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Indian Nations update

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Selected Court Decisions

In *Cayuga Nation v. Tanner*, 2021 WL 3160077 (2d Cir. 2021), the United States had acknowledged the Cayuga Nation's 64,000-acre reservation in the 1794 Treaty of Canandaigua. The State of New York in separate transactions in 1795 and 1807 subsequently purchased the reservation without federal approval in violation of the Non-Intercourse Act. In 2003, the Nation purchased property in fee simple title within its historical reservation and within the Village of Union Springs (Village). The Nation then constructed a gaming facility and enacted a gaming ordinance, which was approved by the National Indian Gaming Commission (NIGC), in order to conduct Class II gaming under the **Indian Gaming Regulatory Act** (IGRA), which preempts state and local laws over certain classes of gambling conducted on "Indian lands," defined, in relevant part, as "all lands within the limits of any Indian reservation." When the Village sought to enforce its anti-gambling ordinance, the Nation sued in federal court, which initially ruled in the Nation's favor on the ground that the parcel in question was within the limits of the Nation's reservation. After the Supreme Court decided *City of Sherrill v. Oneida Nation*, however, the Second Circuit Court of Appeals remanded for reconsideration in light of that decision and the District Court, applying the "equitable considerations" prescribed in *Sherrill*, determined in 2005 that it would be unduly "disruptive" for the Nation to ignore the Village's zoning and other local land use laws, resulting in the closure of the Nation's Class II gaming enterprise. In 2014, the Nation reopened the facility, arguing that it was authorized under the IGRA and that the Village's laws to the contrary were, therefore, preempted. The District Court concluded that the Parcel qualified as "Indian lands" under IGRA, thus preempting the Village's anti-gambling ordinance and divesting the Village of jurisdiction, that IGRA's criminal enforcement provisions separately divested the Village of jurisdiction and that the Nation enjoyed sovereign immunity from any civil suit to enforce the Village's ordinance. The Second Circuit affirmed, rejecting the Village's argument that IGRA preemption had been decided against the Nation in the previous litigation: "[T]he Nation affirmatively invoked IGRA during the 2003 Litigation; it did so, however, in response to the 'exceptional circumstances' argument that the Village raised in support of its summary judgment motion. The Nation's argument was premised on the mere existence of IGRA's comprehensive regulatory scheme as opposed to the scope of any of its specific provisions. On remand after *Sherrill*, the Village, buoyed by a favorable change of law, abandoned the exceptional circumstances argument altogether; there was, indeed, no reason for the Village to invoke it, nor, therefore, for the Nation to pursue its response to that point. The district court, limiting itself to the claims made by the Nation and the arguments advanced by both sides, held that, under *Sherrill*, the Nation could not invoke its inherent sovereignty to claim immunity from local zoning and land use laws. … Nothing about that simple holding implicates IGRA. … Ultimately, the Village mistakes its plausible argument that the Nation could have litigated this claim in 2003 as providing support for its assertion that the Nation therefore was required to

litigate this claim in 2003. But claim preclusion has never been so broad as to require a party to do what the Village insists that the Nation should have done in 2003: comb the books for every ordinance that could be enforced against any use the Nation might make of the property and challenge them all or forever forego the right to challenge any of them. … IGRA defines 'Indian lands' as: (A) all lands within the limits of any Indian reservation… As the parties have stipulated, and as every state and federal court to consider the issue has concluded, the Cayuga Reservation has not been disestablished and persists today within the boundaries set forth in the Treaty of Canandaigua. The Parcel sits within those boundaries. That would seem to be the end of the matter. … Finally, the Village's position is irreconcilable with the Supreme Court's recent decision in *McGirt v. Oklahoma*…. [W]e hold that the Parcel qualifies as 'Indian lands' within the meaning of IGRA and that IGRA accordingly preempts any and all state or local laws that directly or indirectly purport to regulate or limit gaming on the Parcel, including the 1958 Ordinance."

In *Fort McDermitt Paiute and Shoshone Tribe v. Becerra*, 2021 WL 3120766 (D.C. Cir. 2021), the Fort McDermitt Paiute and Shoshone Tribe (Fort McDermitt Tribe), pursuant to a self-governance contract under the **Indian Self-Determination and Education Assistance Act** (ISDA), had assumed sole control of a medical clinic that the Indian Health Service (IHS) had previously operated to benefit both the Fort McDermitt Tribe as well as the nearby Winnemucca Tribe. In determining funding under the ISDA, the IHS withheld the amount that it had budgeted as benefitting members of the Winnemucca Tribe and also withheld an amount equal to the Medicare and Medicaid reimbursements received from operating the clinic. The Fort McDermitt Tribe sued under the Administrative Procedure Act. The District Court granted them summary judgment on both items but the D.C. Circuit Court reversed as to the second: "[I]t is undisputed that the Fort McDermitt have assumed responsibility for all health care programs at the clinic. The tribe is thus entitled to all the funding that IHS would have spent to operate the clinic absent the compact. IHS therefore erred in withholding funds that it had internally allocated to benefit the Winnemucca. … ISDA also expressly excludes third-party income from the secretarial amount. Section 5388(j) provides that 'all Medicare or Medicaid ... income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement.' … A 'supplement' is 'something added to complete a thing, make up for a deficiency, or extend or strengthen the whole.' … Because income from third parties is 'supplemental' to the funds negotiated in a funding agreement, it must be separate from those funds. And because the negotiated funds include the secretarial amount, section 5388(j) requires IHS to calculate that amount separately from third-party income. … Because section 5388(j) thus governs the negotiation of funding agreements, its designation of third-party income as 'supplemental' excludes that income from the secretarial amount." (Internal emendations and quotations omitted in part.)

In *Penobscot Nation v. Frey*, 2021 WL 2850139 (4th Cir. 2021), the federal government, State of Maine and Maine's two Indian tribes, the Passamaquoddy and the Penobscot Nation (Nation) had settled the tribes' land claims by adopting the federal **Maine Indian Claims Settlement Act (MICSA) and the State Maine Implementing Act (MIA)**. The MIA defined the reservation as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act." The MIA further provided, at Section 6207(4): "Notwithstanding any rule or regulation …, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection." The Penobscot Nation (Nation) sued Maine State officials seeking a declaratory judgment that the Nation's reservation included a 60-mile stretch of the Penobscot River (River) known as the Main Stem. The District Court had rejected the Nation's claim that the reservation included the Main Stem but affirmed subsistence fishing rights. The First Circuit Court of Appeals, *en banc*, agreed that the Nation's reservation consisted solely of the named islands but vacated its decision regarding sustenance fishing rights in the Main Stem, while affirming their existence: "[W]e hold that the Reservation does not include the waters and submerged lands constituting the riverbed of the Main Stem. The plain text of the definition of Reservation in MIA and MICSA plainly and unambiguously includes certain islands in the Main Stem but not the Main Stem itself. We also hold that even if there were some arguable ambiguity as to the language at issue, the context, history, and clear legislative intent require rejection of the Nation's claim. As to the Nation's sustenance fishing claim, we do not accept the Nation's argument that its sustenance fishing rights alter the meaning of Reservation.

We disagree that they have anything to do with the definition of Reservation. Such fishing rights do not alter or call into question the clear definition of Reservation. As to the Nation's claim that Maine has infringed those fishing rights, that claim is not ripe and the Nation lacks standing. … Despite our conclusion that § 6207(4) is still coherent when Reservation is given its plain meaning, we agree with the Nation and the United States that 'Indian reservations' as used in § 6207(4) is itself ambiguous and that § 6207(4) grants the Nation sustenance fishing rights in the Main Stem. We do not, as the dissent says, hold that § 6207(4) must be read in this way. And we do not agree that reading § 6207(4) this way means we must deprive § 6203(8) of its plain meaning. The two provisions can and do coexist. … Section 6207(4) has meaning and that meaning is consistent with our holding as to § 6203(8). Whether Congress was aware or not that there are no places to fish on the Reservation's islands, § 6207(4) means that the Nation has the right to engage in sustenance fishing in the Main Stem. That is a different right than the ownership rights the Nation is asserting under § 6203(8)."

In *Yocha Dehe v. United States Department of the Interior*, 2021 WL 2799956 (9th Cir. 2021), the Scotts Valley Band of Pomo Indians had requested an opinion from the Department of Interior (DOI) that a 128-acre parcel of land in the Solano County City of Vallejo would be eligible for tribal gaming under the restored-lands exception to the general **Indian Gaming Regulatory Act** (IGRA) prohibition of gaming on lands acquired after the enactment of the IGRA. The Yocha Dehe Wintun Nation, whose gaming facility would be adversely impacted by an enterprise at the Solano County site, objected. In February 2019, the DOI issued an Indian Lands Opinion in which it concluded that Scotts Valley had been restored to Federal recognition and that the Tribe had demonstrated the required "modern" and "temporal" connections to the parcel, but had failed to demonstrate the "significant historical connection to the land" required under the IGRA. The Scotts Valley Band sued under the Administrative Procedure Act. The District Court denied the motion of the Yocha Dehe Nation to intervene and the Nation appealed. The Ninth Circuit affirmed the District Court's refusal to permit the intervention: "[N]either Yocha Dehe nor its property is the direct subject of the Indian Lands Opinion. Additionally, that opinion is too many steps removed from Yocha Dehe's claimed threat of future harm from Scotts Valley's casino project for that harm to be imminent. On the latter point, if a restored tribe succeeds in securing a favorable Indian Lands Opinion, there are several requirements that must be met before that tribe may lawfully operate a gaming facility on the approved parcel of land. … Together, the indirect relationship between Yocha Dehe and the Indian Lands Opinion and the as-yet remote nature of any harm to Yocha Dehe from a Scotts Valley casino, take Yocha Dehe's asserted injury outside the scope of *Crossroads* and the opinions upon which it relied."

In *Carney v. State of Washington*, 2021 WL 3205799 (W.D. Wash. 2021), Carney, a non-Indian residing on Kiket Island in Skagit County, sued the United States and the State of Washington, equal co-owners of land abutting Carney's property, in state court for infringing with an easement she allegedly owned and for trespassing on her property through their restoration project that resulted in the inundation of her property and an access road. The federal government's 50% ownership interest was held in trust for the Swinomish Tribe, whose rights in right to the tidelands surrounding the islands was recognized in the Treaty of Point Elliot, in 1855. Carney moved to remand to state court but the federal court denied her motion, concluding that **jurisdiction** was properly in federal court: "The Tribe's rights to the tidelands is an issue of federal law. … The amended complaint necessarily raises the Tribe's rights to the tidelands and shows that Plaintiff disputes their rights. The amended complaint refers to, and disputes, the Tribe's position that portions of Kiket Island Road are tidelands. … Plaintiff seeks to vindicate her rights under an easement over an area the Tribe alleges includes tidelands. … She also seeks an injunction directing the Tribe to restore Kiket Island Road, even though the Tribe alleges that portions of the road are tidelands. And Ms. Carney also seeks to quiet title to her entire property. …It does not take a lot to conclude that the Tribe's right to the tidelands is a substantial issue from the perspective of federal law. President Grant's executive order addressed these rights specifically. … And courts have long recognized the significance of determining disputes over Indian rights to tidelands or other lands under federal law."

In *Western Watersheds Project v. Bureau of Land Management*, 2021 WL 3193173 (D. Nev. 2021), Plaintiffs sued the Bureau of Land Management (BLM) over its approval of the Thacker Pass Lithium Mine Project (Project), seeking to halt construction of the mine. (ECF No. 1.) After Lithium Nevada Corporation (Lithium Nevada), the proponent of the Project, intervened, the Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of Red Mountain's (Tribes) moved to intervene and the Court permitted the intervention over the Lithium Nevada's objection: "The Court agrees

with the Tribes that they have shown a significantly protectable interest that would be impaired were they not allowed to intervene. If the Tribes are right, and Federal Defendants did not properly consult them under the [**National Historic Preservation Act**] NHPA, they have a significantly protectable interest in ensuring they are properly consulted before any of their sacred sites are dug up and a lithium mine is built on land they consider sacred. Moreover, if the Court does not allow the Tribes to intervene, Defendants may imminently proceed with the [Historic Property Treatment Plan], which could certainly impair the Tribes' protectable interests in not having their sacred sites dug up before being properly consulted. The Court also finds persuasive the Tribes' argument that the alternative consultation offered by Federal Defendants … is not a perfect substitute for the consultation rights they are entitled to under the NHPA."

In *Brice v. Haynes Investments, LLC.*, 2021 WL 2936733 (N.D. Cal. 2021), California residents had **borrowed money over the internet** from Great Plains Lending, LLC and/or Plain Green, LLC, lending companies owned by the Chippewa Cree Tribe, the Otoe-Missouria Tribe, and Tunica-Biloxi Tribes. Plaintiffs brought a class action suit against the founders, funders, or owners of Think Finance, LLC, alleging that the defendants operated an illegal scheme to evade state and federal lending laws, including the Racketeering Influenced and Corrupt Organizations (RICO) Act, by using Great Plains Lending, LLC and Plain Green, LLC, and the Tribes' sovereign immunity, as fronts for their illegal activities. The District Court denied the defendants' motion for summary judgment and granted to the plaintiffs' motion for partial summary judgment and to exclude two of the defendants' proposed witnesses: "The claims here hinge on the personal conduct of the defendants. While that conduct is based in significant part on the services defendants personally engaged in or approved to be provided to the Tribes, the claims do not impede on the sovereignty of the Tribes where the Tribes are not defendants in this case and no Tribal Entities remain." Absent apposite caselaw or facts showing how this action "interferes with the purpose or operation of a federal policy regarding tribal interests, tribal immunity is irrelevant to this action. … Plaintiffs move to exclude the testimony of Lance G. Morgan, who opines generally on the comparison of the agreements the Tribal Lending Entities entered into with various defendants to other tribal corporate structures, strategies, and operational and financial partnering relationships, whether it was rational for the Tribal Entities to outsource several elements of their respective business operations to defendants and others and how that outsourcing compares to other emerging tribal industries, and whether it was rational for the Tribes to enter into their respective agreements with some of the defendants. … Plaintiffs also move to exclude the testimony of Eric C. Henson who opines generally on federal policy encouraging American Indian economic development and self-sufficiency, that the tribal governments at issue entered into mutually beneficial business arrangements with outside parties that facilitated tribal efforts to engage in online lending, that revenues raised by the Tribes were directed to essential governmental services, that plaintiffs' allegations are dismissive of the role played by the governments of the Tribes, and plaintiffs' efforts to prohibit the Tribes' lending activities directly impair the ability of the Tribes to generate revenues. … Plaintiffs' motions to exclude are GRANTED under Rule 403. Both of these experts opine on issues that are not directly relevant to the resolution of the claims against the defendants remaining in these consolidated cases. Whether the structure of the arrangements between the Tribes and some of the defendants here are similar to other prior or subsequent arrangements is not relevant to the potential RICO liability or liability under California law. Similarly, how the Tribes spent the money they received from these arrangements and the social utility of that income to the Tribes is similarly irrelevant to the claims at issue, except to the scope of the financial benefit vis-à-vis non-Tribal entities. However, that issue can be established through documentary and percipient witness testimony. … The issues that are relevant – e.g., the scope of the contacts and terms of the contractual arrangements between the Tribes and defendants, how the Tribes and defendants were compensated with respect to the loans and business operations, how much control or responsibility the Tribes had over the loan operations versus the control or operation of the defendants – are all matters that can be offered at trial through documentary evidence and percipient witness testimony. Expert testimony on these issues is not appropriate or necessary."

In *Keweenaw Bay Indian Community v. Khouri*, 2021 WL 2936439 (W.D. Mich. 2021), the Keweenaw Bay Indian Community (KBIC) sued Michigan state officials to enjoin the State's imposition of **sales taxes, use taxes, and tobacco taxes** from transactions involving members of the Keweenaw Bay Indian Community and Keweenaw Bay Indian Community itself. On the parties' cross-motions, the Federal District Court ruled for the State, except with respect to the use tax which, the Court held, could not be apportioned: "Under Michigan law, the burden of the sales

tax falls on the retailer. In this lawsuit, the retailers are non-Indian entities. The Supreme Court has expressly rejected any categorical bar or per se rule which would prevent the collection of sales tax in these circumstances. … KBIC's authority does not support the conclusion that a per se rule prohibits the application of state sales taxes to retailers simply because the sale, lease or rental of tangible personal property is made to a member of an Indian tribe or the Tribe itself and because the transaction occurred within KBIC's Indian country. … That KBIC and its members bear the economic burden of the sales tax is a factor the Court considers, but it does not end the inquiry. The Court also notes that the goods that are transferred when the tax is levied derive no value whatsoever from any activity in KBIC's Indian Country. Michigan levies the tax on the initial sale from the non-Indian retail seller to KBIC or its members. … KBIC has not identified, or even attempted to identify, any history or tradition of tribal sovereignty that would function to preempt a generally applicable sales tax. More specifically, the Supreme Court has rejected the argument that a state tax should be preempted on tribal sovereignty grounds because the tax generally burdens tribal revenues which consequently undermines a Tribe's ability to fund governmental programs. … None of the federal statutes and regulations identified by KBIC so thoroughly permeate the federal relationship with KBIC that Michigan's sales tax would impermissibly interfere with the situation. KBIC has not identified any historical tradition of sovereignty concerning the purchase of ordinary goods used in daily life and in commercial enterprises. And, while Michigan has only a general interest in raising revenue, the counterbalancing interests are insufficient for this Court to conclude that the sales tax should be preempted. … In Count 5, KBIC alleges that when the legal incidence of a state's use tax falls on a tribe or its members for activities occurring within their Indian country, the tax violates the Supremacy Clause. And, when the tribe and its members use the property both on and off their Indian country, the State must have some mechanism for apportioning the use tax. … Michigan's UTA does not apportion the tax based on any off-reservation use, a feature the Supreme Court has consistently considered when Tribes have successfully challenged state taxes on vehicles. The statute precludes apportionment. … The 1842 Treaty does not create an independent barrier to Michigan's sales and use taxes in the Ceded Area."

In *Holman v. Vilsack*, 2021 WL 2877915 (W.D. Tenn. 2021), Congress had enacted the American Rescue Plan Act of 2021 (ARPA). Section 1005 provides relief from loans made or guaranteed by the United States Department of Agriculture (USDA) to "socially disadvantaged" farmers and ranchers, which the USDA interpreted to mean "Black, American **Indian/Alaskan Native**, Hispanic, or Asian, or Hawaiian/Pacific Islander," without regard to need or other factors. Holman, a non-minority farmer sued the USDA seeking an injunction on the ground that the program violated the Equal Protection guarantee of the Fifth Amendment. Relying in part on several other federal district court decisions, the Tennessee District Court granted the preliminary injunction: "Defendants have responded that Congress enacted Section 1005 to remedy the lingering effects of long-standing racial discrimination in USDA programs. They claim that, in doing so, Congress looked at evidence that discriminatory loan practices at the USDA placed minority farmers at a significant disadvantage pre-pandemic and that minority farmers' positions were made worse by the pandemic, which disproportionately burdened them. Defendants argue that, in authorizing debt relief in Section 1005, Congress adopted a measure that was narrowly tailored to remedy the lingering effects of discrimination in USDA programs and to correct the ways prior funding had perpetuated those lingering effects. … In *Vitolo*, the Sixth Circuit explained when the government may attempt to remedy past discrimination by using preferential treatment based on race. … First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." … Second, there must be evidence of intentional discrimination in the past. … Third, the government must have had a hand in the past discrimination it now seeks to remedy. … But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles. … Here, Defendants cannot meet the first prong because the evidence does not show that Section 1005 targets a specific episode of past discrimination. Defendants have pointed to statistical and anecdotal evidence of a history of discrimination by the USDA. But it is well-settled that a generalized assertion that there has been past discrimination in an entire industry cannot establish a compelling interest. … Defendants conceded that Congress attempted to remedy the lingering effects of historic discrimination when enacting Section 1005 and did not rely on specific present-day discrimination occurring at the USDA. … As for the second prong, other than statistical disparities, Defendants have presented no evidence of current intentional discrimination by Defendants, and they acknowledged this lack of evidence at the hearing. Instead, Defendants attempted to rely on statistical and anecdotal evidence, even though this type of evidence to show intentional

discrimination has been rejected by the Sixth Circuit." (Internal quotations and emendations omitted.) Accord, *Faust v. Vilsack*, 2021 WL 2409729 (E.D. Wis. 2021).

In *Fredericks v. United States Department of Interior*, 2021 WL 2778575 (D.D.C. 2021), John Fredericks, Jr., a member of the Three Affiliated Tribes of North Dakota, was the beneficial owner of 3,477 acres held in trust by the United States pursuant to an 1886 agreement between the Three Affiliated Tribes and the United States. John died in 2006. In 2008, the acting superintendent of the Fort Berthold Agency executed a lease permitting oil and gas development. John's five children requested that the Department of Interior (DOI) declare the lease invalid and distribute lease proceeds to the children. DOI rejected the request, concluding that the lease was valid and that John's wife was entitled to the proceeds for the remainder of her life. The children sued under the Administrative Procedure Act. The District Court denied their motion for a preliminary injunction, citing provisions of the **American Indian Probate Reform Act** (AIPRA): "The AIPRA specifically provides that, where a tribal probate code does not apply, see id. § 2206(a)(1)(B), '[i]f there is a surviving spouse of the decedent' and 'the decedent is survived by 1 or more eligible heirs[,]' the surviving spouse 'shall receive 1/3 of the trust personalty of the decedent and a life estate without regard to waste in the interests in trust or restricted lands of the decedent[,]' id. § 2206(a)(2)(A)(i) (emphasis added). Moreover, in such a case, '[t]he remainder shall pass' to 'those of the decedent's children who are eligible heirs ... in equal shares." Id. § 2206(a)(2)(A)(iii), (B)(i)." (Emendations in original.)

In *Scudero v. State*, 2021 WL 3123069 (Alaska 2021), Scudero, a member of the Metlakatla Indian Community, was convicted of violating Alaska's commercial fishing laws and fined $20,000. He appealed, contending that his **aboriginal and treaty-based fishing rights** exempted him from State commercial fishing regulations. The Alaska Supreme Court affirmed the conviction, holding that, regardless of alleged aboriginal rights, Alaska could enforce its laws in the interest of conservation: "Whatever the status of Scudero's aboriginal and reserved rights, they do not shield him from the non-discriminatory operation of State fishing laws that are necessary for the conservation of the resource."

In *State v. Begay*, 312 Ore. App. 647 (Ore. App. 2021), Begay, a member of the Confederated Tribes and Bands of the Yakama Nation, was convicted of unlawfully taking a game animal after he shot a deer on a parcel of privately owned property. Begay argued that under Article III of the Yakama Nation's 1855 Treaty with the United States, he had a **treaty right to hunt** on "open and unclaimed land" and that the kill site fell into that category because, although it was privately owned, there was no signage, fencing or other visible signs of private ownership. The trial court barred Begay from asserting a treaty defense but the Court of Appeals reversed and remanded for a new trial on Begay's treaty defense: "In light of those statements … during negotiations, we think the Yakama would have understood that their reserved hunting rights extended to unfenced lands that were not occupied by settlers. … Given the Yakamas' probable lack of familiarity with Western property concepts, we do not believe they would have understood 'occupation' of land in terms of holding legal title. Rather, the Yakama and their neighbors more likely understood 'occupation' to mean actual physical occupation or use of the land. … In short, owing to the Yakamas' traditional understanding of 'occupied' lands—in addition to their probable lack of familiarity with Western concepts of property law—we think the Yakama negotiators would have understood 'occupied' lands to mean lands that bore some indication of actual physical occupation or use—e.g., fences, houses, or outbuildings."

In *State of Minnesota v. Southwest School of Dance LLC*, 2021 WL 2794654 Not Reported in N.W. Reporter (Minn. App. 2021), Minnesota's Governor, in response to the COVID pandemic, had issued an emergency executive order (EEO) 20-99 prohibiting restaurants, bars, tobacco establishments, and other places of public accommodation offering food, beverage, or tobacco products from operating for on-premises consumption from November 20, 2020, through December 18, 2020. The Order included an exemption for "**[a]ctivities by tribal members within the boundaries of their tribal reservations.**" Southwest School of Dance, LLC, d/b/a Havens Garden (SWSD), defied the EEO by holding an event featuring live music, food, and an open microphone. When the State sought an injunction against SWSD to enforce EEO 20-99 and to prevent additional violations, SWSD argued that EEO 20-99 violated its constitutional right to equal protection by discriminating in favor of tribal restaurants. The District Court held a hearing, rejected SWSD's argument and ordered it to comply and to certify its compliance. When SWSD failed to certify its compliance, the state obtained a contempt order that SWSD pay $250 for each day it failed to comply with

the court's order. SWDS appealed the contempt order. The Court of Appeals upheld both the lower court's injunction and its contempt order: "Legislation involving preferences that directly promote Indian interests in self-governance passes rational basis review because 'such regulation is rooted in the unique status of Indians as a separate people with their own political institutions.' *United States v. Antelope*, 430 U.S. 641, 646, 97 S. Ct. 1395, 1399 (1977) (quotation omitted), and is therefore rationally tied to the fulfilment of the trust doctrine. … Applying rational basis review, we conclude that the distinction between restaurants on tribal and non-tribal land in EEO 20-99 does not violate the United States and Minnesota Constitutions' guarantees of equal protection. Therefore, the District Court did not err by issuing a temporary injunction against appellant and finding appellant in constructive civil contempt."

In *White v. Tax Appeals Tribunal*, 2021 WL 2955795 (N.Y. Sup. Ct. 2021), White, a member of the Seneca Nation of Indians (Nation), owned ERW Wholesale, a tobacco wholesale business licensed by the Nation operating on the Cattaraugus Reservation. In December 2012, ERW sold 150 cases (9,000 cartons) of Native American brand cigarettes to Oien'Kwa Trading, a Native American-owned business located on the St. Regis Mohawk Reservation. Oien'Kwa Trading immediately sold the cigarettes to Saihwahenteh, a Native American-owned business located on the Ganienkeh territory. Oien'Kwa Trading hired ERW to deliver the cigarettes directly to Saihwahenteh. Sean Snyder, an ERW employee, was employed as the truck driver. Snyder failed to stop at a commercial vehicle inspection checkpoint and, as a result, he was detained by State law enforcement officials who used bolt cutters to unlock the truck's cargo hold, revealing unstamped cigarettes. The New York Tax Appeals Tribunal later determined that White owed a $1,259,250 penalty pursuant to **Tax Law article 20 for "possession of unstamped or unlawfully stamped cigarettes."** The New York Supreme Court vacated the determination: "It is well settled that a business person's private commercial property is entitled to Fourth Amendment protections. … It is undisputed that the seized cigarettes at the heart of this matter were the product of a warrantless search. … Once it has been established that the search is illegal, it must be determined whether the evidence should be suppressed. The question becomes whether the evidence was based on the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. … Here, the evidence must be suppressed. The assessment is based on evidence of the unstamped cigarettes, which was obtained directly from the exploitation of the illegal search and is tainted evidence. Without evidence of the unstamped cigarettes, there is no foundation for the assessment and, therefore, the assessment cannot stand." (Internal citations, quotations and emendations omitted.)

In *People v. Magnant*, 2021 WL 3235864 (App. 2021), Magnant and Davis were nonsupervisory employees of the Keweenaw Bay Indian Community (KBIC). In 2015, the Michigan State Police pulled over a KBIC-owned pickup truck for speeding on U.S. Highway 41. Davis, the driver, consented to a search of the utility trailer attached to the truck, which revealed 56 cases holding over 600,000 **"Seneca" cigarettes marked with KBIC stamps but not with the Michigan Department of Treasury tax stamps** required by Michigan's Tobacco Products Tax Act (TPTA). Davis and Magnant, a passenger who had helped load the truck, were each charged with violating Michigan Law Code (MLC) 205.428(3) for transporting 3,000 or more cigarettes without the transporter's license required by MCL 205.423(1). The trial court denied the defendants' motion to dismiss and the Court of Appeals affirmed but the Michigan Supreme Court reversed, holding that the State had failed to make the requisite showing of criminal intent: "Our holding does not require a showing that defendants were aware of the particular statutes that applied to their conduct or, specifically, that they were required to be licensed, although either would be sufficient to establish that defendants knew facts that made their conduct unlawful. Rather, our holding requires a minimal showing that defendants knew that they were transporting a tobacco product obtained from a source located outside this state or from a person not duly licensed under the TPTA—facts that would alert a reasonable person to the 'likelihood of strict regulation.'"