



Legal Studies Research Paper Series

Research Paper No. 07 - 01

The Ethics of Pushing the Envelope in Indian Law Cases

Matthew L.M. Fletcher

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection at:
<http://ssrn.com/abstract=xxxxxx>

THE ETHICS OF PUSHING THE ENVELOPE IN INDIAN LAW CASES

Matthew L.M. Fletcher*

Michigan State University College of Law

Federal court judges have significant and varied sources of authority to sanction bad behavior by lawyers. 5A FED. PRAC. & PROC. § 1336 (2008 update) (noting that “federal judges often rely on a variety of ... sources of judicial power” including FRCP 11).

Of particular note for purposes of these materials, Federal Rule of Civil Procedure 11 (“Rule 11”) and Federal Rule of Appellate Procedure 38 (“Appellate Rule 38”) prohibit the filing of frivolous claims. Appellate Rule 38 states, “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” Rule 11’s provisions are slightly more complicated. Rule 11(b) provides, in relevant part:

By presenting to the court a pleading, written motion, or other paper ... an attorney or unrepresented party certifies ...:

(1) is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

Id. See also COLO. APP. RULE 38(d) (“If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.”).

Dean Nell Jessup Newton raised the specter of sanctions against tribes and their attorneys following the “liberalization” of Rule 11 nearly 20 years ago. See Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 842-43 (1992). She wrote:

A federal judge noted the problem faced by attorneys trying to advocate changes in the law with a particularly apt example: “Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly

* Associate Professor, Michigan State University College of Law; Director, Indigenous Law and Policy Center; Enrolled Citizen, Grand Traverse Band of Ottawa and Chippewa Indians.

hopeless. The first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v. Board of Education*.” Similarly, tribal advocates urging the fundamental wrongness of rules like the *Tee-Hit-Ton* rule ought to have room to make such arguments without fearing the sanction of Rule 11.

Id. (quoting *Eastway Const. Corp. v. City of New York*, 637 F. Supp. 558, 575 (E.D. N.Y. 1986) (Weinstein, C.J.)). Dean Newton wrote that a tribe had been sanctioned with the dismissal with prejudice of its claims against the federal government for intentional failure of the client to comply with court orders setting a deadline for the production of expert reports. See *White Mountain Apache Tribe v. United States*, 6 Cl. Ct. 575, 582 (1984), *rev'd*, 776 F.2d 1063 (9th Cir., Aug. 7, 1985) (unpublished). The court noted that the tribal council had enough advance notice of the possibility of the dismissal with prejudice:

In the case at bar, the record, which includes tribal resolutions dated as recently as August 16, 1984, reveals that counsel reported developments to the client and sought plaintiff’s direction and concurrence with respect to positions that would be taken in court, especially with regard to the court’s orders requiring the preparation and pretrial exchange of written expert reports. In fact, out of an abundance of caution, the court required that its February 7, 1984 order imposing the exclusionary sanction be served on plaintiff’s tribal council and its tribal attorney. See *White Mountain Apache Tribe I*, 4 Cl.Ct. at 585-86. Plaintiff took umbrage, complaining that it had been advised fully of counsel’s actions and concurred in them. In these circumstances plaintiff certainly had more than a hint that something was remiss. Finally, counsel for plaintiff has stated on the record that his client instructed him not to comply with the November 7, 1983, February 7, 1984, and May 7, 1984 orders.

Id. at 581. But Dean Newton also highlighted the possibility that parties opposing tribal interests – including the United States – may face sanctions under Rule 11 as well. See Newton, *supra*, at 841 (discussing *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation*, 16 Cl. Ct. 158 (1989), where the court assessed sanctions against the United States).

This short essay prepared for the “Native Americans, Race, and the Constitution Conference” hosted by the University of Colorado and University of Denver Sturm College of Law will summarize the key provisions and cases in the Rule 11 and Appellate Rule 38 universe and highlight areas in which tribal lawyers (and their opponents) might confront the possibility of making sanctionable frivolous claims.

I. A Brief History of the Universe of Sanctionable Frivolous Claims

Chief Judge Finesilver’s analysis of the application of Rule 11 may still stand as the leading statement on the subject in the District of Colorado:

The new language of Rule 11 “is intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.” *See* Advisory Committee Notes to 1983 Amendment. A showing of subjective bad faith is no longer necessary to the imposition of fees. *Eastway Construction Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985). “Simply put, subjective good faith no longer provides the safe harbor it once did.” *Id.* at 253. The standard is now “one of reasonableness under the circumstances”. Advisory Committee Notes, citing *Kinee v. Lincoln Savings & Loan*, 365 F. Supp. 975 (E.D. Pa. 1973). Accordingly, attorneys have an affirmative duty to make reasonable inquiry into both the facts and the law relevant to their pleadings and motions prior to signature. *See* Advisory Committee Notes to 1983 Amendment. Moreover, Rule 11 clearly provides that by signing a pleading, an attorney or party certifies not only that there is a reasonable basis for filing, but also that the pleading has not been interposed for any improper purpose.

If there is no objective basis for an attorney’s belief that his client’s claims are warranted by existing law or a good faith extension, modification or reversal of existing law then sanctions should be imposed. *See Woodfork By And Through Houston v. Gavin*, 105 F.R.D. 100 (D. Miss. 1985). ...

Finally, we concur with this observation of the court in *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985):

We do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. Courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer. But where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated. Such a construction serves to punish only those who would manipulate the federal court system for ends inimicable to those for which it was created.

Colorado Chiropractic Council v. Porter Memorial Hosp., 650 F. Supp. 231, 237-40 (D. Colo. 1986) (footnotes omitted). *See also Storage Tech. Partners II v. Storage Tech. Corp.*, 117 F.R.D. 675, 677-79 (D. Color. 1987).

As for Appellate Rule 38, the Tenth Circuit has articulated the general rule relating to sanctions for filing a frivolous appeal:

Fed.R.App.P. 38 authorizes a court of appeals to award just damages, including attorney's fees, and single or double costs if the court determines that an appeal is frivolous or brought for purposes of delay. *See, e.g., Clark v. Commissioner*, 744 F.2d 1447, 1448 (10th Cir.1984). An appeal is frivolous when "the result is obvious, or the appellant's arguments of error are wholly without merit." *Taylor v. Sentry Life Insurance Co.*, 729 F.2d 652, 656 (9th Cir.1984) (citations omitted); *accord Reliance Insurance Co. v. Sweeney Corp., Maryland*, 792 F.2d 1137, 1138 (D.C.Cir.1986); *see also Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir.) (awarding fees when claim was "frivolous, unreasonable, or without foundation") (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978)), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984). We agree with the wry observation of Chief Judge Markey, sitting with the Sixth Circuit, that "[f]rivolity, like obscenity, is often difficult to define. With courts struggling to remain afloat in a constantly rising sea of litigation, a frivolous appeal can itself be a form of obscenity. Rule 38 should doubtless be more often enforced than ignored in the face of a frivolous appeal." *WSM, Inc. v. Tennessee Sales Co.*, 709 F.2d 1084, 1088 (6th Cir.1983).

The more serious question is whether Rule 38 empowers the appellate court to impose sanctions upon attorneys personally. The rule itself is silent. We have noted before the importance of the courts' power to assess monetary sanctions against attorneys as well as against their clients. The courts' duty, within the spirit of their total powers, is "to impose sanctions and compensating awards of expenses, including attorney's fees, in a manner designed to solve the management problem. If the fault lies with the attorneys, that is where the impact of the action should be lodged." *In re Sanction of Baker*, 744 F.2d 1438, 1442 (10th Cir.1984) (en banc), *cert. denied*, 471 U.S. 1014, 105 S.Ct. 2016, 85 L.Ed.2d 299 (1985); *see also Herzfeld & Stern v. Blair*, 769 F.2d 645, 647 (10th Cir.1985). Other circuits have stated that "[a]ttorneys can be held jointly and severally liable with their clients under Rule 38 for bringing frivolous appeals." *Bartel Dental Books Co. v. Schultz*, 786 F.2d 486, 491 (2d Cir.), *cert. denied*, 478 U.S. 1006, 106 S.Ct. 3298, 92 L.Ed.2d 713 (1986); *see also Reliance*, 792 F.2d at 1138; *Toepfer*, 792 F.2d at 1103. We note, however, that most courts so holding rely in the conjunctive on Rule 38 and 28 U.S.C. § 1927 to impose sanctions on

attorneys, just as the panel of this court did in the instant case. *See, e.g., Reliance*, 792 F.2d at 1138; *Bartel*, 786 F.2d at 491; *cf. McConnell v. Critchlow*, 661 F.2d 116, 118-19 (9th Cir.1981). Nevertheless, we hold that in an appropriate case Rule 38 alone permits sanctions against attorneys for taking a truly frivolous appeal on behalf of their client. *Accord Toepfer*, 792 F.2d at 1102-03.

Brayley v. Campbell, 832 F.2d 1504, 1510-11 (10th Cir. 1987). In a more recent unpublished opinion, the Tenth Circuit wrote:

Rule 38 provides that, “[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and a reasonable opportunity to respond, award just damages and single or double costs to the appellee.” “An appeal is frivolous when the result is obvious, or the appellant’s arguments of error are wholly without merit.” *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir.1987) (en banc) (quotation omitted). Whether to impose Rule 38 sanctions is within this court’s discretion, *Roth v. Green*, 466 F.3d 1179, 1188 (10th Cir.2006), *petition for cert. filed*, 75 U.S.L.W. 3623 (U.S. May 9, 2007) (No. 06-1490), and attorneys can be sanctioned personally “for taking a truly frivolous appeal on behalf of their client,” *Braley*, 832 F.2d at 1511. When an attorney’s conduct “manifests either intentional or reckless disregard of [his or her] duties to the court,” monetary sanctions in an amount equal to the excess costs, expenses, or attorney’s fees are properly levied. *Id.* at 1512.

Poll v. Paulsen, 251 Fed. Appx. 573, 576, 2007 WL 3046313 (10th Cir., Oct. 18, 2007).

Of import for the purposes of this presentation, there is a good faith – “objective reasonableness” – aspect to Rule 11. The Tenth Circuit stated:

As a preliminary matter, plaintiffs challenge the district court’s imposition of sanctions on the ground that the court applied a subjective rather than objective standard in evaluating plaintiffs’ conduct. This circuit has adopted the view that an attorney’s actions must be objectively reasonable in order to avoid Rule 11 sanctions. *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir.1988). A good faith belief in the merit of an argument is not sufficient; the attorney’s belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances. *Id.* In addition, it is not sufficient for an offending attorney to allege that a competent attorney could have made a colorable claim based on the facts and law at issue; the offending attorney must actually present a colorable claim. *See Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1470 (2d Cir.1988) (focus on whether an objectively reasonable basis for claim “was demonstrated”), *rev’d in part on other grounds*, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989). Thus, plaintiffs may not shield their own incompetence by

arguing that, while they failed to make a colorable argument, a competent attorney would have done so. *See Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir.1987) (Rule 11 intended to prevent abuses arising from bad faith, negligence, and to some extent, professional incompetence).

White v. General Motors Corp., Inc., 908 F.2d 675, 680 (10th Cir. 1990). Or, as another judge wrote:

Rule 11 imposes a standard of objective reasonableness, which asks the trial court to determine “whether a reasonable and competent attorney would believe in the merit of an argument.” *See Dodd Insurance Services., Inc. v. Royal Insurance Company of America*, 935 F.2d 1152, 1155 (10th Cir.1991). *See also Bridge Publications, Inc. v. F.A.C.T.Net, Inc.*, 183 F.R.D. 254, 263 (D.Colo.1998) (denying motion for sanctions after determining that defendant’s affirmative defenses were not unreasonable under the circumstances). A Rule 11 violation occurs where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify, or reverse the law as it stands. *Harrison v. Luse*, 760 F.Supp. 1394, 1399 (D.Colo.1991). Rule 11 sanctions will not require a finding of subjective bad faith on the part of the offending counsel. *Cf. Scott v. Boeing Co.*, 204 F.R.D. 698, 700 (D.Kan.2002) (noting that an attorney’s subjective good faith belief in the merits of an argument will not suffice to satisfy the standard of objective reasonableness).

Greeley Pub. Co. v. Hergert, 233 F.R.D. 607, 610 (D. Colo. 2006).

The Colorado Supreme Court has adopted similar language:

By contrast, appellate courts in Colorado have refused to impose or affirm sanctions assessed by the trial courts where a genuine disputed issue in the matter is presented, *see Rocky Mountain Sales & Serv., Inc. v. Havana RV, Inc.*, 635 P.2d 935 (Colo.App.1981), where a proponent makes an argument that although lacking in precedential authority, nonetheless is supported by logic, *see Jorgenson Realty, Inc. v. Box*, 701 P.2d 1256 (Colo.App.1985), and where the appeal was brought in good faith, notwithstanding that the pleadings, affidavits, and depositions disclose, as a matter of law, that no genuine issue exists, *see Price v. Conoco, Inc.*, 748 P.2d 349 (Colo.App.1987). The past reluctance by state appellate courts to impose sanctions in the nature of attorney fees and court costs derived from the general principles established by DR 7-101 and DR 7-102 of the Code of Professional Responsibility which obligated an attorney to zealously represent his or her client even when such representation may require the lawyer to advance innovative claims seeking an extension, modification, or reversal of

existing law. Such advocacy, even though based on arguments that are “extremely unlikely to prevail on appeal ... cannot be said necessarily [to be] frivolous.” *Pierson*, 674 P.2d at 365. Hence the purpose underlying the award of attorney fees and costs is to deter “egregious conduct,” and not to discourage legal theories that, while having no support in our extant decisional law, nevertheless may be persuasive by virtue of the unique character of the case. Accordingly, as a general rule, we have declined to impose this sanction except in cases that are clear and unequivocal. *Id.*

Wood Bros. Homes, Inc. v. Howard, 862 P.2d 925, 935 (Colo. 1993); *see also Mission Denver Co. v. Pierson*, 674 P.2d 363, 365-66 (Colo. 1984).

Finally, once a district court has ruled on Rule 11 sanctions, the appellate courts will not “second-guess” that determination. *See Hughes v. City of Fort Collins, Colorado*, 926 F.2d 986, 989 (10th Cir. 1991) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990)).

II. Federal Indian Law Reform Frivolity

A. Claims for Law Reform

As Dean Newton suggested, claims for law reform, such as the reversal or severe limitation of a Supreme Court holding, may border on frivolous, and therefore become sanctionable.

Problems of Re-Litigation

Treaty rights claims may be the most difficult, especially since Indian tribes often get only one chance to convince the federal courts. Once a tribe loses a treaty case, it is tempting – but unwise – to try again on a new theory. In *Omaha Indian Tribe v. Tract I-Blackbird Bend Area*, 933 F.2d 1462 (8th Cir. 1991), *cert. denied sub nom.*, *Omaha Indian Tribe v. Agricultural and Indus. Inv. Co.*, 502 U.S. 942 (1991), the Eighth Circuit described in great detail the failure of the Tribe’s counsel to adequately follow court orders. *See id.* at 1465 (“The facts and circumstances which lead up to the dismissal of the Tribe’s case with prejudice are extraordinary.”); *id.* at 1465-67 (describing counsel’s actions and inactions in great detail).

The Tribe, through its counsel, continued to re-litigate claims and assert claims that the court previously had rejected, or even declared meritless. Of import, the court wrote:

Throughout the course of this litigation the Tribe has continued to allege that the Department of Justice attorneys participated in fraud and collusion in their representation of the United States as trustee for the Tribe by limiting the Tribe’s claims in the consolidated case to lands inside the Barrett Survey. Counsel for the

Tribe continues to argue fraud notwithstanding this court's previous holdings that the Tribe's fraud argument is without merit. *Omaha Indian Tribe v. Jackson*, 854 F.2d at 1092 n. 4; *In re Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (order denying petition for writ of mandamus).

Id. at 1466. *See also id.* at 1467 (“In *Omaha Indian Tribe v. Jackson*, 854 F.2d at 1092 n. 4, we held that the Tribe's claim that the Department of Justice attorneys participated in fraud was without merit. Moreover, when the Tribe petitioned this court for a writ of mandamus alleging fraud, we dismissed the Tribe's petition as “frivolous and totally without merit” and sanctioned the Tribe's counsel by awarding the United States costs and attorney's fees. *In re Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (order denying petition for writ of mandamus). This court has ruled on the Tribe's fraud claim and our prior decisions now stand as the law of the case.”).¹ The Supreme Court's clerks also noted the failures of the Tribe's counsel. *See* Cert Pool Memo, at 5, *Omaha Indian Tribe v. Agricultural and Indus. Inv. Co.* (No. 91-489), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1991/Denied-pdf/91-489.pdf> (“A harsh result has been visited upon the Tribe due to counsel's action.”); *id.* (“The Tribe needs new counsel.”); *see also* Cert Pool Memo at 6, *White Mountain Apache Tribe v. Hodel* (No. 86-375), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1986/MissedMemos-pdf/86-375.pdf> (noting that Tribe represented by same attorney had brought claims already adjudicated by Supreme Court earlier that were found to “have no merit”).

In a similar vein, a recent brief filed by nonmembers opposed to tribal court jurisdiction in *MacArthur v. San Juan County*, No. 00-584 (D. Utah, May 6, 2008), titled “San Juan County Defendants' Memorandum Opposing Plaintiffs' Latest But Not Last Motion to Reconsider,” available at <http://turtletalk.files.wordpress.com/2008/05/macarthur-v-san-juan-county-defendants-brief.pdf>, is worth repeating in its entirety:

Plaintiffs' Donna Singer, Alison Dicks on and Fred Riggs commenced this action to enforce several *Preliminary Injunction Orders* issued by the Navajo Tribal Court. This Court subsequently found that those *Orders* were not enforceable as to San Juan County, San Juan County Commissioners J. Tyron Lewis and Lynn Stevens, former San Juan County Commissioner Bill Redd, San

¹ The court listed the previous incarnations of same or similar cases:

United States v. Wilson, 433 F.Supp. 67 (N.D.Iowa 1977); *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir.1978), *vacated and remanded*, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979); *Omaha Indian Tribe, Treaty of 1854 with the United States v. Wilson*, 614 F.2d 1153 (8th Cir.), *cert. denied*, 449 U.S. 825, 101 S.Ct. 87, 66 L.Ed.2d 28 (1980); *United States v. Wilson*, 523 F.Supp. 874 (N.D.Iowa 1981); *United States v. Wilson*, 707 F.2d 304 (8th Cir.1982), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1281, 79 L.Ed.2d 684 (1984); *United States v. Wilson*, 578 F.Supp. 1191 (N.D.Iowa 1984), *aff'd in part and rev'd in part*, *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir.1988), *cert. denied*, 490 U.S. 1090, 109 S.Ct. 2429, 104 L.Ed.2d 986 (1989); *United States v. Wilson*, 926 F.2d 725 (8th Cir.1991).

Id. at 1464 n. 2.

Juan County Attorney Craig Halls, and San Juan County Administrator Richard Bailey (collectively “San Juan County Defendants”).

That ruling was affirmed by the United States Court of Appeals for the 10th Circuit in *MacArthur v. San Juan County*, 495 F.3d 1157 (10th Cir. 2007). But despite that ruling from the 10th Circuit, and despite legal doctrines such as the *law of the case*, the *one action rule* and *res judicata*, Plaintiffs have once again filed a *Motion to Reconsider* (Doc. 981). With this *Motion*, Plaintiffs are again asking this Court to enforce those Navajo Tribal Court *Orders* even though both this Court and the 10th Circuit have said that those *Orders* are unenforceable for want of subject matter jurisdiction and/or because of the *sovereign immunity* enjoyed by San Juan County Defendants. San Juan County Defendants hereby submit this *Memorandum* in opposition to Plaintiffs’ most recent Rule 60 *Motion to Reconsider*. [footnote 1: Altogether Plaintiffs have brought, not including the present *Motion* or similar *Motions* filed with the 10th Circuit, seven other *Motions* to reconsider and/or to enforce the Navajo Tribal Court *Orders*. (Doc. 719, 758, 849, 855, 857, 906 and 943). The Court has denied those *Motions*. See *MacArthur v. San Juan County*, 405 F. Supp.2d 1302 (D. Utah 2005). And no justification exists for revisiting these rulings, including the recent Supreme Court decision in *Medellin v. Texas*, 540 U.S. ___, 128 S. Ct. 1346 (2008) cited by Plaintiffs in support of their *Motion*. San Juan County Defendants see no connection between the *Medellin* holding and the present case.]

Id. at 2-3. The argument portion of the brief had just one line:

“*Jesus Christ, the same yesterday, today, and forever.*” -- **Hebrews 13:8**
(King James)

Id. Counsel for San Juan County may have been encouraged (one might suppose) to make such a pithy argument (itself risking a Rule 11 sanction?) by the Tenth Circuit’s comments regarding plaintiffs’ counsel in earlier proceedings:

Sadly, vague and conclusory court filings are nothing new for these litigants. The district court criticized Plaintiffs’ counsel for “shuffling each plaintiff’s factual allegations and legal assertions together as one would a deck of playing cards, sacrificing narrative sequence in favor of argumentative characterizations and conclusory assertions.” R. Doc. 742, at 179. It also noted that some of the allegations raised “serious concerns under Fed.R.Civ.P. 11.” *Id.* at 46 n. 40. In a prior related appeal before this court, we noted the “profound lack of clarity” in the brief and catalogued its other deficiencies. See *MacArthur v. San Juan County*, 309 F.3d 1216, 1218 (10th Cir.2002). The clerk has also

“caution[ed] [Plaintiffs’ counsel] to take better care in drafting her pleadings” in response to deficient filings in this appeal.

MacArthur v. San Juan County, 495 F.3d 1157, 1160 (10th Cir. 2007). In that appeal, the Tenth Circuit dismissed the appeal on the grounds that the appeal was “frivolous”:

There is a difference, however, between understanding the Plaintiffs’ arguments and judging them worthy of a full merits review. We have long recognized our “inherent authority” to dismiss an appeal presenting “no arguably meritorious issue for our consideration.” *United States v. Hahn*, 359 F.3d 1315, 1329 n. 15 (10th Cir.2004) (en banc) (per curiam). Here, all three of the Plaintiffs’ arguments are frivolous; accordingly, we dismiss their appeal.

The Plaintiffs first argue that the district court’s written order is void due to fraud on the court. A litigant seeking to establish fraud on the court must prove that the district court relied on fraudulent statements in rendering its decision. *See Herring v. United States*, 424 F.3d 384, 390 (3d Cir.2005). Here, the district court dismissed the Plaintiffs’ claims due to pleading deficiencies, and this decision was wholly independent of any allegedly fraudulent merits arguments made by defense counsel. Furthermore, a litigant may not raise a fraud on the court argument for the first time on appeal; rather, the issue must first be presented to the court in which the alleged fraud was perpetrated. *Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 809 (7th Cir.1969); *see also Indian Head Nat. Bank of Nashua v. Brunelle*, 689 F.2d 245, 249-52 (1st Cir.1982) (discussing two narrow exceptions to this general rule). We find no indication in the record that the Plaintiffs raised a fraud on the court claim in the district court, dooming their argument to failure.

The Plaintiffs next argue that the district court abused its discretion in dismissing their claims. Rule 16(c) clearly permits the district court to dismiss claims that do not present a genuine issue for trial at the pretrial conference. *See Chavez v. Ill. State Police*, 251 F.3d 612, 654 (7th Cir.2001); *see also* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1529, at 301 (2d ed.1990). Moreover, the two sentences (with no legal citations) devoted to this issue are utterly insufficient to trigger a merits review. *See Craven v. Univ. of Colo. Hosp. Auth.*, 260 F.3d 1218, 1226 (10th Cir.2001) (“We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim....”). In other words, this argument is also frivolous.

Finally, the Plaintiffs argue that the Defendants have waived qualified immunity by failing to plead or otherwise assert it early in the litigation. We have consistently held, however, that “qualified immunity can be raised at any time and

a district court may enter ... judgment on that ground at any point before trial at which it is appropriate.” *Langley v. Adams County*, 987 F.2d 1473, 1481 n. 3 (10th Cir.1993) (internal quotation marks omitted). The Plaintiffs’ argument to the contrary—presented in four sentences without the support of any relevant authority and without any reasoned argument for a departure from our long-standing precedent—is frivolous.

Id. at 1161-62. No Appellate Rule 38 sanctions issued from this holding, however.

Tribal Jurisdiction over Nonmembers

The incredible amount of litigation over a tribe’s authority to regulate the conduct of nonmembers often excites the worst reactions from nonmembers, but the great weight of authority suggests that these cases are close enough to avoid being sanctionable. Judge Gould’s separate concurring opinion in *Burlington Northern Santa Fe Railroad Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 776 (9th Cir. 2003) (Gould, C.J., concurring), for example, argued that tribal assertions of authority over nonmembers generally are not “frivolous”:

I concur and comment on the *Montana* exceptions. Since *Montana* was declared the law of the land by the Supreme Court in 1981, Indian nations, non-Indians who live or do business on Indian lands, and others who interact with Indian nations have struggled to define the bounds for the consent and tribal integrity exceptions to *Montana*’s general rule restricting Indian nations’ jurisdiction over non-Indians. *We are not dealing with a frivolous position by the tribes, but with the line between Indian sovereignty and freedom of action of those whose lives cross Indian territory.* I agree with our ruling on discovery on the second *Montana* exception, for if the trains crossing a tribe’s reservation carry toxic or dangerous chemicals, nuclear waste, biological dangers, or other threats to the reservation, then the tribe has a right to know what company it keeps, and then to assess whether any taxing strategy could fairly cover the tribe’s protective costs. Only on a full record can it fairly be decided whether *Montana*’s second exception can be satisfied.

Id. (emphasis added).

Land claims and treaty rights claims provide, it would appear, the greatest opportunity for federal courts to assess sanctions against Indian tribes and tribal advocates, but the complexity of the cases also deters federal courts in some cases from issuing sanctions. For example, in *Keweenaw Bay Indian Community v. State of Michigan*, 152 F.R.D. 562 (W.D. Mich. 1992), non-Indian opponents of treaty fishing and their state officer co-defendant sought Rule 11 sanctions against individual treaty fishers for filing a motion to alter or amend a judgment dismissing their treaty rights claims for failure to join indispensable parties (the tribes). *See id.* at

564. The treaty fishers made claims about individual treaty rights to fish in “home waters,” a theory the court found to be still in its formative stages:

It is at best a developing theory that is still tentative and not universally accepted. Plaintiff’s expert, Robert Doherty, acknowledges the lack of unanimity on the topic. Doherty quotes Charles F. Wilkinson and Edmund Danziger in his affidavit as referring to fishing grounds as “common property”. He quotes Thomas Vennum as stating that the Chippewas did not claim “ownership of the water, so fishing with spears from a canoe or with nets overnight was open to all throughout the year.”

Id. The court nonetheless denied the motion for sanctions, writing:

In view of the complexity of the issues, the lack of clear precedent, and the historical ambiguity involved in the issues presented by this case, the Court does not believe that sanctions are warranted. Although the Court does not believe its original decision was erroneous, Plaintiff’s effort to present its theory, though unsuccessful, is neither unreasonable nor improper.

Id.

Land Claims

Moreover, sanctions are typically inappropriate for claims arising under federal Indian law statutes such as the Non-Intercourse Acts or federal common law. *See Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 317 F. Supp. 2d 128, 150-51 (N.D. N.Y. 2004). There, the court wrote:

In addition to declaratory and injunctive relief, the Nation also requests an award of attorneys fees and sanctions. However, it fails to cite any statutory authority to support such an award.

Generally, attorneys fees “are not a recoverable cost of litigation absent explicit congressional authorization.” *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-15, 114 S.Ct. 1960, 1965, 128 L.Ed.2d 797 (1994) (internal quotations and citations omitted). Here, the Nation presents its claims pursuant to the Indian Commerce Clause (U.S. Const.Art. I, § 8); U.S. Const. Art. II, § 2, clause 2; the Nonintercourse Act (25 U.S.C. § 177); the Treaty of Canandaigua (7 Stat. 44); 25 C.F.R. § 1.4; and federal common law. *See* Compl. ¶ 6. None of those alleged bases for its causes of action, however, provide explicit authorization for the imposition of attorneys fees. [Footnote 23: This is in contrast to *City of Sherrill*, wherein the Oneida Nation’s claims were based in part on civil rights violations pursuant to 42 U.S.C. § 1983. *See* 145 F.Supp.2d at 237. An award of attorneys

fees may be provided to a prevailing party in a civil rights case. *See id.* at 264, *citing* 42 U.S.C. § 1988. However, even if the Nation's request here were considered pursuant to the § 1988 standard, said request would nonetheless be denied for basically the same reasons the Oneida Nation's request was denied in *City of Sherrill*. *See id.* at 266.]

Nor are attorneys fees appropriate here pursuant to 28 U.S.C. § 1927. Section 1927 provides that attorneys fees may be awarded where opposing counsel "multiplies the proceedings in any case unreasonably and vexatiously." *Id.* "An award of attorneys fees ... pursuant to § 1927 is appropriate only where the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Abbott v. United States*, No. 96-CV-510, 2001 WL 670636, *1 (N.D.N.Y. Apr. 30, 2001) (citation and internal quotations omitted). Such is clearly not the case here. Finally, there is absolutely no basis for an award of sanctions against the defendants or their attorneys. *See Village of Union Springs*, 293 F.Supp.2d at 199.

Id.

Miscellaneous Federal Indian Law Claims

Other kinds of claims and motions risk sanctions from federal courts. In *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244 (9th Cir. 1992), the Ninth Circuit reversed a district court's imposition of Rule 11 sanctions against a tribal group that had filed a motion for reconsideration of the dismissal of its claims (that a contract was void because it did not meet the requirements of Section 81). *See id.* at 254. The court wrote:

The district court imposed sanctions of \$1,383 against Robinson for bringing the motion to reconsider the order of dismissal. The court found Robinson's case to be "absolutely outrageous [and] meritless," and thus found Robinson's motion to reconsider to be frivolous. Accordingly, it imposed sanctions under Fed.R.Civ.P. 11.

As the foregoing discussion amply demonstrates, Robinson's claims were not frivolous. "[T]he central purpose of Rule 11 is to deter baseless filings.... Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and 'not interposed for some improper purpose.'" *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2454, 110 L.Ed.2d 359 (1990). Robinson's claim was certainly legally tenable-not all of the requirements of section 81 had been met, and the section expressly states that contracts in violation of the section are "null and void." Surely that at least cast doubt upon the legality of the contract, including

its arbitration clause. Moreover, we cannot overlook the fact that the district court invited Robinson to file a motion to reconsider when it first dismissed the claims. Although the motion to reconsider presented no new arguments, Robinson's arguments did not become frivolous merely because the district court had heard them before.

Although our review of all aspects of the district court's Rule 11 determination is quite deferential, *Cooter & Gell*, 110 S.Ct. at 2460-61, we must reverse the district court if "it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* at 2461. We find the district court's view about the clarity of the law to have been erroneous. Thus its imposition of sanctions was an abuse of discretion.

Id.

Even claims brought by tribal interests that are not terribly unusual may invoke the wrath of a federal court judge. Judge Kozinski, in a stinging dissent in *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990), *rev'd sub nom.*, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), repeatedly asserted that the Native Village's claims were "frivolous." *See id.* at 1167 (Kozinski, J., dissenting). He wrote:

The villages' purported federal claim is that the state, once having decided to favor Indians over other citizens, is now precluded from treating them the same. As a matter of federal equal protection, this claim is frivolous: I am aware of no constitutional provision that requires a state to treat Indians and non-Indians differently. While the equal protection clause may *permit* states to favor Indians, it certainly does not *compel* it. The villages' equal protection claim is not aided in any way by the fact that the state Attorney General's equality requirement is based on the Alaska Constitution; the federal equal protection clause does not preclude the states from adopting constitutional provisions that guarantee equal treatment for their citizens.

Equally frivolous are the villages' claims based on various federal statutes intended to further tribal self-government. The Indian Reorganization Act, 25 U.S.C. §§ 461- 79 (1982 & Supp. IV 1986), comprises a hodgepodge of statutes relating to land transfer and tribal organization. The Indian Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 77 -80 (codified as amended in scattered sections of title 25), extends a number of federal constitutional rights to members of Indian tribes and authorizes state courts to assume jurisdiction over certain causes of action arising on Indian reservations. The Indian Financing Act of 1974, Pub.L. 93-262, 88 Stat. 77 (codified as amended in scattered sections of title 25), provides credit to members of Indian tribes. The Indian Self-Determination and

Education Assistance Act, Pub.L. 93-683, 88 Stat. 2203 (codified as amended in scattered sections of titles 5, 25, 42 & 50), provides federal assistance for, among other things, tribal governments and school districts educating tribe members. The Indian Health Care Improvement Act, Pub.L. 94-437, 90 Stat. 1400 (codified as amended in scattered sections of title 25), as its name implies, relates to health care. The Indian Child Welfare Act of 1978, Pub.L. 95-908, 92 Stat. 3069 (codified as amended in scattered sections of title 25), includes provisions covering child custody proceedings and federal assistance for various family-related programs. Many of these statutes provide money to Indian tribes, but that is the full extent of their relevance to this lawsuit. By no stretch of the imagination do they preempt state constitutional provisions calling for equal treatment of Indians and non-Indians.

The villages' third and fourth federal causes of action are similarly insubstantial. Section 476 of title 25 permits Indian tribes to organize, adopt a constitution, and negotiate with the federal, state and local governments. It is difficult to ascertain exactly how this statute could be violated by diluting the villages' share of state revenues. The villages' contention that the dilution extinguished their powers of self-government and destroyed their Native culture, in violation of the first amendment, is hyperbole.

Id. Judge Kozinski's status and prominence as a judge, and the vituperative character of his dissent may have helped convince the Supreme Court to grant certiorari in this case. *See* Cert Pool Memo at 5, *Hoffman v. Native Village of Noatak* (No. 89-1752) (repeating Kozinski, J.'s assertion that tribe's claim was "frivolous": "The claim that the state, once having decided to favor Indians over other citizens, is precluded from treating them the same, is frivolous – there is no constitutional provision that requires a state to treat Indians and non-Indians differently."), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1990/Granted-pdf/89-1782.pdf>.²

Procedural Shenanigans

Parties in federal Indian law litigation, even state governments, may find themselves defending a motion for sanctions for performing unusual procedural maneuvers. In *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655 (7th Cir. 2006), the Seventh Circuit refused to award sanctions at the request of the Nation when the State moved to dismiss the appeal rather than file a reply brief. *See id.* at 662. The court wrote:

We next address the Nation's motion for sanctions in Wisconsin's appeal.

The Nation requests sanctions based on Federal Rule of Appellate Procedure 38,

² Actually, could one argue that Judge Kozinski's argument is frivolous, given the very fact of the Indian Commerce Clause and the existence of Indian treaties?

which states that “[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” A “frivolous” appeal is one in which “the result is obvious or when the appellant’s argument is wholly without merit.” *Ins. Co. of the W. v. County of McHenry*, 328 F.3d 926, 929 (7th Cir.2003) (quoting *Grove Fresh Distrib. v. John Labatt, Ltd.*, 299 F.3d 635, 642 (7th Cir.2002)). Frivolity “depends on the work product: neither the lawyer’s state of mind nor the preparation behind the appeal matter.” *Mars Steel Corp. v. Cont’l Bank N.A.*, 880 F.2d 928, 938 (7th Cir.1989) (en banc). This court has found appeals that “rehash[] positions that the district court properly rejected,” or that “present[] arguments that are lacking in substance and foreordained to lose” to be frivolous. *Berwick Grain Co. v. Ill. Dep’t of Agric.*, 217 F.3d 502, 505 (7th Cir.2000) (citations and internal quotation omitted). Whether to impose sanctions for a frivolous appeal “is within the sound discretion of this court.” *Ins. Co. of the W.*, 328 F.3d at 929 (citing *Grove Fresh Distrib.*, 299 F.3d at 642). Even if an appeal is frivolous, Rule 38 by its use of the permissive “may,” “allows the court of appeals to decline to impose sanctions.” *Mars Steel Corp.*, 880 F.2d 928, 938 (citation omitted).

We need not determine whether Wisconsin’s appeal is frivolous, because even if it were frivolous, sanctions are not appropriate in this case. In *Ormsby Motors Incorporated v. General Motors Corporation*, 32 F.3d 240, 241 (7th Cir.1994), we considered an appeal in which, after the opening briefs were filed by both the appellant and appellee, the appellant moved to voluntarily dismiss the appeal in lieu of filing a reply brief. The appellee moved for sanctions. We declined to award sanctions and stated that “only in an exceptional case would we be inclined to grant such relief.” *Ormsby Motors, Inc.*, 32 F.3d at 241. We explained: “We do not want to discourage voluntary dismissals, which save the time not only of appellees but of this court, by a readiness to grant sanctions.” *Id.* In this case, Wisconsin notified the Nation of its willingness to dismiss the appeal before the filing of the Nation’s opening brief, in contrast to *Ormsby* in which the appellee had already filed its brief. Although the Nation had understandably already expended efforts in the drafting of its brief when it received notice from Wisconsin, the notice and the filing of the motion for voluntary dismissal weigh against sanctions. We do not find that Wisconsin acted in bad faith. In sum, we do not find extraordinary circumstances that would warrant the imposition of sanctions after the filing of a motion to dismiss the appeal voluntarily.

Id.

Patently Frivolous Legal Arguments

Some claims, however, are simply so patently meritless and frivolous that sanctions may result. In *Yosef v. Passamaquaddy Tribe*, 876 F.2d 283 (2nd Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990), the Second Circuit affirmed the imposition of Rule 11 sanctions on a former attorney for the Tribe who claimed “that his legal work resulted in the passage of the Maine Indian Claims Settlement Act of 1980, P.L. 96-420, 94 Stat. 1785, 25 U.S.C. §§ 1721- 1735.” *Id.* at 285. The district court imposed the sanctions for attempting to dismiss an action nine months after the court had previously determined that the underlying action was “meritless and imposed penalties.” *Id.* at 284; *see also id.* at 287 (“Appellees were successful on their motion. Chief Judge Platt found that appellant’s claims were “meritless.” He also held that he did not have diversity jurisdiction in a *quantum meruit* suit against the Tribes. Moreover, the district judge found appellant had failed to establish personal jurisdiction against the Tribes, Tureen and the Shawmut Bank. We agree that neither diversity nor federal question jurisdiction was present.”). The plaintiff has made elaborate and perhaps even outrageous claims:

Appellant asserts that the passage of the Act gave him the right to recover \$27 million dollars in *quantum meruit* from the \$81.5 million dollar fund created by the Act, pursuant to an alleged contingency fee agreement he had with the Passamaquoddy Indians. He claims appellee Tureen caused a large part of the funds awarded the Indians to come into the hands of the Bank, and alleges the Bank had a duty to avoid acquisition of the funds.

Yosef apparently served as an attorney for the Passamaquoddy tribe from 1964 to 1971, under a Claims Attorney Contract pursuant to 25 U.S.C. § 81. The contract provided that it would continue in force for ten years from the date of its approval by the Secretary of the Interior. On September 7, 1967, appellant submitted the contract to the Department of the Interior for approval as required by § 81. The Secretary declined to approve it because he believed the Passamaquoddies were not, at that time, a federally recognized tribe.

Despite this development, appellant continued to represent the tribe until 1971, when he was convicted of possession of marijuana and fled from Maine to Israel. There, Gellers adopted the name Tuvia Ben Shmuel Yosef. He was subsequently disbarred by the State of Maine. Although in his absence appellee Tureen became the Claims Attorney for the Passamaquoddies, Yosef resubmitted his contract with the tribe to the Secretary of the Interior in 1979. This time the Secretary declined to accept the agreement because the tribe would not ratify it. Appellant concedes he did not have any contractual arrangement with the Penobscot Nation or the Houlton Band of the Maliseets.

Id. at 285. *See also* Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751, 758 n. 43 (1972) (describing Yosef’s narcotics conviction).

In a state court case, the tribal defendants sought – and were refused – attorney fees and costs where the plaintiff frivolously alleged that a slip-and-fall tort claim at the tribal youth center would be covered by the tribe’s insurance under its gaming compact. *See Taylor v. St. Croix Chippewa Indians of Wisconsin*, 599 N.W.2d 924, 928 (Wis. App. 1999). The court wrote:

In this case, our inquiry necessarily turns on whether Taylor’s appeal was “without any reasonable basis in law,” or could be “supported by a good faith argument for an extension, modification or reversal of existing law.” *Id.* Although neither Taylor nor the cross-appellants dispute the existence of St. Croix’s sovereign immunity, the crux of Taylor’s appeal was the inquiry into what constituted “gaming activities” as contemplated under the gaming compact. Although unconvincing, we cannot hold that Taylor’s attempts to broaden the scope of the definition of gaming activities (based on gaming revenue funding) were made in bad faith or without any reasonable basis in law. As such, the imposition of sanctions against Taylor for frivolous appeal under § 809.25, STATS, is not appropriate under these facts. It follows, therefore, that the trial court was correct in denying sanctions against Taylor for frivolous claim pursuant to § 814.025, STATS. Accordingly, we affirm in part, reverse in part and remand to the trial court with directions to award statutory costs to cross-appellants consistent with this opinion and pursuant to § 814.03, STATS.

Id.

B. Federal Court Jurisdictional Quandaries

Many parties face sanctions for failure to understand the complexities of federal Indian law jurisdictional questions in federal court, including the question of sovereign immunity. Plaintiffs suing Indian tribes and tribal enterprises must be careful when alleging civil rights claims against those defendants.

The leading case in this area is a wrongful termination claim against a tribe and its gaming enterprise, involving numerous frivolous claims of federal court jurisdiction over the defendants. In *Charland v. Little Six, Inc.*, 112 F. Supp. 2d 858 (D. Minn. 2000), *aff’d*, 13 Fed. Appx. 451 (8th Cir., June 27, 2001), the district court sanctioned the plaintiff for alleging that federal courts had jurisdiction over an Indian tribe and its business enterprise, when no federal law existed that could arguably be relied upon to demonstrate jurisdiction, and the plaintiff made no assertion of a “nonfrivolous argument” for law reform. *See id.* at 862-66. The court wrote:

Rule 11(b)(2) requires that a claim be “warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” Rule 11 is violated when a party invokes the jurisdiction of the federal courts without justification. *See Brignoli v. Balch, Hardy & Scheinman, Inc.*, 126 F.R.D. 462, 464 (S.D.N.Y.1989) (“Improperly

invoking the subject matter jurisdiction of a federal district court is sanctionable under Rule 11”). Plaintiff alleged that there was jurisdiction over both defendants by reason of the provisions of 28 U.S.C. § 1331, 28 U.S.C. § 1332 and 28 U.S.C. § 1343; in fact, federal courts do not have jurisdiction over either Defendant under any of these laws, or any other law.

Plaintiff’s lawsuit combined into a single Complaint three separate unrelated claims against Defendants Little Six Inc. and Mdewakanton Sioux Community. Count One was based on common law negligence, and Count Two of the Complaint was based in common law breach of contract. In Counts Three through Six of the Complaint, Plaintiff alleged various counts of employment discrimination. Counts Three and Four were based in Minnesota statutory law, while Five and Six were based upon federal statutes.

Plaintiff’s Complaint was dismissed with prejudice because Plaintiff failed to properly plead jurisdiction, and because existing law offered no grounds for such allegations. Counsel for Plaintiffs violated Rule 11 of the Federal Rules of Civil Procedure when it alleged that there was jurisdiction over either of the defendants. In fact, none of the allegations of jurisdiction over defendant Shakopee Mdewakanton Sioux Community were warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. As to Defendant Little Six, Inc., the allegations in Counts One and Two were neither warranted by existing law nor by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Id. at 862-63. The court noted in a parenthetical at the end of this portion of the opinion to note: “The allegations in Counts Three through Six against Little Six, Inc. were not warranted by existing law, but could have been supported by a nonfrivolous argument for a change in the law.”

Id. at 863. These claims were against the tribe’s business enterprise, in which there is at least some conflict in the courts over questions of sovereign immunity, federal court jurisdiction, and the application of federal statutes of general applicability.

The court then went into great detail about where the *Charland* plaintiff went wrong. First, the plaintiff did not allege the citizenship of the defendants for federal diversity jurisdiction purposes, and related to that, second, could not have demonstrated that suing a tribe or tribal enterprise creates federal diversity jurisdiction:

Plaintiff is a resident of Minnesota. To support diversity jurisdiction, Plaintiff would be required to allege and prove that both of the Defendants are citizens of a different state, or citizens or subjects of a foreign state. *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035, 1039 (5th Cir.1982). *See also Owen*

Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S.Ct. 2396, 2402, 57 L.Ed.2d 274 (1978) (“Diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each Plaintiff”); *Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir.1990).

Plaintiff did not make allegations concerning the citizenship of each Defendant. This in itself is a basis upon which Rule 11 sanctions should be imposed. *Walker by Walker v. Norwest Corporation*, 108 F.3d 158, 162 (8th Cir.1997) (“The fact that [Plaintiffs] did not allege the citizenship of the defendants convinces us that the district court did not abuse its discretion in determining that Rule 11 sanctions were appropriate.”).

The fact that no allegations of diversity could *properly* have been made provides additional grounds for sanctions. The Court of Appeals for the Eighth Circuit has expressly held that courts lack diversity jurisdiction over an Indian tribe. *See Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir.1974) (An Indian tribe “is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction”). Count One could not be maintained against Defendant Shakopee Mdewakanton Sioux Community.

Id. at 863-64. Plaintiff did argue that there is a colorable argument that federal jurisdiction could reach the tribal enterprise, but the court rejected the argument because the plaintiff’s complaint never alleged facts to support these claims:

Plaintiff urged that Little Six, Inc. should be treated differently from the Community for purposes of considering diversity allegations. We have not been made aware of any cases which so hold, but acknowledge that it is possible that a Court may someday reach this conclusion. This would not save Plaintiff in this case, however. Here, even if we were to accept this view, as well as Plaintiff’s argument that LSI is a “foreign corporation” because it was once registered as such, Plaintiff neither alleged nor substantiated that Little Six Inc. is not a citizen of the State of Minnesota.

Plaintiff did not offer legal argument in support of diversity jurisdiction. Instead, Plaintiff offered arguments based upon issues relating to whether Casinos should be entitled to immunity; whether diversity jurisdiction could be exercised where state courts did not have jurisdiction; and whether the tribal sovereign immunity doctrine should be abrogated. Whether the law of immunity is emerging as Plaintiff claims misses the point of the dispute. Even if Casinos were not immune from suit, and if the tribal sovereign immunity doctrine were abrogated

completely, there would not be diversity jurisdiction over the negligence claim asserted in Count One of this Complaint, for the reasons we have stated.

Id. at 864.

Third, the court noted that one count – breach of contract for failure to pay an amount of \$1000, plus a trip to the Bahamas – fell far short of the \$75,000 federal jurisdictional threshold. *See id.*

Fourth, the court held that plaintiff’s state law employment discrimination claims could not serve to invoke federal subject matter jurisdiction, even under the court’s supplemental jurisdiction. *See id.* The court wrote:

Counts Three and Four of Plaintiff’s Complaint asserted claims for employment discrimination based upon Minnesota Statutes. These claims were not based upon a federal question, and also failed to plead the minimum jurisdictional amount required for diversity jurisdiction. *See, e.g. Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 814 (8th Cir.1969); *St. Paul Mercury Indemnity Co. v. Red Cab. Co.*, 303 U.S. 283, 288-90, 58 S.Ct. 586, 82 L.Ed. 845 (1938). Accordingly, jurisdiction over these Counts could not be sustained unless supplemental jurisdiction were established under 28 U.S.C. § 1367.

The Court did not have supplemental jurisdiction over Counts Three and Four for two reasons. First, Plaintiff’s Complaint did not contain allegations invoking jurisdiction under that statute. Second, there must be an underlying claim over which the Court does have original jurisdiction before supplemental jurisdiction may be found. There was not such a claim in the Complaint.

Id. at 864-65.

Fifth, the court seemed to sanction the plaintiff for alleging that the court had jurisdiction under 28 U.S.C. § 1343. *See id.* at 866. The court wrote:

Plaintiff also relied on 28 U.S.C. § 1343 as a basis for jurisdiction over the claims under the ADA and Title VII, alleging that these claims “fit squarely within the jurisdictional provisions of 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1343(a)(4).” ...

Plaintiff argued that any argument that federal law does not apply to Defendants raises questions concerning due process and equal protection, implicating the United States Constitution, and that applying tribal sovereign

immunity to commercial business entities creates an invalid “racial preference” violating due process. Plaintiff also argued that applying the Indian tribe exemption to the ADA and Title VII to the Casino would also violate her equal protection, as these statutes were developed to establish a human rights framework for all United States citizens, and to extend the exemption would be to take these rights from her.

Plaintiff failed to legally support this argument when making it in her Memorandum in Opposition to Defendants’ Motion to Dismiss, and this Court has also been unable to find legal support for it. Also preventing jurisdiction under § 1343 is Plaintiff’s failure to allege and prove a deprivation of civil rights under the color of state law. The Complaint does not allege any violation of her rights under color of state law. To the extent that Plaintiff’s allegations constitute deprivations of rights under color of tribal law, 28 U.S.C. § 1343(a)(3) would not provide jurisdiction. *See R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir.1983) (“no action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law”).

Id.

The *Charland* plaintiff did avoid Rule 11 sanctions on the Title VII and ADA claims against the tribal enterprise. *See id.* at 865-66. The court noted that there was a colorable argument that Congress might have not intended for the tribal employer exceptions to Title VII and the ADA to apply to tribal gaming enterprises. *See id.* The court faulted the plaintiff for not properly developing these arguments, but refused to sanction the plaintiff for that specific failure:

The statutes upon which Plaintiff relied forbid discrimination by “employers.” Both statutes expressly provide that “an Indian tribe” is not an employer. Title VII, 42 U.S.C. § 2000e(b); ADA, 42 U.S.C. § 12111(5)(B)(i). Plaintiff offered no suggestion of any basis upon which jurisdiction would exist as to a claim against Defendant Mdewakanton Sioux Community, an Indian Tribe.

Plaintiff now suggest that the phrase “Indian tribe” in the statutes should not be construed in such a way as to include Indian Casinos as those which are excluded from the statutory definition of employer. This argument has not been accepted when it has been presented to other courts. *See Giedosh v. Little Wound School Board, Inc.*, 995 F.Supp. 1052, 1055-56 (D.S.D.1997); *Setchell v. Little Six, Inc.*, No. C4-95-2208, 1996 WL 162560, at *2 (Minn.App. Apr.9, 1996), *review granted* (Minn. July 10, 1996), petition for writ of cert. to the Supreme Court of Minnesota denied, 521 U.S. 1124, 117 S.Ct. 2520, 138 L.Ed.2d 1021 (1997); *see also Wardle v. Ute Indian Tribe*, 623 F.2d 670, 672 (10th Cir.1980)

(“Indian tribes and businesses operating on or near Indian reservations are excluded from the employment prohibitions of Title VII”).

Plaintiff claims that she was making a nonfrivolous argument for the extension, modification or reversal of existing law, relying on cases such as *Kiowa*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *Puyallup Tribe, Inc. v. Department of Game of the State of Washington*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) (Blackmun, J. concurring); *Oklahoma Tax Comm’n v. Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (Stevens, J. concurring); and the dissenting opinion in *Cohen v. Little Six, Inc.*, 543 N.W.2d 376 (Minn.App.1996).

Plaintiff contends that the Little Six, Inc. would meet the definition of “employer” under Title VII and the ADA, were it not for the proviso that states that “an Indian Tribe” is not an employer. Plaintiff wishes to persuade that the phrase “an Indian tribe” should not be construed in such a way as to include the commercial casino Little Six, Inc. Plaintiff could contend that a holding to the contrary would allow commercial enterprises to have protections that were not intended by Congress, at the expense of tort victims such as herself who are not provided a full opportunity to pursue legal claims against the enterprise.

Such contentions, if they were developed in support of Counts Five and Six, would represent nonfrivolous argument seeking a modification to existing law as it pertains to the claims against Little Six, Inc. under Title VII and the ADA. It is true that in this case, counsel for Plaintiffs did not effectively develop this argument, but we do not read Rule 11 as imposing a requirement in every case that the nonfrivolous argument for a change in existing law be made in a particular manner. (*But see* 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1335, p. 71-81, in which the authors examine the question of “whether Rule 11 is violated when an attorney presents an argument for the extension of existing law in a manner that creates the impression that it is based on settled law”).

Id.

In similar fashion, but relating to an appeal, the Tenth Circuit in *Gallegos v. Jicarilla Apache Nation*, 97 Fed. Appx. 806, 2003 WL 22854632 (10th Cir., Nov. 28, 2003), an unpublished decision, sanctioned the appellant’s attorney under Appellate Rule 38 for bringing a frivolous appeal. *See id.* at 814-14. Plaintiff had brought civil rights claims against the Nation under Sections 1985(1), 1985(2), 1985(3), and 1986, and under the so-called *Dry Creek Lodge* exception; all of which the district court dismissed on grounds that *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997), foreclosed these claims due to tribal sovereign immunity and tribal

official immunity. *See Gallegos*, 97 Fed. Appx. at 811-14. The Tenth Circuit imposed Rule 38 sanctions in the amount of \$5000 and double costs. *See id.* at 814. The court wrote:

“To deter frivolous and abusive litigation and promote justice and judicial efficiency, the federal courts are empowered to impose monetary sanctions, by statutes and the rules of civil and appellate procedure as well as their inherent right to manage their own proceedings.” *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir.1987) (en banc). “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” Fed. R.App. R. 38.

“An appeal is frivolous when the result is obvious, or the appellant’s arguments of error are wholly without merit.” *Id.* at 1510 (internal quotations omitted). “Rule 38 ... permits sanctions against attorneys for taking a truly frivolous appeal[.]” *id.* at 1511, regardless of the presence of subjective bad faith on the part of counsel, *id.* at 1512 (“We believe the proper standard under ... Rule 38 ... is that ... [sanctions] are impossible against an attorney personally for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney’s duties to the court.”).

An appeal may be frivolous as filed or as argued. *See Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1578-79 (Fed.Cir.1991). A party may argue an appeal frivolously, for example, by “submitting rambling briefs that make no attempt to address the elements requisite to obtaining reversal, ... failing to explain how the lower tribunal erred or to present clear or cogent arguments for overturning the decision below, ... citation of inapplicable or irrelevant authorities, [or] misrepresenting facts or law to the court[.]” *Id.* at 1579 (internal citations omitted).

For many of the reasons cited by the court in *Finch*, we consider this appeal frivolous as argued. An example of this frivolous argumentation appears in Mr. Chappabitty’s efforts to oppose the district court holding that the *Dry Creek* exception does not apply. Mr. Chappabitty, on appeal, does not attempt to distinguish the authority upon which the district court relied, present counter authority, or forward a serious countervailing policy argument. Rather, he first references facts not alleged in the Complaint, which is impermissible on a motion to dismiss. *See Sutton*, 173 F.3d at 1236. Then, he references, without citation, the Major Crimes Act, 18 U.S.C. § 1153, which governs the prosecution of enumerated crimes committed by an Indian in Indian Country. This case, of course, is a civil action brought by a non-Indian. Finally, Mr. Chappabitty cites *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209

(1978), in an attempt to argue that the Nation illegally exercised criminal jurisdiction over Mr. Gallegos. It is at best bizarre, and more likely, a grave mischaracterization, to characterize the Nation's firing of Mr. Gallegos as an exercise of criminal jurisdiction. *Cf. Charczuk v. C.I.R.*, 771 F.2d 471, 475-76 (10th Cir.1985) ("Courts are in no way obligated to tolerate arguments that thoroughly defy common sense. Such conduct is permissible in our society for the very young, those attempting to make a joke or, occasionally, philosophers, but it cannot be allowed of one engaged in the serious work of a practicing attorney appearing before a court of law.").

Mr. Chappabitty contends, without relevant authority, [footnote 6: Mr. Chappabitty's cite to *Bralely v. Campbell*, 832 F.2d 1504 (10th Cir.1987) (en banc), is without merit. In *Bralely*, the court considered the propriety of sanctions issued sua sponte, and did not address the timing of motions filed by parties.] that the Nation's motion was premature because we had yet to rule on the merits. Rule 38, however, requires only that a party file a separate motion for sanctions. It is silent as to timing. Our review of case law finds no prohibition against filing a motion for sanctions prior to a decision on the merits. *Cf. Hirschfeld v. New Mexico Corr. Dept.*, 916 F.2d 572, 581 (10th Cir.1990) (considering a motion for sanctions that was filed prior to disposition on the merits).

The Nation, pursuant to Rule 38, requests the Court to award it \$13,507.50 in attorney's fees and double costs in the amount of \$126.34. The unopposed*815 Affidavit of Wayne H. Bladh, counsel for the Nation, supports this request. We find, however, that "just damages" in this case amount to \$5,000.00. *See Fed. R.App. P. 38; Stafford v. United States*, 208 F.3d 1177, 1179 (10th Cir.2000) (awarding Rule 38 sanctions of \$4,000.00, an amount less than full attorney's fees). Therefore, we grant the Nation's motion for sanctions in the amount of \$5,000.00 in "just damages" and \$126.34 in double costs.

Id. at 813-15 (footnote 7 omitted).

Of particular note was the plaintiff's claim that *Oliphant v. Suquamish Tribe* prohibited the termination of the plaintiff's employment:

Finally, Mr. Chappabitty cites *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), in an attempt to argue that the Nation illegally exercised criminal jurisdiction over Mr. Gallegos. It is at best bizarre, and more likely, a grave mischaracterization, to characterize the Nation's firing of Mr. Gallegos as an exercise of criminal jurisdiction.

Id. at 814.

Another exceptional example of jurisdictional confusion, coupled with unusual procedural maneuvers by counsel, is *Affiliated Ute Citizens of the State of Utah v. Ute Indian Tribe of Uintah and Ouray Reservation*, 21 F.3d 1120, 1994 WL 142414 (10th Cir., April 20, 1994) (unpublished). The Tribe had won on its defense of sovereign immunity in 1987 at the district court level, and the plaintiffs-appellants attempted to intervene three years later, eventually being dismissed from the case for lack of standing in 1992. *See id.* at *1. The tribe appealed a narrow aspect of the 1987 sovereign immunity order, in which the lower court suggested that the Tribe had impliedly waived its immunity for certain other actions. *See id.* at *2 (referencing appeal No. 93-4007). The attorney for plaintiffs-appellants that had been dismissed from the district court action in 1992 intervened in the Tribe's appeal and filed a series of briefs on the merits and motions to dismiss, all without authority or justification. *See id.* at *1. Plaintiffs-appellants then filed a separate appeal (No. 93-4063) of the 1992 order. *See id.* The court granted the motion for sanctions, writing:

Mr. Higgins' multiple filings are irreconcilable. If one is to infer that he claims de facto intervenor party status for his clients in the proceedings below, *see, e.g., In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461, 1463-64 (10th Cir.1983) (where party was allowed to participate in the district court proceedings, the district court's failure to rule upon its motion to intervene did not prevent it from appealing), then he had no basis for this appeal. His client could, and must, proceed as party-appellees in the Tribe's appeal. If this appeal takes primacy on the ground that Mr. Higgins' clients were not permitted to intervene below, then Mr. Higgins could not file motions and briefs in the Tribe's appeal without a motion to intervene and permission by this court. The tactic of "appearing" for the AUC in No. 93-4007 is wholly unsupported by the record and was not pursued by Mr. Higgins. It simply complicated matters further for the court and the parties.

Besides being inconsistent, Mr. Higgins' arguments in this appeal address nothing for which real redress can be granted. The dispute over intervention below, even if resolved in favor of these appellants, could only lead to a remand and an amended judgment of dismissal on grounds of standing. The sovereign immunity claim could only be contested where it was raised, i.e., in the Tribe's appeal.

The AUC and the Tribe seek sanctions against Mr. Higgins and his clients, and Mr. Higgins has had opportunities to respond (1) by filing a reply brief as he was permitted to do (but did not) under Fed. R.App. P. 31; (2) in responding to the motion to strike his brief in the Tribe's appeal; and (3) at oral argument. We

therefore see no reason to delay ruling on sanctions. *See Braley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir.1987).

This court has inherent power to impose sanctions to deter frivolous filings and promote judicial efficiency, *see Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980). Additionally, Fed. R.App. P. 38 authorizes us to impose “just damages and ... costs” upon litigants or their attorneys for filing “frivolous” appeals, and 28 U.S.C.1927 provides that “any attorney who ... multiplies the proceedings in any case unreasonably and vexatiously” may be personally sanctioned for the “excess costs, expenses, and attorneys fees reasonably incurred because of such conduct.” We have held that under either Rule 38 or 1927 sanctions may be imposed against an attorney personally if his conduct, “viewed objectively, manifests either intentional or reckless disregard of the attorney’s duties to the court.” *Braley*, 832 F.2d at 1512.

We conclude that sanctions are justified against Mr. Higgins personally under Fed. R.App. P. 38 and 28 U.S.C.1927 for vexatiously and unreasonably multiplying proceedings in this court. *See Braley*, 832 F.2d at 1511-12. His multiple filings, briefs and motions have needlessly consumed the time of the various parties in preparing motions to dismiss, and have unreasonably complicated the resolution of the Tribe’s appeal. The Tribe and AUC have requested sanctions equal to their costs and attorneys fees incurred in responding to this appeal and in responding to Mr. Higgins’ motions and brief filed in the Tribe’s appeal. We will not go so far. Instead, we sanction Mr. Higgins (and not his clients) in the amount of \$500, payable in equal shares to AUC and the Ute Indian Tribe.

Id. at *1-2.

Not all courts will impose sanctions on parties suing Indian tribes without a colorable claim to federal court jurisdiction. In *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890 (10th Cir. 1989), the Tenth Circuit refused to reverse a decision by the district court *not* to sanction a party for bringing a claim against an Indian tribe that was clearly barred by tribal sovereign immunity. *See id.* at 894-95. The court wrote:

Finally, we address the district court’s denial of the Tribe’s request to award Rule 11 sanctions against EMCI for suing it without consent in violation of its clear right to sovereign immunity. “Rule 11 requires sanctions against attorneys who file signed pleadings, motions or other papers in district court which are not well grounded in fact, are not warranted by existing law or a good faith argument for its extension, or are filed for an improper purpose.” *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir.1988). The imposition of such sanctions is

committed to the trial court's discretion. *See Adamson*, 855 F.2d at 673. The majority of the panel, Judges Logan and McWilliams, has concluded that the trial court did not abuse its discretion in denying Rule 11 sanctions against EMCI. Similarly, it declines to impose sanctions for filing a frivolous appeal, as requested by the Tribe.

Id. However, the writer of the majority opinion dropped an unusual footnote where he noted that he would vote to reverse the district court's decision not to sanction the plaintiff:

I would reverse the trial court's refusal to grant Rule 11 sanctions, and I therefore respectfully dissent from this portion of the opinion. The only discussion by the court concerning the denial of sanctions does not support its decision. Indeed, the court recognized that "nothing presented ... here obviates the principle of the Tribe's nonamenability to a suit like this." Rec., vol. II, at 11. The court further stated that although it thought EMCI had behaved prudently in filing the instant suit, it disagreed with EMCI's decision to include the Tribe, stating that it did not "believe [it] would have filed a complaint of such comprehensiveness other than just a direct appeal of the [administrative] decision." *Id.* While I will rarely second-guess a district court's decision not to apply Rule 11 sanctions, *see Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985), *cert. denied*, 484 U.S. 1008, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987), the clarity of law and the circumstances of this litigation convince me that there was no objectively reasonable basis for naming the Tribe as a defendant in the complaint. At the time EMCI filed the instant suit, *Santa Clara Pueblo* had made clear that Indian tribes are not amenable to suit absent their consent or that of Congress. *See* 436 U.S. at 58, 98 S.Ct. at 1676. Moreover, this circuit's decisions by then left no room for an argument that the exception in *Dry Creek Lodge* could be extended beyond the highly unusual facts of that case. *See White*, 728 F.2d at 1312-13; *Ramey*, 673 F.2d at 319 n. 4. Our decision in *Jicarilla Apache Tribe* had also made clear that a Tribe under the circumstances here is immune from suit. *See* 821 F.2d at 539-41. I am particularly persuaded by the fact that in the related litigation where EMCI is the defendant, EMCI asserted in its counterclaim allegations similar to those it presses against the Tribe here. The Tribe raised the defense of sovereign immunity, and the district court in that litigation dismissed the counterclaims on that basis, all before EMCI sued the Tribe in this action.

Id. at 895 n. 5 (Seymour, C.J.).

III. “Good Faith” Extensions of Current Law or Sanctionable Frivolity?

The following hypotheticals hopefully will serve to give real-world meaning to the substantive portion of these materials. They are, loosely speaking, in order of difficulty, with the easier questions coming first.

Scenario #1

Counsel represents Client A, a convicted sex offender residing in Indian Country. Federal and tribal officials indict Client A on grounds that he failed to register with the tribal sex offender registry office, in violation of SORNA, a part of the Adam Walsh Act. Counsel moves to dismiss the federal indictment on grounds that Congress does not have authority under the Indian Commerce Clause, nor its so-called “plenary power” to legislate in Indian affairs, to require tribes to establish sex offender registries. *See United States v. Lara*, 541 U.S. 193, 216 (2004) (Thomas, J., concurring); *United States v. Valverde*, No. 08-187 (E.D. Cal., Feb. 9, 2009), <http://sexcrimes.typepad.com/files/valverde-opinion.pdf>; *United States v. Powers*, No. 07-221 (M.D. Fla., April 18, 2008), <http://turtletalk.files.wordpress.com/2008/04/us-v-powers-dct-opinion.pdf>.

Is Counsel making a good faith or reasonably objective argument?

Scenario #2

Counsel represents Tribe B. Tribe B has petitioned for federal recognition, but has not received a ruling from the Department of Interior. Tribe B is a defendant, along with a business partner in another state, in federal court for violating a multi-million dollar business contract. Counsel moves to dismiss the claim on grounds that Tribe B is immune from suit. *See Huron Potawatomi, Inc. v. Stinger*, 574 N.W.2d 706 (Mich. App. 1997), *lv. denied*, 590 N.W.2d 576 (Mich. 1999); *Sungold Gaming USA, Inc. v. United Nation of Chippewa, Ottawa, and Potawatomi Indians of Michigan, Inc.*, 2002 WL 522886 (Mich. App., April 5, 2002), *lv. denied*, 654 N.W.2d 336 (Mich. 2002).

Is Counsel making a good faith or reasonably objective argument?

Scenario #3

Counsel represents Tribe C, a signatory to the Treaty of 1871, which includes a “bad men”-style clause requiring the Tribe to turn over any “bad men” not from the community to federal law enforcement officials at the reservation border. The treaty journals are clear that Tribe C wanted to keep United States officials out of the reservation. The treaty has never been abrogated. The Tribal Council instructed the tribal police to refuse entry to the Federal Bureau of Investigation during a drug sweep, citing this clause. The United States Attorney brings a claim for injunctive relief against the Tribal Council. *See United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986); *United States v. Blackfeet Tribe*, 364 F. Supp. 192 (D. Mont. 1973).

Can counsel make a good faith or reasonably objective argument that the Treaty of 1871 excludes the FBI from Tribe C's reservation?

Scenario #4

Counselor D represents Tribal Court E in a federal court action challenging the authority of the tribal court. The tribal court had ordered the arrest and week-long incarceration of a non-Indian person on the grounds that the person was dangerous to herself. Can Counselor D argue in good faith for an exception to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)?

Scenario #5

Counselor F represents Prisoner G in the same action. Can Counselor F, in good faith, bring Section 1981, 1982, and 1985 claims against the tribal judge? How about a Bivens action? See *Murgia v. United States*, No. 07-101 (D. Ariz., Feb 14, 2008), <http://turtletalk.files.wordpress.com/2009/02/mtd-order-doc-58-021508.pdf>.

Scenario #6

Counsel represents Tribe H. Tribe H is not federally recognized, and in fact has been denied federal recognition and exhausted all of its appeals against the denial. After hearing oral argument in *Carcieri v. Kempthorne*, Tribe H opens a small bingo hall on its only parcel of land, located near a United Methodist Church and held in trust for the Tribe by the Church. Counsel advises Tribe H that the *Carcieri* oral argument made a strong suggestion that treaty tribes (like Tribe H) that were not federally recognized in 1934 could make a colorable argument that they *should have been* "under federal jurisdiction," and therefore may in essence become federally recognized that way. The United States Attorney and the State's Attorney General brings suit together in federal court against Tribe H, seeking to enjoin the operation of the bingo hall. See Oral Argument Transcript at 20, *Carcieri v. Kempthorne*, __ U.S. __ (2009) (No. 07-526) (question from Breyer, J.), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-526.pdf.

Can Counsel make a good faith argument that the bingo hall on restricted "Indian lands" is permissible?

Scenario #7

Similarly, after hearing the oral argument in *Carcieri v. Kempthorne*, State Attorney General J brings a federal court action seeking a declaratory judgment that Tribe K is not authorized to purchase any land. Tribe K's constitution, which expressly grants that authority to Tribe K's tribal council, is a product of Section 16 of the Indian Reorganization Act, which allowed the Tribe to reorganize and vote on the tribal constitution. Attorney General J argues that Tribe K's reservation was never subject to allotment, and therefore Tribe K cannot benefit from Section 16. See Oral Argument Transcript at 39, *Carcieri v. Kempthorne*, __ U.S. __ (2009) (No.

07-526) (question from Roberts, C.J.), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-526.pdf.

Is Counsel making a good faith or reasonably objective argument?

Scenario #8

Counsel represents three entities – Citizen Group L, Citizen Group M, and Citizen Group N – each of whom organized to oppose the acquisition of gaming lands by the Department of Interior on behalf of Tribe O, Tribe P, and Tribe Q, respectively. The sole claim each group brings is a constitutional challenge to the Department of Interior’s regulations on trust acquisitions of gaming lands. The federal district court decided Citizen Group L’s case against Tribe O in 1997, and that was affirmed on appeal in 1998. The same federal district court decided Citizen Group M’s case against Tribe P in 2000, and that was affirmed on appeal in 2002. The same federal district court decided Citizen Group N’s case against Tribe Q in 2009, and explicitly warned Counsel that two panels of the federal circuit above had already rejected the same exact claims being made on behalf of Citizen Group N in *Citizen Group M v. DOI* (XXXth Cir. 2002) and *Citizen Group L v. DOI* (XXXth Cir. 1998). Counsel appeals *Citizen Group N v. DOI* to the XXXth Circuit. See *TOMAC v. Norton*, 433 F.3d 852 (D.C. Cir. 2006); *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007); *Michigan Gambling Opposition v. Kempthorne*, 2008 WL 4356930 (D.C. Cir., Aug. 15, 2008), *cert. denied*, 129 S. Ct. 1002 (2009); *Patchak v. Kempthorne*, No. 08-1331 (D. D.C., Jan. 26, 2009), <http://turtletalk.files.wordpress.com/2009/01/patchak-v-kempthorne-transcript.pdf>.

Did Counsel file a frivolous appeal?