Published on *The National Law Review* https://natlawreview.com

Indian Nations Law Update - August 2018

Article By:

Brian L. Pierson

Wisconsin Indian Law Section Annual Conference in Milwaukee Sept. 6-7

The Indian Law Section of the State Bar of Wisconsin holds its annual Indian Law conference Sept. 6-7 at Potawatomi Hotel and Casino in Milwaukee. The event is scheduled to coincide with Indian Summer, an annual celebration of Indian culture held on Milwaukee's lakefront festival grounds, which commences Friday afternoon, Sept. 7 and runs through Sunday.

This year's CLE conference will include presentations on a wide range of interesting topics, including:

- Legislation update
- Case law update
- The *United States v. Washington* treaty rights decision and its impact across Indian country
- Tribal opportunities for developing renewable energy
- The *Upper Skagit* decision and other recent developments in tribal sovereign immunity
- Indian tax law update
- Indian Child Welfare Act update
- The opioid epidemic in Indian country
- CBD ventures in Wisconsin Indian country
- Tribal economic development
- Ethics Panel: tribal elections

Selected Court Decisions

In *Navajo Nation v. Dalley*, 2018 WL 3543643 (10th Cir. 2018), the Navajo Nation and its wholly owned government enterprise, the Northern Edge Navajo Casino (together, the Tribe or Nation), had entered into a state-tribal gaming compact with New Mexico under the **Indian Gaming Regulatory Act** (IGRA) that included the Tribe's agreement to waive its sovereign immunity for personal-injury lawsuits brought by visitors to its on-reservation gaming facilities and to permit state courts to take jurisdiction over such claims. A married couple, the McNeals, sued the Tribe in state court after Mr. McNeal allegedly slipped on a wet floor in the Northern Edge Navajo Casino. The Tribe sued in federal court to enjoin the state court judge, Dalley, from exercising jurisdiction, arguing that the state court lacked jurisdiction because neither IGRA nor Navajo law permitted the shifting of jurisdiction to a state court over personal-injury claims. The district court granted Dalley summary judgment, but the Tenth Circuit reversed, holding that (1) "federal courts generally have jurisdiction to enjoin the exercise of state regulatory authority (which includes judicial action) contrary to federal law," and (2) Congress did not, through enactment of the IGRA, authorize tribes to shift tort jurisdiction: "the Court's analysis in *Bay Mills* leads us to the clear conclusion that Class III gaming activity relates only to activities actually involved in the *playing* of the game and not activities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike…. It necessarily follows that the allocation of civil jurisdiction referenced in clause (ii) pertains solely to the allocation that is 'necessary for the enforcement of the laws and regulations,' § 2710(d)(3)(C)(ii), that are 'directly related to, and necessary for, the licensing and regulation of' the playing of Class III games, § 2710(d)(3)(C)(i)—and not for the enforcement of laws and regulations pertaining to such tangential matters as the safety of walking surfaces in Class III casino restrooms. Put another way, because tort law in the circumstances here does not directly relate to the licensing and regulation of gambling itself, clause (ii)—which depends upon clause (i) to define the scope of its allocation of civil jurisdiction—does not authorize tribes to agree in gaming compacts to shift (i.e., allocate) jurisdiction to state courts over tort claims like those here."

In *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 2018 WL 3490073 (D.C. Cir. 2018), the Oglala Sioux Tribe sued the Nuclear Regulatory Commission (NRC), challenging the NRC's decision to leave in place a license for a uranium mining project in the Black Hills of South Dakota, despite its explicit finding that there were significant deficiencies in its compliance with the **National Environmental Policy Act** (NEPA). The NRC determined that the Tribe had failed to show that noncompliance with the Act would cause irreparable harm. The D.C. Circuit reversed and remanded: "[T]he Commission was following what appears to be the agency's settled practice to require such a showing. The National Environmental Policy Act, however, obligates every federal agency to prepare an adequate environmental impact statement *before* taking any major action, which includes issuing a uranium mining license. The statute does not permit an agency to act first and comply later. Nor does it permit an agency to condition performance of its obligation on a showing of irreparable harm. … In fact, such a policy puts the Tribe in a classic Catch-22. In order to require the agency to complete an adequate survey of the project site before granting a license, the Tribe must show that construction at the site would cause irreparable harm to cultural or historical resources. But without an adequate survey of the cultural and historical resources at the site, such a showing may well be impossible. Of course, if the project does go forward and such resources are damaged, the Tribe will then be able to show irreparable harm. By then, however, it will be too late."

In *Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals, Inc*., 2018 WL 3484448 (Fed. Cir. 2018), Allergan, Inc. who owned a patent for a dry eye drug known as "Restasis," had assigned the patents to the Saint Regis Mohawk Tribe. Mylan, a drug maker hoping to manufacture a generic version of Restasis, petitioned for inter parties review (IPR) of Allergan's patents in the Patent and Trademark Appeals Board (PTAB). Allergan assigned the patent to the Saint Regis Mohawk Tribe and the Tribe asserted **sovereign immunity** as a defense and moved to dismiss the IPR proceedings. The PTAB

denied the motion and the Court of Appeals for the Federal Circuit affirmed, holding that the IPR proceedings were essentially a process under which the U.S. Patent and Trademark Office was re-examining its previous decision to grant the patent and the Tribe could not, therefore, assert immunity against the United States: "Generally, immunity does not apply where the federal government acting through an agency engages in an investigative action or pursues an adjudicatory agency action. … IPR is simply a reconsideration of the PTO's original grant of a public franchise, which serves to protect the public's paramount interest in seeing that patent monopolies are kept within their legitimate scope. … [A]lthough the Director's discretion in how he conducts IPR is significantly constrained, he possesses broad discretion in deciding whether to institute review. … Although this is only one decision, it embraces the entirety of the proceeding. If the Director decides to institute, review occurs. If the Director decides not to institute, for whatever reason, there is no review. In making this decision, the Director has complete discretion." (Internal quotations and citations omitted.)

In *Ho-Chunk, Inc. v. Sessions*, 2018 WL 3233699 (D.C. Cir. 2018), Ho-Chunk, Inc. (HCI), a business arm of the Winnebago Tribe and three of its subsidiaries, Rock River, HCI Distribution and Woodlands, sued the United States Attorney General seeking a declaration judgment that they were not subject

to the **Contraband Cigarettes Trafficking Act's** (CCTA) recordkeeping requirements because the statute and the regulations do not cover wholly owned corporations of a federally recognized Indian tribe. The United States District Court for the District of Columbia granted summary judgment in the government's favor and the corporations appealed. The D.C. Circuit affirmed, holding that (1) CCTA's recordkeeping requirements applied to tribal corporations, and (2) tribal corporations were "persons" subject to CCTA's recordkeeping requirements: "[T]he Act's recordkeeping requirements do not turn on any territorial determination. … That these three corporations have their principal place of business on the Tribe's reservation in Nebraska says nothing about whether federal law requires them to keep records. More than that, if the corporations were correct that the Act's regulation of contraband cigarettes does not apply to sales to non-Indians in Indian country, this would not only be senseless but would also contravene decades of settled law upholding enforcement of the Act against individuals and entities operating on reservations. … Neither the Act nor the implementing regulations contain any language exempting tribal entities operating on Indian reservations from the federal recordkeeping requirements. 'Ordinarily, ... an Indian reservation is considered part of the territory of the State.' … The corporate appellants conceded as much at oral argument. … The corporations' main argument is that § 2343(a)—the recordkeeping provision—applies only to '[a]ny person' and they are not 'persons.' They are not 'persons,' they argue, because they are 'tribal instrumentalities,' which assumes that a tribal instrumentality—and for that matter, a tribe itself—cannot be a 'person.' Both assumptions are mistaken."

In *Gibbs v. Plain Green*, LLC, 2018 WL 3614969 (E.D. Va. 2018), Plain Green, LLC, a wholly owned company of the Chippewa Cree Tribe and Great Plains, LLC (Great Plains), a wholly owned company of the Otoe-Missouria Tribe in Oklahoma, made consumer loans over the internet. Plaintiffs, borrowers residing in Virginia, sued Plain Green, Great Plains and associate companies and individuals, on behalf of themselves and all others similarly situated, alleging that Defendants' lending enterprises violated state and federal lending laws. Great Plains moved to stay pending a determination by the Judicial Panel on Multidistrict Litigation (JPML) to consolidate cases against it. The court denied Great Plains' motion to stay proceedings and granted the plaintiffs' motion for discovery to determine whether the defendant entities were "arms" of their tribal owners eligible to share in their sovereign immunity: "Although defendants agree that the *Breakthrough* factors apply, they nevertheless argue that granting Plaintiffs' motion to permit jurisdictional discovery would undermine the principles of **sovereign immunity**. Defendants' reliance on a few cases for this

proposition is misplaced: unlike the defendants in those cases, defendants' sovereignty as arms of the tribes is seriously contested here. … Plain Green and in the case at bar, Great Plains is only entitled to tribal immunity if it is an 'arm of the tribe.' The method of analyzing that question cannot impose a judicial restraint on 'immunity' when the existence of immunity is conditioned on the outcome of that analysis in the first instance." (Quotations, citations and emendations omitted.).

In *Williams v. Big Picture Loans*, 2018 WL 3615988 (E.D. Va. 2018), the Lac Vieux Desert Band of Lake Superior Chippewa Indians (Tribe) had formed Red Rock Tribal Lending LLC in 2011 to engage in consumer lending. The Tribe established Big Picture Loans, LLC under tribal law in 2014 to serve as an independent tribal lender of consumer loans. In 2015, the Tribe formed Tribal Economic Development Holdings, LLC (TED) to operate the Tribe's current and future lending companies. The Tribe created Ascension Technologies, Inc. as a subsidiary of TED "for the purpose of engaging in marketing, technological and vendor services" to support the Tribe's lending entities. Big Picture offered loans to residents of Virginia pursuant to loan agreements providing for tribal law to apply to disputes and disputes to be resolved under a tribal dispute resolution procedure. Williams and other borrowers sued the tribal entities and two non-Indian individuals, Gravel and Martorello, who allegedly formulated the business model with the Tribe, in federal court seeking a declaratory judgment against all defendants that the choice-of-law and forum-selection provisions in all loan agreements made by Big Picture or Red Rock to Virginia residents are void and unenforceable and alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO); violations of Virginia Usury Laws, against Big Picture, Ascension and Gravel and Martorello; and claims for unjust enrichment, against Big Picture, Ascension and Gravel and Martorello. Big Picture and Ascension moved to dismiss on the ground that, as instrumentalities of the Tribe, they shared its **sovereign immunity**. Applying the multi-factor tests formulated by the Tenth Circuit in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort* and the California Supreme Court in *People ex rel. Owen v. Miami Nation Enters*., the court denied the motion, concluding that neither entity was an arm of the Tribe: "Big Picture and Ascension have the burden to prove arm-of-the-tribe immunity by a preponderance of the evidence. That means the weighing of factors must permit a finding of immunity. On this record, that balance actually falls the other way, and weighing everything on the balance, the Court finds that neither entity qualifies as an arm of the Tribe. Therefore, Big Picture and Ascension are not immune from suit here."

In *Northern Natural Gas Company v. 80 Acres*, 2018 WL 3586527 (D. Neb. 2018), Northern Natural Gas Company, attempting to renew an **expiring right of way** across tribal and allotted lands within the Omaha Tribe's reservation, filed a federal court action to condemn an allotment whose owners had declined to consent, relying on 25 U.S.C. § 357, which provides that "[l]and allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory," but omits language authorizing condemnation of tribal trust lands. While the case was pending, one of the individual interest holders in Allotment No. 742-2 and Allotment No. 742-4, Solomon, deeded a fractional interest to the United States in trust for the Omaha Tribe and asserted that because of the Tribe's interest in those parcels of land, Northern could not condemn the Allotments. The court granted Northern partial summary judgment, confirming its right to condemn the interests of the remaining individual owners on the ground that Northern had obtained the Tribe's consent:

"[O]n December 4, 2017, Northern and the Omaha Tribe entered into a contractual agreement (i.e., the "New ROW") renewing the rights-of-way for natural gas pipelines 'traversing lands held in trust by the United States for the benefit of the Tribe within the boundaries of the Omaha Tribe's reservation ....' … A few days later, the Omaha Tribal Council approved that agreement and authorized the renewal of Northern's pipelines. … And on December 12, the BIA approved the 'New ROW' and granted Northern a right-of-way to 'operate, inspect, maintain, and terminate natural gas

pipelines on tribal and allotted lands ... located on the Reservation of the Omaha Tribe of Nebraska.' … [W]hen the BIA renewed Northern's right-of-way across the Omaha Tribe's trust land, see 25 U.S.C. § 324, it also authorized that right-of-way to cross newly acquired trust interests deeded to the Tribe between February 8, 2018 and February 9, 2046. That means Solomon's February 23, 2018 conveyance is precisely the type of land acquisition the 'New ROW' sought to include and govern.

In *Wilhite v. Awe Kualawaache Care Center*, 2018 WL 3586539 (D. Mont. 2018), Wilhite had been employed as a registered nurse at the Awe Kualawaache Care Center, an entity owned by the Crow Tribe of Indians. When a patient at the Care Center informed Wilhite that he had been molested, Wilhite reported the conversation, first to her supervisor and later, when no action was taken, to law enforcement. As a result, Wilhite was allegedly harassed by her supervisor and terminated. She sued in federal district court, alleging solely that she was entitled to damages under the Racketeer Influenced and Corrupt Organizations Act (RICO). The Defendants filed a motion to dismiss, arguing that the **federal court lacked subject matter jurisdiction** on the grounds that the Tribe's jurisdiction over Wilhite's claim was exclusive, Wilhite was required to exhaust tribal remedies before filing her claim in federal court and tribes were exempt from RICO under the first and third *Coeur d 'Alene* exceptions. The court rejected all three arguments and denied the motion, holding that (1) the RICO statute expressly vests the federal courts with jurisdiction, (2) the Ninth Circuit's decision in *Booze v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004), mandates exhaustion of tribal court remedies only where there is a tribal court case pending when the federal action is filed, and (3) none of the *Coeur d'Alene* exceptions precluded Wilhite's RICO action against the Tribe: "Regarding the first exception, the RICO Act does not touch exclusive rights of self-governance in purely intramural matters. Organized crime that controls or affects businesses engaged in interstate commerce is, by definition, not a purely intramural matter. … Regarding the third exception, the Defendants themselves state the RICO Act's 'legislative history makes absolutely no mention of Indian tribes or any intent on Congress' part to have this statute apply to Indian tribes.; ... Contrary to the Defendants' assertions, the third *Coeur d'Alene* exception requires affirmative proof Congress did not intend to include tribes within a generally applicable statute."

In *Free v. Dellinger*, 2018 WL 3580769 (N.D. Okla. 2018), Bruner, a member of the Muscogee Creek Nation (MCN), sought to conduct gaming activities on land that he owned (Bruner Parcel) pursuant to a license issued by the Kialegee Indian Town, of which Bruner was also a member. The MCN filed an action in the MCN tribal court to enjoin gaming activities on the Bruner Parcel, naming Bruner's wife, Free, a member of the Choctaw tribe, as a defendant. MCN alleged that Free was a principal of Bruner Investments and that Free participated in casino development efforts. Free filed a motion to dismiss for lack of **jurisdiction**, but the tribal court denied the motion. Free then sued the MCN's attorney general and the tribal court judge in federal court and moved to enjoin the tribal court proceedings against her. The court denied the motion and dismissed, holding that (1) Free's suit fell within the *Ex Parte Young* exception to tribal sovereign immunity, and (2) because Free failed to make "a substantial showing that the tribal court clearly lacks jurisdiction" over her, she was required to exhaust tribal remedies before challenging the Tribe's jurisdiction in federal court.

In *Brackeen v. Zinke*, (N.D. Tex. 2018), three states, Texas, Louisiana, and Indiana (State Plaintiffs) and seven individual Plaintiffs sued officials of the U.S. Department of Interior and Department of Health and Human Services (Federal Defendants). The Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians (Tribal Defendants) were permitted to intervene. The plaintiffs challenged the constitutionality of the **Indian Child Welfare Act** (ICWA) and rules adopted by the Bureau of Indian Affairs (BIA) under the ICWA on the grounds that the ICWA and Rules;

---

1. implement a system that mandates racial and ethnic preferences, in direct violation of state and federal law,

2. violate the Tenth Amendment because the provisions violate the Commerce Clause, intrude into state domestic relations, and violate principles of anti-commandeering, and

3. violate substantive due process and the Equal Protection Clause provisions of the Fifth Amendment to the United States Constitution.

The State plaintiffs also argued that the ICWA and Final Rule violate the non-delegation doctrine. The Defendants moved to dismiss on the ground that the Plaintiffs lacked standing, but the district court disagreed and denied the Defendants' motion: "At this time, it appears the Fifth Circuit requires a party that participates in an administrative process to appeal an adverse ruling or waive its right to later challenge the decision. But if a party has not participated in the agency process, a subsequent challenge is not waived. … Accordingly, the State Plaintiffs did not waive their right to challenge the Final Rule in this case."

In *Perkins v. United States*, 2018 WL 3548597 (W.D. N.Y. 2018), Perkins, a member of the Seneca Nation, and her husband extracted and sold gravel they had removed from Seneca Territory under a lease and permit issued by the Nation. When the Internal Revenue Service claimed they owed **federal income taxes** on the proceeds of the sale, the Perkinses first filed a petition in tax court, then a refund suit in federal court, contending in both fora that the income was protected from taxation by the 1794 Treaty of Canandaigua, which provides that "the United States will never ... disturb the Seneka nation," or "their Indian friends residing thereon and united with them, in the free use and enjoyment" of the Seneca land, and the treaty of 1842, which provides that the parties to the treaty "agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians … from all taxes, and assessments for roads, highways, or any other purpose…." The district court had denied the government's motion to dismiss, holding that the 1842 treaty exemption should be interpreted to include the gravel on the property, 2017 WL 3326818 (W.D.N.Y. 2017), but the tax court disagreed and held that the gravel was subject to taxation, 150 T.C. No. 6, 2018 WL 1146343, Tax Ct. Rep. Dec. (RIA). In the instant case, the government argued that the tax court ruling on liability would collaterally estop the Perkinses from pursuing their federal court refund claim. On the parties' cross motions for summary judgment, the magistrate judge recommended that both motions be denied and that the case be tried: "Plaintiffs are entitled to an exemption from income tax for income derived from gravel extracted and sold from Seneca Nation land. The problem is, while everyone knows that gravel sales happened, no one seems to know exactly how much tax-exempt gravel income plaintiffs generated. … That some gravel sales occurred and would be tax-exempt is enough to say that plaintiffs' principal claim, and defendant's affirmative defenses including the fifth affirmative defense, must await ultimate resolution at trial."

In *Stand Up For California v. United States*, 2018 WL 3473975 (E.D. Cal. 2018), the plaintiff sued Interior Department officials to prevent Class III gaming under the **Indian Gaming Regulatory Act** from taking place on the North Fork Rancheria (Tribe), arguing that the defendants improperly took land into trust for the Tribe and the issuance of "Secretarial Procedures" in lieu of a gaming compact were improper. The court granted summary judgment to the defendants:
"[N]o court has ever found that class III gaming cannot be conducted pursuant to Secretarial Procedures for want of a Tribal-State compact. In fact, many courts recognize that Secretarial Procedures issued at the final stage of IGRA's remedial process operates as an 'alternative mechanism permitted under IGRA' for conducting class III gaming. … The Court cannot conclude

that the Secretary's decision to not conduct a conformity determination into whether emissions at the proposed gaming site exceed threshold amounts was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

In *Grindstone Indian Rancheria v. Olliff*, 2018 WL 3460207 (E.D. Cal. 2018), Grindstone Indian Rancheria sued their neighbors, the Olliffs, over a property line dispute, accusing the Olliffs of a pattern of domestic terrorism and seeking damages for willful trespass, negligent trespass, conversion, intentional infliction of emotional distress, and negligent infliction of emotional distress, and seeking for an injunction compelling the Olliffs to remove the encroachments, cease trespassing on and obstructing any property rights, and cease other intimidating behavior. The Olliffs filed an Answer and Counterclaim, asserting claims against Grindstone for trespass. On the Grindstone's motion, the court dismissed the counterclaim based on Grindstone's **sovereign immunity**: "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. [Citation omitted.] This rule applies to compulsory counterclaims.… In light of clear precedent holding that tribal sovereign immunity bars suits for damages—the relief sought here—the burden falls on the Olliffs to demonstrate that their claim is an exception to the rule. They have not done so."

In *Club One Casino, Inc. v. United States Department of the Interior*, 2018 WL 3436962 (E.D. Cal. 2018), the Assistant Secretary – Indian Affairs, Department of Interior, in 2012 had approved the acquisition of land in trust for gaming purposes for the North Fork Rancheria (North Fork). The Governor made a two-part determination under the **Indian Gaming Regulatory Act** (IGRA) consenting to the acquisition and concluded a compact with the North Fork permitting Class III gaming on the property. The California legislature ratified the compact in 2013 and the Secretary of State forwarded it to the Secretary of Interior with the notation that the effective date of the compact would be Jan. 1, 2014, unless a referendum measure qualified for the ballot. The compact was published in the Federal Register as approved to "the extent it was consistent with IGRA." On Nov. 20, 2013, the Secretary of State informed the Secretary of the Interior that a veto referendum had qualified for the ballot (Proposition 48) and that the measure would go before voters at the Nov. 3, 2014 general election. Sixty-one percent of California voters voted against the legislative ratification of the compact. When North Fork requested that the State of California enter into negotiations for a new compact, the State refused, citing the referendum. North Fork filed suit against California pursuant to 25 U.S.C. § 2710(d)(7), seeking a determination that the State of California did not negotiate in good faith toward an enforceable compact. The Court held that by refusing to negotiate, California failed to negotiate in good faith to conclude a Tribal-State compact within the meaning of 25 U.S.C. § 2710(d)(7)(B)(ii-iii) and ordered North Fork and California to conclude a compact within 60 days of the date of that order. In 2016, the Secretary of Interior issued Secretarial Procedures permitting the Tribe to conduct Class III gaming without a Tribal-State compact. In issuing those procedures, the Secretary did not make any express finding regarding whether North Fork had jurisdiction over the Madera Site or whether it was Indian land. Plaintiffs in the instant case sued under the Administrative Procedure Act, arguing that the Secretary violated IGRA when he issued Secretarial Procedures because the site was under state jurisdiction, that the Federal Government's unilateral diminishment of the state's territorial jurisdiction would violate the Tenth Amendment and that the Secretarial Procedures were not consistent with state law because no compact was in effect. The court rejected all three arguments and granted the government summary judgment.

In *Flandreau Santee Sioux Tribe v. Sattgast*, 2018 WL 3432047 (D.S.D. 2018), the Flandreau Santee Sioux Tribe hired contractors to carry out a $24 million renovation of the Tribe's Indian Gaming Regulatory Act (IGRA) Class III gaming enterprise. The State of South Dakota attempted to levy a two percent **excise tax** on the contractor's gross receipts under SDCL § 10-46A-1, arguing that the

tax was permissible because it fell on the non-Indian contractor rather than the tribe. The tribe sued in federal court for declaratory and injunctive relief. Applying the legal standards established by the Supreme Court in *White Mountain Apache v. Bracker* and related cases, the court granted the tribe summary judgment: "The State's excise tax undermines the objective of IGRA because the tax is passed from the contractor to the tribe which interferes with the tribe's ability to make a profit from gaming activities. Thus, Congress intended for IGRA to completely regulate Indian gaming and there is no room for the State's imposition of an excise tax. … [B]oth barriers to the State's exercise of authority are present here. The excise tax is pre-empted by federal law by IGRA. Also, the State's interests in imposing the excise tax do not outweigh the tribal and federal interests in promoting self-sufficiency because there is not a nexus between any services the State provides to the Tribe or the contractor and the imposition of the excise tax. Either barrier, on its own, is sufficient to find that state authority inapplicable. Bracker, 448 U.S. at 143."

In *Gwitchyaa Zhee Corporation v. Alexander*, 2018 WL 3240955 (D. Alaska 2018), Gwitchyaa Zhee Corporation (GZ Corporation) had transferred certain land in Alaska to the Gwichyaa Zhee Gwich'in Tribal Government under a Land Transfer Agreement that exempted any land GZ Corporation was required to transfer under § 14(c)(1) of the Alaski Natives Claims Settlement Act (ANCSA). Section 14(c)(1) requires village corporations that receive title to the surface estate of land formerly held by the federal government to convey title to property occupied by anyone that used the land as, among other things, a primary residence, a primary place of business, or as a subsistence campsite. In order to comply with its obligations under § 14(c)(1) of ANCSA, GZ Corporation submitted a Map of Boundaries to the federal Bureau of Land Management that identified 14(c)(1) claims in the Fort Yukon area and that created Tracts 19 and 19A.The tribe and the Corporation sued Alexander in state court for ejectment, alleging that he had convinced the surveyor to include more acreage in Alexander's § 14(c)(1) Claim than was identified on the Fort Yukon Map of Boundaries. Alexander removed to federal court. The court denied the plaintiff's motion to remand: "[H]ere, the primary issue is whether the boundaries of Tract 19A are correct. In their well-pleaded complaint, plaintiffs put the correctness of the boundaries of Tract 19A at issue, and resolution of that issue will depend on plaintiffs' compliance with the requirements for § 14(c)(1) claims, which is a substantial question of federal law."

In *State v. Peltier*, 2018 WL 3372316 (N.D. 2018), Peltier, a member of the Crow Tribe residing on the Turtle Mountain Chippewa Reservation, fathered a child with Breland, a member of the Standing Rock Sioux Tribe. The child was born within the exterior boundaries of the Turtle Mountain Chippewa Reservation. The Turtle Mountain Tribal Court had determined paternity in a 2009 proceeding in which the Court, apparently incorrectly, found Peltier to be a Turtle Mountain member. Breland received assistance from the State of North Dakota and assigned to the State her right to child support. The state sued Peltier for unpaid child support in state court. The court denied Peltier's motion to dismiss for lack of jurisdiction, holding that the **state court had jurisdiction** concurrently with the Turtle Mountain tribal court. The North Dakota Supreme Court affirmed: "Neither of the parties or the child are enrolled members of the Turtle Mountain Band of Chippewa Indians. The Defendant testifies by his affidavit that he is an enrolled member of the Crow Nation, but eligible for enrollment with the Turtle Mountain Band of Chippewa Indians. The Defendant further testifies that both mother and child are enrolled members of the Standing Rock Sioux Tribe. Thus, while conception may have occurred within the boundaries of the Turtle Mountain Indian Reservation, and the parties have lived within those same boundaries, vitally important to the Court's analysis is the fact that none of the parties are enrolled members of the Turtle Mountain Band of Chippewa Indians. … In this case, the state has commenced an action against the Defendant to obtain reimbursement for public funds expended for the child, and to ensure that the Defendant makes his child support payments. The exercise of state court jurisdiction in this matter doesn't seem to 'undermine the

authority of the tribal courts over reservation affairs and thereby infringe on the right of the Indians to govern themselves.' *Williams v. Lee*, 358 U.S. 217 [79 S.Ct. 269, 3 L.Ed.2d 251] (1959). As none of the individuals in this matter are members of the Turtle Mountain Indian Reservation, when the state is expending financial assistance for the child, this state court case involving non-enrolled individuals living on the Turtle Mountain Indian Reservation, which reservation is located near the state court, does not seem to impact the Turtle Mountain Indian Tribe's ability to govern Turtle Mountain Tribal Members or Turtle Mountain Tribal Affairs."

In *State of Idaho v. George*, 2018 WL 3598926 (Idaho 2018), Coeur d'Alene tribal police arrested George for possession of methamphetamine on the Coeur d'Alene reservation. Upon discovery that George was not a member of the Coeur d'Alene Tribe, the case was referred to the Kootenai County district court. The district court dismissed for lack of **jurisdiction** on the ground that George was an Indian, citing her 22% blood quantum and extensive ties to the Tribe: "It is apparent to the court that the Tribe recognizes her as an Indian. She has lived virtually her whole life on the Coeur d'Alene Reservation as an Indian. She is the adopted daughter of an enrolled member of the Coeur d'Alene Tribe and an enrolled member of the Flathead Tribe. Throughout her entire life she has received benefits include [sic] health care, substance abuse treatment, housing assistance, job assistance, education, social benefits (the tribe's taking tribal members including Ms. George to Silverwood, for example), and food assistance. She has worked on the reservation. Throughout her life she has participated in tribal social and cultural events. Thus while case law indicates that tribal enrollment is an important consideration, and if it exists, is determinative of the second element of the status test, it is not an absolute requirement for recognition as an Indian." The Idaho Supreme Court affirmed: "The State points out that the Coeur d'Alene Tribe requires that a person have at least one quarter Indian heritage to be eligible for Tribe membership, and that the Tribe will only prosecute enrolled members. However, the district court correctly held that this was not a necessary consideration."

In *Cayuga Nation v. Campbell*, 2018 WL 3567391 (N.Y. App. 2018), one faction of the Cayuga Nation sued the other in state court over which was the **legitimate government of the tribe**. Plaintiffs alleged that defendants were improperly in control of and trespassing on certain property of the Nation on which the Nation's offices and security center, a cannery, a gas station and convenience store, and an ice cream store were located. Plaintiff moved for a preliminary injunction directing defendants to vacate the subject property. Defendants moved to dismiss on the ground that the court lacked subject matter jurisdiction. The court denied the motion and granted the plaintiffs preliminary injunctive relief, citing a determination by the Bureau of Indian Affairs that, for purposes of the tribe's contract under the Indian Self-Determination Act (ISDA), the government would recognize the plaintiffs. The appellate division affirmed: "Here, the BIA determined that it will conduct government-to-government relations with plaintiff. Based on that determination, the BIA awarded an ISDA contract to plaintiff for the purpose, among others, of running the Nation's office. In this action, plaintiff seeks several forms of relief, including possession of and the ability to run the Nation's office. Thus, although we may not make a determination that will interfere with the Nation's governance and right to self-determination, we must defer to the federal executive branch's determination that the Nation has resolved that issue, especially where, as here, that determination concerns the very property that is the subject of this action. We caution that we do not determine which party is the proper governing body of the Nation, nor does our determination prevent the Nation from resolving that dispute differently according to its law in the future."
