indian tribe be made by treaty or convention and that corporation lacked standing under various statutes. Affirmed.

40. ***United States v. Idaho***, Nos. 98-35831, 98-35847, 210 F.3d 1067 (9th Cir. 2000). United States, in its own capacity and as trustee for Coeur dAlene Indian Tribe, brought action against State of Idaho seeking to quiet title to lands submerged by Coeur dAlene Lake and St. Joe River within exterior boundaries of Coeur dAlene Indian Reservation. Tribe intervened as plaintiff. The district court quieted title in favor of United States, as trustee, and Tribe, as beneficially interested party, but refused to adjudicate ownership of submerged lands within Heyburn State Park. State and Tribe appealed. The Ninth Circuit held that: (1) Congress intended to defeat states title to lands submerged by Coeur dAlene Lake and St. Joe River, and (2) district court properly declined to adjudicate ownership of submerged lands within Heyburn State Park. Affirmed.

41. ***Virgin v. County of San Luis Obispo***, No. 98-55557, 201 F.3d 1141 (9th Cir. 2000). Landowners challenged countys denial of their application for a lot line adjustment. The district court dismissed for lack of jurisdiction, and landowners appealed. The Ninth Circuit held that mere fact that landownerspredecessors had received title via federal land patents did not create federal-question jurisdiction. Affirmed.

42. ***Ysleta Del Sur Pueblo v. Laney***, No. 98-50575, 199 F.3d 281 (5th Cir. 2000). Tribe filed suit seeking to eject officials of State of Texas from a piece of real property. Motion to dismiss the suit as barred by the Eleventh Amendment was denied by the district court and defendants appealed. The Fifth Circuit held that: (1) State was the true party in interest for purposes of Eleventh Amendment immunity, though state officials were named in their individual capacities; (2) the Nonintercourse Act does not abrogate statessovereign immunity under the Eleventh Amendment; and (3) suit could not proceed under the *Ex parte Halios* doctrine.Reversed.

J. Misappropriation

43. ***Lebeau v. United States,*** No. Civ. 99-4106, 115 F. Supp. 2d 1172 (D.S.D. 2000). Individual Indians sued United States, challenging constitutionality of statute giving tribes portion of individuals share of settlement fund.On tribesmotions to intervene and dismiss, the district court held that tribes were not necessary parties to suit. Motion granted in part and denied in part.

K. Federal and Tribal Civil Rights

44. ***McElhaney v. Elo***, No. 98-1832, 2000 WL 32036 (6th Cir. 2000) (unpublished opinion; only Westlaw cite available). Plaintiff is an inmate in the prison system of the state of Michigan who practices an Indian religion. He alleges that the Michigan Department of Corrections violated his first amendment rights to practice his religion by denying him (1) access to a sweat lodge, (2) access to a ceremonial pipe, (3) an ash tray for ceremonial in-cell smudging, (4) denial of materials to make a medicine bag, and (5) participation in communal worship

while on detention sanctions. The district court granted summary judgment for the defendants because the prison officials articulated reasons for limiting the expression of his first amendment rights that were reasonably related to legitimate penological interestsand there was no genuine issue of material fact that needed to be resolved at trial. The Sixth Circuit affirmed.

45. ***Old Person v. Cooney***, No. 98-36157, 230 F.3d 1113 (9th Cir. 2000). Individual Indian voters sued Governor and Secretary of State of Montana, alleging that 1992 redistricting plan for State House of Representatives and Senate diluted voting strength of Indians and was adopted with discriminatory purpose, violating Voting Rights Act. Following bench trial, the U.S. District Court for the District of Montana entered judgment for Governor and Secretary. Voters appealed. The Ninth Circuit held that: (1) white majority voted sufficiently as bloc to enable it usually to defeat Indians preferred candidates for Montana House of Representatives and Senate, thus satisfying third Gingles factor for determining whether plan diluted Indiansvotes; (2) no proportionality existed that would weigh against finding that plan diluted votes of Indians; and (3) district court did not clearly err in finding that plan was not adopted with discriminatory purpose. Reversed and remanded.

46. ***Sinajini v. Board of Education of San Juan School*** *District*, No. 99-4130, 233 F.3d 1236 (10th Cir. 2000). Parents and Chapters of Navajo Tribe sued school district, alleging that it denied equal educational activities to Native Americans on basis of race. Following approval of consent decree, 964 F. Supp. 319, the U.S. District Court for the District of Utah, 47 F. Supp. 2d 1316, determined that parents and Chapters had partially prevailed and awarded them reduced amount of attorney fees. Parents and Chapters appealed. The Tenth Circuit held that: (1) Court erred in limiting attorney fees award to issues pled, since courts judgment on negotiated settlement was larger in scope than pleadings had been; (2) catalyst test did not apply to question whether parents and chapters prevailed for purposes of attorney fees; and (3) district court erred in determining that parents achieved only limited success because they prevailed on a significant claim but such claim was only one of approximately 21 claims for relief. Reversed and remanded.

47. ***United States v. Gotchnik***, No. 99-4288, 222 F.3d 506 (8th Cir. 2000). Indians filed motions for acquittal following their convictions for use of motorized equipment in federally held wilderness area. The district court held that treaty did not give Indian band right of unrestricted travel to fishing grounds and regulations prohibiting use of motorized vehicles in area preempted conflicting treaty rights. Motions granted in part, and denied in part. Affirmed.

48. ***Western Mohegan Tribe and Nation of New York v. New York***, No. 99-CV-2140 LEK/DRH, 100 F. Supp. 2d 122 (N.D.N.Y. 2000). In a previous suit plaintiffs sought a preliminary injunction and alleged violations of the Native American Graves Protection and Repatriation Act and their Free Exercise rights

under the First Amendment with respect to the construction of a bridge connecting the mainland to the island. The district court held that it lacked jurisdiction under NAGPRA and found the Free Exercise claim too vague to meet the demanding standard required for a preliminary injunction. Plaintiffs commenced a second suit, again alleging claims under those statutes as well as under the National Historic Preservation Act. The court denied the motion and dismissed sua sponte.

49. ***Yankton Sioux Tribe v. United States Army Corps of*** *Engineers*, No. Civ. 99-4228, 83 F. Supp. 2d 1047 (D.S.D. 2000). Indian tribe sought preliminary injunction protecting inadvertently discovered grave sites. The district court held that Tribe was entitled to preliminary injunction preventing Corps of Engineers from raising water level until expiration of statutory thirty-day period following inadvertent discovery of lakeshore grave sites, during which time exposed remains would be removed.

L Sovereign Immunity and Federal Jurisdiction

50. ***Barker-Hatch v. Viejas Group Baron Long Capitan Grande Band of Digueno Mission Indians of the Viejas Group Reservation, California***, No. 99 CV 1730BTM(LSP), 83 F. Supp. 2d 1155 (S.D. Cal. 2000). Action was brought against Indian tribe to recover for injuries suffered in slip and fall. On defendants motion to dismiss, the district court held that court lacked diversity jurisdiction. Motion granted.

51. ***Bassett v. Mashantucket Pequot Tribe***, No. 98-9162, 204 F.3d 343 (2nd Cir. 2000). Film producer sued Indian tribe, museum, and related defendants, alleging copyright infringement, breach of contract, and various state-law torts. The district court dismissed claims, and producer appealed. The Second Circuit held that: (1) whether a complaint asserting claims of copyright infringement arising from, or in the context of, an alleged contractual breach "arises under" the federal copyright laws for the purposes of jurisdiction of federal district court is determined under the *T.B. Harms* test, abrogating *Schoenberg*; (2) producers copyright claims "arose under" the Copyright Act; (3) tribe was immune from suit on copyright claims; and (4) tribe was not an "indispensable party" in action to enjoin museum from further infringing copyrights. Affirmed in part, vacated in part, and remanded.

52. ***Dry v. City of Durant***, No. 99-7137, 242 F.3d 388 (10th Cir. 2000) (unpublished opinion; only Westlaw cite available). Choctaw Nation hired off-duty police officers from the City of Durant, Oklahoma, to work as security officers at the Choctaw Nation's annual Labor Day festival. Tribal ordinance prohibited dissemination of political literature outside of designated area at fair. After Dry left the designated area, he was approached by one of these police officers and a physical altercation ensued. Dry filed an action under 42 U.S.C. ' 1983 and the Oklahoma Governmental Torts Claims Act and sought compensatory damages,

attorneysfees and costs, and punitive damages. The district court granted summary judgment for the defendant, holding that neither the police officers nor the City of Durant were liable because the police officers were operating under the color of tribal, not state, law. Affirmed.

53. ***Dry v. United States***, No. 99-7110, 235 F.3d 1249 (10th Cir. 2000). Tribal members brought ' 1983 and Federal Tort Claims Act claims against tribal law enforcement officers, who allegedly committed torts when arresting members, and cities where members were detained following their arrests. The U.S. District Court for the Eastern District of Oklahoma dismissed claims, and members appealed. The Tenth Circuit held that:(1) officers were acting pursuant to tribal rather than federal authority, and thus could not be held liable under Bivens or FTCA for alleged torts; (2) provision of 1855 Treaty between United States and Choctaw Nation, providing for indemnification from United States for injuries caused by non-tribal members, was not applicable to members allegedly injured by tribal officers; and (3) city jailers did not violate constitutional rights of members by detaining them, in accordance with cross-deputization agreements with tribe, based upon representations of tribal officers that offenses had been committed. Affirmed.

54. ***Hagen v. Sisseton-Wahpeton Community College***, No. 99-2124, 205 F.3d 1040 (8th Cir. 2000). Former employees filed race discrimination actions against community college chartered by Indian tribe. Following entry of default judgment in favor of former employees, college moved to set aside default on grounds of lack of subject matter jurisdiction and sovereign immunity. The district court denied motion. College appealed. The Eighth Circuit held that: (1) college was arm of tribe entitled to sovereign immunity; (2) college did not waive its immunity by failing to answer employeesdiscrimination complaints; and (3) colleges charter did not waive its immunity. Reversed and remanded.

55. ***Hein v. Capitan Grande Band of Diegueno Mission Indians***, No. 98-56182, 201 F.3d 1256 (9th Cir. 2000). Members of splinter group of Capitan Grande Band of Diegueno Mission Indians brought action against Barona Group of same Band, and against Secretary of the Interior, asserting rights to portion of Barona Groups gaming revenues. The district court dismissed on basis of lack of subject matter jurisdiction and tribal sovereign immunity. Members appealed. The Ninth Circuit held that: (1) members did not have cause of action under Indian Civil Rights Act; (2) Indian Gaming Regulatory Act did not provide members with direct cause of action; (3) Administrative Procedure Act provided district court with subject matter jurisdiction over membersclaims against Secretary; and (4) Barona Group was not indispensable party with respect to claims against Secretary. Affirmed in part, reversed in part, and remanded.

56. ***Iowa Management & Consultants, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa***, No. 99-2538, 207 F.3d 488 (8th Cir. 2000). Corporation brought action against Indian tribe alleging breach of contract for provision of gaming-related

services and seeking order compelling arbitration. The district court dismissed complaint. Corporation appealed. The Eighth Circuit held that: (1) district court did not have federal question jurisdiction over claim for breach of contract, and (2) corporations claim that it was entitled to arbitration under Federal Arbitration Act did not confer federal question jurisdiction on district court. Affirmed.

57. ***Kerr-McGee Corp. v. Farley***, No. Civ. 95-0438MVRLP, 88 F. Supp. 2d 1219 (D.N.M. 2000). Tribal members brought suit in Navajo tribal court seeking damages for alleged negligence and wrongful death arising out of corporationsoperation of uranium processing mill located on leased tribal land within reservation. Defendants moved to enjoin tribal court proceedings. The district court stayed proceedings under tribal exhaustion rule to allow tribal court opportunity to determine its jurisdiction, and defendants appealed. The court of appeals affirmed. On renewal of corporationsmotion to district court following new United States Supreme Court opinion on issue, the district court held that Price-Anderson Act established exclusive federal adjudicatory framework covering tribal membersclaims. Motion granted.

58. ***Longie v. Pearson***, No. 99-4142 , 2000 WL 427630 (8th Cir. 2000) (unpublished opinion; only Westlaw cite available). Longie, the former Chief Judge of the Spirit Lake Sioux Tribal Court, filed a pro se "Petition for an Order of Writ of Habeas Corpus" complaining that, pursuant to a Council resolution, he was illegally removed from his position as chief judge in violation of tribal law, the Tribes constitution, and federal law. After defendants moved to dismiss, the district court granted their motion. Affirmed.

59. ***Mannatt v. United States***, No. 98-689L, 48 Fed. Cl. 148 (2000). Owners of land adjacent to Indian reservation brought suit claiming that the BLM improperly conducted a resurvey of their lands, resulting in takings of their property by inverse condemnation. On defendants motion to dismiss for lack of subject matter jurisdiction, or, in the alternative, for failure to state a claim upon which relief may be granted, the Court of Federal Claims held that: (1) plaintiffs stated takings claims upon which relief could be granted; (2) Court had jurisdiction to determine title to the disputed lands; (3) Quiet Title Act was not applicable to preclude jurisdiction; and (4) plaintiffs were not required to exhaust administrative remedies before the BLM prior to asserting takings claims. Motion denied.

60. ***Manybeads v. United States of America,*** No. 90-15003, 209 F.3d 1164 (9th Cir. 2000). Members of Navajo Nation residing on land belonging to Hopi Tribe brought action against United States alleging that Navajo and Hopi Indian Land Settlement Act of 1974 violated their First Amendment right to freely exercise their religion. The district court dismissed action, and members appealed. After Hopi Tribe and United States reached Settlement Agreement entitling Hopi Tribe to compensation, and after Hopi Tribe, Navajo Nation, and representatives of individual Navajos reached Accommodation Agreement limiting rights of

Navajos residing on Hopi land, the Ninth Circuit held that: (1) Tribe was necessary party, and (2) Tribe was indispensable party.Affirmed.

61. ***Penobscot Nation v. Georgia-Pacific Corp.***, No. 00-101-B-H, 116 F. Supp. 2d 201 (D. Me. 2000). Indian tribes sued paper companies, seeking declaratory judgment that they were not subject to companiesclaims under Maine Freedom of Access Act. On motion for reconsideration of order granting companiesmotion to dismiss, 106 F. Supp. 2d 81, the district court held that, under well-pleaded complaint rule, court lacked jurisdiction. Motion denied.

62. ***United States v. Peterson***, No. CR00-9-M-DWM, 121 F. Supp. 2d 1309 (D. Mont. 2000). Native American was charged with hunting in national park. On defendants motion to dismiss, the district court held that, although Blackfeet Tribe retained hunting rights under treaty ceding land to federal government, Congress abrogated those rights on portion of land which it subsequently included in national park. Motion denied.

63. ***Sac And Fox Nation of Missouri v. Babbitt***, Nos. 96-4129-RDR, 964130-RDR, 92 F. Supp. 2d 1124 (D. Kan. 2000). Action was brought challenging decision of Interior Secretary to take land into trust on behalf of Indian tribe. The district court held that tribe was indispensable party, and thus its refusal to waive sovereign immunity necessitated dismissal of action. Dismissed.

64. ***Sanderlin v. Seminole Tribe of Florida***, No. 00-10312, ___ F.3d ___ (11th Cir. March 8, 2001). Former employee of Seminole Tribe of Florida brought disability discrimination action against Tribe under Rehabilitation Act. The U.S. District Court for the Southern District of Florida dismissed for lack of jurisdiction. Former employee appealed. The Eleventh Circuit held that: (1) tribal chief did not waive Tribes right to sovereign immunity when he accepted federal funds contingent on compliance with Act; (2) Congress did not waive sovereign immunity by enacting Act, abrogating *Frost v. Seminole Tribe of Florida*; (3) district court did not abuse its discretion in denying motion for reconsideration; and (4) district court did not commit reversible error in denying as moot former employees motion to compel production of tribal budget. Affirmed.

65. ***United States v. Gardner***, No. 00-4113, 240 F.3d 1250 (10th Cir. March 22, 2001). Following jury trial before the U.S. District Court for the District of Utah defendant was convicted of transporting, receiving and acquiring elk in violation of tribal regulations. Defendant appealed. The Tenth Circuit held that: (1) defendants status as non-Indian was not essential element of jurisdiction for crime; (2) interstate transportation was not element of crime as charged; (3) *Trombetta/Youngblood* error did not occur when state lost tape of recorded interview with witnesses; and (4) failure to give cautionary instruction about uncorroborated testimony of accomplices was reversible error. Reversed and remanded.

66. ***United States v. Prentiss***, No. 98-2040, 206 F.3d 960 (10th Cir. 2000). Defendant appealed his conviction of arson in Indian country. The Tenth Circuit that: (1) the Indian status of the defendant and victim are essential elements under the Indian Country Crimes Act, which must be alleged in the indictment and established by the government at trial, (2) indictment lacking these allegations deprived defendant of his Fifth Amendment right to be tried only on charges presented in an indictment returned by a grand jury, and (3) such defect was not subject to harmless error analysis. Vacated and remanded.

67. ***United States v. White***, Nos. 00-1039(L), 00-1040, 237 F.3d 170 (2nd Cir. 2001). Defendants were convicted, pursuant to conditional guilty pleas, in the U.S. District Court for the Northern District of New York, of violation currency transaction reporting requirements, and they appealed. The Second Circuit held that: (1) reporting requirements for currency transactions exceeding $10,000 applied to transactions occurring exclusively within American Indian reservation, and (2) defendantsconditional guilty pleas waived issue of whether their violations were willful. Affirmed.

68. ***Wallett v. Anderson***, No. CIV. 3:00CV0053 (AVC), 198 F.R.D. 20 (D. Conn. 2000). Agent of the Liquor Control Division of the Connecticut Department of Consumer Protection brought ' 1983 action, alleging that attorney for casino and his supervisor conspired to remove him from his assignment at casino, thereby violating his right to free speech and depriving him of equal protection. On defendantsmotions to dismiss, and one defendants alternative motion for a more definite statement, the district court held that: (1) defense of tribal sovereign immunity was not available to attorney employed by Indian casino, even assuming she was a tribal official by virtue of her employment, as alleged conduct was not within scope of her authority; (2) motion for a more definite statement would be granted to the extent plaintiff intended to assert a cause of action arising under state law; and (3) supervisor was not entitled to qualified immunity from subordinates claim that he was subjected to disciplinary proceeding in retaliation for exercising his right to free speech. Motions to dismiss denied; motion for more definite statement granted in part.

M. Sovereignty, Tribal Inherent

69. ***Atkinson Trading Company, Inc. v. Shirley,*** No. 98-2247, 210 F.3d 1247 (10th Cir. 2000). Non-Indian hotel proprietor brought action against members of Navajo Tax Commission seeking declaratory judgment that Navajo Nation had no jurisdiction to impose hotel occupancy tax on proprietors guests. The district court denied proprietors motions for summary judgment and for trial de novo and entered summary judgment in favor of Commission members. Proprietor appealed. The Tenth Circuit held that: (1) district courts in reviewing tribal court decisions on jurisdictional issues should review findings of fact for clear error and conclusions of law de novo; (2) district court did not abuse its discretion in

finding that Navajo tribal courts were not fundamentally unfair or biased, and that clear error discretion thus should be given to tribal courtsfindings of fact; (3) fact that hotel was situated on fee land did not compel finding that Nation lacked jurisdiction over proprietors nonmember guests; (4) district court applied appropriate test for determining whether proprietor entered into consensual relationship with Navajo Nation; and (5) consensual relationship existed between Nation and guests, such that Nation had jurisdiction to impose tax. Affirmed.

70. ***Big Horn County Elec. Coop. v. Adams***, No. 99-35799, 219 F.3d 944 (9th Cir. 2000). Electric company sued officials of Crow Tribe, seeking injunctive and declaratory relief against tribe utility tax on companys property on rights-of-way across tribal land and refund of taxes paid under protest. Parties filed cross-motions for summary judgment. The Ninth Circuit affirmed the district court's ruling that the rights-of-way were equivalent to nonmember fee land; companys delivery of electricity to tribe and its members constituted consensual relationship, so that tribe had civil jurisdiction over companys conduct; and tribes utility tax on companys property exceeded tribes inherent sovereign authority.

71. ***Bowen v. Doyle***, No. 97-9572, 230 F.3d 525 (2nd Cir. 2000). President of Seneca Nation brought ' 1983 action seeking injunction to prevent New York court judges from making further decisions in state court action filed against President by enrolled members of Nation, who claimed that President had violated law of Nation in taking various actions relating to conduct of Nations government. The U.S. District Court for the Western District of New York, 880 F. Supp. 99, permanently enjoined state court judges from exercising further jurisdiction over subject matter of state court action. State court judges appealed. The Second Circuit held that:(1) tribal exhaustion rule would not be extended to bar district court jurisdiction until state court proceeding was exhausted, and (2) rule of *United States ex rel. Kennedy v. Tyler* would not be extended to bar district court jurisdiction until state court proceeding was exhausted. Affirmed.

72. ***Bugenig v. Hoopa Valley Tribe,*** No. 99-15654, 229 F.3d 1210 (9th Cir. 2000). Nonmember brought action against Hoopa Valley Tribe and others seeking declaratory and injunctive relief against Tribes exercise of regulatory jurisdiction over use of her land located within boundaries of Hoopa Valley Indian Reservation and within half-mile buffer zone around site of ten-day dance held every two years by Tribe. The U.S. District Court for the Northern District of California dismissed action. Nonmember appealed. A panel of the Ninth Circuit held that: (1) "clear statement rule" applied to question whether Tribe could regulate nonmembers land pursuant to express grant of congressional authority; (2) Hoopa-Yurok Settlement Act was not express congressional grant of authority sufficient to confer tribal jurisdiction over nonmembers; and (3) Tribe did not have inherent authority to prohibit tribal nonmember from logging fee property located within the Tribes Reservation. Reversed and remanded.

73. ***Bugenig v. Hoopa Valley Tribe,*** No. 99-15654, 240 F.3d 1215 (9th Cir. Feb. 28, 2001). Ordering rehearing by en banc court pursuant to Circuit Rule 35-3. Further ordering that the three-judge panel opinion shall not be cited as precedent by or to the Ninth Circuit or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

74. ***In Re Haines***, No. CV 99-67-BLG-JDS, 245 B.R. 401 (D. Mont. 2000). Chapter 13 debtor, a non-Indian who owned and operated a restaurant/guest room business located on fee land within the exterior boundaries of an Indian reservation, objected to proofs of claim filed by creditor-Indian tribe for unpaid tribal resort tax, penalties, and interest. The bankruptcy court, 233 B.R. 480, denied the proofs of claim, and creditor appealed.The district court held that absent a nexus between tribe and debtor, whose business was conducted on nonmember fee land and did not significantly involve tribe, debtor was not subject to tribes jurisdiction, including its ability to tax. Affirmed.

75. ***Nevada v. Hicks***, No. 96-17315,196 F.3d 1020 (9th Cir. 1999). State of Nevada and State officials brought action against member of Fallon Paiute-Shoshone Tribe and Fallon Tribal Court, seeking declaratory judgment that Tribal Court lacked jurisdiction over Tribe members civil rights and tort action filed against State officials arising from seizure of big horn sheep head trophies on allotted land within reservation. The district court, 944 F. Supp. 1455, entered summary judgment for Tribe member and Tribal Court. State and officials appealed. The Ninth Circuit held that: (1) Tribal Court had civil jurisdiction over Tribe members claims, and (2) State officials failed to exhaust their remedies in tribal court with respect to sovereign and qualified immunity. Affirmed.

76. ***United States v. Enas***, No. 99-10049, 219 F.3d 1138 (9th Cir. 2000). After tribal court convicted defendant, a nonmember Indian, on two charges of assault, he was charged with the same crimes in federal court. The district court dismissed indictment on double jeopardy grounds. Government appealed. The Ninth Circuit held that Tribe proceeded under its inherent authority when it prosecuted defendant, and, thus, his prosecution by federal government for same crimes did not violate Double Jeopardy Clause. Reversed and remanded. Rehearing en banc granted.

N. Tax

77. ***Atkinson Trading Company, Inc. v. Shirley***, No. 98-2247, 210 F.3d 1247 (10th Cir. 2000). Non-Indian hotel proprietor brought action against members of Navajo Tax Commission seeking declaratory judgment that Navajo Nation had no jurisdiction to impose hotel occupancy tax on proprietors guests. The New Mexico District Court denied proprietors motions for summary judgment and for trial de novo and entered summary judgment in favor of Commission members. Proprietor appealed. The Ninth Circuit held that: (1) district courts in reviewing tribal court decisions on jurisdictional issues should review findings of

fact for clear error and conclusions of law de novo; (2) district court did not abuse its discretion in finding that Navajo tribal courts were not fundamentally unfair or biased, and that clear error discretion thus should be given to tribal courtsfindings of fact; (3) fact that hotel was situated on fee land did not compel finding that Nation lacked jurisdiction over proprietors nonmember guests; (4) district court applied appropriate test for determining whether proprietor entered into consensual relationship with Navajo Nation; and (5) consensual relationship existed between Nation and guests, such that Nation had jurisdiction to impose tax. Affirmed.

78. ***Big Horn County Elec. Coop. v. Adams***, No. 99-35799, 219 F.3d 944 (9th Cir. 2000). Electric company sued officials of Crow Tribe, seeking injunctive and declaratory relief against tribe utility tax on company's property on rights-of-way across tribal land and refund of taxes paid under protest. Parties filed cross-motions for summary judgment. The district court held that: (1) companys rights-of-way were equivalent to nonmember fee land; (2) companys delivery of electricity to tribe and its members constituted consensual relationship, so that tribe had civil jurisdiction over companys conduct; and (3) tribes utility tax on companys property exceeded tribes inherent sovereign authority. Motions granted in part; injunction granted. Affirmed.

79. ***Choctaw Nation of Oklahoma v. United States***, No. 99-7072, 2000 WL 350241 (10th Cir. 2000) (unpublished opinion; only Westlaw cite available). In companion appeal to Chickasaw Nation v. United States, No. 99-7042, 208 F.3d 871, plaintiff Choctaw Nation of Oklahoma appeals from the district court's entry of judgment in favor of defendant United States on its claim for a refund of federal wagering and occupational excise taxes which it alleges were unlawfully assessed against its pull-tab gaming activities pursuant to 26 U.S.C. " 4401 and 4411. We exercise jurisdiction pursuant to 28 U.S.C. ' 1291 and affirm. We conclude the district court properly granted summary judgment in favor of the United States. In particular, we agree with the district court that: (1) pull-tabs involve a taxable wager, as defined in 26 U.S.C. ' 4421, (2) the Choctaw Nation is a "person" subject to federal wagering excise taxes (and the accompanying federal occupational taxes), (3) the Indian Gaming Regulatory Act does not preclude the gaming activities at issue from being subject to federal wagering excise taxes, and (4) the self-government guarantee of the 1855 treaty between the United States and the Choctaw Nation cannot reasonably be interpreted as providing the Choctaw Nation with an exemption from federal wagering excise taxes. Affirmed.

80. ***Colville Confederated Tribes v. Somday***, No. CS-98-350-AAM, 96 F. Supp. 2d 1120 (E.D. Wash. 2000). Tribal government brought action against Tribe members seeking declaration that amendment to its retirement plan was valid. On cross-motions for summary judgment, the district court held that: (1) action involved justiciable controversy; (2) plan was "governmental plan"

under ERISA; and (3) tribal business council ratified amendment. Plaintiff's motion granted.

81. ***Little Six, Inc. v. United States***, No. 99-5083, 210 F.3d 1361 (Fed. Cir. 2000). Indian tribe brought suit seeking refund of federal excise taxes paid on wagers placed on "pull-tab" games operated on its reservation. The Court of Federal Claims granted summary judgment for government, and taxpayer appealed. The appellate court held that Indian pull-tab games are exempt from federal wagering taxes. Reversed.

82. ***Sac and Fox Nation of Missouri v. Pierce***, No. 99-3019, 213 F.3d 566 (10th Cir. 2000). Indian tribes sued to enjoin State of Kansas from collecting tax on motor fuel distributed to tribes retail stations. The district court enjoined enforcement of the tax and denied motion to alter judgment. Kansas appealed. The Tenth Circuit held that: (1) neither Tax Injunction Act nor Eleventh Amendment barred suit; (2) tribes had standing; (3) legal incidence of tax fell upon distributors and tax imposed only indirect burden on tribes; (4) tax law was not preempted; and (5) there was insufficient evidence to allow balancing of federal, tribal and state interests. Reversed and remanded.

83. ***In re Tillman v. United States Treasury***, No. 99-71075, 2000 WL 641617 (Bankr. E.D. Okla. 2000). The United States submitted evidence indicating that debtor failed to file income tax returns for the years 1991, 1992, and 1993, that debtor earned well over the exemption equivalent in each of those years. The government has also shown that income was earned by the debtor individually, not by her former husband. The IRS determined that debtor owed taxes individually for these years, but the debtor filed bankruptcy before those tax deficiencies could be assessed. The IRS filed a proof of claim for these deficiencies. The debtor has admitted in her response to the United Statesamended motion for summary judgment that she did not file any tax returns, either individual or joint, for the tax years in question. She presented no authority nor evidence in support of her position that she was not required to file a return because she is a member of the Otoe-Missouria tribe and had a smokeshop on tribal land. She presented no specific facts or evidence in support of her claim that she is an innocent spouse and that the tax deficiencies are owed by her former husband. The United Statesmotion for summary judgment is granted, and the debtors tax liabilities are not dischargeable.

O. Trust Breach and Claims

84. ***Bear Medicine v. United States***, No. 99-35665, 241 F.3d 1208 (9th Cir. March 7, 2001). Descendants of member of Blackfeet Tribe who had been fatally injured in accident while working, pursuant to contract authorized by Bureau of Indian Affairs for private logging operation on Blackfeet Reservation sued United States for monetary damages under Federal Tort Claims Act. The U.S. District Court for the District of Montana, 47 F. Supp. 2d 1172, entered summary judgment in favor

of United States. Descendants appealed. The Ninth Circuit held that: (1) discretionary function exception to FTCA barred claim that BIA negligently entrusted timber cutting to timber operation; (2) discretionary function exception did not bar claim that BIA was negligent in supervising and managing safety aspects of logging operation; (3) Federal Acquisition Regulations did not apply to contract between logging operation and Tribe; (4) logging operations use of untrained employees in high wind area was inherently dangerous activity under Montana law, imposing nondelegable duty on BIA to ensure that operation took adequate safety measures; and (4) BIA had fiduciary duty to ensure that basic safety practices were communicated and used at logging site. Reversed and remanded.

85. ***Del-Rio Drilling Programs, Inc. v. United States***, No. 569-86L, 46 Fed. Cl. 683 (2000). Oil and gas lessees brought action for breach of contract or, in the alternative, for a Fifth Amendment taking, alleging that the United States, acting through the Bureau of Indian Affairs and Bureau of Land Management, violated the terms of leases by improperly permitting the Ute Indian Tribe to control physical access necessary to develop the leases which were located on Indian reservation. The Court of Federal Claims held that evidence supported find that the government effectively gave Indian tribe a veto over access, and thus bore responsibility for tribes interference with access. So ordered.

86. ***Navajo Nation v. United States***, No. 93-763L, 46 Fed. Cl. 217 (2000). The Navajo Nation brought suit alleging that the Secretary of the Interior breached fiduciary duties owed it under the Indian Mineral Leasing Act and related treaties and regulations, and breached contractual obligations under a coal lease. On cross-motions for summary judgment on the issue of liability, the Court of Federal Claims held that: (1) level of management and control that the government has assumed over Indian coal leases under the Indian Mineral Leasing Act does not give rise to the type of fiduciary duty that can be enforced through a money remedy in the Court of Federal Claims for breach of fiduciary duty; (2) coal mining lease executed by Indian tribe as lessor did not create a contractual relationship between the tribe and the Secretary of the Interior; and (3) lease did not give rise to a contract implied-in-fact with the government pursuant to which the Secretary was bound by covenant of good faith and fair dealing in adjusting royalty provisions of the lease. Defendants motion granted; plaintiffs motion denied.

87. ***Pueblo of Santa Ana v. United States***, No. 99-5105, 214 F.3d 1338 (Fed. Cir. 2000). Indian tribe brought suit against United States, seeking just compensation for rock and fill taken from tribal lands in course of dam modification project. The Federal Claims Court granted partial summary judgment in favor of the United States on issue of liability. Tribe appealed. The Federal Circuit held that land grant to Indian tribe did not reserve to United States the right to use minerals on and under the land for dam modification project. Reversed and remanded.

88. ***Sac and Fox Nation of Missouri v. Norton***, No. 00-3063, 240 F.3d 1250 (10th Cir. Feb. 27, 2001). Various Indian tribes and Governor of Kansas brought suit to prevent Secretary of the Interior from taking a tract of land into trust on behalf of Wyandotte Indian Tribe and approving gaming activities on tract. The U.S. District Court for the District of Kansas dismissed action based on failure to join Wyandotte Tribe as a necessary and indispensable party. Plaintiffs appealed. The Tenth Circuit held that: (1) Wyandotte Tribe was not a necessary or indispensable party to action; (2) federal legislation appropriating funds to Tribe in settlement of claims, and giving directives as to specified uses of funds, gave Secretary nondiscretionary duty to acquire tract; (3) Secretary thus was not required to comply with NHPA or NEPA in acquiring tract; but (4) evidence did not support finding that appropriated funds were used to purchase tract; and (5) cemetery adjacent to tract, which was reserved to tribe in 1855 treaty but had not since been occupied, was not a "reservation" under provision of Indian Gaming Regulatory Act allowing gaming on tracts adjacent to reservations. Reversed and remanded.

89. ***Warr v. United States***, No. 99-288 C, 46 Fed. Cl. 343 (2000). Tenant of Indian allottees brought suit against the government for monetary damages arising out of crop losses on the rented land due to inadequate water supplies from the Wapato Irrigation Project. On governments motion to dismiss, or for summary judgment, the Court of Federal Claims held that: (1) governments role in granting approval to lease agreement between tenant and Indian allottees did not put the United States in privity of contract with the tenant so as to render it liable for breach of the lease; (2) statutes and regulations governing the Wapato Irrigation Project do not mandate compensation by the federal government for failure to deliver adequate irrigation water to land on the Yakima Indian Reservation, and thus do not support a Tucker Act claim for damages; and (3) failure of tenant to pay timely pay annual irrigation assessments precluded formation of a contract based upon oral representations made by Administrator of the Wapato Irrigation Project that tenant would receive his share of irrigation water on a continuous basis. Motion granted.

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