GODFREY & KAHN S.C.

April 2021

Indian Nations update

John L. Clancy
414.287.9256
jclancy@gklaw.com

Brian L. Pierson
414.287.9456
bpierson@gklaw.com

An Important New Option for Financing Affordable Housing

The federal "9%" Housing Tax Credit (HTC) program, designed to finance up to 70% of qualified development costs, has for decades been the principal engine for the financing of low income housing in the United States. HTCs function like grants because the return to investors comes from the credits they take against their federal income tax liability over a ten-year period. Unfortunately, there is a limited supply of 9% HTCs and the allocation process, administered by state housing agencies, is highly competitive.

While some tribally-designated housing entities (TDHEs) have been successful in obtaining 9% HTCs, most have not. Demand for the 9% HTCs far outstrips supply and many states' criteria give preference to urban developments, making it difficult for tribes to file successful applications. Tribes unable to access the 9% HTC program have incorrectly assumed that they have no options. While Indian country's awareness of the 9% HTC has steadily grown in recent decades, the less competitive "4%" HTC program remains largely unknown.

The recently enacted Consolidated Appropriations Act (Act) revitalizes and improves the 4% HTC program by amending the Internal Revenue Code to provide that investors are entitled to a *minimum* of 4% annual credits. Moreover, the IRC provides for an enhancement of the tax credit percentage in qualified census tracts (QCTs), which apply to many tribal communities. The Act also appropriates $100 million for a new round of competitive Indian Housing Block Grants (IHBGs) to supplement the formula-based IHGB program.

As a result of these changes, the 4% HTC can now finance approximately 50% of the qualified costs of low income housing on reservations within QCTs. By leveraging the 4% HTCs with other grant sources, e.g., competitive IHBG, Indian Community Development Block Grant program, Department of Energy Indian Energy Grant, FHLB Affordable Housing Program grants, etc., a tribe or TDHE can potentially finance a large affordable housing development *solely from non-tribal sources*.

While 9% HTCs should be pursued by tribes well positioned to obtain them, the 4% HTC should be added to every TDHE's finance toolbox.

Helping tribes finance housing and infrastructure is a major focus of G&K's Indian Nations practice. We have provided housing finance training to many tribal clients, in some cases free of charge. For more information, contact a member of our Indian Nations Practice Group.

Selected Court Decisions

In *Aquinnah/Gay Head Community Association, Inc. v. Wampanoag Tribe*, 989 F.3d 72 (1st Cir. 2021), Congress had acknowledged the Wampanoag Tribe and set aside lands in the Town of Aquinnah (Settlement Lands) as part of the Indian Land Claims Settlement Act of 1987 (Massachusetts Settlement Act), which also provided that the Settlement Lands "shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth ... and the [T]own ... (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." In 2013, the Tribe declared its intention to develop a **Class II gaming** facility, asserting that the Indian Gaming Regulatory Act of 1988 had implicitly removed the prohibition in the Settlement Act. The State sued and both the Town and a neighborhood association later intervened, both arguing that the Tribe could engage in gaming activity only after properly complying with all pertinent regulatory, permitting, and licensing requirements, including all local zoning ordinances. The district court ruled against the Tribe, holding that the gaming prohibition survived the enactment of IGRA and, additionally, that the Settlement Act required the Tribe's compliance with all other state and local laws. The Tribe appealed, focusing on the issue whether the IGRA implicitly repealed the prohibition against gaming. In 2017, in *Wampanoag I*, the First Circuit Court of Appeals agreed with the Tribe that the IGRA implicitly partially repealed the Settlement Act but the Court did not address the Town's claims relating to building permits and zoning requirements. On remand, the district court issued a final judgment that the IGRA preempted the Settlement Act's prohibitions against gaming but also that the Tribe had failed to appeal the Court's previous ruling that, apart from the gaming issue, the Tribe was subject to state and local non-gaming laws and regulations. The Tribe appealed again. The First Circuit held that (1) the Tribe had waived any objection to the Town building permit requirement by not including it in its previous appeal, (2) the Tribe had waived its tribal immunity through its litigation conduct and (3) the district court's ruling on remand was not so unreasonable or obviously wrong to preclude application of law of the case doctrine: "The Tribe never asked us to consider the permitting issue, nor did it mention the preliminary injunction, which had addressed the permitting issue head on, beyond a single footnote. … [T]he Tribe raised a variant of its sovereign immunity argument in the district court prior to *Wampanoag I*, and the district court permitted the suit to proceed. The Tribe later appealed to us without advancing on appeal a challenge to the district court's adverse ruling on the sovereign immunity issue. We resolved the merits of that case in the Tribe's favor. Now the Tribe, dissatisfied with implications of *Wampanoag I* it may not have considered, wants to press rewind. The Supreme Court, however, has looked unfavorably on a sovereign's attempt to regain immunity even after it litigated and lost a case brought against it in federal court." (Internal quotes and citations omitted.)

In *Clay v. Commissioner of Internal Revenue*, 2021 WL 968621 (11th Cir. 2021), the Internal Revenue Service sought to recover unpaid federal income taxes from Clay and Osceola members of the Miccosukee Tribe on income of over $100,000, paid to them annually from the Tribe's casino revenues. They sued in federal court, contending that the **federal income taxes** were lease payments rather than casino revenue taxable under the Indian Gaming Regulatory Act. The district court granted the government's motion for summary judgment and the Eleventh Circuit Court of Appeals affirmed: "The tax court found that there was no lease agreement, and that finding was not clearly erroneous. … Indeed, Clay and Osceola have not pointed to anything in the record even resembling a lease agreement. And a closer look reveals why: no lease ever existed. … The second problem is a basic doctrinal one. Tax exemptions, as we said earlier, must be 'clearly expressed.' … But Clay and Osceola have not identified any statutory exemption for lease payments. They instead assert that revenue from the 'leasing of undeveloped Tribal lands has always been considered tax exempt,' and that development makes no difference for the application of that rule. They cite a handful of revenue rulings to support this claim. … But they do so in the context of *Squire v. Capoeman*, a Supreme Court decision holding that income 'derived directly' from lands allotted under the General Allotment Act of 1887 is exempt from taxation. … *Capoeman's* holding on that issue cannot apply here though—Miccosukee lands have never been allotted, under the General Allotment Act or otherwise. And again, we have already held that casino revenues do 'not derive directly from the land' anyway."

In *Swiger v. Rosette*, 2021 WL 821396 (6th Cir. 2021), Swiger, a non-Indian Michigan resident, **borrowed money through the internet** from Plain Green LLC, an entity owned by the Chippewa Cree Tribe of Montana, under a loan agreement that provided for disputes to be resolved by arbitration under tribal law with review limited to tribal court. Seven months later, Swiger sued Plain Green's executives, contending that the loans violated the federal Racketeering Influenced and Corrupt Organization (RICO) Act and Michigan consumer protection laws. The federal district court concluded that the arbitration clause of the agreement was invalid but the Sixth Circuit Court of Appeals reversed, holding that, under the Federal Arbitration Act (FAA) the validity of the arbitration clause must be addressed by the arbitrator: "The FAA … allows parties to agree that an arbitrator, rather than a court, will determine gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. … Such an agreement, commonly known as a delegation clause, requires clear and unmistakable evidence that the parties agreed to have an arbitrator decide arbitrability. … A valid delegation clause precludes courts from resolving any threshold arbitrability disputes, even those that appear wholly groundless. … Only a specific challenge to a delegation clause brings arbitrability issues back within the court's province. … A party seeking to avoid the effects of a delegation clause should raise a challenge at least in its opposition to a motion to compel arbitration. … If a party fails to acknowledge their delegation provision, let alone challenge it … they forfeit any such challenge. … Swiger failed to specifically challenge her delegation clause. … As Swiger points out, several circuits have found similar arbitration agreements unenforceable. … But her failure to specifically challenge the delegation clause prevents us from reaching the issues addressed in those cases, where the plaintiffs challenged their delegation clauses." (Citations, quotations and internal emendations omitted)

In *Doucette v. United States Department of Interior*, 2021 WL 915378 (9th Cir. 2021), members of the Nooksack Tribe sued the Department of Interior (DOI) under the Administrative Procedure Act, contending that DOI's **recognition of a tribal election** was arbitrary and capricious. The district court granted the government summary judgment and the Ninth Circuit Court of Appeals affirmed: "Appellants also argue that the recognition decision is arbitrary and capricious under 5 U.S.C. § 706(2)(A) because it was made with improper influence, secret meetings, and without proper procedure. First, we agree with the district court that there is nothing in the emails between the Tribe's lobbyist and DOI that indicates an improper influence or nefarious dealings affected DOI's decision to recognize the results of the Nooksack election. Nor have Appellants identified a liberty or property interest that they were denied by the alleged improper process. … DOI's actions comported with the agency's duty to balance the Tribe's right to self determination and its obligation to ensure that the Tribe followed its Constitution. … DOI points out that even if there were irregularities, the number of ballots purportedly received by hand would not have affected the outcome. Thus, DOI's recognition of the elected tribal council was not arbitrary and capricious."

In *JLLJ Development, LLC v. Kewadin Casinos Gaming Authority*, 2021 WL 1186228 (W.D. Mich. 2021), JLLJ Development, LLC, and Lansing Future Development II, LLC (Developers) sued Kewadin Casinos Gaming Authority (Gaming Authority), the gaming agency of the Sault Ste. Marie Chippewa Tribe, for breach of contracts for the development and construction of two proposed casinos on newly two parcels purchased by the Tribe in Michigan's Lower Peninsula. Although the parties had designated the federal district court as the forum for resolution of disputes arising under their agreements, the district court dismissed for lack of **subject matter jurisdiction**: "The most common way federal question jurisdiction is established is when federal law creates the cause of action. … Here, the Developers did not assert any cause of action created by a federal statute. Breach of contract, misrepresentation, promissory estoppel, as well as the other contract-related claims are state law claims. … The parties have failed to identify any disputed federal issue necessarily raised by any of the state law claims, let alone one actually disputed and substantial. To be sure, federal Indian law generally, and the Indian Gaming Regulatory Act in particular, provide the general backdrop for the parties' dispute. But the issues framed by the state law causes of action involve run-of-the-mill factual disputes over how a party did, or failed to do, in performing basic contractual commitments, like submitting and following budgets, or appointing particular committees, or pursuing the best and fastest strategy for completing the land acquisition and trust process. In fact, the parties expressly agreed that the Turn-Key Agreements were not intended to be management contracts under the IGRA. None of this is sufficient to confer federal question subject matter jurisdiction."

In *Cherokee Nation v. McKesson*, 2021 WL 1181176 (E.D. Okla. 2021), the Cherokee Nation of Oklahoma sued manufacturers and distributors of prescription drugs, alleging that they failed to combat the illegal diversion of prescription opiates to nonmedical users, contributing to an epidemic of opiate abuse, addiction, and overdoses. The Nation alleged causes of action based on public nuisance, negligence and gross negligence, unjust enrichment and civil conspiracy. The court denied the defendants' motion to dismiss, holding that the Nation had standing to sue on behalf of its citizens under the doctrine of *parens patriae* and that the Nation had pleaded sufficient facts to state each one of its asserted claims.

In *Beetus v. United States*, 2021 WL 1093617 (D. Alaska 2021), Beetus sued the United States under the **Federal Tort Claims Act (FTCA)**, alleging that Adams, an employee of the Tanana Chiefs Conference (TCC) and Tanana Tribal Council (TTC), sexually assaulted her when she participated in a program conducted by the TCC and/or TTC under a contract with the federal government pursuant to the Indian Self-Determination and Education Assistance Act. Her claims against the government alleged failure to adequately safeguard program participants and negligent hiring, training, and supervision. The district court denied the government's motion to dismiss: "Plaintiff alleges that TCC and/or TTC employees were negligent in supervising, training, and hiring Culture Camp employees, and in monitoring youth participants. Both TCC and TTC employees were carrying out aspects of the Culture Camp, which were encompassed within the relevant ISDEAA agreement, TCC's Funding Agreement. … The Court need not determine at this juncture whether there is a plausible argument that Mr. Adams' actions fall within the scope of his employment. This is because Plaintiff has also pleaded negligent hiring and supervision claims and the United States does not dispute that these FTCA claims may proceed under Ninth Circuit precedent."

In *Mendenhall v. United States*, 2021 WL 1032276 (D. Alaska 2021), Mendenhall sued the United States in state court, alleging that he was assaulted and battered by Ireton, a security guard employed by the Alaska Native Tribal Health Consortium (ANTHC). The United States removed the action to federal court and substituted itself as the defendant pursuant to the **Federal Tort Claims Act** (FTCA), which provides a waiver of the government's sovereign immunity for tort claims arising from acts by federal employees within the scope of their employment, including employees of tribes when carrying out their duties under Indian Self-Determination and Education Assistance Act (ISDEAA) contracts, but which also disclaims any waiver for claims "arising out of assault, battery, [or] false imprisonment." The federal district court dismissed, holding that (1) because Ireton's actions were within the scope of his employment, the FTCA was Mendenhall's exclusive remedy and (2) the court lacked jurisdiction because Mendenhall had failed to exhaust administrative remedies, as required by the FTCA.

In *Smith v. Martorello*, 2021 WL 981491 (D. Ore. 2021), Smith had **borrowed money** over the internet from Big Picture Loans, LLC, an entity owned by the Lac Vieux Desert Band of Lake Superior Chippewa Indians. Smith sued Martorello and related companies and individuals, alleging that they used Big Picture, and the Tribe's sovereign immunity, as a shield against state usury laws in violation of various state and federal laws. The district court denied Martorello's motion to dismiss: "Martorello's reliance on tribal sovereignty is misplaced. The Court's decision necessarily turns on Smith's well-pleaded factual allegations, which must be accepted as true at this stage of the litigation. Because Smith has plausibly alleged that Martorello, who is not a member of the Tribe, controls Big Picture's and Ascension's lending operations, neither the Court's exercise of personal jurisdiction over Martorello nor permitting Smith's RICO and unjust enrichment claims to proceed violates tribal sovereignty."

In *Weaver v. Gregory*, 2021 WL 1010947 (D. Ore. 2021), Weaver sued Gregory and other officials of the Warm Springs Police Department, an agency of the Confederated Tribes of Warm Springs, alleging claims under 42 U.S.C. § 1983 and state law claims arising out of his employment. The district court dismissed, holding that official capacity claims against the officials were barred by **sovereign immunity**, that their individual actions were not "state" actions for purposes of Section 1983 and that the court would not exercise supplemental federal jurisdiction over the remaining state law claims because the tribal court was a more appropriate forum.

In *Metlakatla Indian Community v. Dunleavy*, 2021 WL 960648 (D. Alaska 2021), Congress in 1891 had created the Metlakatla reservation for mission Indians emigrating from Canada pursuant to a statute providing "That until otherwise provided by law the body of land known as Annette Islands, … set apart as a reservation for the use of the Metlakatla [sic] Indians, … and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior." In 1918, the US Supreme Court, in a suit brought by the United States against a non-Indian commercial fishing company, held that Congress had intended to create an exclusive fishing zone for the Metlakatlans within 3,000 feet of the reservation. In 2020, the Tribe sued the governor of Alaska, contending that the State's Limited Entry Act regulating fishing outside the Tribe's exclusive zone interfered with the Tribe's non-exclusive, **off-reservation fishing rights**. The Tribe argued that such rights were implied in the 1891 act creating the reservation, based on Congress' knowledge that the Tribe depended on fishing for its sustenance. The district court granted the State's motion to dismiss, distinguishing the Tribe's claim from the *Winters* lines of cases describing reserved water rights and from cases in which fishing rights were reserved in land cession treaties: "The 1891 statute itself says nothing with regard to fishing rights. … [I]mplied off-reservation fishing rights have been found based on circumstances involving more than just a tribe's historical reliance on fishing and an intent to encourage self-sufficiency. Unlike the other implied off-reservation water or fishing rights cases discussed above, the Metlakatlans voluntarily emigrated to the United States a few short years before the creation of the reservation; they were not forcefully relocated and had no land claim to settle with the United States. They did not engage in negotiations from which some additional or implied intent could be inferred or understood."

In *Muscogee Creek Nation v. Poarch Band of Creek*, 2021 WL 961743 (D. Alaska. 2021), a large portion of the Creek Nation, known today as the Muscogee (Creek) Nation (Muscogee), had been forced to emigrate from their homeland in Alabama to Oklahoma in the 1830s. Another portion of the Tribe, the Poarch Band of Creek Indians (Poarch Band), remained and was federally recognized in 1984, at which time the government acquired in trust a 34-acre site, known as Hickory Grounds, that had been the Nation's last pre-emigration capital and also contained graves and cultural artifacts. When the Poarch Band developed the site for a gaming enterprise, the Muscogee and related parties sued the Band, Band officials and various federal officials and agencies, alleging violations of the Indian Reorganization Act, Native American Graves Protection and Repatriation Act, Archaeological Resources Protection Act, Religious Land Use and Institutionalized Persons Act, Religious Freedom Restoration Act, and National Historic Preservation Act, as well as claims under Alabama law. The plaintiffs sought to have Hickory Grounds taken out of trust and restored to its pre-development status. The district court dismissed, holding that the Band was protected by **sovereign immunity**, that Band officials could not be sued under the *Ex Parte Young* doctrine because the relief sought would impose on the special sovereignty interests of the Band and that, in the absence of the Band, the case could not proceed against the federal defendants: "This land, long owned by PBCI, is a vital part of both the Tribe's history and its present economy. No matter the phrasing of the plaintiffs' complaint or how the defendants they name are therein denominated, PBCI's sovereign interest in its ownership and use of Hickory Ground cannot be placed in jeopardy before this court without the Tribe's consent. As a result, the Tribal Defendants--including the tribal officials named in their official capacity--must be dismissed from this suit."

In *United States v. Osage Wind LLC*, 2021 WL 879051 (N.D. Okla. 2021), the United States had challenged Osage Wind LLC's installation of 84 wind turbines on land in which the Osage Tribe held subsurface rights, contending that excavation activities associated with the installation constituted mining for purposes of Indian Mining Leasing Act, triggering the requirement of a **federally-approved lease**. The district court rejected the government's argument but the Tenth Circuit reversed and remanded. On remand, the Osage Mineral Council (OMC), an agency of the Tribe, filed an amended complaint. Osage Wind LLC asserted multiple affirmative defenses to OMC's claims, based on both state and federal law. On OMC's motion, the court granted OMC judgment on the affirmative defenses: "[C]ourts have consistently recognized that tribes, as well as the United States while acting as a trustee on behalf of Indian tribes, are not subject to 'state delay-based defenses.' … (laches, estoppel and waiver) … Nor are Indian land claims subject to state-law affirmative defenses based on the tribe's own conduct, including waiver, unclean hands, or in pari delicto. … Osage Wind next contends that, even if the state-law affirmative defenses are insufficient as a matter of law to prevent liability, the defenses may apply to bar or limit the available remedies. … [T]he court does not presume incorporation of state law as to remedies. Further, for the reasons discussed above, incorporation of state law remedies would frustrate federal Indian policy."

Engasser v. Tetra Tech, 2021 WL 911887 (C.D. Cal. 2021), Tetra Tech, Inc. had entered into an agreement with the California Department of Resources Recycling and Recovery to coordinate the abatement and removal of debris resulting from California's Camp Fire in Butte County, including part of the Mechoopda Indian Tribe of Chico Rancheria, California (Tribe) Tetra Tech entered into a Professional Services Agreement (PSA) with the Mechoopda Cultural Resource Preservation Enterprise, a wholly owned, unincorporated entity of the Tribe (Mechoopda) to provide tribal monitoring for the cleanup. The parties agreed in the PSA to indemnify and defend each other against "losses, damages, liabilities, fines, fees, penalties and claims" caused by the other's "intentional misconduct and sole negligence [sic] acts or omissions" and also agreed that "[p]rior to commencing litigation," a party seeking relief must meet and confer with the other in a good faith attempt to resolve "all claims, disputes, and other matters in controversy ... arising out of or in any way related to" the PSA. The Dispute Resolution provision also provided that "[a]ny court with competent jurisdiction shall have the authority to enforce this provision and to determine if the meet and confer process has been satisfied." Engasser, one of the monitors hired by Mechoopda to perform monitoring services under the PSA, sued Tetra Tech, on behalf of himself and a putative class of tribal monitors, asserting wage-and-hour violations under the Fair Labor Standards Act and California law. Tetra Tech demanded that Mechoopda defend and indemnify Tetra Tech against Engasser's suit. When Mechoopda refused, Tetra Tech filed a Third-Party Complaint against Mechoopda seeking indemnity, contribution, and restitution. The district court dismissed Mechoopda on the ground of **sovereign immunity**: "Tetra Tech contends Mechoopda waived its sovereign immunity by agreeing to the Dispute Resolution provision of the PSA, which Tetra Tech interprets as creating a right to sue Mechoopda. … For support, Tetra Tech relies on *C & L Enterprises*, 532 U.S. 411. … In *C & L*, the Supreme Court held the Potawatomi Tribe clearly waived its sovereign immunity in a contractual arbitration provision. … Applying *C & L*, the Ninth Circuit has found contractual provisions did not waive immunity where the dispute resolution procedure was not binding, the tribe did not unequivocally submit to a court's jurisdiction, or the tribe expressly retained its sovereign immunity. See *Miller v. Wright*, 705 F.3d 919, 925 (9th Cir. 2013); *Demontiney*, 255 F.3d at 812–13. … The facts here are more akin to *Miller* and *Demontiney* than to those in *C & L*. Mechoopda expressly retained its sovereign immunity in the PSA. Just two lines above the Dispute Resolution provision, the PSA states unequivocally, 'Nothing herein shall be construed as a waiver of sovereign immunity.' … As in *Demontiney*, this is the only express discussion of sovereign immunity in the PSA to which the parties direct the Court, and it makes it abundantly clear that Mechoopda did not intend to waive its sovereign immunity. See *Demontiney*, 255 F.3d at 812–13. Tetra Tech's attempts to dismiss Mechoopda's express and unequivocal retention of immunity as 'boilerplate,' in need of the Court's reconciliation to avoid waiver, are unpersuasive. … The Court may not 'resolve any ambiguity' as Tetra Tech suggests—a waiver of sovereign immunity must be clear and unequivocal."

In *Picard v. Colville Tribal Correctional Facility*, 2021 WL 768137 (E.D. Wash. 2021), Picard was sentenced by the Colville Tribal Court to a total of 720 days imprisonment for three separate criminal offenses, each of which carried a sentence of less than one year. Picard appealed to the Colville Tribal Court of Appeals challenging the imposition of consecutive sentences that resulted in a period of confinement exceeding one year and the use of the Colville Tribal Correctional Center for long-term confinement. The Tribal Court of Appeals affirmed the trial court's ruling but declined to review challenges to Picard's confinement because he had not raised it in the trial court. Picard petitioned the federal court for appointment of counsel and a writ of habeas corpus pursuant to the **Indian Civil Rights Act (ICRA)**, 25 U.S.C. § 1303, arguing that both the imposition of consecutive sentences resulting in a cumulative period of incarceration exceeding one year and the use of the Colville Tribal Correctional Facility for long-term confinement violated the ICRA. Picard was subsequently transferred to the Okanogan County Jail. The district court denied the petition, holding that Picard had failed to exhaust tribal remedies with respect to the site of his confinement and failed to demonstrate that his sentence violated the ICRA: "The statute now permits prison sentences of up to three years for 'any [one] offense' and defines the term 'offense' as 'a violation of a criminal law.' 25 U.S.C. §§ 1302(a)(7)(C), 1302(e). The amended statute also clarified that cumulative sentences of up to nine years are permissible. 25 U.S.C. § 1302(a)(7)(D); see also *Miranda*, 684 F.3d at 849 n.4. However, tribal courts imposing prison sentences exceeding one year must now comply with additional statutory requirements. See 25 U.S.C. § 1302(c). … [T]he Court of Appeals found the Colville Tribes implemented the following policies to meet the requirements under TLOA § 1302(c): Colville Tribes provide indigent criminal defense services; the Colville Tribal Court has several licensed judges with sufficient legal training to preside over criminal proceedings; Colville tribal laws are publicly available

through the Colville Tribes' official website; the Colville Court of Appeals decisions are also publicly available online; the Federal Rules of Evidence were adopted by tribal caselaw and are publicly available; the Colville Tribes' rules of criminal procedure are publicly available; Colville tribal caselaw provides rules of recusal for judges; and finally, the Colville Tribes have a standing practice of keeping records of its court proceedings."

In *Ahtna, Inc. v. Department of Natural Resources*, 2021 WL 938371 (Alaska 2021), the State of Alaska had claimed a 100-foot road **right-of-way** under an 1866 law, Revised Statute 2477 (RS 2477), over land owned by Ahtna, Inc., a regional Alaska Native corporation. In 2007 the State cleared a swath of land along the road to enhance recreational activities at Klutina Lake and removed one of the "permit fee stations" Ahtna had erected to collect fees for use of its land, whereupon Ahtna sued, arguing that its prior aboriginal title prevented the federal government from conveying a right-of-way to the State or, alternatively, if the right-of-way existed, that construction of boat launches, camping sites, and day use sites exceeded its scope. The trial court held that any preexisting aboriginal title did not disturb the State's right-of-way over the land and that the right-of-way was limited to ingress and egress. The Alaska Supreme Court affirmed, holding that the Alaska Native Claims Settlement Act extinguished rights based on aboriginal title and affirmed existing rights-of-way but that the rights-of-way were limited: "RS 2477 rights of way are limited in scope. … The holder of a right-of-way is 'entitled to make only reasonable use.' Clearing the full width of the 100-foot right-of-way in service of a single-lane dirt road was not reasonable use. The State therefore exceeded the scope of its RS 2477 right-of-way when it cleared 100 feet of land along Klutina Lake Road."

In *Big Horn County Electric Cooperative, Inc. v. Big Man*, 2021 WL 754143 (D. Mont. 2021), Big Horn County Electric Cooperative (BHCEC), a non-Indian entity, provided electrical service to Southeastern Montana and Northern Wyoming. BHCEC was the primary provider of electrical services on the Crow Reservation and Crow Tribe members, including Big Man, made up approximately half of BHCEC's membership. Big Man's contract with BHCEC for services included a choice of law. In 2012, BHCEC notified Big Man that his account was delinquent, and that it would terminate service if non-payment continued. When Big Man did not pay, BHCEC disconnected service. Big Man sued BHCEC in Crow Tribal Court alleging that BHCEC's termination violated the Crow Law and Order Code, which provides that "no termination of residential service shall occur between Nov. 1 and April 1 without specific prior approval of the Crow Tribal Health Board." Initially, the Crow Trial Court dismissed for lack of jurisdiction but the Crow Court of Appeals reversed and remanded the case. BHCEC then sued Big Man and Crow officials in federal court to enjoin the tribal court proceedings on the ground that the Crow Tribal Court lacked jurisdiction over BHCEC. The magistrate judge found that defendants were entitled to summary judgment on both the Tribe's jurisdiction to regulate and adjudicate BHCEC's conduct as it relates to Big Man as well as on the issue of the enforceability of BHCEC's choice of law provision in its membership agreement. The district court agreed and adopted the magistrate's recommendations and order: If the Tribe has retained the right to exclude, then it may regulate BHCEC's conduct. If the Tribe has been divested of its right to exclude BHCEC on Big Man's land, then it may only regulate BHCEC under the narrow *Montana* exceptions. … Judge Cavan did not err in determining that Big Man's homesite is properly considered tribal land, and that the Tribe correspondingly had the right to condition BHCEC's conduct such as with Title 20, BHCEC's objection is likewise resolved. However, even if the land were alienated from Tribal control, as the Court explains below, the Tribe still possesses jurisdiction to regulate and adjudicate the dispute under both *Montana* exceptions. … BHCEC has chosen to avail itself of the Tribe's customer base and in doing so created a consensual relationship. The Tribe then conditioned one aspect of that service with Title 20. This is exactly the nexus required by the first exception. … BHCEC claims that, because the absence of tribal authority to enforce Title 20 would not menace the Tribe's ability to govern its members or its internal relations, *Montana's* second exception does not apply. … This argument ignores the 'health and welfare' provision of the exception and selectively quotes from cases where that portion of the exception was not at issue. The conduct at issue here imperils tribal health and welfare on a much greater scale than generalized safety concerns on roadways or railroads as in *Strate* and *Redwolf*. Winter in Montana can be bitterly cold and electric service provides the necessary power to keep the heat on. Termination of that service clearly imperils the health and welfare of any Tribal member who obtains service from BHCEC—a class of approximately 1,700 members—and therefore the Tribe itself. The second *Montana* exception applies."

In *Treat v. Stitt*, 481 P.3d 240 (Okla. 2021), the Oklahoma legislature had prescribed conditions for Class III gaming in the state, in accordance with the **Indian Gaming Regulatory Act** (IGRA), as reflected in a model gaming compact. When Oklahoma's governor negotiated gaming compacts with tribes that went beyond the parameters of the model compact, legislators sued. The Oklahoma Supreme Court held that the governor was limited by the model compact and that the compacts he had negotiated were invalid: "When the Executive branch negotiates terms of a tribal gaming compact that differ from the Model Compact found in the State-Tribal Gaming Act (outside of the provisions regarding fees and exclusivity as discussed previously), the Executive branch is acting under the general authority given to it pursuant to § 1221(C). It is then necessary that the Executive branch and the Tribe obtain the approval from the Joint Committee prior to submitting the compact to the Department of Interior. … The Executive branch did not follow either the Model Compact method or the Joint Committee method in negotiating the new compacts with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town."

In *Warehouse Market Inc. v. State ex rel. Oklahoma Tax Commission*, 481 P.3d 250 (Okla. 2021), Warehouse Market Inc. (WMI), a non-Indian corporation, conducted business as a sublessee of restricted fee property on the Muscogee Creek Reservation. The Muscogee Creek Tribe and Oklahoma Tax Commission both demanded that WMI pay a 6% **sales tax**. The Tribe advised WMI that the state tax was unlawful. WMI filed an interpleader action asking the State court to decide which entity was entitled to the sales tax proceeds. The Tribe was dismissed on the ground of sovereign immunity. The Oklahoma Supreme Court held that the case then became a tax protest which, under Oklahoma law, could not be heard until WMI had first exhausted administrative remedies.

In *Unkechaug Indian Nation v. Treadwell*, 2021 WL 799811 (N.Y. App. 2021), a New York appellate court rejected a state court challenge by a determination by the Unkechaug Indian Nation of a dispute among Nation members relating to real property within the Nation's reservation: "When acting within its territorial boundaries and with respect to internal matters, an Indian Nation retains the sovereignty it enjoyed prior to the adoption of the United States Constitution except to the extent that its sovereignty has been abrogated or curtailed by Congress. … Accordingly, the Supreme Court correctly determined that … it lacked subject matter **jurisdiction** over the dispute, and that any determination regarding Danielle's rights to the disputed portion of the subject property was rendered academic."

In *Brackeen v. Haaland*, 2021 WL 1263721 (5th Cir. 2021), plaintiffs had challenged the **Indian Child Welfare Act (ICWA)** on constitutional and other grounds. A panel of the Fifth Circuit Court of Appeals had upheld the law but on rehearing en banc, the court split into two major opinions. A pro-ICWA majority held that (1) Congress had the authority, by enacting the ICWA, to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by imposing federal standards for state child custody cases involving Native American children, (2) the law's classification of "Indian child" was not a racial classification that violated the equal protection provisions of the Constitution, (3) certain ICWA provisions did not illegally commandeer states and (4) BIA did not exceed its authority in issuing regulations binding and state courts. An anti-ICWA majority, however, held that several of the "active efforts" ICWA requires states to undertake to prevent the breakup of Indian families unconstitutionally commandeered state officials. Significantly, the court split evenly — thereby leaving in place — on the district court's holdings that ICWA's preferences for placing children with "other Indian families" or with a licensed "Indian foster home" violated equal protection. The Fifth Circuit, which covers the states of Texas, Louisiana and Mississippi, is not binding on courts within the other federal circuits.