THE
NATIONAL LAW REVIEW

Indian Nations Law Focus–September, 2014

Thursday, September 11, 2014

Article By Godfrey & Kahn S.C.
Brian L. PiersonIndian Nations Law Update

Tribal Law / Indigenous Peoples
Bankruptcy & Restructuring
Entertainment, Art & Sports
Criminal Law / Business Crimes
Consumer Protection
Tax
Financial Institutions & Banking
Health Law & Managed Care
Labor & Employment
Litigation / Trial Practice
Administrative & Regulatory
South Dakota
Alaska
Oklahoma
New Mexico
Minnesota
Connecticut
Washington
7th Circuit (incl. bankruptcy)
Illinois
9th Circuit (incl. bankruptcy)
Michigan
California

In ***White v. University of California***, 2014 WL 4211421 (9th Cir. 2014), archaeologists employed by the University of California–Los Angeles (University) in 1976 had discovered two human skeletons (La Jolla remains), estimated to be between 8977 to 9603 years old, making them among the earliest known human remains from North or South America. The property on which the La Jolla remains were discovered was aboriginally occupied by members of the Kumeyaay Nation (Tribe), which consists of a number of federally recognized Indian tribes. A lengthy controversy over custody of the remains ensued between the Kumeyaay Cultural Repatriation Committee (Repatriation Committee), a tribal organization that was formed by the 12 constituent members of the Tribe and scholars wishing to study the remains. In 2011, the University, after determining that the Native American Graves Protection and Repatriation Act (NAGPRA) governed the issue, decided to transfer custody of the remains to the La Posta Band of Diegueno Mission Indians. NAGPRA applies to "Native American" cultural items, and it defines "Native American" to mean "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). The Ninth Circuit had held in the *Bonnichsen* case that "Native American" applied to a "presently existing" tribe, people, or culture. Scientists, asserting that the remains did not satisfy this definition, sued the University in state court, challenging the University's determination. The University removed to federal court, which then dismissed, concluding that the Repatriation Committee was a necessary and indispensable party under Fed R. Civ P. 19 that could not be joined because it was immune from suit. The Ninth Circuit affirmed, holding (1) that the NAGPRA does not abrogate tribal sovereign immunity and (2) the Repatriation Committee was an arm of the Tribe entitled to immunity: "And, as the Supreme Court [in Bay Mills] observed, it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. Moreover, as the University points out, the United States retains the right to bring an action against a tribe" (cites and internal quotations omitted). On the second point, the Court noted that the Committee was created by resolution of each of the Tribes, comprised solely of tribal members appointed by each tribe, funded exclusively by the Tribes, for a purpose, recovery of remains and education of the public, that is "core to the notion of sovereignty."

In ***Jackson v. Payday Financial LLC***, (7th Cir. 2014), Jackson and other plaintiffs had received payday loans from Payday Financial, LLC and other defendant entities owned by, or doing business with, Martin A. Webb, a member of the Cheyenne River Sioux Tribe and also a named defendant pursuant to loan agreements that required that all disputes be resolved through arbitration to be conducted on the Tribe's reservation. The plaintiffs sued the defendants in Illinois state court for alleged violations of Illinois civil and criminal statutes related to loans. The defendants removed to federal court and moved to dismiss on the ground that the plaintiffs were required to arbitrate and that the Tribal court had exclusive jurisdiction. The district court granted that the motion by the Seventh Circuit Court of Appeals be reversed, holding that (1) the arbitration provisions in the loan agreements were procedurally and substantively unconscionable, a sham and unenforceable and (2) the tribal court had no

jurisdiction: “It is procedurally unconscionable because the Plaintiffs could not have ascertained or understood the arbitration procedure to which they were agreeing because it did not exist. It is substantively unconscionable because it allowed the Loan Entities to manipulate what purported to be a fair arbitration process by selecting an arbitrator and proceeding according to nonexistent rules. Here, the Plaintiffs have not engaged in any activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. They applied for loans in Illinois by accessing a website. They made payments on the loans and paid the financing charges from Illinois. Because the Plaintiffs’ activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of nonmembers on that land, the tribal courts do not have jurisdiction over the Plaintiffs’ claims. Moreover, a tribal court’s authority to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction. See id. n.8. Therefore, a nonmember’s consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court.”

In ***U.S. v. Lummi Nation***, 2014 WL 4067168 (9th Cir. 2014), the Lower Elwha Band of S’Klallams, Jamestown Band of S’Klallams, Port Gamble Band of S’Klallams, and Skokomish Indian Tribe, beginning in 1990, had sought a determination that the Lummi Indian Tribe pursued fishing activities outside its adjudicated usual and accustomed grounds and stations in violation of Judge George Boldt’s 1974 District Court opinion in *United States v. Washington* relating to Washington tribes fishing rights under the 1855 Treaty of Point Elliott. The district court, interpreting Judge Boldt’s opinion and subsequent rulings in the lengthy litigation, entered summary judgment that the Lummi tribe’s usual and accustomed grounds did not include the eastern portion of the Strait of Juan de Fuca or waters west of Whidbey Island. The Ninth Circuit reversed and remanded, holding that there was no binding “law of the case” and that the issue would have to be determined by further proceedings: “Thus, each of Lummi Indian Tribe‘s two holdings implies a different result. Therefore, we conclude that Lummi Indian Tribe is ambiguous regarding whether the waters immediately to the west of northern Whidbey Island are included within the Lummi U & A, and accordingly that this issue has not yet been decided explicitly or by necessary implication.”

In re Greektown Holdings, LLC, 2014 WL 4187440 (E.D. Mich. 2014), involves bankruptcy proceedings of Greektown Holdings, LLC (Greektown), a commercial casino in Detroit. The bankruptcy trustee brought a fraudulent transfser action under federal and Michigan laws to set aside transfers of money from Greektown to various parties, including the Sault Ste. Marie Tribe of Chippewa Indians and its political subdivision Kewadin Casinos Gaming Authority (Tribal Defendants). The Tribal Defendants moved to dismiss on the ground of sovereign immunity. The court denied the motion, holding that 11 U.S.C. § 106, which waives the sovereign immunity of any “governmental unit,” and 11 U.S.C. § 101(27), which defines “governmental unit” to include a “foreign or domestic government,” effected a congressional waiver of tribal sovereign immunity: “Congress expanded the scope of ‘governmental unit’ by adding the phrase ‘or other foreign or domestic government.’ It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. Therefore, if Indian tribes do not comprise or fall under ‘other ... domestic government,’ there must be some other domestic government that was not enumerated and that gives meaning to the phrase. Upon being so questioned at the most recent hearing, counsel for the Tribe Defendants was unable to provide such an example.”

In ***Maniilaq Association v. Burwell***, 2014 WL 4178267 (D.D.C. 2014), Maniilaq Association (Maniilaq), an Alaska Native Regional Non–Profit Corporation, operated a health services programs for its 12 member Alaska Native village tribes and other eligible American Indians and Alaska Natives through a self-determination compact and annual funding agreements under the Indian Self–Determination and Education Assistance Act (ISDEAA). Maniilaq sued the Secretary of the Department of Health and Social Services (HSS) for a declaration that the lease of an Indian Health Service (IHS)–owned clinic that it had proposed was properly included as part of its ISDEAA Funding Agreement. The government moved for summary judgment, arguing that a lease could not be included as part of the Funding Agreement. The court denied the motion: “Ultimately, defendant can give this Court no reason why it should ignore the clear language of the statute. Therefore, the Court finds that the proposed lease of the Ambler clinic is included Maniilaq’s 2013 FA by operation of law.”

In ***U.S. v. Nichols***, 2014 WL 4185360 (D.S.D. 2014), Nichols, a non-Indian, was excluded from the Rosebud Sioux Indian Reservation for various criminal acts. After encountering Nichols driving on a public road within the reservation, tribal officers stopped and detained him until an FBI agent arrived. The agent arrested Nichols, who was subsequently charged with criminal trespass in federal court. Nichols moved to dismiss, arguing that the tribe did not have the authority to ban him from using the road. The court denied the motion without prejudice: “Because there exists latent factual issues that require an evidentiary foundation and because there has been no exhaustion of tribal remedies or any showing that some exception to the exhaustion prescription applies, Nichols’s dismissal motion must be denied, but without prejudice. The burden is on the tribe to establish that one of the Montana exceptions would allow for an extension of tribal authority to regulate nonmembers on non-Indian land. In Nichols’s case, whether the tribal court and council had the civil authority to exclude and thus had personal jurisdiction over him is a federal question. Even so, principles of comity require that the Court stay its hand and allow the tribal courts the opportunity to initially pass on the jurisdictional question. Nichols has the burden to show that the underlying tribal writ and order, excluding him from the Rosebud Reservation, was void

for lack of personal jurisdiction. Just because Nichols was traveling on a public road does not mean he is immune from tribal authority. The road he was on and the situs of the stop were within the exterior boundaries of the Rosebud Reservation and in 'Indian country' as defined by federal law. Apart from this, Nichols appears to have had, and maintained, a consensual relationship with a female tribal member. And his prior transgressions and disruptive conduct may very well have been sufficient to subject him to regulation to protect tribal health and safety interests."

In ***Graham v. BMO Harris Bank, N.A.***, 2014 WL 4090548 Not Reported in F.Supp.2d (D. Conn. 2014), plaintiffs brought a putative class action arising from allegedly illegal "payday" loans obtained from certain lenders through the internet in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), state laws prohibiting conspiracy, *assumpsit*, aiding and abetting usury, aiding and abetting in violation of state statutory law, and the Connecticut Unfair Trade Practices Act. According to the plaintiffs, defendants BMO Harris Bank, N.A. (BMO), National Bank of California, N.A., First International Bank & Trust, First Premier Bank, Missouri Bank and Trust, and North American Banking Company served as Originating Depository Financial Institutions (ODFIs) in connection with transactions related to the loans. The court granted the defendants' motions to compel arbitration, holding that the banks, though not parties to the loan agreements, were covered by provisions requiring borrowers to arbitrate any dispute: "The defendant ODFIs are not strangers to the loan agreements but rather entities that are integral to the operation of the loans that are the subject of the agreements." Any arguments that the agreements were unenforceable because of their illegality would need to be presented to the arbitrator, according to the court.

In ***Haeker v. U.S. Government***, 2014 WL 4073199, Not Reported in F.Supp.2d (D. Mont. 2014), Allotment 3316 was an 840-acre tract on the Crow reservation. In 1984, an undivided 1/9th interest passed to non-Indian heirs. The Bureau of Indian Nationsl (BIA) then issued a fee simple patent to these heirs pursuant to 25 C.F.R. § 152.6, which provides: "Whenever the Secretary determines that trust land, or any interest therein, has been acquired through inheritance or devise by a non-Indian, or by a person of Indian descent to whom the United States owes no trust responsibility, the Secretary may issue a patent in fee for the land or interest therein to such person without application." The United States continued to hold the remaining 8/9ths in trust. After the heirs failed to pay property taxes levied by Yellowstone County, the undivided 1/9th interest was sold to a real estate company and then to Haeker, who received a quit claim deed for a "1/9%" undivided interest in Allotment 3316. Haeker sued the United States for a partition of the allotment, contending that the United States was "a tenant in common and therefore is the proper defendant." The district court disagreed and dismissed: "The Court is aware of no real property relationship comparable to the trust relationship between the United States and Indian owners. Haeker cites no authority suggesting that the United States and the Indian owners are tenants in common, and there is authority suggesting to the contrary.

Similarly, because the United States does not enjoy the benefits of possession and use of the land, the United States as trustee for Indian allottees cannot be held to be a tenant in common with other owners. Mindful, as noted earlier herein, that a waiver of sovereign immunity must be clear, and that the Court is to presume that the cause lies outside federal jurisdiction unless the plaintiff has established otherwise, the Court here concludes that the United States is not a tenant in common with Haeker. The Court is also guided by the general rule that acts of Congress relative to Indian property rights are liberally construed by the courts in favor of the Indian people."

In ***Achey v. BMO Harris Bank***, 2014 WL 4099139 (N.D. Ill 2014), Achey alleged that BMO Harris (Bank) had served as an Originating Depository Financial Institution (ODFI), functioning as an intermediary between a tribal payday lender and the lender's Automatic Clearing House network (ACH) and, in that capacity had facilitated loans that MNE Services, Inc. (MNE), a lending entity owned by the Miami Tribe of Oklahoma, had made to Achey over the internet. Achey, alleging that the loans violated the usury laws of her state of residence, Pennsylvania, sued BMO for violations of the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), assumpsit, unjust enrichment, and aiding and abetting under Pennsylvania state lending and usury laws. The Bank moved to compel arbitration pursuant to a provision of the loan agreement requiring the borrower to arbitrate "any dispute" concerning the loan. The court held that the arbitration agreement was enforceable, dismissed Achey's suit but declined to order arbitration because the loan agreement provided for arbitration in the county of the borrower's residence, which lay outside the court's jurisdiction.

In ***Oglala Sioux Tribe v. Van Hunnik***, 993 F.Supp.2d 1017 (D.S.D. 2014), the Oglala Sioux Tribe, Rosebud Sioux Tribe and individual tribal members sued Davis, a South Dakota county judge, Malsam–Rysdon and Van Hunnik, officials of the South Dakota Department of Social Services (SDDSS), and Vargo, State's attorney for Pennington county, alleging violations of the civil rights act of 1871, 42 U.S.C. § 1983, the Fourteenth Amendment's Due Process Clause and the Indian Child Welfare Act (ICWA), arising out of the defendants' policies, practices and procedures relating to the removal of Native American children from their homes pursuant to "48-hour hearings" held under South Dakota law. Specifically, the plaintiffs alleged that the SDDSS defendants failed to provide a copy of the petition and ICWA affidavit to Indian parents prior to the 48–hour hearing, adopted the unconstitutional practices of the circuit court during 48–hour hearings, failed to ensure Indian parents received an

adequate post-deprivation hearing, and failed to properly work with Indian parents following the 48–hour hearings. The defendants moved to dismiss, arguing that (1) the federal court should abstain under the Rooker–Feldman and abstention doctrines; (2) plaintiffs had failed to exhaust their state court remedies; (3) plaintiffs lacked standing; (4) plaintiffs failed to state a claim upon which relief can be granted; and (5) plaintiffs' ICWA claims could not be vindicated under 42 U.S.C. § 1983. The court denied the motion: "[A]lthough defendants contend the procedures followed during a 48–hour hearing appropriately advise parents of their constitutional and statutory rights, the facts as set forth by plaintiffs allege the rights are not appropriately explained and the proceedings are conducted in such a way that the parents are not voluntarily and knowingly waiving their rights. If the facts alleged by plaintiffs are true, plaintiffs' complaint sets forth a claim upon which relief may be granted. Defendants' motions to dismiss on this basis are denied."

In ***U.S. v. Janis***, 2014 WL 4064018 (D.S.D. 2014), Janis was indicted for assaulting a federal officer in violation of 18 U.S.C. § 111. Janis moved to dismiss, arguing that at the time of the alleged offense the officer that he was accused of assaulting, Oglala Sioux Tribal Officer Mousseau, was not acting as a federal officer enforcing federal law but, rather, as a tribal officer enforcing tribal law. The court disagreed and denied the motion, holding that Mousseau was carrying out a federal law enforcement obligation under a "638" contract between the Tribe and the Bureau of Indian Affairs under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 et seq., Pub. L. 93-638, and that she had "federal officer" status with respect to activities carried out under the contract, regardless of the particular law being enforced: "The court finds that the 638 contract is a proper delegation of authority under 25 U.S.C. § 2804(a) to the Oglala Sioux Tribe Public Safety Commission and that the contract authorized Officer Mousseau to enforce both federal and tribal laws. The court finds as a matter of law that Officer Mousseau was a federal officer for purposes of 18 U.S.C. § 111 at the time of the alleged assault."

In ***No Casino in Plymouth v. Jewell***, 2014 WL 3939585 (E.D. Cal. 2014), the Bureau of Indian Affairs (BIA) had issued a Record of Decision (ROD), placing approximately 228 acres of land located near the city of Plymouth into trust on behalf of the Ione Band of Miwok Indians (Tribe) for gaming purposes. Plaintiff, No Casino in Plymouth (NCIP), sued the Secretary of Interior, seeking to vacate the ROD, arguing that the Tribe, which had intervened in the litigation, was not a federally recognized tribe in 1934 and, thus, the Secretary of the Department of Interior (DOI) lacked authority to transfer the land into trust pursuant to the Supreme Court's 2009 decision in *Carcieri v. Salazar*. NCIP also alleged that the trust acquisition parcels did not fall within any of the exceptions to the general prohibition under the Indian Gaming Regulatory Act (IGRA) against gaming on land acquired after 1998 and that the BIA failed to take a "hard look" at the environmental and socio-economic impacts of this action as required by the National Environmental Policy Act (NEPA). The court denied NCIP's motion for judgment on the pleadings: "Plaintiffs allege that Federal Defendants' ROD is inconsistent with the facts; however, Federal Defendants argue that they considered evidence pertaining to the status of Intervenor Defendant in 1934 and concluded that those facts support their ability to acquire land into trust for Intervenor Defendant today. … Since the Answer raises issues of fact that, if proved, would defeat recovery, judgment on the pleadings is inappropriate at this time."

In ***Caddo Nation of Oklahoma v. Court of Indian Offenses***, 2014 WL 3880464 Slip Copy (W.D. Okla. 2014), a group claiming to be the legitimate government of the Caddo Nation of Oklahoma filed suit in the Court of Indian Offenses for the Caddo Nation, a court established by the United States Department of the Interior pursuant to 25 C.F.R. Part 11 (CFR Court.) A competing faction sued in federal court to enjoin the CFR court proceedings, arguing that CFR courts are not "tribal courts" for purposes of the rule that litigants must normally exhaust tribal court remedies before suing in federal court. The district court disagreed and dismissed: "The Tenth Circuit has recognized that CFR courts 'retain some characteristics of an agency of the federal government' but 'also function as tribal courts.'… The CFR Court has considered the facts in dispute and determined it has jurisdiction over the matter. The proceedings in the CFR Court were the first to be filed and a factual record has been made in those proceedings addressing the jurisdictional issue. Plaintiffs have the opportunity to be heard in that forum, to raise the jurisdictional challenges there, and to appeal any adverse determination."

In ***Outsource Services Management, LLC v. Nooksack Business Corp.***, 2014 WL 4108073 (Wash. 2014), Nooksack Business Corporation (NBC), a tribal enterprise of the Nooksack Indian Tribe, signed a contract with Outsource Services Management LLC (OSM) to finance the renovation and expansion of its casino. The contract contained a waiver of tribal sovereign immunity, including NBC's agreement to be sued in the United States District Court for Western District of Washington, any court of general jurisdiction in the State, and only if none of the foregoing courts had jurisdiction, in the courts of the tribe. When NBC failed to make payments under the contract, OSM sued in state court. NBC moved to dismiss, arguing that, notwithstanding the contract, the exercise of state court jurisdiction would infringe the right of self-government under the rule of *Williams v. Lee*. The Washington Supreme Court disagreed: "Given that Nooksack made the decision to enter into that contract and consent to those provisions, we do not see how state court jurisdiction would infringe on the tribe's right to self-rule."

In ***State ex rel. Swanson v. CashCall, Inc.***, 2014 WL 4056028 Not Reported in N.W.2d (Minn. App. 2014), Minnesota brought a consumer-enforcement action against CashCall, Inc. and WS Funding, LLC, alleging that they

used a third company, Western Sky Financial, LLC, based on the Cheyenne River Sioux Tribe (CRST) Reservation, as a front to make usurious payday loans to Minnesota consumers, using the internet to market. The state moved for a temporary injunction, and appellants moved to dismiss. The district court granted the temporary injunction and denied the dismissal motion. The court of appeals affirmed, holding that (1) sovereign immunity is irrelevant because Western Sky is owned by an individual member of the CRST, not the tribe and because, in any event, the plaintiff cannot "stand in the shoes" of Western Sky, (2) plaintiffs' theory that tribal sovereignty "displaces state sovereignty" is factually and legally flawed because Western Sky is not a tribe and because it conducts significant activity within Minnesota, (3) the rule of White Mountain *Apache v. Bracker* generally prohibiting state regulation of Indians in Indian country does not protect the plaintiffs because Indians going beyond reservations boundaries are subject to state and states are authorized to regulate Indians even within Indian country where state interests are sufficiently compelling, (4) the "dormant commerce clause" did not bar state regulation of payday loans to Minnesota residents: "The complaint states that Western Sky and CashCall advertise in Minnesota, deposit loan money into Minnesota banks, send text and e-mail messages to individuals in Minnesota, collect money in Minnesota, and 'direct many other commercial acts' into Minnesota. On the other end, Minnesota borrowers take out the loans while physically located in Minnesota using computers or telephones in Minnesota. As in Integrity, these facts demonstrate that the state's action does not violate the Dormant Commerce Clause."

In ***Chavez v. Morongo Casino Resort & Spa***, 2014 WL 4053805, Not Reported in Cal.Rptr.3d (Cal. App. 2014), former employees of Morongo Casino Resort & Spa, a tribally owned enterprise, sued Morongo Casino Resort & Spa (Morongo), the Executive Director for the Morongo Gaming Agency and various Morongo management members, for various alleged violations of California's laws prohibiting employment discrimination and other state law violations. The plaintiffs asserted that the court had jurisdiction pursuant to Section 4 of Public Law 280, 28 U.S.C. § 1360, which provides that each of the listed states, including California, "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country … to the same extent that such State has jurisdiction over other civil causes of action." The trial court dismissed on sovereign immunity grounds and the court of appeals affirmed, holding that (1) arbitration obligations in the Tribe's gaming compact applied only to disputes with the state, (2) Section 1360 conferred state jurisdiction only over suits against individual Indians, not suits against tribes, and (3) "[s]ince the individual defendants were named in the lawsuit as part of their official duties, acting on behalf of the tribe, it appears the trial court correctly concluded the individuals were also protected by the tribe's sovereign immunity."

In ***South v. Lujan***, 2014 WL 3908038 (N.M. App. 2014), South, a non-Indian formerly employed by the Sandia Pueblo Police Department, filed a complaint for violation of the New Mexico Human Rights Act (NMHRA), retaliatory discharge, and tortious inference with contract against Lujan and Duran, police chief and captain, respectively, and Brogdon, the Pueblo's employment relations manager, arising out of the officers' alleged sexual harassment and her eventual termination after complaining. Lujan was a Sandia Pueblo member but the other defendants were non-Indian. The defendants moved to dismiss, arguing that the NMHRA did not apply to the Pueblo and its employees- and that, the Plaintiff's claims were barred by the Pueblo's sovereign immunity, and that the suit must be dismissed because the Pueblo is a necessary party to the suit which cannot be joined. The trial court granted the motion, but the court of appeals reversed and remanded for additional fact-finding on the issues whether the defendants' actions were within the scope of their employment and whether state court jurisdiction would infringe on the Pueblo's sovereignty: "Defendants do not address how state court jurisdiction over the two non-Indian tribe employees, as individuals, infringes on tribal authority, especially if they were acting outside their scope of employment."

In ***National Wildlife Federation v. Department Of Environmental Quality***, 2014 WL 3928561 (Mich. App. 2014), Kennecott Eagle Minerals Company (Kennecott) had submitted applications to the Michigan Department of Environmental Quality (DEQ) for a nonferrous metallic mining permit and a groundwater discharge permit in connection with the Kennecott's plan to develop an underground mine to extract nickel and copper from the sulfide ores beneath the headwaters of the Salmon Trout River in the Yellow Dog Plains in Marquette County. Plaintiffs including the Keweenaw Bay Indian Community (Tribe) sought judicial review, contending that the mine could collapse, and that operations would produce excessive acid rock drainage, either of which would result in serious damage to the area's environment and natural resources, including the Salmon Trout River. The trial court upheld the permit, and the court of appeals affirmed, holding that (1) Kennecott and DEQ were not foreclosed from introducing additional evidence at a contested case hearing held after the initial decision to issue the permit, (2) the discharge permit-issued to Kennecott pursuant to Part 31 of the Michigan Natural Resources and Environmental Protection Act, which covered discharges of storm water coming into contact with potentially polluting materials at the surface of the mine site, drainage water collected from the development rock storage area, and water pumped out of the mine to enable mining operations, and which authorized a maximum daily discharge of 504,000 gallons through the treated water infiltration system, was sufficient and Kennecott was not required to obtain separate permits to recirculate utility water within the mine, to backfill excavated areas in time by returning development rock to the mine cavity, and to re-flood the mine upon the completion of operations; (3) the design of the proposed wastewater treatment system, including where alternatives were yet in contemplation, was sufficient; (4) Kennecott satisfied the requirement that design of the treatment system

include “a description of the anticipated influent, including the substances to be treated … and the concentrations of the substances;” and (5) Kennecott satisfied the requirement that a discharge permit “properly characterize the waste or wastewater to be discharged” by determining “the pollutants that may be present in the waste or wastewater in light of the process by which it is generated.”

In ***National Wildlife Federation v. Department Of Environmental Quality***, 2014 WL 3928563 (Mich. App. 2014), Kennecott Eagle Minerals Company (Kennecott) had submitted applications to the Michigan Department of Environmental Quality (DEQ) for a nonferrous metallic mining permit and a groundwater discharge permit, in connection with the Kennecott’s plan to develop an underground mine to extract nickel and copper from the sulfide ores beneath the headwaters of the Salmon Trout River in the Yellow Dog Plains in Marquette County. Plaintiffs including the Keweenaw Bay Indian Community (Tribe) sought judicial review. Rejecting many of the same objections raised in connection with the DEQ’s issuance of the related groundwater discharge permit, the court upheld the permit: “Not in dispute is that the experts offered conflicting opinions … The ALJ resolved them in favor of Kennecott Eagle, concluding that the record showed that there would be no adverse environmental effects outside the mine’s fence line from air deposition, water drawdown, habitat fragmentation, or noise, that Kennecott’s air emissions would meet air quality standards both on and off site, and that emission would be at permissible levels and have no adverse impact on the area’s flora or fauna. The ALJ was thus satisfied that Kennecott fulfilled Part 632’s requirements to address the ‘affected area’ subject to mining impacts…. Appellants insist that the evidence militated in favor of recognizing significant environmental impacts outside the area covered by the EIA [environmental impact assessment.] However, again, weighing the evidence that way is not this Court’s, nor was it the circuit court’s, task, which was to review for substantial evidence.” The court also rejected the Tribe’s contention that the EIA was defective because Kennecott had failed to regard Eagle Rock, a large boulder at the proposed mine portal, as a “place of worship” for purposes of Michigan’s mining laws: “The testimony below included elaborate descriptions of traditional religious and other cultural uses of that location as a special gathering place, along with ancient names for it reflecting the pertinent Native American languages. … Kennecott Eagle’s EIA considered Eagle Rock only as normal topography, its archeologist having reported nothing on that location to suggest that it was a place of any cultural significance. … Accordingly, assuming without deciding that no stipulation prevented litigation of this issue, and also that ‘places of worship’ for purposes of Rule 425.202(2)(p) include such outdoor locations as Eagle Rock, we nonetheless hold that Kennecott Eagle’s EIA was not deficient for want of consideration of Eagle Rock as a place of worship, because it neither knew, nor should have known, of such traditional cultural uses of that location when it offered its EIA.”