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# Indian Nations update

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## May Selected Court Decisions

In *Oertwich v. Traditional Village of Togiak*, 2022 WL 951272 (9th Cir. 2022), Oertwich, a non-Native, had lived in Togiak, an Alaskan Native Village (Tribe), for over thirty years and operated the Airport Inn there. The Village had its own law enforcement officers and the State of Alaska provided law enforcement assistance through its Village Public Safety Officer (VPSO) Program. After VPSO officer alerted the Village to the arrival of a suspicious package at the airport, a Village officer opened it and discovered alcohol, whereupon the Togiak Tribal Court issued an order banishing Oertwich from the Native Village of Togiak Tribe for "possession of prohibited controlled substances." Native officers put Oertwich on a plane for Dillingham, Washington. When Oertwich returned to Togiak the following day, Village officers and a VPSO officer incarcerated him in the City of Togiak jail, bound him and placed him on a plane bound for Dillingham. Oertwich sued the Tribe, its members and its officials, alleging claims under 42 U.S.C. s. 1983, the Indian Civil Rights Act (ICRA) based on illegal search and seizure, arrest, imprisonment and banishment, unconstitutional search and seizure, arrest, imprisonment, and banishment, false imprisonment, battery, intentional infliction of emotional distress stemming from the unlawful arrest, imprisonment, and banishment. The district court dismissed, holding that certain of the plaintiff's claims failed and that others must be brought in tribal court. The Ninth Circuit affirmed in part and reversed in part, holding that (1) the claims against the Tribe were barred by sovereign immunity, (2) the tribal judges were acting in their judicial capacities and were entitled to judicial immunity, (3) the district court failed to adequately consider whether Oertwich had pleaded valid Section 1983 claims against the officers in their individual capacities, under the doctrine of *Lewis v. Clarke*, and Oertwich would be permitted to amend his complaint on remand.

In *Rincon Mushroom Corporation of America v. Mazzetti*, 2022 WL 1043451 (S.D. Cal. 2022), Rincon Mushroom Corporation of America (RMCA) owned five acres within the boundaries of the reservation of the Rincon Band of Luiseño Indians (Tribe). After the Tribe sought to regulate RMCA's mushroom business, RMCA sued tribal officials in federal court, contending that the Tribe lacked jurisdiction under the rule of *Montana v. United States*, which, with two exceptions, bars tribes from asserting jurisdiction over non-Indians on fee land within reservation boundaries. RMCA sought an injunction to bar defendants from enforcing tribal regulations against RMCA. The district court ruled that RMCA was required to exhaust tribal court remedies and the Ninth Circuit affirmed. The tribal court and appellate court ultimately determined that the Tribe had jurisdiction over RMCA under the second *Montana* exception allowing tribes to assert jurisdiction over conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." RMCA then renewed its suit in federal court, again asserting that the Tribe never had jurisdiction. The district court disagreed

and granted judgment affirming the validity of the tribal court judgment: “The Rincon Trial Court made the following four core factual findings in its Jurisdictional Order in support of its conclusion that the Tribe had jurisdiction under *Montana*’s second exception: (1) that Plaintiffs failed to maintain the Property; (2) that the Property constitutes a fire hazard that endangers the Tribe’s casino and resort, which is located across the street from the Property and is the Tribe’s primary source of income; (3) that Plaintiffs’ actions and inactions have contributed to a threat of contamination to the pristine character of the Tribe’s drinking water supply; and (4) that Plaintiffs’ assertion of immunity from tribal jurisdiction, together with local government’s demurrer, creates a lawless enclave within the reservation. … The Court reviews these findings for clear error based on the evidence in the record before the Rincon Trial Court. … In this case, the Property is located in close proximity to two important tribal resources—the Tribe’s water supply and its casino and resort. … The activities that the Tribe seeks to regulate—such as the storage of various flammable materials and the presence of tanks and vehicles without adequate disposal systems—are the same types of activities that have previously resulted in groundwater contamination and large fuel explosions on the Property.

In *Bonner v. Williams*, 2022 WL 1078608 (D. Ore. 2022), Bonner sued Williams, an Umatilla Tribal Police Department officer, and Demary, a Housing Coordinator with the Confederated Tribes of the Umatilla Indian Reservation, in federal court under **42 U.S.C. § 1983**, contending they conducted an illegal search of his residence and, in addition, that Demary discriminated against Bonner because of his race and harassed Bonner’s wife. The court dismissed for failure to state a claim: “Section 1983 claims alleging the deprivation of rights under color of Tribal law ‘cannot be maintained in federal court.’ *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989). Instead, a plaintiff asserting § 1983 claims against a Tribal official must show that the Tribal official ‘may fairly be said to be a state actor.’ Id. This requirement is satisfied where, for example, Tribal officials acted ‘in concert with officers of the state’ or acted as enforcers of state or local authority. Id. at 1348. Similarly, a Tribal official does not act under color of federal law for the purposes of an action under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal-defendant equivalent to § 1983, unless there is ‘some interdependence between the federal government’ and the Tribal official; in other words, unless there is a ‘symbiotic relationship’ between federal and Tribal officers. *Bressi v. Ford*, 565 F.3d 891, 898 (9th Cir. 2009). … The allegations in plaintiff’s Complaint do not give rise to a reasonable inference that any defendant acted in concert with state or federal officials.”

In *Duggan v. Martorello*, 2022 WL 952187 (D. Mass. 2022), Duggan and others sought to bring a class action lawsuit against Martorello and his company, Eventide Credit Acquisitions, LLC (Eventide), contending that the defendants violated Massachusetts usury laws by offering **high-interest loans over the internet** purportedly made by the Lac Vieux Desert Chippewa tribe and its lending arm, Big Picture Loans, LLC, under tribal law. After the plaintiffs settled with the Tribe and Big Picture, Martello moved to dismiss on the ground that the tribal entities were necessary parties under Fed. R. Civ. Proc. 19 and could not be joined because they enjoyed sovereign immunity. Martello contended that proceeding in the absence of the tribal entities could prejudice their interests by undermining the legal basis for their internet lending activities. The district court denied the motion: “As presently plead, it does not appear that a judgment in Duggan’s favor on her declaratory judgment claim would necessarily prohibit Big Picture Loans or the other Tribal Entities from carrying out their lending activities or collecting on their existing loans. The issue presented is whether such activities can be carried out by Martorello and Eventide, and whether these defendants can make use of the protections afforded to the Tribe under the Loan Agreements. … The defendants also … contend that the Tribe’s economic interest in the continued operations of Big Picture Loans’ lending operations, and the interest in avoiding a judgment that would negatively impact its lending business, further supports its status as a necessary party in this case. ... This court finds these arguments unpersuasive. The Tribal Entities’ decision to settle Duggan’s claims against them, instead of remaining in the case and defending those claims on the grounds of sovereign immunity, defeats the defendants’ argument that litigating without them will impair or impede those parties’ interests.” See also, *Duggan v. Martorello*, 2022 WL 952183 (D. Mass. 2022) (denying motion to dismiss for lack of personal jurisdiction.)

In *Nicholson v. Stitt*, 2022 WL 1151153 (Okla. 2022), plaintiffs, citizens of the Cherokee Nation of Oklahoma, had paid fines and fees in connection with criminal cases brought against them by the State of Oklahoma for offense committed within was thought, at the time of their convictions, to be the former Muscogee Creek Indian reservation. After the U.S. Supreme Court held in ***McGirt v. Oklahoma*** that the Creek reservation had never been disestablished, as previously supposed, the plaintiffs sued to recover fines and fees that they had paid to the state and municipal

governments. The district court dismissed their claims and the Oklahoma Supreme Court affirmed: "Plaintiffs' claims for money had and received are premised on the belief their state and municipal court convictions and sentences are void. … Plaintiffs must prove their convictions and sentences have been overturned to recover on their claim for money had and received. Plaintiffs' claims clearly bear a relationship to their convictions and sentences. The assertions made by Plaintiffs in their petition, their briefs responding to the State and Municipalities' motions to dismiss, and at the hearing indicate their convictions have not been vacated. … An action for money had and received arises when one has received money which in equity and good conscience should be paid to another. …Plaintiffs have not pleaded facts sufficient to support a cause of action for money had and received. Because Plaintiffs' convictions and sentences have not been invalidated, they cannot demonstrate that the money received by the State and Municipalities in equity and good conscience should be paid to them."

In *Association of Village Council Presidents Regional Housing Authority v. Mael*, 2022 WL 1123082 (Alaska 2022), a regional Alaska Native Housing Authority ran a HUD-financed housing program. The Authority entered into a "**mutual help and occupancy agreement**" (Agreement) with the Maels, a rent-to-own arrangement that permitted the Maels to own their home after making payments for an agreed-upon period of years. The home was eligible for conveyance to the Maels in 2009 but the Authority did not convey it to the Maels. The Authority continued to charge an annual administrative fee but discontinued inspecting the home's boiler after 2009. When the boiler exploded in January 2016, injuring the Mael's adult son, Diedrich, he sued for breach of contract and negligence. After Diedrich dropped his breach of contract claim, a jury found the Authority negligent and awarded him a total of $3,252,000 in economic and non-economic damages. The Authority moved for judgment notwithstanding the verdict on the ground that Diedrich could not legally convert a contract claim into a tort claim. The trial court denied the motion and the Alaska Supreme Court affirmed: "[W]e agree with the superior court's conclusion that, as a matter of law, both the contract and the federal regulations created a duty to inspect that was in effect at the time of the explosion."

In *Irv's Boomin' Fireworks, LLC, v. Muhar*, 2022 WL 1132053, Not Reported (Minn. App. 2022), Irving Seelye (Seelye), an enrolled member of the Leech Lake Band of Ojibwe (the Band), operated Irv's Boomin' Fireworks, LLC, located within the Band's reservation. The Band granted Seelye a tribal permit to sell explosive fireworks on the reservation but Muhar, the county attorney, sought to enforce a ban on such fireworks under state law anyway. Irv's sued to enjoin the enforcement, arguing that the sales fell within an exception under the state statute for sales of explosive fireworks "out of the state" and that selling fireworks within the Band's reservation to people who took the explosive fireworks off the reservation constituted selling "out of the state" under the statute. The trial court disagreed and denied Irv's motion and dismissed the action. The Minnesota Court of Appeals affirmed: "We agree with the district court that the only logical meaning of the term 'the state' in the statute is 'the State of Minnesota.' The definition of 'state' that appellants urge us to use, found in Minnesota Statutes section 645.44, defines 'state,' not 'the state.' Section 645.44 defines 'state' to include the District of Columbia and the several territories. The statute specifically notes that this definition of 'state' should be used 'when applied to a part of the United States.' … Thus, if we were to adopt appellants' interpretation of 'out of the state,' the statutory exception would allow the 'sale of any kind of fireworks for shipment directly out of [the District of Columbia and the several territories].' In other words, reading criminal statute section 624.21 this way would unlawfully expand Minnesota's criminal jurisdiction to territories outside the state. Such a broad reading of the statute leads to absurd and unreasonable results, as the district court correctly found. And it contradicts Supreme Court caselaw that 'an Indian reservation is considered part of the territory of the State.' Nevada v. Hicks, 533 U.S. 353, 361-62 (2001). Thus, because there is only one reasonable interpretation of the statute, the statute is not ambiguous."

In *A+ Government Solutions, LLC v. Comptroller of Maryland*, 2022 WL 964880 (Md. Ct. Spec. App. 2022), the Chickasaw Tribe had formed Chickasaw Nation Industries, Inc. (CNI) in 1996 under the provision of the Oklahoma Indian Welfare Act (OIWA) corresponding to **section 17 of the Indian Reorganization Act** of 1934. CNI owned CNI Government, LLC which, in turn, owned six limited liability companies (CNI Subsidiaries), all treated as disregarded entities for income tax purposes. The CNI Subsidiaries derived substantially all of their income from the performance of various services contracts with the federal government. In 2014, the Maryland Comptroller of the Treasury issued notices of tax assessment against each of the CNI Subsidiaries for tax year 2012 after determining that they were required to pay pass-through entity income tax ("PTE income tax"). The Maryland Tax Court and the Circuit Court for

Anne Arundel County both affirmed the Comptroller's assessment of PTE income tax. The Maryland Court of Special Appeals reversed: "We hold that the Tax Court erred in its determination that the CNI Subsidiaries are subject to PTE income tax. … the PTE income tax is not imposed on the pass-through entity itself (here, the CNI Subsidiaries and CNI Government)—rather, it is treated as a tax imposed on the nonresident owner of the pass-through entity (here, CNI) that is paid on behalf of the nonresidents … by the pass-through entity. Accordingly, the Comptroller's ability to collect PTE income tax from the CNI Subsidiaries depends on whether CNI's income is taxable under Maryland law. And because we use the federal calculation of taxable income as the base for PTE income tax, whether CNI is subject to Maryland income tax depends on whether any of its income is taxable at the federal level. … Under 26 C.F.R. § 301.7701-1(a)(3), section 17 corporations like CNI "are not recognized as separate entities for federal tax purposes," and the corporations therefore receive the same federal tax treatment as the tribes that own them. … Native American tribes are not subject to federal income tax; consequently, neither are federally chartered tribal corporations like CNI. … Thus, because none of CNI's income is taxable under federal law, and Maryland has elected to rely on the federal calculation of taxable income, we hold that none of CNI's income is taxable under Maryland law, regardless of whether that tax is assessed directly or if it is assessed via CNI Government and the CNI Subsidiaries as pass-through entities."

In *State v. On-Auk-Mor Trade Center, LLC*, Not Reported in Pac. Rptr. 2022 WL 1256617 (Ariz. App. 2022), the Montiel Family Trust formed On-Auk-Mor Trade Center, LLC (OAM) as a limited liability company ("LLC") under Arizona law. OAM's sole member was the Montiel Family Trust, and David Montiel, the sole trustee of the Trust and manager of OAM, was an enrolled member of the Salt River Pima-Maricopa Indian Community (Community) residing on the Community's reservation (Reservation). OAM was licensed by the Community to do business on the Reservation and, in fact, operated solely within the reservation. After a former employee applied for unemployment benefits, the Arizona Department of Economic Security's E.S.A. Tax Unit (Department) investigated and determined that OAM was an employer under A.R.S. § 23-613 and was liable for *unemployment insurance taxes*. OAM appealed the Department's determination, arguing it was not subject to Arizona's unemployment insurance tax because OAM is located on the Reservation and owned by a member of the Community. The Department affirmed its decision and the Arizona Court of Appeals affirmed: "Although Montiel is the sole manager of OAM, OAM is treated as a separate entity from Montiel for purposes of Arizona's unemployment insurance tax. Accordingly, the legal incidence of the tax falls on OAM as an Arizona LLC, not on Montiel as its sole manager. … According to the Community's constitution, only natural persons are considered enrolled members of the Community. Salt River Pima-Maricopa Indian Cmty. Const. art. II, § 1. Thus, as an LLC, OAM cannot be an enrolled member of the Community. Because the tax incidence falls on OAM as a non-member of the Community, Chickasaw does not categorically bar the state from enforcing the tax. … To the extent that Bracker applies here, OAM has waived any argument regarding it. We lack an evidentiary basis to remand on this issue because OAM did not raise any arguments regarding the state, federal, or tribal interests in the tax court, despite the Department's motion practice on the issue, and did not discuss the balance of interests until its reply brief on appeal. … Because OAM is an LLC organized under Arizona law, is taxed as a corporation for unemployment insurance tax purposes, and is not an enrolled member of the Community, it is subject to Arizona's unemployment insurance tax."

In *Trenton Indian Housing Authority (TIHA) v. Poitra*, 973 N.W.2d 419 (N.D. 2022), Poitra, an enrolled member of the Turtle Mountain Band of Chippewa Indians, resided a housing unit operated by Trenton Indian Housing Authority, located within the Trenton Indian Service Area (TISA), approximately 240 miles away from the Turtle Mountain reservation. TIHA initiated eviction proceedings against Poitra in the North Dakota district court. Poitra asserted the state court lacked subject matter jurisdiction and moved to dismiss the eviction action. The court denied Poitra's motion to dismiss. The North Dakota Supreme Court affirmed, holding that the TISA was not a dependent Indian community for jurisdictional purposes and that TIHA was under no obligation to bring proceedings in the Tribal Court.

In *South Point Energy Center LLC v. Arizona Department of Revenue*, 508 P.3d 246 (Ariz. 2022), South Point Energy Center LLC held a long-term lease of tribal land on the Fort Mojave Indian Reservation for the operation of an electric power generating plant that sells electrical energy to public and private utility companies for resale and redistribution to end-users but does not supply electrical energy to the Tribe or to any person or entity located on the reservation. The Tribe did not finance the Plant's construction or contribute any operating funds. The lease, approved

by the BIA, provided that "all [i]mprovements and associated materials, supplies, and equipment" are "owned and controlled" by South Point, and that at the expiration of the lease, South Point must remove all above-ground real property improvements and personal property, excepting roads and foundations." The lease required South Point to timely pay all taxes levied by any governmental entity to prevent imposition of any liens and to hold the Tribe harmless against any liens that are imposed. Mohave County assessed ad valorem property taxes against the Plant based on valuations determined by the Arizona Department of Revenue (ADOR), under an Ariz. Const. art. 9, § 2(13), which provides: "All property in the state not exempt under the laws of the United States or under this constitution or exempt by law under the provisions of this section shall be subject to taxation to be ascertained as provided by law." ADOR assessed only the value of the Plant itself and the personal property used to operate it; ADOR did not assess the value of the underlying land. South Point sought a refund of taxes it paid from 2010 to 2018, to the extent they were based on valuations of the Plant. South Point did not challenge the tax assessments based on ownership of the Plant but argued that § 5 of the Indian Reorganization Act, 25 U.S.C. § 5108, which holds that land taken into trust for tribes "shall be exempt from State and local taxation," expressly preempts states from imposing property taxes on any real property improvements, regardless of ownership, located on land held in trust by the federal government for the benefit of Indian tribes or individual Indians. Alternatively, South Point argued that application of the *Bracker* balancing test evidenced Congress's implicit intent to preempt taxing the Plant. The Arizona Court of Appeals concluded that Section 5 of the IRA barred the tax but the State Supreme Court reversed: "In sum, § 5 preempts state and local taxes imposed on land and rights acquired by the Secretary of the Interior and titled in the name of the United States in trust for Indian tribes or individual Indians. Ownership rights in land generally include permanent improvements affixed to that land by a lessee but not if the parties agree that the lessee owns those improvements. When that lessee is a non-Indian, § 5 does not preempt a state or locality from taxing the improvements. … Here, South Point indisputably owns the Plant, and the property taxes fall solely on it and not the Tribe's land. Consequently, § 5 does not exempt the Plant from taxation, and the court of appeals erred by holding otherwise."

## June Selected Court Decisions

In the case of *In re Coughlin*, 2022 WL 1438867 (1st Cir. 2022), Section 106(a) of the Bankruptcy Code provided that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section …. " Section 101(27) of the Code, enacted as part of the Bankruptcy Reform Act of 1978, defined "governmental unit" as: "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." After Coughlin filed for relief under the Bankruptcy Code, one of his creditors, Lendgreen, a subsidiary of the Lac Du Flambeau Band of Lake Superior Chippewa Indians (Band), continued to attempt to collect amounts owed by Coughlin under a loan agreement. Coughlin filed a motion to enforce the automatic stay that normally bars collection efforts once a bankruptcy petition had been filed. The bankruptcy court denied the motion based on sovereign immunity but the First Circuit reversed, concluding that tribes are domestic governments for purposes of Section 101(27): "This case presents an important question of first impression in our circuit: whether the Bankruptcy Code abrogates tribal sovereign immunity. Two of our sister circuits have already considered the question and reached opposite conclusions. Compare *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1061 (9th Cir. 2004) (holding that the Code abrogates immunity), with *In re Greektown Holdings, LLC* 917 F.3d 451, 460-61 (6th Cir. 2019) (holding that the Code does not abrogate immunity), cert. dismissed sub nom. *Buchwald Cap. Advisors LLC v. Sault Ste. Marie Tribe*, ––– U.S. ––––, 140 S. Ct. 2638, 206 L.Ed.2d 711 (2020). Like the Ninth Circuit, we hold that the Bankruptcy Code unequivocally strips tribes of their immunity. … [W]hen Congress enacted §§ 101(27) and 106, it understood tribes to be domestic governments, and when it abrogated the sovereign immunity of domestic governments in § 106, it unmistakably abrogated the sovereign immunity of tribes."

In *Ute Indian Tribe of Uintah and Ouray Reservation v. McKee*, 32 F.4th 1003 (10th Cir. 2022), McKee, a non-Indian, owned fee land within the boundaries of the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe). The Tribe sued McKee in the Ute tribal court, alleging that McKee had been diverting the Tribe's water for years, and won. The Tribe petitioned the district court to recognize and enforce the tribal-court judgement but the district court dismissed

the case after holding that the tribal court lacked jurisdiction to enter its judgment. The Tenth Circuit affirmed the dismissal: "Plaintiff concedes that Defendant is not a member of the Tribe and that the alleged misappropriation of water occurred on non-Indian fee land. Supreme Court precedent makes clear then that Plaintiff has no jurisdiction over Defendant's activity unless one of the *Montana* exceptions applies. … Yet Plaintiff urges us to overlook that precedent and hold that as long as an Indian tribe claims an interest in a natural resource on nontribal land, it may exercise civil jurisdiction over a nonmember's use of the natural resource even if the use does not implicate one of the *Montana* factors. Thus, Plaintiff effectively invites us to create a third exception to the general rule that Indian tribes lack jurisdiction over the actions of nonmembers on nontribal land. We decline the invitation. … Plaintiff points to no case in which the Supreme Court or we have held that an Indian tribe may regulate the use of natural resources outside the tribe's territory. … Plaintiff identifies no connection between Defendant's use of the disputed water on non-Indian fee land and Defendant's agricultural leases on other lands or Defendant's farming partnership. Indeed, this water dispute would be no different even if those agreements did not exist. Without a nexus between Defendant's use of the disputed water and any of those agreements, Plaintiff cannot show that through the agreements, Defendant consented to tribal-court jurisdiction over his use of irrigation water on his non-Indian fee land. Thus, the first *Montana* exception did not provide the tribal court with jurisdiction. … Although Plaintiff argues that Defendant's use of the disputed water inflicts more than a minor injury on the Tribe, Plaintiff does not attempt to meet its burden to show that Defendant's use of the disputed water is catastrophic for tribal self-government. … Because neither *Montana* exception applies to Defendant's alleged conduct, the district court correctly determined that the tribal court lacked subject-matter jurisdiction over the parties' water dispute."

In *Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross*, 32 F.4th 548 (6th Cir. 2022), the Saginaw Chippewa Indian Tribe of Michigan (Tribe) sued Blue Cross/Blue Shield (BCBS), administrator of the Tribe's self-funded health insurance policy for tribe members and self-funded plan for tribal employees, alleging that BCBS breached its fiduciary duty pursuant to Employee Retirement Income Security Act (ERISA) by paying excess claim amounts to Medicare-participating hospitals for services authorized by the Tribe, that administrator violated Michigan Health Care False Claims Act (HCFCA) by not seeking Medicare-like rates for eligible claims under the member plan, and that administrator breached its common law fiduciary duty under member plan by not seeking Medicare-like rates for eligible claims. The district court granted the defendant summary judgment but the Sixth Circuit reversed, holding that "carrying out," understood within context of regulation requiring Medicare-participating hospitals to accept Medicare-like rates as payment in full for care authorized by tribe carrying out contract health services (CHS) program of Indian Health Service (IHS), meant That the Tribe *authorized* the care in furtherance of its CHS program, not that the Tribe's CHS program provided money for the services.

In *Unite Here Local 30 v. Sycuan Band of the Kumeyaay Nation*, 2022 WL 1594948 (9th Cir. 2022), the State of California and the Sycuan Band of the Kumeyaay Nation Sycuan (Band) entered into a compact in 2015 (Compact) requiring the Band to adopt and maintain a Tribal Labor Relations Ordinance (TLRO), included in an appendix as a material part of the Compact, setting forth the parties' agreement about specific labor rights for casino employees, establishing procedures for organizing employees into unions and providing for arbitration as the dispute resolution procedure for all issues arising under the TLRO. Unite Here Local 30 sued the Band to compel arbitration over an alleged violation of the union's contract with the Nation. The district court granted the motion to compel, rejecting the Nation's argument that the contract was preempted by the National Labor Relations Act (NLRA), and the Ninth Circuit affirmed: "Sycuan admits that it waived immunity for disputes arising under the TLRO. Sycuan denies, however, waiving **sovereign immunity** with respect to the issue of NLRA preemption because such a waiver was not clear and unequivocal. … Here, there was an express waiver of tribal sovereign immunity as Sycuan agreed in Section 13(e) of the Compact's TLRO to waive its immunity from suit for the purpose of compelling arbitration. Further, when a tribe agrees to judicial enforcement of an arbitration agreement it waives its immunity concerning that agreement. … Sycuan cites no law supporting its argument that the arbitration agreement must expressly list all issues to which the Tribe waives sovereign immunity. There is no sovereign immunity to arbitration because a party is only obligated to arbitrate when that party agreed to arbitrate, as Sycuan did here."

In *Consumer Financial Protection Bureau v. CashCall*, 2022 WL 1614930 (9th Cir. 2022), CashCall, Inc. made unsecured, **high-interest** loans to consumers throughout the country over the internet through an entity operating on an Indian reservation, under loan agreements purporting to subject non-Indians residing outside of Indian country to tribal law, thus avoiding state law restrictions on interest rates. The Consumer Financial Protection Bureau (CFPB) sued CashCall, its CEO, and several affiliated companies, alleging that the scheme was an "unfair, deceptive, or abusive act or practice," 12 U.S.C. § 5536(a)(1)(B), because CashCall demanded payment from consumers under the pretense that the loans were legally enforceable obligations, when in fact they were invalid under state law. The CFPB sought penalties and a restitution award of approximately $235.6 million, reflecting the total interest and fees on the void loans. The district court found the defendants liable and imposed a civil penalty of $10.3 million, but the court declined to order restitution. The CFPB appealed, arguing that the civil penalty should have been larger and that the district court should have ordered restitution. CashCall cross-appealed the finding of liability. The Ninth Circuit affirmed the district court's finding of liability but vacated its penalty determination and remanded for further consideration whether to grant restitution: "Because the Tribe had no substantial relationship to the transactions, and because there is no other reasonable basis for the parties' choice of tribal law, the district court correctly declined to give effect to the choice-of-law provision in the loan agreements. Instead, the court applied the law of the jurisdiction with the most significant relationship to the transaction and the parties, which it found to be the borrowers' home States. … CashCall led borrowers to believe that they had an obligation to pay, when in fact under their States' laws they did not. That is the deceptive act pursued by the Bureau, and it falls within the prohibition of the statute. … We conclude that from September 2013 on, the danger that CashCall's conduct violated the statute was so obvious that CashCall must have been aware of it. … The district court's contrary conclusion was clearly erroneous. We therefore vacate the civil penalty and remand with instructions that the district court reassess it, with the penalty for the period beginning in September 2013 being based on tier two." (Internal quotations and emendations omitted.)

In *Red Cloud v. United States*, 158 Fed.Cl. 500 (Fed. Cl. 2022), members of the Oglala Sioux Tribe sued the federal government in the Court of Federal Claims seeking compensation under the "Bad Men" clause of the Tribe's 1868 treaty with the United States, 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 ... proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained." The plaintiffs sought damages for sexual abuse perpetrated on tribal children by a doctor employed by the Indian Health Service. The Court dismissed, holding that (1) the cause of action accrued when the doctor committed the acts of sexual abuse; [2] plaintiffs failed to demonstrate that the wrongfulness of the acts of sexual abuse committed against them was inherently unknowable, as required for accrual suspension rule to apply; [3] plaintiffs failed to demonstrate that the government concealed the acts of sexual abuse committed against them, as required to apply accrual suspension rule on grounds of concealment; [4] plaintiffs satisfied minimal exhaustion requirements for bringing an action under "bad men" provision of 1868 Treaty; [5] the legal disability of infancy exception did not apply to stop accrual of the limitations period; and [6] allegations in the complaint were insufficient to state claims against the Indian Health System (IHS) officials.

In *Rosebud Sioux Tribe v. Barnett*, 2022 WL 1689393 (D. S.D. 2022), the Rosebud Sioux Tribe sued officials of the State of South Dakota alleging violations of the **National Voter Registration Act (NVRA)**. The district court granted the Tribe's motion for injunctive relief, holding that several of the State's voter registration imposed burden not permitted under the NVRA.

In *Fort Defiance Indian Hospital v. Becerra*, 2022 WL 1690040 (D. N.M. 2022), Fort Defiance Indian Hospital Board, Inc. (Fort Defiance) was a 501(c)(3) nonprofit healthcare organization, chartered by the Navajo Nation (Nation), that owned and operated a hospital campus in Fort Defiance, Arizona, on the Arizona/New Mexico border, and a health clinic in Sanders, Arizona. In 2009, the Nation approved Fort Defiance as a "tribal organization" for purposes of the Indian Self-Determination and Education Assistance Act (ISDEAA) and Fort Defiance began providing healthcare services to members of the Navajo Nation pursuant to a contract with Indian Health Service (IHS) under Title I of the **Indian Self-Determination and Education Assistance Act (ISDEAA)** in 2010 under formula-based annual funding agreements (AFA) providing for reimbursement of Fort Defiance's direct and indirect costs. In 2021, the Navajo Nation's Health, Education and Human Service Committee (HEHSC) had approved a resolution that Fort Defiance

be designated as a Tribal organization for a period of fifteen years. Fort Defiance then submitted an AFA renewal proposal based on previous AFAs, which the IHS partially declined based on its determination that certain of the indirect costs claimed were duplicative. Fort Defiance sued. The district court granted Fort Defiance's motion for a preliminary injunction ordering IHS to fully fund Fort Defiance in accordance with the parties' renewal contract: "IHS must comply with Fort Defiance's proposed FY 2022 self-determination renewal contract and its accompanying AFA by reimbursing Fort Defiance an additional $16,627,268.00, prorated monthly, for contract support costs for all of FY 2022, and, if necessary, $18,515,007.00, prorated monthly, for FY 2023 and beyond, until this case can be resolved on the merits."

In *Seneca v. Great Lakes Inter-Tribal Council*, 2022 WL 1618758 (W.D. Wis. 2022), Great Lakes Inter-Tribal Council, Inc. (GLITC), a 501(c)(3) nonprofit formed under Wisconsin law as a consortium of eleven Wisconsin and one Michigan tribe for the purpose of carrying out programs jointly benefiting the member tribes, terminated Seneca from his position as Director of Epidemiology. Seneca sued, claiming his termination violated Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), the Age Discrimination in Employment Act of 1967 (ADEA), and the Genetic Information Nondiscrimination Act of 2008 (GINA). The district court dismissed on the ground or tribal **sovereign immunity**: "Given that GLITC is composed of and operated solely by federally recognized tribes and its members, with its sole purpose being to support its member tribes through service and assistance, there appears little question that this entity is entitled to assert sovereign immunity as an arm of those tribes."

In *Mestek v. Lac Courte Oreilles Band*, 2022 WL 1568881 (W.D. Wis. 2022), the Lac Courte Oreilles Community Health Center (LCO-CHC) terminated Mestek's employment as health information director. She sued tribal officials and employees, as well as employees of a consulting firm the LCO-CHC had retained, alleging claims under the federal False Claims Act (FCA), 31 U.S.C. § 3730(h), and Wisconsin common law. The district court dismissed based on **sovereign immunity**: "To determine whether the Tribe or its arm, the LCO-CHC, is the true party in interest, … courts must look for the party against whom the judgment would operate and on whom its burden would fall. … Here, defendants argue that plaintiff's requested relief is actually against the LCO-CHC, not the individual defendants. … Specifically, plaintiff Mestek's amended complaint requests front pay, back pay, damages, reinstatement, and injunctive relief prohibiting defendants from blacklisting or retaliating against her. Besides other unspecified damages, therefore, Mestek is seeking relief that would have to come from LCO-CHC, putting the burden of any judgment on the Tribe's health center and suggesting it is the true party at interest. … The allegations in plaintiff's amended complaint also make plain that her claims for relief from the individual defendants are all essentially claims against LCO-CHC, as she consistently refers to the individual defendants granting relief in their official capacities. … These allegations readily distinguish Mestek's claims for relief from *Lewis*, which The Supreme Court explained was 'simply a suit against Clarke to recover for his personal actions,' and 'will not require action by the sovereign or disturb the sovereign's property.'" … Finally, plaintiff herself makes no argument on the matter of sovereign immunity for individual employees, giving defendants the sole word on this issue. This is hardly surprising since not only is the relief sought against all of the individual employees of LCO-CHC sought in their capacity as employees of an arm of the Tribe, but all of their alleged actions also fall easily within the scope of their employment. Given the unambiguous pleadings in the amended complaint, the relevant caselaw and the briefing provided by the parties, Mestek may have formalistically sued Taylor, Bae, Starr, Klecan, and Franz in both their individual and official capacities, but her claims and requested relief establish that the real party in interest is LCO-CHC, an arm of the Tribe. Thus, defendants Taylor, Bae, Starr, Klecan, and Franz are entitled to assert the LCO-CHC's sovereign immunity." (Quotations, citations and internal emendation omitted.)

In *Berry v. United States*, 2022 WL 1563663 (Fed. Cl. 2022), Berry owned land adjacent to a parcel that the United States took into trust for the Cherokee Nation for gaming purposes in 2017. Berry sued the government in the Court of Federal Claims, asserting that certain adverse effects on her property constituted an uncompensated taking in violation of the Fifth Amendment. The Court dismissed the claim: "Plaintiff's Amended Complaint must be dismissed because it fails to plausibly allege a takings claim. As Defendant correctly argues, Plaintiff's allegations against the United States are founded on its alleged failure to prevent a third party (the Nation) from causing harm to Plaintiff's property, which is insufficient to constitute a taking. Nor does Plaintiff plead an actionable claim (either under a takings theory or otherwise) for Defendant's alleged breach of fiduciary duty."

In *Nygaard v. Taylor*, 2022 WL 1487455 (D.S.D. 2022), Nygaard and Stanley were fathers of children born several years apart to Tricia Taylor, an enrolled member of the Cheyenne River Sioux Tribe (Tribe). Nygaard and Stanley initiated custody proceedings in the North Dakota court of Tricia's residence in March and July of 2014, respectively. Pending resolution, Tricia was forbidden from removing the children. She nevertheless took the children to the Cheyenne River Sioux reservation and initiated proceedings in the Cheyenne River Sioux Tribal Court which, over a seven-year period, including three trips to the Tribal Court of Appeals, declined to credit state court orders finding Tricia in contempt and awarding custody to the fathers. Under tribal court orders, the children were placed with Tricia's sister while Tricia served jail time for parental kidnapping. In 2019, the fathers filed a petition for writ of habeas corpus under the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1303, against the Cheyenne River Sioux Tribal Court and Appellate Court and numerous judicial officers (Tribal Defendants) in their official capacities, arguing that they were obligated by the **Parental Kidnapping Prevention Act (PKPA)** to give full faith and credit to the state court custody judgments. The district court granted the Tribal Defendants' motion for summary judgment, holding that the PKPA did not apply to tribes: "The PKPA applies to 'states,' which it defines as: 'a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.' 28 U.S.C. § 1738A(b)(8). There is no mention of Indian Tribes anywhere in the PKPA, and no evidence in the PKPA's legislative history that Congress considered whether the statute would apply to tribes and tribal courts. … When reviewing the PKPA alongside of other contemporary full faith and credit statutes, it appears that Congress views a 'territory or possession of the United States' as distinct from an Indian tribe. While it might have better served Congress's purposes to extend the PKPA to tribes, Congress did not write a definition of 'state' in the PKPA broadly enough to apply to Indian Tribes."

In *Rowbotham v. Nunn*, 2022 WL 1523195 (N.D. Okla. 2022), Rowbotham, an Indian, filed a petition for habeas corpus relief on the ground that his state court conviction many years earlier was invalid under the Supreme Court's McGirt decision holding that the Cherokee reservation, where he committed his offense, had never been disestablished. The district court denied the petition for failure to file within the one-year statute of limitations prescribed by federal statute. The court rejected Rowbotham's argument that the statute should be tolled for equitable reasons: "Equitable tolling is available only when extraordinary circumstances prevented an individual prisoner exercising reasonable diligence from filing a timely federal habeas petition. … Even accepting that McGirt significantly altered the understanding of the allocation of criminal jurisdiction in Oklahoma, applying equitable tolling in this situation would effectively turn the doctrine of equitable tolling into a judicially-created equitable exception to § 2244(d)(1)'s one-year statute of limitations for all Oklahoma prisoners who were purportedly tried by a state court that lacked criminal jurisdiction. This would be contrary to the well-established principle that equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs. … Even applying the rule of liberal construction, the Court does not discern any argument from Rowbotham suggesting he is actually innocent. Rather, his arguments assert that he was wrongly prosecuted in state court because Oklahoma lacked criminal jurisdiction over the crime he committed in Indian country. Equity does not warrant tolling of the one-year limitation period so that Rowbotham can assert that claim decades after his conviction." (Quotations, citations and internal emendations omitted.)

In *Tasso v. Lucky Star Casino*, 2022 WL 1576863 (Okla. Civ. App. 2022), Tasso injured his knee while employed by Lucky Star Casino, which is owned by the Cheyenne and Arapaho Tribes. The Oklahoma Worker's Compensation Commission (WCC) dismissed his claim for compensation against the casino and its insurer, Amerind, a nonprofit, inter-tribal corporation chartered under Section 17 of the Indian Reorganization Act, for lack of jurisdiction based on **sovereign immunity**, rejecting Tasso's argument that he could bring his claim against the casino's third party administrator. The Oklahoma Civil Appeals Court affirmed: "We agree with the WCC that AMERIND, as a federally chartered corporation, or a Section 17 corporation, is also entitled to sovereign immunity… That leads us to whether Claimant may proceed against Berkley in the absence of any jurisdiction over Employer or Insurer. … Claimant has not provided any legal authority to hold a third-party administrator directly responsible for the duties AWCA places on employers and insurance carriers. In short, Claimant has cited no authority to support his claim that he can proceed directly on his workers' compensation claim against Berkley alone as merely the administrator."