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Indian Nations Law *Focus*

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The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy and environmental protection, and housing development.

Selected court decisions

In *Agua Caliente Band v. Riverside County*, 2019 WL 351204 (9th Cir. 2019), non-Indians held leases from the Agua Caliente Band of Cahuilla Indians (Tribe) within the Agua Caliente Indian Reservation for purposes that included homes, hotels, restaurants and retail stores. The Tribe sued to challenge Riverside County's authority to impose a **tax on "the full cash value of the lessee's interest in"** the property leased, arguing that the tax was preempted by federal law under the doctrine of *White Mountain Apache Tribe v. Bracker*. The Tribe argued that a pre-*Bracker* decision of the Ninth Circuit upholding the tax was no longer binding. The district court disagreed and upheld the tax and the Ninth Circuit affirmed: "In *Agua Caliente*, decided nine years before *Bracker*, we did not expressly engage in that particularized, interest-balancing inquiry. But we did consider the congressional purpose behind 'the legislation dealing with Indians and Indian lands,' the PIT's legal incidence, and the indirect economic effect of the PIT on the tribe and tribal members. … A few years later, in *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), we again upheld the assessment and imposition of a PIT on non-Indian lessees of land held in trust by the federal government for an Indian tribe. In *Fort Mojave*, we engaged in a more extensive analysis of the PIT's effect on federal and tribal interests, foreshadowing the later requirements of *Bracker*. Indeed, in *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1158 (9th Cir. 2013), we observed that our PIT cases, including *Fort Mojave*, 'applied a similar mode of analysis' to *Bracker*. We conclude that our PIT precedents are not clearly irreconcilable with *Bracker*." According to the concurring opinion, the Ninth Circuit's earlier decision was not binding but the PIT was permissible under *Bracker* based on the Tribe's and County's respective interests.

In *Hoopa Valley Tribe v. Federal Energy Regulatory Commission,* 2019 WL 321025 (D.C. Cir. 2019), in 2010, a consortium of parties—California, Oregon, farmers, ranchers, conservation groups, fishermen, and PacifiCorp— entered into the Klamath Hydroelectric Settlement Agreement (KHSA), permitting PacifiCorp to **decommission certain licensed obsolete hydroelectric dams** on the Klamath River and imposing on PacifiCorp a series of interim environmental measures and funding obligations with respect to remaining dams. Under the KHSA, the states and PacifiCorp agreed to defer the one-year statutory limit for Clean Water Act Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests that serve as a pre-requisite to FERC's overarching review. In 2016, certain KHSA parties amended the KHSA to create an alternative plan for decommissioning, including transfer of the license from PacifiCorp to a company, Klamath River Renewal Corporation (KRRC), formed by the signatories of the Amended KHSA, in order to limit potential liability that existing parties anticipated from decommissioning the dams. The FERC approved PacifiCorp's application

to split the lower dams into separate licenses but withheld approval of the license transfer. The Hoopa Valley Tribe, which had not been a party to the original or amended agreement, in 2012 petitioned FERC for a declaratory order that California and Oregon had waived their Section 401 authority and that PacifiCorp had correspondingly failed to diligently prosecute its licensing application for the Project. Such an order would result in denial of PacifiCorp's license and a requirement that PacifiCorp file a decommissioning plan for the Klamath dams. FERC denied the petition but the D.C. Court of Appeals reversed: "Resolution of this case requires us to answer a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year. … This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification. PacifiCorp's withdrawals-and-resubmissions were not just similar requests, they were not new requests at all. The KHSA makes clear that PacifiCorp never intended to submit a 'new request.' Indeed, as agreed, before each calendar year had passed, PacifiCorp sent a letter indicating withdrawal of its water quality certification request and resubmission of the very same ... in the same one-page letter ... for more than a decade. Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project."

In *Stillaguamish Tribe of Indians v. Washington,* 2019 WL 274040 (9th Cir. 2019), the Stillaguamish Tribe's Environmental Manager in 2005 had signed an agreement with the State of Washington concerning construction of a revetment to protect salmon populations in the Stillaguamish River. An indemnification provision obligated the Tribe to "indemnify, defend and hold harmless [Washington] from and against all claims ... arising out of or incident to the [Tribe's] ... performance." After a tragic landslide near the Stillaguamish River, victims of the landslide sued the State, alleging that the revetment had contributed to their injuries. After Washington indicated that it would seek indemnification from the Tribe, the Tribe sued Washington in federal court, seeking to establish that the Tribe's sovereign immunity would bar a suit for indemnification. The district court granted summary judgment in favor of the Tribe but the Ninth Circuit vacated the judgment for lack of subject matter jurisdiction: "Under the well-pleaded complaint rule, **federal question jurisdiction** exists only if the plaintiff's cause of action is based on federal law. … Neither a defense based on federal law nor a plaintiff's anticipation of such a defense is a basis for federal jurisdiction. … Parties cannot circumvent the well-pleaded complaint rule by filing a declaratory judgment action to head off a threatened lawsuit. … When a declaratory judgment action seeks in essence to assert a defense to an impending or threatened state court action, courts apply the well-pleaded complaint rule to the impending or threatened action, rather than the complaint seeking declaratory relief. … In *Shaw* [v. Delta Air Lines, Inc., 463 U.S. 85 (1983)], the Supreme Court reiterated that 'a plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute ... presents a federal question.' … The Tribe is asserting a defense to a threatened lawsuit, not contending that federal law preempts state law. The rule from *Shaw* is inapplicable."

In *Davilla v. Enable Midstream Partners L.P.,* 2019 WL 150627 (10th Cir. 2019), heirs of a Kiowa allottee of trust lands in Oklahoma sued Enable Midstream Partners L.P (Enable) for trespass after the **right of way** of its predecessor in interest expired. The district court granted the plaintiffs summary judgment on the trespass claim and entered an injunction under Oklahoma law. The Tenth Circuit affirmed the trespass judgment but remanded for consideration whether injunctive relief was appropriate under the standard four-part federal test: "Because we lack a federal body of trespass law to protect the Allottees' federal property interests, we must borrow state law to the extent it comports with federal policy. … Our reading of Oklahoma law thus yields three elements constituting the Allottees' federal trespass claims. First, the Allottees must prove an entitlement to possession of the allotment. Second, they must prove Enable physically entered or remained on the allotment. Finally, they must prove Enable lacked a legal right—express or implied—to enter or remain. … The undisputed facts—expiration of the easement, specifically—show that Enable lacks a legal right to keep the pipeline in the ground. … By failing to apply the federal courts' traditional equity

jurisprudence to its remedy analysis, the court below committed an error of law and thus abused its equitable discretion."

In *Dallas v. Hill,* 2019 WL 403713 (E.D. Wis. 2019), Dallas, a member of the Oneida Nation of Wisconsin, sued members of the Tribe's Business Committee claiming violations of her rights under the First Amendment of the United States Constitution and Article VII of the Oneida Constitution arising out of the Committee's refusal to convene a meeting of the Oneida Nation's General Tribal Council so that Dallas could address the Council regarding her petition for a $5,000 per capita distribution to the tribal membership. The court dismissed, holding that

> (1) the First Amendment does not apply to tribes,
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> (2) the Indian Civil Rights Act (ICRA) does not confer jurisdiction on the federal courts to hear claims arising under the ICRA, and
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> (3) federal courts have no jurisdiction over claims arising under tribal law.

In *Little Traverse Bay Bands of Odawa Indians v. Whitmer* (W.D. Mich. 2019), the Little Traverse Bay Bands of Odawa Indians (Tribe) had sued State and county officials seeking a declaratory judgment that the Reservation created for the Tribe by **treaty** with the Federal Government in 1855 was not diminished or disestablished by any subsequent government action and, therefore, continues to exist. On the plaintiff's motion for summary judgment and the defendants' motion to dismiss, the court held that

> (1) the Tribe was not estopped from asserting the continued existence of the reservation because it had decades earlier sought compensation before the Indian Claims Commission (ICC) for underpayment for lands ceded by treaty ("The claims presented to the ICC by the Tribe's predecessor arose from the cession of title to land for inadequate compensation; the claims did not address whether or not a reservation had been created in 1855 or whether a reservation continued to exist between 1855 and the time of that litigation"),
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> (2) litigation of the existence of the reservation was not precluded by judgments of the ICC ("it does not appear to the Court that the ICC ever litigated whether the 1855 Treaty created a permanent reservation"), and
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> (3) the Tribe's claim was not barred by the ICC's requirement that claims against the United States be brought by 1951 ("the ICC lacked authority to litigate the jurisdictional claim now brought by Tribe").
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> The court would deny, without prejudice, the Tribe's motion to disallow the defendants' affirmative defenses that the reservation, if established, had subsequently been disestablished or diminished.

In *Winnemucca Indian Colony v. United States Department of Interior,* 2019 WL 320560 (D. Nev. 2019), the Bureau of Indian Affairs (BIA) had refused to recognize a tribal government of the Winnemucca Indian Colony. After the federal district court ordered the BIA to recognize an interim chairman and the BIA had ultimately acknowledged the results of tribal enrollment, elections, and litigation, the Tribe moved for award of attorney's fees under the Equal Access to Justice Act (EAJA), which the court granted: "The underlying refusal of the BIA to recognize a tribal government of a congressionally recognized tribe (and the failure to attempt to sort out any dispute) for several years was not substantially justified. Tribal leadership disputes can be complex and acrimonious, but so long as Congress continues to recognize dependent tribal sovereigns within America's borders, the appropriate executive agency has a trust duty to those tribes, and taking sides in tribal leadership disputes, at least so far as necessary to ensure diplomatic contact, is a price of that continuing policy that the executive branch must pay. As noted, the BIA was only required to make a rational decision as to which person(s) to recognize as the tribal representative(s). It was an unjustified abdication of this duty to refuse to treat with the Winnemucca Indian Colony at all rather than choose which person(s) to recognize."

In *World Fuel Services, Inc. v. Nambe Pueblo Development Corporation,* 2019 WL 293231 (D. N.M. 2019), World Fuel Services, Inc. (World Fuel), a Texas corporation, entered into a ten-year contract with Nambe Pueblo Development Corporation (Nambe Corp.), a wholly-owned corporation of the Nambe Pueblo chartered under Section 17 of the Indian Reorganization Act, under which World Fuel agreed to supply fuel to Nambe Falls Travel Center,

an enterprise owned and operated by Nambe Corp. The agreement provided for dispute resolution by arbitration and waiver of sovereign immunity "for the limited and sole purposes of compelling arbitration or enforcing any binding arbitration decision rendered pursuant to the terms and conditions of this Agreement by any court having jurisdiction over the parties and the subject matter and for purposes of any such arbitration proceedings." When a disagreement arose, World Fuels demanded arbitration but Nambe Corp. did not respond. World Fuels sued in federal court under the Federal Arbitration Act (FAA) to compel arbitration but the court stayed the suit pending World Fuels' exhaustion of tribal remedies, holding that

(1) the court could exercise diversity jurisdiction because World Fuels was organized under Texas law and maintained its principal place of business in Texas and Nambe Corp. would be considered a citizen of New Mexico, where it has its principal place of business,

(2) the court would consider Nambe Corp.'s motion to dismiss as a motion under Rule 12(b)(6) for failure to state a claim rather than as a motion based on lack of subject matter jurisdiction under 12(b)(1) because the exhaustion doctrine is based on comity rather than jurisdiction,

(3) pursuant to the multi-factor test established by the Tenth Circuit in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort,* 629 F.3d 1173, 1183 (10th Cir. 2010), Nambe Corp. was an arm of the Tribe and shared its sovereign immunity, although the Corporation's organization under IRA Section 17 weighed *against* arm of the tribe status,

(4) Nambe Corp. waived its sovereign immunity in the agreement itself as well as by operation of the "sue and be sued" clause of its Section 17 charter,

(5) the Nambe Pueblo Tribal Court's jurisdiction was colorable based on the **First Montana Exception** and World Fuels' consensual relationship with the Tribe, and

(6) the exhaustion requirement applied to cases brought under the FAA.

In *United States v. Denezpi,* 2019 WL 295670 (D. Colo. 2019), Denezpi was charged with assault and battery in violation of Title 6, Ute Mountain Ute Code, Section 2; one count of making terroristic threats in violation of 25 C.F.R. § 11.402; and one count of false imprisonment in violation of 25 C.F.R. § 11.404. He entered an Alford plea to the assault and battery count and was sentenced to time served. Six months later, a federal grand jury indicted Denezpi on one count of aggravated sexual abuse in Indian Country for the same conduct. Denezpi moved to dismiss, asserting that the prosecution violated the Fifth Amendment proscription against double jeopardy because the **"CFR Court"** in which he was previously convicted was an arm of the federal government and not a separate sovereign. The court denied the motion: "Although the CFR courts' retain some characteristics of an agency of the federal government, … the logic of *Wheeler* and its progeny clearly indicates that the CFR courts' power to punish crimes occurring on tribal lands derives from their original sovereignty, not from a grant of authority by the federal government. … the CFR court which convicted Mr. Denezpi was exercising the sovereign powers of the Ute Mountain Ute Tribe and is not an arm of the federal government." (Citation, internal quotations and emendations omitted).

In *Dettle v. Treasure Island Resort & Casino,* 2019 WL 259652 (D. Minn. 2019), Dettle sued Treasure Island Resort & Casino, an enterprise of the Prairie Island Indian Community, for damages resulting from alleged injuries she suffered at Treasure Island. The district court dismissed for lack of jurisdiction: "Plaintiff still has not pleaded any facts showing how Defendants violated her First Amendment rights (or any other federal Constitutional provision or law). A mere suggestion of a federal question, as the Plaintiff has made here, is not sufficient to establish the jurisdiction of federal courts. … When an Indian tribe is involved, diversity jurisdiction is not available because Indian tribes are neither foreign states, nor citizens of any state. … If a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the **diversity statute** for each defendant or face dismissal. ... the presence of a 'stateless' party destroys the complete diversity required under 28 U.S.C. § 1332." (Internal quotations, citations and emendations omitted.)

In *Koi Nation of Northern California v. United States Department of*

Interior, 2019 WL 250670 (D. D.C. 2019), the Department of Interior (DOI) had begun to treat the Koi Nation, then known as the Lower Lake Rancheria, as a terminated tribe in 1956. The DOI reversed course in 2000, when the Assistant Secretary - Indian Affairs reaffirmed the Tribe's status outside of the Part 83 acknowledgement procedures. The DOI nonetheless thereafter denied the Tribe the right to conduct gaming activities on newly acquired land under the Indian Gaming Regulatory Act's (IGRA) **"restored lands" exception** to the general prohibition against gaming on lands acquired after 1988. The DOI relied on 2008 regulations limiting the availability of the "restored lands" exception to tribes that had been restored through one of three means, including act of Congress, Part 83 acknowledgement regulations or court order, observing that the Tribe fell into none of these categories. The Tribe challenged DOI's decision under the Administrative Procedure Act and the D.C. district court granted the Tribe's motion for summary judgment, overturning the DOI's decision: "[T]he Court agrees with the Koi Nation that the phrase 'restored to Federal recognition' in IGRA's restored lands exception, under 25 U.S.C. § 2719(b)(1)(B)(iii), is unambiguous as applied to the Koi Nation, which had been *de facto* terminated until DOI formally corrected its mistake and reinstated, or restored, the tribe to the Federal Register list of federally recognized tribes. As a result, DOI's administrative definition of 'restored to Federal recognition,' set out in 25 C.F.R. § 292.10(b), is invalid, particularly as applied to the Koi Nation because the regulation narrows IGRA's statutory language to exclude the tribe from being considered 'restored to Federal recognition,' contrary to the plain language of the statute. Furthermore, even if the phrase 'restored to Federal recognition' were ambiguous in the circumstances presented here, any deference to which DOI's interpretation may otherwise be entitled is muted by the Indian canon of construction, which counsels that statutory ambiguities are to be resolved in favor of Indians."

In *Wichtman v. Martorello,* 2019 WL 244688 (W.D. Mich. 2019), borrowers residing in Virginia had sued internet lending subsidiaries owned by the Lac Vieux Desert Band of Lake Superior Chippewa Indians (Tribe) and related parties, including Martello, who had allegedly devised the internet lending model with the Tribe, in Virginia federal court, alleging violations of Virginia and federal laws and seeking a declaratory judgment that the choice-of-law and forum-selection provisions in the loan agreements providing for tribal law and a tribal dispute resolution were void and unenforceable. The Virginia federal court denied the tribal subsidiaries' motion to dismiss on **sovereign immunity** grounds, holding that they were not arms of the Tribe itself. *Martorello*, a defendant in the Virginia litigation, subpoenaed the Tribe's general counsel, Wichtman, to appear for a deposition in Minocqua, Wisconsin, near the Tribe's reservation. Wichtman filed a petition in Michigan federal court seeking to quash the Virginia subpoena on sovereign immunity and undue burden grounds but the magistrate judge denied the motion: "The district court in Virginia has already determined that tribal sovereign immunity is not applicable to defendants. This Court will not interfere with that decision or revisit that issue. Wichtman argues that she is protected by tribal immunity from suit. First, the Virginia Court has held that defendants are not entitled to sovereign immunity. It therefore follows that tribal immunity cannot extend to Wichtman. Second, Wichtman is not a party to the underlying lawsuit, but is being subpoenaed as a witness. … Wichtman argues that although the subpoena seeks only non-privileged documents, reviewing each document for privileged communications is too burdensome. Actions of an attorney asserting attorney client privilege should not be considered burdensome. It is the responsibility of an attorney to make arguments regarding privilege. The movant has failed to show that the subpoenas requesting only non-privileged documents and her deposition are unduly burdensome."

In *Cavazos v. Zinke,* 2019 WL 121210 (D.D.C. 2019), disenrolled former members of the Saginaw Chippewa Tribe sued the Secretary of the Interior and other federal officials, contending that they had properly been enrolled under the federal Judgment Funds Act (JFA), that their enrollment was mandated by the JFA and that their **disenrollment** violated the JFA. The Court dismissed on the ground that the plaintiffs failed to exhaust their administrative remedies before the Department of Interior, as required by the Administrative Procedure Act (APA): "As is relevant here, under the APA, an agency action is not final if

the agency requires that the decision be appealed to a 'superior agency authority." ...In this case, Defendants' decision was not final under the APA because BIA regulations required that the Defendants' inaction be administratively appealed before becoming final. In order to challenge inaction by the BIA, a petitioner must:

> (1) request in writing that the official take the action originally asked of him or her;
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> (2) describe the interest which has been adversely affected by the official's inaction; and
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> (3) state that, unless the official takes the action within ten days or by a date certain, an appeal will be filed. 25 C.F.R. § 2.8(a).

If the official makes a decision contrary to the petitioner's request or fails to take the requested action within the designated time frame, that official's decision or inaction 'shall be appealable to the next official.' ...BIA regulations further mandate that, prior to making an appeal, '[a] n appellant must file a written notice of appeal in the office of the official whose decision is being appealed.' ... The regulations go on to specify the format, timing, and content required for the appeal."

In *Tsi Akim Maidu of Taylorsville Rancheria v. US Dept. of Interior,* 2019 WL 95511 (E.D. Cal. 2019), the Department of Interior (DOI) in 2015 had determined that the Tsi Akim Maidu of Taylorsville Rancheria (Rancheria) had lost its status as a federally **recognized Indian Tribe** when the United States sold the Taylorsville Rancheria in 1966 pursuant to the California Rancheria Act (CRA). The CRA authorized the DOI to distribute forty-one rancherias' assets to "individual Indians" and provided that, after such distribution, the recipients would not be entitled to government services "because of their status as Indians ..., all statutes of the United States which affect Indians because of their status as Indians [would] be inapplicable to them, and the laws of the several States [would] apply to them in the same manner as they apply to other citizens." The Rancheria sued the DOI under the Administrative Procedure Act (APA). The defendants moved to dismiss on the ground that the plaintiff's claim accrued, at the latest, when the Rancheria applied for acknowledgement in 1998, placing the claim outside the APA's six-year statute of limitations. The Court agreed but allowed the Rancheria to amend its complaint to "allege further factual details regarding its lack of notice of adverse agency action, if applicable."

In *Alaska Logistics, LLC v. Newtok Village,* 2019 WL 181115 (D. Alaska 2019), Alaska Logistics, LLC (Alaska Logistics), a limited liability company based in Seattle, Washington, sued Newtok Village Council (Newtok), the governing body of Newtok Village, a federally recognized Indian tribe located in Newtok, Alaska, and Goldstream Engineering, Newtok's consulting engineers, for claims arising out of a contract for Alaska Logistics to provide barge services from the Port of Anchorage to Mertarvik, on Nelson Island near Newtok, Alaska. Newtok filed five counterclaims and a motion to dismiss asserting sovereign immunity, whereupon Alaska Logistics filed an "Amended Answer to Newtok's Counterclaims and Plaintiff's Counterclaims to Counterclaims," which were identical to the causes of action alleged in Alaska Logistics' initial Complaint. The court dismissed Newtok based on **sovereign immunity**, holding that

> (1) Alaska Logistics could not avoid sovereign immunity by bringing counterclaims to Newtok's counterclaims where Newtok continually asserted sovereign immunity,
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> (2) a forum selection clause in a proposed Transportation Agreement contained in the bid packet, designating federal courts for dispute resolution, did not constitute a waiver of sovereign immunity where the agreement was characterized as an agreement "by and between Alaska Logistics, LLC ... (Carrier), and Goldstream Engineering, acting for the Newtok Village Council" and where signature lines provided with space for two signatories: "Alaska Logistics, identified as the 'Carrier,' and 'Goldstream Engineering for [Newtok Village Council],' identified as the "Shipper;" and
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> (3) jurisdictional discovery was not warranted.

In *Barron v. Alaska Native Tribal Health Consortium,* 2019 WL 80889 (D. Alaska 2019), Barron sued her employer, Alaska Native Tribal Health Consortium, for disparate treatment and retaliation on the basis of race in violation of the Civil Rights Act of

1866, 42 U.S.C. § 1981. The federal district court dismissed on the ground of tribal sovereign immunity, citing Ninth Circuit precedents addressing the **immunity of tribal subsidiary entities**: "These cases suggest that ANTHC is an arm of Alaska's tribes that is entitled to sovereign immunity. Like the casino examined in *Allen*, ANTHC's creation was authorized pursuant to a federal law intended to promote tribal self-sufficiency. And like the BHA, ANTHC receives federal funding to conduct activities that benefit tribe members. The factors identified in *White* also indicate that ANTHC is entitled to sovereign immunity. ANTHC was formed by Alaska Native tribes. By 'entering into self-determination and self-governance agreements' with the IHS, ANTHC provides and manages health services that benefit members of Alaska Native tribes. The structure of ANTHC's board places control over the ANTHC's ownership and management in representatives of the Alaska Native tribes. Like the KCRC, ANTHC's purpose — entering into 'self-determination and self-governance agreements' — is 'core to the notion of sovereignty.' Finally, ANTHC receives federal funding to carry out governmental functions critical to Alaska Native tribes."

In the case of *In re children of Shirley T.,* 2019 WL 81122 (Me. 2019), legal guardians of two children eligible for membership in the Oglala Sioux Tribe appealed from an order of a state district court denying their motion, joined by the Oglala Sioux Tribe, to transfer jurisdiction of a child protection matter to the Oglala Sioux Tribal Court pursuant to the **Indian Child Welfare Act** of 1978 (ICWA). The Maine Supreme Court affirmed: "Unlike placement considerations, the evidentiary hardships imposed by a transfer of jurisdiction *are* an acceptable basis for a finding of good cause. … Here, the court's denial of the motion to transfer is fully supported by its findings and conclusions regarding the evidentiary burdens that would be imposed by the fact that all relevant witnesses and evidence are currently located in Maine. The court's analysis of the challenges posed by the geographic distance between the location of the Tribal Court and the location of all of the evidence about and the witnesses with information concerning these children is supported by ample evidence, contains no legal errors, and does not represent an abuse of discretion."

In the case of *In re Children of Mary J.,* 2019 WL 81125 (Me. 2019), the Maine Department of Health and Human Services filed a child-protection petition alleging neglect by both the mother and the father of several children who were living with the mother on the Passamaquoddy Indian reservation. The Department then requested a preliminary protection order, seeking custody of the children. The district court allowed the Department to seek foster placement. Following the Department's removal of the children from their mother's care, the Passamaquoddy Tribe moved to intervene, asserting that the removal violated a provision of the Maine Indian Claims Settlement Act that "internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State." The District Court denied the motion and the Maine Supreme Court affirmed: "Here, neither the court nor the Department has, or is, attempting to regulate who may or may not reside within an Indian territory. As the court correctly held, a child protective proceeding in no way 'calls into question the right of the Tribe to determine who is able or not able to reside on its reservation or within its territory.' … In addition, the Implementing Act specifically acknowledged and retained the existing structure of the **Indian Child Welfare Act** (ICWA)."

In *Chemehuevi Indian Tribe v. Mullally,* 2019 WL 273041 (Ariz. App. 2019), Mullally had sued officials of the Chemehuevi Indian Tribe for alleged legal violations arising out of his employment at the Tribe's gaming enterprise. The district court stayed the case on **comity** grounds to allow the tribal court to consider Mullally's claims and the tribal court eventually rejected them. The Tribe, which had paid for the defendants' defense, moved for and was awarded attorney fees by the tribal court. The Tribe then sought to domesticate the judgment in the Mohave County Court. The county court initially stayed the action while Mullally sought relief in the federal courts but lifted the stay when the Ninth Circuit rejected his appeal. Mullally appealed the county court's lifting of the stay but the Arizona Court of Appeals affirmed: "Mullally argues that because the tribe was not a party to the original litigation it cannot have standing to

sue and therefore Arizona courts don't have subject matter jurisdiction over the case. As a threshold matter, we note that the tribe is not attempting to sue Mullally, rather they are requesting recognition of a tribal judgment in Arizona under Rule 5. … The place for Mullally to argue that the tribe was not entitled to attorneys' fees was the tribal court. Once the tribal court determined the tribe was entitled to a fee award that judgment is entitled to comity in Arizona's courts. … Mullally next argues that he was not afforded due process by the tribal court because he did not have the ability to appeal the attorneys' fees award, citing *Wilson v. Marchington* …. Due process requires that 'there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws.' … *Marchington* lists several factors that a court should consider when deciding if a U.S. citizen was afforded due process. Those factors are 'the judiciary was dominated by the political branches of government or by an opposing litigant, a party was unable to obtain counsel, to secure documents or attendance of witnesses, or have access to appeal or review. … Although the tribal court does not have an appeals court, the issue of the attorneys' fees award was presented and resolved in the federal courts and they found in favor of the tribe. Additionally, the federal courts found that Mullally had been afforded due process in the tribal court. We agree. Mullally was given the opportunity to respond to the motion for attorneys' fees as well as present evidence before the tribal court but did not avail himself of that opportunity."

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