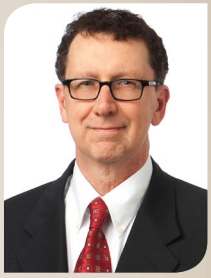
GODFREY & KAHN S.C.

Indian Nations Law *Focus*

March 2019, Volume 14, Issue 3



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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 the case of *In re Greektown Holdings, LLC*, 2019 WL 922658 (6th Cir. 2019), the trustee in an adversary action within bankruptcy proceedings sought to void as fraudulent a restructuring and financing transaction whereby the bankruptcy debtor, Greektown Holdings, LLC, directly or indirectly transferred money to multiple parties, including the Sault Ste. Marie Tribe of Chippewa Indians and its political subdivision, Kewadin Casinos Gaming Authority (Tribe Defendants). The district court had previously concluded that 11 U.S.C. § 106(a), which abrogates the **sovereign immunity** of "governmental units" under certain enumerated sections of the Bankruptcy Code, did not waive tribal sovereign immunity. Later, the court held that the Tribe Defendants had not themselves waived their immunity. Relying on the Sixth Circuit's decision in the *Memphis Biofuels* case, the court had rejected the Trustee's argument that, absent a resolution waiving immunity or a contractual waiver, the Tribe Defendants waived immunity by their conduct. The court rejected the Trustee's argument that the *Memphis Biofuels* principles did not apply to a claim sounding in tort. The Sixth Circuit affirmed, holding that Congress did not waive tribal sovereign immunity through Section 106(a) and that the Tribe Defendants had not waived immunity through their actions: "A proper respect both for tribal sovereignty and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. We heed those warnings, and hold that Congress did not unequivocally express an intent to abrogate tribal sovereign immunity in 11 U.S.C. §§ 106, 101(27). … The Trustee's argument that the Tribe clearly waived any tribal sovereign immunity it possessed has three analytical steps: (1) Indian tribes can waive sovereign immunity by litigation conduct, (2) alter egos or agents of Indian tribes can waive tribal sovereign immunity by litigation conduct, and (3) filing a bankruptcy petition waives sovereign immunity as to separate, adversarial fraudulent transfer claims. If each step is a correct statement of the law, then, according to the Trustee, the Tribe may have waived its immunity from the Trustee's fraudulent transfer claim by actually or effectively filing the Debtors' bankruptcy petitions in federal court. We agree with the first step of the Trustee's analysis, but we disagree with the second and third steps. Tribal sovereign immunity can be waived by litigation conduct, but not by the litigation conduct of a tribe's alter ego or agent, and the litigation conduct of filing a bankruptcy petition does not waive tribal sovereign immunity as to a separate, adversarial fraudulent transfer claim. Accordingly, we hold that the Tribe did not waive its tribal sovereign immunity."

In *Stanko v. Oglala Sioux Tribe*, 2019 WL 846573 (8th Cir. 2019), Stanko, a non-Indian, sued the Oglala Sioux Tribe and various tribal officers under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the **Indian Civil Rights Act** (ICRA), for actions arising out of his arrest by tribal officers, including alleged battery and theft. The district court dismissed and the Eighth Circuit affirmed the dismissal, with

prejudice, of claims against the Tribe and against individual defendants in their official capacity, but dismissed claims against defendants in their individual capacities without prejudice on the ground that Stanko failed to exhaust his tribal remedies: "The district court properly dismissed Stanko's claims against individual tribal officers acting in their official capacities as also barred by the Tribe's sovereign immunity. A suit against a governmental officer in his official capacity is the same as a suit against the entity of which the officer is an agent. ... There is no reason to depart from these general rules in the context of tribal sovereign immunity. … [T]here is no implied private right of action against tribal officers in federal court to remedy alleged ICRA violations, other than the habeas corpus provisions of 25 U.S.C. § 1303. … Thus, Stanko's complaint did not state a claim under ICRA against any defendant. ... Stanko did not allege that the individual defendants were acting under color of state law, as § 1983 requires. He alleged that US/BIA Highway 27 is maintained by the Federal Government, not the State of South Dakota. Thus, his § 1983 claim was properly dismissed. … Stanko relies on *Bivens v. Six Unknown Named Agents*, where the Supreme Court, citing *Bell v. Hood*, held that 'violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.' … [t]he question is whether the 'substantiality doctrine' reflected in *Bivens* should be extended to permit a non-Indian to bring a damage action in federal court for violation of his constitutional rights by tribal officers acting under color of tribal law, when non-Indian citizens have a right to bring that action against officials acting elsewhere under color of state or federal law. … Given the recognized limitations on tribal sovereign power over non-Indians on reservation land, this is not a frivolous claim. … We conclude we need not remand to the district court to address this issue because Stanko's individual-capacity claims were properly dismissed without prejudice for his failure to exhaust an available tribal court remedy. … Article V of the Constitution of the Oglala Sioux Tribe created an independent tribal judiciary with jurisdiction over 'cases, in law and equity, arising under the ... Constitution [and] the laws of the Oglala Sioux Tribe.' Art. V, Section 2. This jurisdiction would obviously include a civil damage action by Stanko alleging that tribal officers acting in their individual capacities under color of tribal law violated his civil rights on reservation land. ... Tribal court jurisdiction is not at issue here. 'Indian tribes retain inherent sovereign power ... to exercise civil authority over the conduct of non-Indians ... within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.' **Montana**, … Whether tribal officers violated the civil rights of a non-Indian traveling on the reservation unquestionably has a direct effect on the political integrity and welfare of the Tribe." (Emendations, quotations and citations partially omitted.)

In *Hernandez v. United States*, 141 Fed. Cl. 454 (Fed. Cl. 2019), the Treaty of Fort Laramie provided After he was arrested, convicted and sentenced for drug offenses, Hernandez, a member of the Rosebud Sioux Tribe, brought claims against federal officials for various alleged acts of misconduct under the **"Bad Men" clause** of the 1868 Treaty of Fort Laramie, which provides: "If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will ... reimburse the injured person for the loss sustained." The court of claims dismissed: "It is well established that the Court of Federal Claims has Tucker Act jurisdiction over a claim for money damages brought under the 'bad men' provision of the Fort Laramie Treaty. … 'To state a claim for relief under the bad men provision requires the identification of particular 'bad men,' and an allegation that those men committed a wrong within the meaning of the treaty. Only acts that could be prosecutable as criminal wrongdoing are cognizable under the bad men provision. … Further, as the Federal Circuit strongly suggested (if not held) in *Jones*, there are at least some geographical limitations on the applicability of the 'bad men' provision in the Fort Laramie Treaty. … Thus, in *Jones*, the court of appeals observed that the 'bad men provision' takes cognizance of activities that either occur on-reservation or that were 'a clear continuation of activities that took place on-reservation' and remanded the case to the Court of Federal Claims to make that heavily fact-dependent determination. The Court agrees with the government that none of Mr. Hernandez's allegations states a claim under the Fort Laramie Treaty. Although Mr. Hernandez is a member of the Rosebud Sioux Tribe, he asserts no facts that would establish a nexus between the acts of

which he complains and activities that occurred or began on the Rosebud Indian Reservation (which is in South Dakota). To the contrary, all of the activities about which Mr. Hernandez complains in this case appear to have occurred in Nebraska." (Internal quotations, citations and emendations omitted).

In *Confederated Bands of the Yakama Nation v. City of Toppenish*, (E.D. Wash. 2019), the State of Washington had assumed criminal jurisdiction over Indians and Indian reservations within the state pursuant to **Public Law 280**, except that the State assumed jurisdiction over trust lands only in specified areas, including school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoptions, dependent children and operation of motor vehicles on public roads. In 2012, Washington adopted a procedure by which tribes could ask the State to retrocede civil and criminal jurisdiction. The Confederated Bands of the Yakama Nation (Tribe) asked the State to retrocede jurisdiction in five areas. In 2014, the Governor proclaimed that the State was retroceding jurisdiction over "certain criminal offenses" but retaining jurisdiction "over criminal offenses involving non-Indian defendants and non-Indian victims." In a letter to the Department of Interior, the Governor explained that the State retained jurisdiction when "non-Indian defendants and/or non-Indian victims" were involved. In 2018, police officers of the City of Toppenish arrested members of the Confederated Bands of the Yakama Nation and charged them with auto theft. The Tribe sued in federal court for injunctive relief, asserting that under the retrocession and the Tribe's 1855 treaty with the United States, the State lacked jurisdiction whenever a tribal member was involved, either as a victim or perpetrator. The district court disagreed and denied the motion, holding that (1) the Tribe had standing to bring the suit because "a tribe has a legal interest protecting tribal self-government from a state's unjustified assertion of criminal jurisdiction over Indians and Indian country," and (2) a Washington appellate court, in *State v. Zack*, had correctly interpreted the retrocession proclamation to mean that Washington retained jurisdiction whenever a non-Indian was involved: "The Court concludes that the State retained jurisdiction over criminal offenses where any party is a non-Indian. This interpretation is consistent with the plain language of the Governor's retrocession proclamation, DOI's acceptance and federal and state law governing the retrocession process."

In *Cain v. Salish Kootenai College, Inc.*, 2019 WL 718545 (D. Mont. 2019), former employees of Salish Kootenai College, Inc. brought a qui tam action against the College, the Salish Kootenai College Foundation and eight of the College's board members (Individual Defendants), alleging that the Individual Defendants violated the federal False Claims Act (FCA), which permits suits against "any person" who defrauds the government by "knowingly present[ing] ... a false or fraudulent claim for payment or approval," and Montana law by providing false progress reports on students in order to keep grant monies coming from the Department of Health and Human Services and the Indian Health Service. The Court had previously dismissed the College, finding that it was an arm of the Tribe entitled to share its **immunity**. In the instant decision, the Court denied the Individual Defendants' motion to dismiss the Plaintiff's FCA fraud claim, granted their motion to dismiss the FCA retaliation claim, and allowed the Plaintiffs to pursue their state law defamation claims under the Court's supplemental jurisdiction: "[T]he general rule against official capacity claims does not mean that tribal officials are immunized from individual capacity suits arising out of actions they took in their official capacities. Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe. … Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity. … An individual capacity suit proves proper, therefore, when a plaintiff seeks to hold a government official or employee personally liable for their own unlawful choice or action. … A tribal government employee sued in his or her personal capacity stands, therefore, as a person who may be subject to liability for knowingly submitting false information to the United States for purposes of FCA liability. … It is of no consideration that the Individual Defendants made the alleged fraudulent decision 'because of' their official tribal duties. … A retaliation claim pursuant to § 3740(h) seeks a remedy for the retaliatory actions of an employer. The remedy available through § 3740(h) can be satisfied only by an employer. … The College stands

as the Plaintiffs' employer here." (internal emendations, quotations and citations omitted.)

In *Crawford-Hall v. United States*, (C.D. Cal. 2019), the Regional Director of the Bureau of Indian Affairs (BIA) had approved the government's acquisition of **1427 acres in trust** for housing and other non-gaming purposes on behalf of the Santa Ynez Band Indians pursuant to Section 5 of the Indian Reorganization Act. In 2017, Crawford-Hall, a nearby landowner, appealed to the Board of Indian Appeals. In 2015, the Assistant Secretary-Indian Affairs, pursuant to his authority under 25 C.F.R. § 2.2, had assumed direct jurisdiction of appeals. The appeal, therefore, was transferred to the office of the Assistant Secretary which, by 2017, was vacant. Principal Deputy Assistant Secretary Larry Roberts in January 2017 rejected the appeal and approved the acquisition. The BIA Regional Director accepted the conveyance. Crawford-Hall sued under the Administrative Procedure Act. Analyzing the Federal Vacancies Reform and principles of delegation under administrative law, the district court granted summary judgment in favor of Crawford-Hall and ordered the BIA to remove the property from trust, holding that only the Assistant Secretary, not the Principal Deputy Assistant, had the authority to make a final decision under 25 C.F.R. § 2.2 on an appeal taken from BIA jurisdiction.

In *Texas v. Ysleta Del Sur Pueblo*, 2019 WL 542036 (W.D. Tex. 2019), Congress in 1987 had enacted the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, which restored a federal trust relationship and federal assistance to the Ysleta del Sur Pueblo (Tribe). Section 107(a) of the Act provided that "gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." The Act also provided that the "United States shall have exclusive jurisdiction over any offense in violation of subsection (a)" but that "nothing in [§ 107] shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section." Following the enactment of the Indian Gaming Regulatory Act (IGRA), the Tribe and the State engaged in protracted litigation over the Tribe's right to engage in gaming under IGRA. The Tribe alleged in a counterclaim pursuant to the Civil Rights Act of 1870, **42 U.S.C. § 1983** that the Texas Constitution and Bingo Enabling Act violated the Equal Protection Clause of the Fourteenth Amendment "by allowing certain organizations the right to conduct bingo, but omitting Indian nations and their members from that list." The Tribe also contended that Texas had enforced Texas's gaming laws in a discriminatory manner. Relying on the Supreme Court's decision in *Inyo Cty., Cal. v. Paiute-Shoshone Indians*, the Court held that the Tribe was not a "person" eligible to sue under Section 1983 with respect to some claims and granted summary judgment on the merits with respect to others: "If a Tribe could not bring its claim if it were not a sovereign, then the claim should be barred by *Inyo County*. Thus, claims that are based on Tribal treaties, sovereign immunity, or other privileges granted only to sovereigns should be barred. On the other hand, if the claim is one that non-sovereign entities in similar situations could bring—even if the claim has some relation to the Tribe's sovereignty—then *Inyo County* should not preclude the claim. … Ultimately, the Court concludes that two of the Tribe's theories—that the Bingo Enabling Act is discriminatory and that the State has enforced its gaming law in a discriminatory way— could plausibly be asserted by a non-sovereign entity. Thus, the Court determines that these theories should be evaluated on their merits. On the other hand, the Court determines that the Tribe's assertion that the State has unlawfully expanded its regulatory reach is inextricably tied to the Tribe's sovereignty and that the Tribe may not pursue this claim. … [T]he Tribe has not provided any evidence that would tend to show that other, similarly situated entities are violating the State's gaming laws without being prosecuted for the violation. Thus, the Tribe fails to identify a genuine issue of fact for trial, and the Court determines that summary judgment should be granted in the State's favor on this issue."

In *Texas v. Ysleta del Sur Pueblo*, 2019 WL 639971 (W.D. Tex. 2019), the latest decision, the district court ruled that Texas was entitled to injunctive relief to bar the Ysleta Pueblo from conducting gaming activities in violation of Texas law: "[T]he Court concludes that the Tribe is subject to the State's regulations. The Court also determines that the Tribe's operations violate Texas law. Finally, the Court is of the opinion that the Tribe should be enjoined from continuing its gaming operations at Speaking Rock. … [A]lthough the Tribe has an interest in self-governance, the Tribe cannot satisfy that interest by

engaging in illegal activity. Further, the Court cannot decline to enforce the Restoration Act, which is federal law."

In *First Interstate Band v. Not Afraid*, 2019 WL 633208 (D. Mont. 2019), the district court, pursuant to an interpleader action filed by First Interstate Bank, had entered and permitting the bank to allow withdrawal of funds by Alvin Not Afraid rather than rivals claiming to be the legitimate government. The court subsequently dismissed for lack of **jurisdiction**: "[T]he Crow Tribal Civil Court's January 29, 2019, restraining order maintains the status quo that Not Afraid, Jr. is the Tribe Chairman and prevents Goes Ahead and Back Bone from assuming or occupying Not Afraid, Jr. and Old Crow's positions, titles, duties, and financial signature authority. … In other words, the Crow Tribal Civil Court has already determined that Not Afraid, Jr., not Goes Ahead or Back Bone, is entitled to access funds belonging to the Crow Tribe currently held by First Interstate Bank. Accordingly, a temporary restraining order or injunction from this Court stating the same is redundant and unnecessary."

In *State of Connecticut and Mashantucket Pequot Tribe v. Department of Interior*, 2019 WL 652321 (D.D.C. 2019), the Department of Interior (DOI) had declined to approve a proposed amendment to the **Gaming Compact** between the State of Connecticut and the Mashantucket and Pequot and Mohegan Tribe. An amendment to the Mohegan Tribe's compact was later approved. The State and the Pequot Tribe sued under the Administrative Procedure Act, contending that the DOI's failure to approve was arbitrary and capricious. The court allowed the State and the Tribe to amend the complaint to allege unlawful political considerations by DOI: "[T]o the extent the Secretary explained his decision, Plaintiffs sufficiently allege that the explanation was conclusory at best. And conclusory statements will not do; an agency's statement must be one of reasoning. … Plaintiffs must plausibly allege that political pressure caused the Secretary to rely on considerations not made relevant by Congress in the IGRA. … First, Plaintiffs must demonstrate that political pressure was applied to the agency's decisionmakers. … Second, Plaintiffs must demonstrate that the pressure caused those decisionmakers to rely on improper factors." (Internal emendations omitted.)

In *State of New York v. Grand River Enterprises Six Nations*, 2019 WL 516955 (W.D.N.Y. 2019), Grand River Enterprises Six Nations, Ltd. (GRE), a corporation formed under the laws of the Six Nations with its principal place of business in Ontario, engaged in the business of manufacturing, selling, transferring, transporting, and shipping **cigarettes** for profit throughout the United States, including into and throughout New York State. NWS, a for-profit corporation formed under the laws of the Sac and Fox Nation of Oklahoma but not controlled by the tribe or operated for tribal government purposes, engaged in the business of purchasing, transporting, distributing, and reselling GRE's tobacco products for profit throughout the United States, including in New York. NWS imported only GRE-manufactured products into the United States. NWS's principal place of business is located in Perrysburg, New York. GRE and NWS engaged in a joint venture for the specific purpose of manufacturing, distributing, shipping and selling untaxed and unstamped contraband cigarettes into the State of New York. GRE manufactured Seneca® brand cigarettes in Ontario, then sold or assigned them to NWS, "FOB Canada," at GRE's Canada facility, with title transferring from GRE to NWS in Canada. NWS then imported and distributed the cigarettes inside the United States, including into and throughout New York State, untaxed and unstamped by New York. The State of New York sued GRE and NWS, alleging violations of the Contraband Cigarettes Trafficking Act of 1978 (CCTA), the Prevent All Contraband Trafficking Act (PACT Act), and New York Tax law. The district court, rejecting the magistrate's recommendation, denied the defendants' motion to dismiss, holding that (1) the filing requirement of the PACT Act applied to the shipment of cigarettes into a reservation within a state regardless whether the Tribe taxed the cigarettes, (2) CCTA and its implementing regulations applied to wholly-owned corporations of federally-recognized Indian tribes, and (3) the State's complaint plausibly alleged the existence of joint venture between Defendants, which plausibly implicated GRE under a theory of vicarious liability.

In *Pfarr v. United States*, 2019 WL 498453 (E.D. Cal. 2019), Pfarr sued Chapa-De Indian Health (Chapa-De), a tribal health clinic operated under contract with the Indian Health Service under the Indian Self-Determination Act, in

the Nevada County Superior Court, alleging that defendant negligently repaired his dentures. The United States substituted itself as defendant pursuant to the **Federal Tort Claims Act**, removed to federal court and moved to dismiss on the ground that Pfarr failed to comply with the FTCA's procedural requirements. The court granted the motion: "Although Congress has consented to suits against the United States under the FTCA, prior to litigating a tort claim against the United States, a plaintiff must first file an administrative claim with the appropriate federal agency … within two years of the accrual of the claimant's cause of action. … A civil action may not be instituted until an administrative claim has 'been finally denied by the agency in writing and sent by certified or registered mail.' … the administrative claim requirement under the FTCA is jurisdictional and cannot be waived. … In addition, courts are required to strictly construe the exhaustion requirement."

In *Mandan, Hidatsa and Arikara Nation v. Department of Interior*, 2019 WL 451351 (D.D.C. 2019), the Mandan, Hidatsa and Arikara Nation (Tribe) sued Department of Interior officials and Slawson Exploration Company, Inc. (Slawson) in the federal district court for the District of Columbia, challenging the Bureau of Land Management's (BLM) approval of permits for Slawson to drill horizontal oil and gas wells underneath Lake Sakakawea in North Dakota. The Tribe contended that the well, based on a well pad 600 feet from the lake on privately-owned fee land within the Tribe's Fort Berthold Indian Reservation, violated a tribal law requiring that well sites be at least 1000 feet from the lake. The Tribe argued that the law was a valid exercise of tribal authority under the rule of ***United States v. Montana*** and that, in any event, Congress delegated authority to the tribe when the Secretary of Interior approved the Tribe's Constitution providing for tribal jurisdiction over fee lands. On the defendants' motion, the court transferred the case to the federal district court for North Dakota because the D.C. court lacked a connection with the case. The court agreed and granted the motion, holding that the North Dakota Court could evaluate the Tribe's arguments: "[T]he Court concludes that potential national implications of this case do not outweigh the significant local interests of North Dakota and its residents, which includes the Tribe. … Thus, because this case focuses on land in North Dakota and an administrative decision made in North Dakota, and because federal courts in North Dakota are more than capable of handling cases involving national issues, the Court finds that this factor weighs in favor of transfer. … Because the District of North Dakota is familiar with the facts and issues in this case and has already considered the likely merits of some of the Tribe's arguments, the Court concludes that the interest in judicial economy also favors transfer."

In *Edwards v. Foxwoods Resort Casino*, 2019 WL 486077 (E.D.N.Y. 2019), the Edwards, a married couple, were detained by security personnel employed by Foxwoods Resort Casino, an enterprise of the Mashantucket Pequot Tribal Nation, on suspicion of credit card fraud. Security personnel released them after determining they did not match the description of the suspects. The Edwards sued the Tribe and tribal officials under 42 U.S.C. § 1983 for alleged violations of the Fourth Amendment based on false imprisonment, false arrest, and unlawful detention based on race, as well as asserting state law claims of assault and battery, negligent hiring and trespass. The federal district court dismissed for lack of **federal jurisdiction**: "Here, there are no colorable federal claims. To the extent Plaintiffs seek to invoke federal question jurisdiction by claiming the Defendants violated their rights under the Fourth and Fourteenth Amendments, such an argument is unavailing. These constitutional protections do not apply to Defendants. Moreover, Plaintiffs cannot sue Defendants under 42 U.S.C. § 1983 … because none of the Defendants were acting under the color of state law."

In *United States v. Turtle*, 2019 WL 423346 (M.D. Fla. 2019), Turtle, a member of the Seminole Tribe residing on the Tribe's Brighton Reservation which had been created by executive order in 1911, sold 3,996 alligator eggs that he had collected on the Reservation for $19,980. Federal prosecutors charged him with selling American alligator eggs in violation of the Lacey Act, predicated on the **Endangered Species Act (ESA)**. Turtle moved to dismiss, challenging the federal government's jurisdiction and arguing that the Tribe retained traditional sovereign hunting and fishing rights never relinquished by treaty, and any statutes restricting those rights are void and unenforceable. The government conceded that the Tribe had implicit usufructuary rights on the reservation

and argued that those rights did not include the right to sell wildlife and, even if they do, the Tribe still must comply with the ESA. The court denied Turtle's motion, holding that (1) the Tribe's usufructuary rights on its reservations included the right to sell alligator eggs gathered from the reservation, (2) neither the Lacey Act nor the ESA abrogated the Tribe's usufructuary rights, and (3) the federal government could enforce reasonable and necessary conservation measures against members of the Seminole Tribe: "The American alligator has remained federally protected for the past thirty plus years. Requiring the Seminole Tribe to recognize the American alligator's protected status is necessary to the continued and successful conservation efforts to protect the health and safety of the species (and other crocodilians)."

In *Bill S and Clara B v. State of Alaska*, 2019 WL 642729 (Alaska 2019), the Alaska Supreme Court reversed a lower court order that had terminated the parental rights of Native Parents on the ground that the State Office of Children Services (OCS) had violated the **Indian Child Welfare Act** (ICWA) by failing to show by clear and convincing evidence that it had made sufficient efforts to avoid the breakup of an Indian family: "Like the superior court, we are underwhelmed by the quality of OCS's testimony. We agree with the court's observation that OCS 'made a rather lackadaisical effort' and 'put on a skeletal case about [its] required active efforts.' The superior court was rightly concerned to doubt OCS's demonstration of active efforts. We acknowledge that the superior court concluded that OCS met its burden due in large part to 'the consideration the Court is to give to the parents' demonstration of an unwillingness to change or participate in rehabilitative efforts.' While this principle remains valid, the parents' lack of effort does not excuse OCS's failure to make and demonstrate its efforts. Even considering the parents' lack of participation, there is simply insufficient evidence in the record to show that OCS made active efforts. It was legal error for the superior court to conclude by clear and convincing evidence that OCS made active efforts to reunify the family."

In the case of *In re Children of Shirley T.*, 199 A.3d 221 (Me. 2019), Maine's Department of Health and Human Services brought child protection proceedings to remove two Indian children, members of the Oglala Sioux Tribe, from their home pursuant to allegations of abuse. The children were long-time Maine residents. The parents and the Tribe requested that the matter be transferred to the jurisdiction of the Tribal Court in South Dakota pursuant to the **Indian Child Welfare Act (ICWA)**. The trial court denied the motion on the grounds that the knowledgeable witnesses were Maine residents and that holding the proceedings 2000 miles distant would cause hardship. The Maine Supreme Court affirmed the denial: "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.*, 199 A.3d 231 (Me. 2019), the Maine Department of Health and Human Services initiated child-protection proceedings alleging neglect by the parents of several non-Indian children living with their Passamaquoddy tribal member mother on the Tribe's reservation. The trial court denied the Tribe's motion to intervene and the Maine Supreme Court affirmed: "In arguing that the Department's actions interfered with internal tribal matters, the Tribe specifically points to the 'right to reside within the respective Indian territories,' and asserts that, by placing the children in a foster home that is not on Passamaquoddy territory, the Department has interfered with an internal tribal matter. Based on this assertion, the Tribe claims a right to intervene in this child protective matter. … 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.' … If the children who are the subject of this action were members of the Tribe, or eligible to become members, then the ICWA would apply. … In determining whether something constitutes an internal tribal matter, we have looked to the factors announced by the First Circuit in *Akins v. Penobscot Nation*: … '(1) the effect on nontribal members, (2) & (3) the subject matter of the dispute, particularly when related to Indian lands or the harvesting of natural resources on Indian lands, (4) the interest of the State of Maine, and (5)

prior legal understandings.' … When the *Akins* factors are applied here, the subject matter of this action—the children—are nonmembers, and stand to be the most affected by its outcome. Moreover, the State has a well-established *parens patriae* interest in the safety and well-being of the children within its jurisdiction." (Citations omitted.)

In *Long v. Snoqualmie Gaming Commission*, 2019 WL 912132 (Wash. App. 2019), the Snoqualmie Tribe hired Long as CEO of the Tribe's gaming enterprise under a contract that waived the Tribe's immunity for purpose of adjudicating disputes arising under the contract in tribal court. After firing Long, the Tribe sued him in state court for breach of fiduciary duty, conversion and unjust enrichment. When the Tribe's Gaming Commission suspended Long's gaming license, he sued the Commission in tribal court. The Commission later revoked Long's license. In January 2017, the Tribe and Long settled their state court lawsuit and the Tribe waived its immunity for purposes of enforcement of the settlement agreement in state court. Long sued the Commission in state court to force it to rescind its revocation of his license. The trial court dismissed Long's suit and the court of appeals affirmed, holding that the immunity waiver that the Tribe granted Long for purposes of enforcing the agreement to settle its claims against Long did not bind the Commission: "We conclude that the Commission's independent role in Indian land gaming regulation requires that its immunity be analyzed separately from any waiver of immunity by the Tribe. This means that the Tribe's waiver of its own immunity, without more, does not waive the **Commission's sovereign immunity** in matters falling within its exclusive purview, like gaming license revocation. A contrary view would frustrate the independence of the Commission contemplated by the Snoqualmie Tribe Tribal Gaming Act (STTGA) and the compact between the State of Washington and the Tribe. It would also ignore the carefully worded limited waivers found in the Commission's regulations."

In *Becerra v. Huber*, 2019 WL 912147 (Cal. App. 2019), Huber, a member of the Wiyot Band (Tribe), owned a smokeshop on the Tribe's Table Bluff Rancheria. The California Attorney General sued Huber for violations of the State's Unfair Competition Law, the Business and Professions Code, the Tax Stamp Act, Directory Act and Fire Safety Act. Huber challenged the state's jurisdiction on the ground that Public Law 280 limited state jurisdiction and that state jurisdiction violated the Tribe's right of self-government under the ***Williams v. Lee*** doctrine and was preempted by federal law under the rule of *White Mountain Apache Tribe v. Bracker*. The trial court granted the State summary judgment and the Court of Appeals affirmed: "Applying *Williams* to the facts presented on this record, the exercise of jurisdiction here does not infringe tribal sovereignty. The case implicates no issues of tribal self-governance, tribal membership, ownership of any tribe member's real property, or domestic relations among tribe members. Huber's business is located on the Wiyot reservation, but all the claims at issue are directed to her sales of contraband cigarettes to non-members of the Wiyot tribe, both at the retail level (based on promotions directed to off-reservation customers enticing them to visit her on-reservation business) and at the wholesale level (based on deliveries by truck off the reservation to other tribes). While these claims involve a Native American residing and doing business in Indian country, they cannot be said to have arisen entirely there. Nor does the Wiyot tribe have a court system that might be undermined by a California court's assertion of jurisdiction involving a Wiyot tribe member and a business she operates on Wiyot tribal lands. Unlike the situation in *Williams* with Navajos in Arizona, there has never been any disclaimer by the state of California of any aspect of its jurisdiction over Indian country within the territorial boundaries of this state. … *Bracker*, … summed up an area of law in which *Moe v. Confederated Salish & Kootenai Tribes*, … *Washington v. Confederated Tribes of Colville* … and *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc*. … are leading decisions. … Thus, we reject Huber's argument that *Moe, Colville, and Milhelm* may be cast aside as oddball tax cases having no significance outside the specialized arena of taxation. Indeed, we view this trio of cases as integral to the entire body of Indian preemption law that has evolved over the last 50 years. … The trial court correctly concluded that the balance of federal, tribal, and state interests weighs in favor of California. Huber points to no federal interest, expressed by statute or regulation, in promoting reservation sales of cigarettes, and makes no claim that Congress, by statute or regulation, delegated to the Wiyots some form of authority that might oust the authority of the state in this area."