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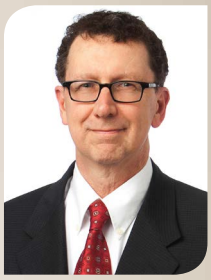

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The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy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

In *Spurr v. Pope*, 2019 WL 4009131 (6th Cir. 2019), Nathaniel Spurr, a member of the Nottawaseppi Huron Band of the Potawatomi (NHBP), sought and received a personal protection order (PPO) from the NHBP Tribal Court barring his stepmother, Joy Spurr, a nonmember, from harassing him. The NHBP Supreme Court affirmed, holding that tribal law authorized the tribal court to issue civil PPOs against a non-Indian who resides outside of NHBP Indian country. The tribal court later found Joy in contempt for violating the PPO and ordered her to pay Nathaniel's attorney fees for a hearing she had missed and $250 in court costs. Joy then brought a federal court action against Pope, Chief Judge of the NHBP Tribal Court, (2) the NHBP Supreme Court and (3) the NHBP, seeking a declaratory judgment and injunctive relief. The district court held that it had federal question jurisdiction to review Joy's claim that the tribal court lacked jurisdiction to issue the PPO but ultimately found that 18 U.S.C. § 2265 established the tribal court's jurisdiction and dismissed under Rule 12(b)(6) Joy's jurisdictional challenge without addressing the sovereign immunity issue. The Sixth Circuit affirmed the dismissal, holding that (1) sovereign immunity barred Joy's claims against all defendants other than the chief judge, whose immunity had been expressly waived and (2) the **tribal court had jurisdiction** to issue the PPO pursuant to 18 U.S.C. § 2265(e), which provides that "a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe."

In *Chemehuevi Indian Tribe v. McMahon*, 2019 WL 3886168 (9th Cir. 2019), San Bernardino County Sheriff's Deputies cited four enrolled members of the Chemehuevi Indian Tribe for violating California regulatory traffic laws. Two tribal members were cited on Section 36 of Township 5 North, Range 24 East (Section 36), a one square mile plot the Tribe claims is part of its Reservation, two were cited elsewhere on the Reservation. The members sued the deputies in federal court alleging a violation of their civil rights under 42 U.S.C. § 1983. The district court dismissed, holding that Section 36 was not part of the Tribe's reservation and that the plaintiffs' objection to the county's exercise of jurisdiction did not constitute a **federal civil rights violation**. The Ninth Circuit reversed, holding both that Section 36 was reservation and that the plaintiffs had standing under Section 1983: "Given the language of the 1853 Act, the Kelsey report identifying Section 36 as land occupied historically by Indians, and the express inclusion of Section 36 in the 1907 Order, the Chemehuevi Tribe (and indeed, the Secretary of the Interior) surely understood Section 36 to be within the Reservation. … The defendants concede that the citations at issue involved regulatory laws and therefore could not be issued against enrolled members of the Tribe within the boundaries of the Reservation. … But, they argue that even such citations cannot be the subject of a § 1983 action. … We disagree. Section 1983 allows any "person" to sue for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C.

§ 1983. Because § 1983 was designed to secure private rights against government encroachment, … tribal members can use it to vindicate their individual rights, but not the tribe's communal rights, ... And, traditional section 1983 suits—for example, those challenging an arrest on tribal land—seek to vindicate an individual right. … The Tribe, however, does not have a § 1983 claim. An Indian tribe may not sue under § 1983 to vindicate a sovereign right, such as its right to be free of state regulation and control. … Nor can the Tribe assert its members' individual rights as parens patriae in a § 1983 action. To assert parens patriae standing, the Tribe would have to articulate an interest apart from the interests of particular private parties, i.e., be more than a nominal party, and express a quasi-sovereign interest. … That requirement is inconsistent with a § 1983 action: quasi-sovereign interests are not individual rights." (Internal quotations, citations and emendations omitted.)

In *United Keetoowah Band of Cherokee Indians v. Federal Communications Commission*, 2019 WL 3756373 (D.C. Cir. 2019), the Federal Communications Commission (FCC) had issued an order (Order) in 2018 that eliminated certain reviews under the **National Historic Preservation Act** (NHPA) and **National Environmental Policy Act** (NEPA) relating to approval of wireless telecommunications cells below a certain size. The Order also changed requirements for tribal involvement under Section 106 of the NHPA, including providing that payment by applicants of "up front" fees to tribes to facilitate their identification of culturally significant properties, is voluntary. Plaintiffs, including tribes and environmental protection groups, petitioned the District of Columbia Circuit for review. The D.C. Circuit vacated the portion of the Order removing small cells from FCC's limited approval authority but denied the petition to vacate changes to Section 106 tribal procedures: "The Order permissibly confirms that upfront fees for Tribes to comment on proposed deployments are voluntary. Unchallenged Advisory Council regulations already make clear that fees are voluntary, so the Order's reiteration of the same point is not arbitrary and capricious. While applicants have apparently been uniformly paying upfront fees for Section 106 review, no party asserts that they have been required to do so. … Keetoowah implies that Tribes have only agreed to accept direct contact from applicants under the condition that applicants pay for Tribes' responses—meaning that if Tribes refuse to respond without being paid upfront fees, they will not have waived the Commission's responsibility to consult with them directly. Without having fulfilled its legal obligation to consult, Keetoowah contends, the Commission cannot permit applicants to go ahead with construction. Keetoowah overlooks the fact that when a Tribe refuses to review an application without being paid, the Order requires the Commission to step in to ask the Tribe for a response before allowing applicants to construct. Tribes' refusal to respond triggers a process in which applicants can refer the matter to the Commission, the Commission must contact Tribes directly, and Tribes have 15 days from Commission contact to respond."

In *Beam v. Naha*, 2019 WL 3937390, Fed. Appx. (9th Cir. 2019), the Hopi Tribe had assumed responsibility of Hopi Junior/Senior High School (Hopi High School) by converting it from a Bureau of Indian Affairs (BIA) operated school to a tribally controlled school, as provided under federal law. Beam, a teacher at the school, brought claims against Hopi High School's Superintendent and Principal for federal civil rights violations under ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics***, alleging that they acted under the color of federal law. The district court disagreed and dismissed: "[T]he Supreme Court articulated four factors to determine whether an entity is engaging in government action: 1) the degree of funding by the government; 2) the extent to which regulations influence the entity's conduct; 3) whether the entity was engaging in a public function; and 4) whether there was a symbiotic relationship between the government and the entity…. The ultimate question is whether there is a sufficiently close nexus between the government and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the government itself. … there is no evidence of a symbiotic relationship between the federal government and Hopi High School. The record lacks evidence that Hopi High School was conferring significant financial benefits indispensable to the government's financial success or that the federal government exercised plenary control over the school's employment and personnel matters. … Finally, that tribally controlled grant schools and their employees are considered federal actors under the Federal Tort Claims Act … does

not render defendants federal actors for purposes of Bivens, because an entity may be a federal actor for some purposes but not for others." (Quotations and citations omitted.)

In *Brackeen v. Bernhardt*, 2019 WL 3759491 (5th Cir. 2019), plaintiffs, including would-be non-Indian adoptive parents of Native children and the states of Texas, Louisiana, and Indiana, sued the federal government to challenge the **Indian Child Welfare Act** (ICWA) and the Final Rule adopted to implement it. The district court granted them summary judgment, holding that ICWA and the Final Rule violated equal protection, the Tenth Amendment-based prohibition against federal "commandeering" of state resources and the nondelegation doctrine, and that the challenged portions of the Final Rule were invalid under the Administrative Procedure Act (APA). The Fifth Circuit reversed, holding that (1) the individual and state plaintiffs had standing to sue; (2) the special rules that ICWA applies to Indian children are not race-based distinctions subject to Fourteenth Amendment strict scrutiny but, rather, a political classification based on the unique relationship between the United States and tribes; (3) the special treatment of Indian children under ICWA "is rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of "protecting the best interests of Indian children and promoting the stability and security of Indian tribes;" (4) the requirements that ICWA places on state courts are consistent with the Supremacy Clause and do not implicate the anti-commandeering mandate of the Tenth Amendment; (5) the requirements that ICWA places on state agencies do not violate the anti-commandeering mandate because they "do not require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals; (6) ICWA, as an exercise of the Congress's plenary power over Indian affairs under the Commerce Clause, preempts inconsistent state laws; (7) provisions of ICWA permitting tribes to adopt placement preferences did not run afoul of the non-delegation doctrine since "[t]he Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine" and the preferences constitute a "deliberate continuing adoption by Congress of tribal law as binding federal law;" (8) the Final Rule did not violate the APA because, in promulgating it, "BIA relied on its own expertise in Indian affairs, its experience in administering ICWA and other Indian child-welfare programs, state interpretations and best practices, public hearings, and tribal consultations. … and … BIA's current interpretation is not arbitrary, capricious, or an abuse of discretion because it was not sudden and unexplained;" and (9) the Final Rule's recommendation that a deviation from prescribed placement preferences be supported by "clear and convincing evidence" was entitled to Chevron deference and did not contradict congressional intent.

In *Coeur d'Alene Tribe v. Hawks*, 2019 WL 3756886 (9th Cir. 2019), the Coeur d'Alene Tribe sued the Hawks in Tribal Court for encroachment on tribal lands without a permit in violation of tribal law. The Hawks ignored the suit and the Tribal Court entered default judgment. The Tribe then sued in federal court for recognition and enforcement of the tribal court judgment. The district court dismissed for lack of **federal subject matter jurisdiction** but the Ninth Circuit reversed: "By seeking to enforce its judgment against the Hawks, the Tribe was 'pressing' the outer boundaries" of its authority over nonmembers. … It was in essence asking the district court to determine whether the Tribal Court validly exercised the powers 'reserved' to it under federal common law. … Because the Tribe's enforcement action required a 'showing of its authority' over nonmembers, … we conclude that the Tribe's invocation of its sovereign power over the Hawks inhered in the district court complaint …. In order to recognize the Tribal Court's judgment against the Hawks, the district court would have had to consider the various factors set forth in *Montana v. United States*, … and determine potentially complex questions of land ownership. … Our decision today should not be construed as recognizing federal question jurisdiction anytime a tribe sues a nonmember. … Nor is our holding relevant to situations in which a tribe is not acting in its sovereign capacity or cases that do not implicate a tribe's relationship with the federal government. … We emphasize that our holding is confined to the facts presented—a tribe seeking to enforce a tribal court judgment against a nonmember."

In *Agua Caliente Tribe of Cupeño Indians v. Sweeney*, 2019 WL 3676342 (9th Cir. 2019), the Agua Caliente Tribe of Cupeño Indians (Cupeño) sued the Assistant Secretary of the Interior seeking a

court order that the Department of Interior include Cupeño on its list of **federally acknowledged tribal entities**. The district court denied the request and the Ninth Circuit, construing the action as seeking mandamus relief, affirmed: "Here, the Part 83 process, which is a formal administrative process for an Indian tribe to obtain federal recognition codified in Interior's regulations, is the prescribed remedy. A tribe seeking recognition—whether it has been previously recognized or not—may petition Interior. 25 C.F.R. §§ 83.3–83.5, 83.12. Once it receives the petition, Interior's Office of Federal Acknowledgement evaluates it and issues a proposed finding. Id. §§ 83.26, 83.28, 83.32. The tribe may respond, submit additional documents, and challenge the proposed finding before an Administrative Law Judge. Id. §§ 83.35, 83.37, 83.38. After the Administrative Law Judge issues a decision, the Assistant Secretary of Indian Affairs within Interior will begin review and, within 90 days of starting review, issue a final determination. Id. §§ 83.40, 83.42. The Assistant Secretary's final determination is a final agency action under the APA, which may be challenged in federal court. 5 U.S.C. § 704; 25 C.F.R. § 83.44. … The Cupeño have made no attempt to exhaust that process. Instead, the Cupeño argue that the Part 83 process does not apply here because the Cupeño seek 'correction' of the list, not recognition. Sending a letter to the Assistant Secretary exhausts the process for correcting the list, according to the Cupeño. While sending a letter is similar to the method by which the PBMI sought a tribal name change on the list, see 81 Fed. Reg. 5019-02 (Jan. 29, 2016), the Cupeño's construction of 'correction' is novel and does not control. The Cupeño seek to add an additional indigenous entity to the list rather than correct an entity's name. … Framing the issue as one of 'correction' is unsupported by the applicable regulations and case law."

In *Kodiak Oil & Gas (USA) Inc. v. Burr*, 2019 WL 3540423 (8th Cir. 2019), members of the Three Affiliated Tribes of the Fort Berthold Reservation (Tribe) had leased their allotments, with the approval of the Department of Interior pursuant to the Indian Mineral Development Act and Indian Mineral Leasing Act, to Kodiak for purposes of drilling for oil and gas. When the lessors sued Kodiak in tribal court for royalties that they claimed they were denied because of gas flaring, Kodiak contested the **Tribal court's jurisdiction**. After the Tribe's Supreme Court affirmed Tribal jurisdiction, Kodiak sued the lessors and Tribal judges in federal district court to enjoin further tribal court proceedings. Citing the extensive federal regulatory framework governing the leases, the federal court granted Kodiak's motion for preliminary injunction, holding that the rule of *Montana v. United States* precluded the Tribe's exercise of jurisdiction over the non-Indian lessees and that neither of the *Montana* Exceptions applied. The Eighth Circuit affirmed: "Federal regulations control nearly every aspect of the leasing process, such as how leases are awarded, id. § 212.20, the size of land that may be included in a single lease, id. §§ 211.25, 212.25, the duration of leases, id. §§ 211.27, 212.27, the spacing of oil wells, id. § 212.28(h), the rates of royalties for oil and gas leases, id. § 212.41, the manner of payment, id. §§ 211.40, 212.40, and more. And the Bureau of Land Management extensively regulates and monitors oil and gas drilling operations. See 43 C.F.R. pt. 3160; see also 25 C.F.R. § 212.4. … Federal law also controls the entire process of royalty payments under the Federal Oil and Gas Royalty Management Act. See 30 U.S.C. §§ 1701–1759. Royalties are paid to the Department of Interior's Office of Natural Resources Revenue, which in turn disburses the royalties to the allottees, see id.; 30 C.F.R. §§ 1218.100–1218.105, 1219.103, and federal law provides for penalties for failure to pay royalties due under a lease, see 30 U.S.C. § 1719. Relevant to this case, the Department of the Interior has issued a notice specifically addressing the issue of "Royalty or Compensation for Oil and Gas Lost" by flaring. … In sum, the total of these regulations is comprehensive, giving wide powers to the Department of the Interior as to all aspects of the leasing arrangement. … Unlike routine contracts that are governed by general common law principles of contract, oil and gas leases on federally-held Indian trust land are governed by federal law. … Because the tribal courts' adjudicative authority is limited to cases arising under tribal law and the case at issue here arises under federal law, we conclude the tribal court lacked jurisdiction. ... The Court recognizes that while commercial activities on a reservation may certainly affect a tribe's self-governance and even intrude on the internal relations of the tribe, the specific activity from which the Tribal Court Plaintiffs seek relief in their breach of contract action is wholly regulated, determined, and

enforced by the federal government. This characteristic of flaring clearly distinguishes it from other commercial activities that occur on a reservation which are subject to regulation by the tribe. There is no immediate control of flaring by the tribe and whether the mineral lease was breached is, without question, a determination left to the federal government. … The Court concludes the determination of whether royalties are to be paid for the flaring of natural gas pursuant to a mineral lease entered into by an allottee and an oil and gas company pursuant to 25 U.S.C. § 396 is not the type of consensual relationship under *Montana's* first exception over which a tribe may exercise adjudicative authority. … This Court recognizes the flaring of natural gas may jeopardize the health of tribal members. However, the Court nevertheless does not interpret the second *Montana* exception to apply to a claim to recover royalties for flaring arising from a mineral lease entered into pursuant to 25 U.S.C. § 396." (Internal quotations, citations and emendations omitted.)

In *Brakebill v. Jaeger*, 2019 WL 3432470 (8th Cir. 2019), six Turtle Mountain Chippewa Indians sued the North Dakota Secretary of State, alleging that state's statutory voter identification requirements violated **equal protection** requirements of the Fourteenth Amendment and the Voting Rights Act. The district court granted their motion for a state-wide preliminary injunction. On appeal, the Eighth Circuit vacated and remanded, holding that plaintiffs (1) lacked a likelihood of success on merits of challenge to requiring presentation of documents with current residential street address, and (2) lacked a likelihood of success on their challenge to forms of identification enumerated under state law: "Here, the plaintiffs have not presented evidence that the residential street address requirement imposes a substantial burden on most North Dakota voters. Even assuming that some communities do not have residential street addresses, that fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have them. … We also conclude that the statute's requirement to present an enumerated form of identification does not impose a burden on voters that justifies a statewide injunction to accept additional forms of identification."

In *J.C. Johnson, and Diamond Willow, LLC, Plaintiffs, v. Phelan*, 2019 WL 4061666 (D.N.D. 2019), the plaintiffs, providers of oil and gas services on the Fort Berthold Reservation of the Three Affiliated Tribes through service agreements with producers and operators, sued tribal elected officials alleging tortious interference with the plaintiffs' contracts through various actions, including suspension of the plaintiffs' business license. The plaintiffs' alleged **federal question jurisdiction** "because the action involves federal Indian preference law and federal mineral leases that mandate Indian preference in employment on Indian/federal trust lands, and more specifically to allotted lands held in trust by the United States for individual Plaintiffs." The district court dismissed: "The claims asserted against the Defendants in the amended complaint consist of (1) tortious interference with contract, (2) conspiracy, (3) declaratory relief, (4) injunctive relief, and (5) intentional infliction of emotional distress. The Plaintiffs' causes of action arise exclusively from the actions of the Tribal Business Council's staying the renewal of Diamond Willow's business license by Executive Action, and Chairman Fox's communication of such stayed renewal to oil and gas companies. Those actions of the Tribal Business Council are certainly troubling and suspect. The Plaintiffs couch their claims as arising under federal law; however, a review of the allegations in the complaint unquestionably reveals the claims asserted do not arise under the Constitution, laws, or treaties of the United States. See 28 U.S.C. § 1331. The mere reference in the complaint to 'federal Indian preference law' and 'federal mineral leases,' or 'federal trust lands' is insufficient to trigger federal question jurisdiction. The Plaintiffs have failed to meet their burden to establish this Court's subject matter jurisdiction over this action. Consequently, the Court finds it lacks jurisdiction over the case and it must be dismissed."

In *Alegre v. United States*, 2019 WL 3891036 (S.D. Cal. 2019), plaintiffs, descendants of Jose Juan Martinez, had applied for membership in the San Pasqual Band of Mission Indians. The Tribe's **enrollment** committee and general council determined that Martinez was a 4/4 San Pasqual Indian and, on that basis, approved their applications and sent their findings to Fletcher, the then-Superintendent of the BIA Southern California Agency. Fletcher determined that Martinez was not 4/4 Indian and, on that basis, the BIA's Pacific Region Director, Dutschke, denied

the plaintiffs' enrollment. Plaintiffs sued Dutschke, current Southern California Agency Superintendent, Moore, and other federal officials in their official capacities, alleging civil rights violations but also sought to hold Dutschke and Moore personally responsible under the Supreme Court's holding in *Bivens v. Six Unknown Named Agents*, which established an implied private right of action for tortious deprivation of constitutional rights against federal officials in their personal capacity. The court dismissed claims based on *Bivens*, unconstitutional delegation of authority, Due Process, breach of statutory fiduciary duty, denial of inherited property rights, unconstitutional diminution of land rights and conspiracy but permitted claims under APA for declaratory relief to continue.

In *Little Traverse Bay Band of Odawa Indians v. Whitmer*, 2019 WL 3854299 (W.D. Mich. 2019), The Little Traverse Bay Band of Odawa Indians (Tribe) sued the Governor and other Michigan State officials for a judgment declaring that a **300 square mile reservation** allegedly established for the Tribe by treaty in 1855 continues to exist undiminished. The Court disagreed and granted summary judgment to the defendants, concluding that the Treaty, which provided for the withdrawal of lands from sale to whites pending the selection of individual allotments by Indians over a ten-year period, did not create a reservation but only provided for the individual allotments: "The Treaty Journal also makes abundantly clear that the Band representatives understood that the purpose of their designating the tracts of land that appear in the numbered paragraphs was to withdraw the land from sale for future selections by individuals. The idea came directly from Manypenny as his proposed solution to expressed fears among the Bands that their selected lands would be inhospitable. Once Manypenny offered this solution, none of the Band representatives maintained their concern about inhospitable lands, and after some deliberation, each of the Bands decided where their lands would be located. No discussion of reservations or land held in common occurred. And the final clause in this section of Article I provides the strongest support of all. After both five-year terms for Indian settlement of the lands ended, the treaty stipulated that 'all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands.' If the remaining lands (those that had not been selected or purchased) could be disposed of by the United States 'as other public lands[,]' then the lands described in the numbered paragraphs could not be an Indian reservation. In other words, the Treaty could not simultaneously set the lands aside as reservations while also allowing for the United States to dispose of the land in any manner it wished."

In *Rincon Mushroom Corp. v. Mazzetti*, 2019 WL 3818011 (S.D. Cal. 2019), Rincon Mushroom Corporation of America (RMCA) operated a mushroom factory on fee land within the boundaries of the reservation of the Rincon Band of Luiseno Mission Indians (Tribe). When the **Tribe sought to regulate** the factory, Rincon sued tribal officials, in their official capacities, in federal court, asserting ten cases of action, including contract, tort and claims under the Racketeering Influenced and Corrupt Organizations (RICO) act. In 2010, the district court, without addressing whether the Tribe had jurisdiction, dismissed for failure to exhaust tribal remedies. The Ninth Circuit partially affirmed in 2012 but held that the action in the district court should be stayed pending exhaustion. In April 2019, the Intertribal Court of Southern California held that the Tribe had jurisdiction and ordered RMCA to comply with tribal regulations. RMCA filed an appeal, accompanied by a motion to stay the tribal court judgment, with the Court of Appeal for the Intertribal Court of Southern California. At about the same time, RMCA filed an ex parte motion seeking a federal court order enjoining the Tribe from enforcing the April tribal court judgment. The district court denied the motion for failure to exhaust tribal remedies. In July, 2019, the tribal appellate court, granted RMCA a stay of enforcement of the tribal court judgment on the condition that RMCA post a $1,000,000 bond dissolvable if the appellate court ultimately found that the tribal court was without jurisdiction but forfeitable if any compensation were ultimately paid under the tribal court judgment. Contending that it had exhausted tribal court remedies, RMCA returned to federal court and sought a stay of the tribal court judgment pending appeal to the federal court. The district court denied the motion: "Generally, if a non-Indian defendant is haled into a tribal court and asserts that the tribal court lacks jurisdiction, the defendant must exhaust tribal remedies before seeking to enjoin the

tribal proceeding in federal court. … Even if there is no pending proceeding in tribal court, a non-member plaintiff may not sue in federal court asserting that the tribe lacks regulatory authority over non-member actions taken on non-Indian land within a reservation without exhausting tribal court remedies. … In this case, exhaustion of tribal remedies requires tribal appellate review of the April 2019 Judgment determining that the Tribe has regulatory jurisdiction over the Property. …. The record demonstrates that tribal appellate review of the April 2019 Judgment is not 'complete.' … For the reasons stated in the Court's June 3, 2019 and July 26, 2017 Orders, no exception to the exhaustion requirement applies in this case."

In *Cook Inlet Tribal Council v. Mandregan*, 2019 WL 3816573 (D.D.C. 2019), the Cook Inlet Tribal Council (CITC) and the Indian Health Service (IHS) entered into a self-determination contract pursuant to the **Indian Self-Determination and Education Assistance Act** (ISDEAA) under which IHS provided funding for CITC's substance abuse programs serving Alaskan Native patients. In 2014, CITC proposed a contract amendment for additional contract support costs (CSC) funding to account for increased facility support costs but IHS declined the proposed amendment in part on the ground that CITC receives payment for facility support costs as part of IHS' annual "Secretarial" funding rather than from CSC. The court concluded that CITC's interpretation of the statute requiring that the additional funding be made from CSC funds was correct. Vacating its 2018 remand order, the court granted CITC injunctive and mandamus relief to CITC, and directed IHS to award CITC facility support costs.

In *Big Sandy Rancheria Enterprises v. Becerra*, 2019 WL 3803627 (E.D. Cal. 2019), Big Sandy Rancheria Enterprises (BSRE) purchased **tobacco products**, through Big Sandy Importing and Big Sandy Distributing, exclusively from Indian manufacturers in Indian Country, (1) Azuma Corporation, a corporation formed under the laws of and wholly owned by the Alturas Indian Rancheria, and (2) Grand River Enterprises Six Nations, Ltd. (Grand River Enterprises), a Canadian corporation wholly-owned by members of the Six Nations of the Grand River, a recognized First Nation of Canada, with offices located on the Six Nations of the Grand River Reserve. Products purchased by Big Sandy Distributing are purchased and received at its warehouse facilities on the Tribe's reservation in Auberry, California. Big Sandy Distributing then resells and distributes tobacco products exclusively to Indian reservation-based retailers operating within Indian Country within the geographical limits of the State of California. After California threatened enforcement action, BSRE filed an action in federal court seeking a declaration that (1) federal common law and tribal sovereignty preempt the application of the State's Complementary Statute, intended to implement the Master Settlement Agreement with major tobacco companies; (2) the Indian Trader Statutes preempt the application of the State's Complementary Statute; (3) federal common law and tribal sovereignty preempt application of the State's licensing requirements; (4) the Indian Trader Statutes preempt the application of the State's licensing requirements; and (5) federal law and tribal sovereignty preempt application to it of the State's Cigarette Tax Law. The court dismissed BSRE's challenge on the State's motion, holding that BSRE, a corporation chartered under Section 17 of the Indian Reorganization Act, could not avoid the Tax Injunction Act's prohibition against federal challenges to state taxes: "Because BSRE, as a section 17 incorporated tribe, is a distinct entity from the Tribe in its constitutional form, the court concludes that BSRE is not exempt from the TIA's jurisdictional bar." The Court also rejected BSRE'S federal common law argument: "[T]he court concludes that BSRE's sales constitute off-reservation activities that, unless expressly prohibited by federal law, are subject to non-discriminatory state laws otherwise applicable to all citizens of the state. Plaintiff has not alleged that the Complementary Statute is discriminatory in any way, and otherwise fails to allege facts that if proven would show that the Statute is expressly prohibited by federal law."

In *Doucette v. Bernhardt*, 2019 WL 3804118 (W.D. Wash. 2019), unsuccessful candidates for four open positions on the Nooksack Tribal Council (Tribe) sued the Principal Deputy Assistant Secretary-Indian Affairs (PDAS) and other Department of Interior officials (DOI) under the Administrative Procedure Act (APA), alleging that DOI had established a policy of "interpreting Tribal constitutional, statutory, and common law to **determine whether the Tribal Council was validly seated** as the governing body of the Tribe" for purposes of government-

to-government relations that DOE had departed from former policy by endorsing the results of primary and general elections conducted in the fall of 2017. The district court disagreed and dismissed: "With respect to the Nooksack Tribe, defendants and their predecessors have attempted to balance the deference due under principles of tribal sovereignty with the scrutiny required to fulfill their fiduciary responsibilities. … In sum, none of the materials on which plaintiffs rely, namely the correspondence of former PDAS Roberts, the MOA signed by former Acting Assistant Secretary Black, and the letter sent by former Acting RD Shaw, articulated a policy of 'interpreting Tribal constitutional, statutory, and common law to determine whether the Tribal Council was validly seated as the governing body of the Tribe.' To the contrary, PDAS Roberts explicitly disclaimed any attempt to interpret the Tribe's Constitution or interfere in its internal affairs."

In *Yankton Sioux Tribe v. Bernhardt*, 2019 WL 3753616 (D.D.C. 2019), the Yankton Sioux Tribe had sued the Secretary of the Interior to obtain a declaratory judgment that the Government had not provided the Tribe with a full and complete accounting of the Tribe's trust funds and an injunction requiring the Government to account for those funds. The Tribe joined numerous other Indian tribes who were in settlement negotiations with the government. In 2012, the Tribe's counsel, Herman, Mermelstein & Horowitz (Herman Law) moved to withdraw as counsel and intervene to assert a charging lien for work and services performed from the filing of the action in 2003 through their withdrawal. The district court denied the motion to intervene on the ground of the Tribe's sovereign immunity, holding that a "sue and be sued" clause in the Tribe's corporate charter did not waive its immunity. Herman then moved for a stay of proceedings pending its appeal of the court's denial of its motion to intervene, arguing that it the motion to intervene was not a "suit" triggering the Tribe's **sovereign immunity**. The court disagreed and denied the motion: "Charging liens can provide attorneys with unique protections that ordinary contracts may not provide, including allowing attorneys to invoke 'the power of the court to preserve the judgment pending payment of the contracted-for charges. However, given that an attorney's interest in a charging lien stems from a contract, an attorney's intervention to enforce a charging lien against a former client is akin to a suit on a contract. Because 'tribes enjoy immunity from suits on contracts.' Herman Law's ability to assert a charging lien against the Yankton Sioux Tribe depends on whether the Tribe waived its sovereign immunity in the Contingency Agreement. The Court already examined the Contingency Agreement and concluded that the Tribe did not waive its immunity. … the Court is still not convinced that the distinction between an independent suit to enforce a charging lien and a motion to intervene should lead the Court to 'suddenly ... start carving out exceptions' to tribal immunity in the absence of any authority directly supporting Herman Law's position. … Herman Law does in fact seek compensation from a sovereign. If the Court ruled that the Contingency Agreement were valid—an issue the parties dispute—the Court would then need to oversee distribution of a portion of the settlement proceeds to Herman Law, reducing the Tribe's recovery. This would interfere with the Tribe's ability to manage its own finances and internal affairs, and raise somewhat similar concerns about the Tribe's 'public fisc' raised by the D.C. Circuit in Watters related to state governments."

In *Center for Biological Diversity v. United States*, 2019 WL 3503330 (D. Ariz. 2019), Rosemont Copper Company (Rosemont) applied to the U.S. Forest Service (USFS) to operate a large-scale pit-mine within the boundaries of the Coronado National Forest involving the extraction of approximately 1.2 billion tons of waste rock and approximately 700 million tons of tailings, impacting approximately 3,653 acres of the Coronado National Forest. After the USFS approved the mine, plaintiffs, including the Tohono O'odham Nation, Pasqua Yaqui Tribe, and Hopi Tribes (collectively Tribes) sued under the Administrative Procedure Act contending that the government violated the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA) and other laws. Finding multiple errors in the USFS' decision-making process, the district court vacated the permit and remanded: "[A]mong the cultural resources impacted by the Rosemont Mine would be the disturbance and desecration of 33 ancient Native American **burial grounds** containing, or likely containing, the human remains of ancestors of the … Tribes; there is also the potential for additional disturbance and desecration of unmarked and unrecognized graves outside known cemetery

areas. … The Forest Service further acknowledged that the Rosemont Mine would adversely impact the Tribes': 'historic properties, human burials, sacred sites...villages and graves of ancestors and traditional resource gathering areas, would be destroyed...These impacts are severe, irreversible, and irretrievable...The Rosemont Mine would destroy this historical and cultural foundation of the Tribes, diminish tribal members' sense of orientation in the world, and destroy part of their heritage.' … Throughout the administrative process, the Forest Service improperly evaluated and misapplied: 1) Rosemont's right to surface use; 2) the regulatory framework in which the Forest Service needed to analyze those surface rights; and 3) to what extent the Forest Service could regulate activities upon Forest Service land in association with those surface rights. These defects pervaded throughout the FEIS and ROD, and led to an inherently flawed analysis from the inception of the proposed Rosemont Mine."

In *Taylor v. Kingdom of Sweden*, 2019 WL 3536599 (D. D.C. 2019), Taylor's ancestor, White Fox, a Pawnee Indian, died in 1875 while touring Scandinavia presenting dances and songs and Native cultural practices. Taylor sued the government of Sweden and Sweden's National Museums of World Culture (NMWC) to recover certain **cultural property** of White Fox not previously returned. The district court dismissed based on the Foreign Sovereign Immunities Act (FSIA): "Sweden is, of course, a foreign state. … To say the least, NMWC presents a more difficult question. After careful review of the record and relevant precedent, however, I conclude that NMWC is 'so closely bound up with the structure of the' Swedish sovereign that it is properly considered as the foreign state itself under § 1605(a)(3). … According to NMWC's Director General, the entity was created by Act of Swedish Parliament as 'a state agency within the Swedish Ministry of Culture, which is itself a department of the Government of the Kingdom of Sweden." (Emendations partially omitted.)

In *Matyascik v. Arctic Slope Native Association Ltd*, 2019 WL 3554687 (D. Alaska 2019), Arctic Slope Native Association Ltd (Defendant) operated Samuel Simmonds Memorial Hospital, a regional health organization for the Arctic Slope Region of Alaska, funded under the Indian Self-Determination Act. After his employment contract was terminated, Matyascik sued, alleging breach of contract, violation of Alaska's Uniform Residential Landlord Tenant Act, conversion, intentional violation of COBRA, and breach of the implied covenant of good faith and fair dealing. The court, applying the five-factor test prescribed by the Ninth Circuit in *White v. University*, dismissed on the ground of **sovereign immunity**: "The dispute here centers on the fifth factor, which is the financial relationship between defendant and its member tribes. … In other cases, when considering this factor, this court has found that this factor weighs in favor of a tribal consortium being an arm of its member tribes because the tribal consortium was largely funded by federal funds intended to allow tribes to carry out their governmental function of providing health care services to their members. … [P]laintiff argues that because defendant is an Alaska nonprofit corporation, its member tribes would not be liable for any damages that might be awarded. Thus, plaintiff urges the court to conclude that defendant's member tribes are not the real parties in interest and that defendant is not entitled to sovereign immunity. … Plaintiff's financial insulation argument ignores the fact that defendant's core funding comes from tribally-authorized federal funding that it receives on behalf of its member tribes along with non-federal funds that it is able to collect due to its status as an ISDEAA organization providing health care services for the tribes. In other words, defendant's funding is money that the tribes would receive directly if they chose to operate individually, as ISDEAA allows. Thus, a judgment for damages against defendant would adversely affect its member tribes because funds would be diverted from health care services. The member tribes would not be insulated from financial harm simply because they might not be directly liable for an adverse judgment. … Defendant is entitled to sovereign immunity because it is an arm of its member tribes. And, if defendant is entitled to sovereign immunity, defendant has not waived that immunity as to plaintiff's contract and statutory claims."

In *Yoe v. United States*, 2019 WL 3501457 (D. Ariz. 2019), Yoe's 6-year old son died at the Chinle Comprehensive Health Care Facility (Hospital) operated by the U.S. Public Health Service and Indian Health Service, after being treated by Dr. Murtagh a physician placed at the Hospital by Harris Medical Associates, a medical employment

placement service. Yoe sued for malpractice under the **Federal Tort Claims Act** but the district court dismissed: "The FTCA does not cover the acts of independent contractors; generally, the Government may not be held liable for employees of a party with whom it contracts for a specified performance. … A contractor is considered to be an employee only if the government agency manages the details of the contractor's work or supervises his daily duties, but not if the government agency acts generally as an overseer. … It is well settled that physicians practicing medicine under contract in federal facilities qualify as independent contractors under the FTCA, not government employees. … Thus, in accordance with unanimous precedent, the Court finds that Murtagh was an independent contractor under the control test, as he was a physician contracted to provide services at a federal facility."

In *Ching v. Case*, 2019 WL 3986283 (Hawaii 2019), the State of Hawaii Department of Land and Natural Resources (DLNR) in 1964 had leased to the United States for sixty-five years, for the rental of one dollar, three tracts of land known as the Pōhakuloa Training Area (PTA). The land had previously been ceded to the United States following the overthrow of the Hawaiian monarchy and later ceded back to the State. The United States used the land for military purposes. The lease required that the United States "make every reasonable effort to ... remove and deactivate all live or blank ammunition upon completion of a training exercise or prior to entry by the ... public, whichever is sooner." Plaintiffs had requested from the DLNR documentation that the United States was in compliance with the lease conditions. When no documentation was provided, they sued, contending that the State, as trustee of the state's ceded lands, breached its trust duty to protect and maintain public trust lands by failing to investigate and take all necessary steps to ensure compliance with the terms of the lease. The trial court held for the plaintiffs and the Hawaiian Supreme Court, applying case law relating to federal trust obligations relating to tribal trust lands, affirmed: "We hold that an essential component of the State's duty to protect and preserve **trust land** is an obligation to reasonably monitor a third party's use of the property, and that this duty exists independent of whether the third party has in fact violated the terms of any agreement governing its use of the land. To hold otherwise would permit the State to ignore the risk of impending damage to the land, leaving trust beneficiaries powerless to prevent irreparable harm before it occurs. We therefore affirm the trial court's determination that the State breached its constitutional trust duties by failing to reasonably monitor or inspect the trust land at issue."

In *Alone v. C. Brunsch, Inc.*, 931 N.W.2d 707 (S.D. 2019), an explosion in a duplex on the Oglala Sioux Tribe (Tribe) Pine Ridge Reservation killed four tribal members. Their estates sued the building's propane suppliers, Lakota Propane and Western Cooperative Company, Inc. (Western Co-op), in state court, alleging negligence, strict liability, and breach of warranty. After conducting an investigation, Lakota Propane filed a third-party complaint against the Oglala Sioux Housing Authority and several tribal members in their individual capacities, alleging they caused the explosion by failing to cap one or more propane lines that had previously supplied gas to the propane appliances. The Trial court dismissed for lack of subject matter jurisdiction and the South Dakota Supreme Court affirmed based on the rule of ***Williams v. Lee***: "[T]he court correctly determined it did not have subject matter jurisdiction over the third-party complaint. Lakota Propane has not identified any federal law that would provide our courts with jurisdiction over its claims. Further, if the State asserted jurisdiction over the complaint, it would infringe upon tribal self-governance. Lakota Propane's claims are asserted against member Indians and a tribal entity and arise from tortious conduct occurring entirely within the Pine Ridge Indian Reservation. *See Williams*, 358 U.S. at 218, 79 S. Ct. 269 (requiring a non-Indian plaintiff to file his claim against member Indians in tribal court under infringement principles)."