

Gorsuch

Somerlott v. Cherokee Nation Distributors, Inc., 686 F.3d 1144, 1154 (10th Cir. 2012). Wrote concurring opinion. Employee brought federal employment discrimination claims against tribal corporation, alleging violations of Title VII and the Age Discrimination in Employment Act (ADEA). The United States District Court for the Western District of Oklahoma dismissed complaint for lack of subject matter jurisdiction. Employee appealed. The Court of Appeals affirmed, holding that: (1) tribal corporation was not immune from employee's federal employment discrimination claims under tribal sovereign immunity, and (2) employee failed to preserve argument regarding sovereign immunity.

Nowlin v. United States, 581 F. App'x 722 (10th Cir. 2014). Wrote opinion. Defendant convicted of Indian-on-Indian crime in Indian Country. Appealed claiming there was insufficient evidence that he is Indian and that Eastern Shoshone was not federally recognized at the time of his conviction. Court of appeals affirmed conviction, holding that: (1) his plea colloquy as well as a previous case he was involved in established that he was Indian; and (2) Eastern Shoshone was a tribe at the time of his conviction because it appeared on Interior's list of federally recognized tribes.

Gardner v. Arrowichis, 543 F. App'x 891 (10th Cir. 2013). Wrote majority opinion. Non-Indians filed a habeas corpus petition, alleging they were unlawfully in the custody of an Indian tribe. District Court dismissed because, based on the petition, it was unclear whether the petitioners were actually in custody. Circuit Court affirmed, holding: (1) petitioners failed to demonstrate an abuse of discretion by the District Court, and (2) petitioners assertion that District Court misapplied *Ex Parte Young* was without merit because it was not a basis of the court's decision.

Yellowbear v. Atty. Gen. of Wyoming, 380 F. App'x 740 (10th Cir. 2010). Wrote majority opinion. Following conviction for first-degree murder, petitioner filed a petition for writ of habeas corpus. The United States District Court for the District of Wyoming denied the petition. The Court of Appeals affirmed, holding that state court's determination that crime did not occur on Indian reservation was not an unreasonable application of federal law.

Fletcher v. United States, 730 F.3d 1206 (10th Cir. 2013). Wrote majority opinion. Tribal members brought action against federal government, seeking an accounting to determine whether the federal government had fulfilled the fiduciary obligations it chose to assume as trustee to oversee the collection of royalty income from oil and gas reserves and its distribution to tribal members. The United States District Court for the Northern District of Oklahoma dismissed the tribal members' claims. The Court of Appeals reversed and remanded, holding that American Indian Trust Fund Management Reform Act imposed on federal government a duty to provide an accounting of royalty income from oil and gas reserves held in trust and its distribution to tribal members.

Ute Indian Tribe of the Uintah v. Myton, 835 F.3d 1255 (10th Cir. 2016). Wrote majority opinion. Ute Indian Tribe filed suit against cities, counties, and state officials, seeking injunctive relief halting criminal prosecution of tribal member for alleged traffic offenses on land judicially recognized as Indian country. The United States District Court for the District of Utah granted city's motion to dismiss, and tribe appealed. The Court of Appeals reversed, holding that: (1) issue preclusion barred relitigation of whether parcel of land within city was Indian country; (2) equitable principles did not warrant eliminating checkerboard jurisdiction; and (3) doctrine of laches did not apply.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah, 790 F.3d 1000 (10th Cir. 2015), cert. denied sub nom. Wasatch Cty., Utah v. Ute Indian Tribe of the Uintah & Ouray Reservation., 136 S. Ct. 1451, 194 L. Ed. 2d 575 (2016), and cert. denied sub nom. Uintah Cty., Utah v. Ute Indian Tribe of the Uintah & Ouray Reservation, 136 S. Ct. 1451, 194 L. Ed. 2d 550 (2016). Wrote majority opinion. Indian tribe brought action alleging that state and local governments were unlawfully trying to displace tribal authority on tribal lands. State and counties filed counterclaims alleging that tribe infringed their sovereignty. The United States District Court for the District of Utah denied tribe's motion for preliminary injunction to halt tribal member's prosecution for alleged traffic offenses on tribal land, tribe's claim of immunity from counterclaims, and county's claim of immunity from tribe's suit.

The Court of Appeals, affirmed in part, reversed in part, and remanded, holding that: (1) county's prosecution of tribal member constituted irreparable injury to tribal sovereignty; (2) Anti-Injunction Act did not bar federal court from issuing preliminary injunction; (3) *Younger* abstention was not warranted; (4) mutual assistance agreement between state and tribe did not waive tribe's sovereign immunity from suit in state court; (5) doctrine of equitable recoupment did not apply to permit state and county to assert counterclaims; and (6) county attorneys were not entitled to sovereign immunity.

Sanders v. Anoatubby, 631 F. App'x 618 (10th Cir. 2015). On panel, voted with majority. Citizen of Chickasaw Nation, pro se, brought action against Nation's Division of Housing, asserting claims under Title VI and Title VII, based on allegations that she was wrongfully discharged and that she was being retaliated against, in her application for housing assistance, for having filed grievance against her supervisor. The United States District Court for the Western District of Oklahoma, Vicki Miles-LaGrange, Chief Judge, granted tribe's motion to dismiss. Citizen appealed. The Court of Appeals affirmed, holding that: (1) claims were barred under doctrine of tribal sovereign immunity, and (2) Ex Parte Young doctrine did not apply to action.

Santana v. Muscogee (Creek) Nation, ex rel. River Spirit Casino, 508 F. App'x 821 (10th Cir. 2013). On panel, voted with majority. Gambling addict filed state court action pursuant to state's tribal gaming compact with Indian tribe alleging that tribe improperly induced him to gamble at its casino. After removal, the United District Court for the Northern District of Oklahoma

dismissed complaint. Plaintiff appealed. The Court of Appeals affirmed, holding that compact did not waive tribal immunity.

United Planners Fin. Servs. of Am., L.P. v. Sac & Fox Nation, 654 F. App'x 376, 377 (10th Cir. 2016). Wrote majority opinion. Sac & Fox Nation sued company in tribal court over an “investment gone awry.” Tribal court found that parties’ contract contemplated arbitration and dismissed the suit. Subsequently, the arbitrators dismissed on statute of limitations grounds. Tribe again sued in tribal court, asserting that since arbitration was not available, then judiciary should be. United Planners then filed suit in federal court seeking to have the tribal court litigation enjoined. Federal district court dismissed the action for failure to exhaust tribal court remedies. United Planners appealed. Circuit court affirmed, holding that even the broadest reading of the original tribal court order, which United Planners urged, would bar the tribe’s claim pursuant to claim preclusion or issue preclusion – a defense still available and unexhausted in tribal court.

Nanomantube v. Kickapoo Tribe in Kansas, 631 F.3d 1150 (10th Cir. 2011). On panel, voted with majority. Former tribal employee brought Title VII employment discrimination action against Indian tribe, as well as against tribe's governing body and unincorporated tribal casino at which employee worked. The United States District Court for the District of Kansas dismissed action based on tribal sovereign immunity, and employee appealed. The Court of Appeals affirmed, held that: (1) Congress did not abrogate tribal immunity with regard to Title VII, and (2) tribe's agreement to comply with Title VII, contained in single sentence in casino employee handbook, did not unequivocally waive tribal sovereign immunity.

Reber v. Steele, 570 F.3d 1206 (10th Cir. 2009). On panel, voted with majority. State petitioner sought federal habeas corpus review, after affirmance of his state juvenile court conviction and finding of delinquency but prior to sentencing, contending that he was Indian and that the crime occurred in Indian Country, depriving the state of jurisdiction. The United States District Court for the District of Utah denied petition because “he was clearly not entitled to relief.” Petitioner appealed. The Court of Appeals vacated and remanded, holding that petition was premature, since it was filed before imposition of sentence. Court of Appeals did not reach the tribal jurisdiction issue.

Fay v. Chester, 413 F. App'x 23 (10th Cir. 2011). On panel, voted with majority. Following affirmance of convictions on four counts of assault resulting in serious bodily injury and one count of assault by striking, beating, or wounding, 668 F.2d 375, and following revocation of his parole, defendant petitioned for a writ of habeas corpus. The United States District Court for the District of Kansas denied relief, and defendant appealed. The Court of Appeals affirmed, holding that: (1) Indian Major Crimes Act was constitutional; (2) claim that defendant was actually innocent of the original charges that underlay his parole could not be raised in the instant proceeding; and (3) Parole Commission's decision to revoke defendant's parole and continue him to the expiration of his sentence was supported by a rational basis in the record.

Nahno-Lopez v. Houser, 625 F.3d 1279 (10th Cir. 2010). On panel, voted with majority. Two groups of Native American plaintiffs, consisting of the alleged owners of an allotment of land and the alleged leaseholders for a portion of that allotment, brought action, under Federal and Oklahoma law, against the Tribal Council of a different tribe, that tribe's manager, and the tribe's casino, alleging that a portion of the allotment was trespassed upon by the casino. The United States District Court for the Western District of Oklahoma, granted in part and denied in part defendants' motion to dismiss, and subsequently granted defendants' motion for summary judgment on remaining claims. Plaintiffs appealed. The Court of Appeals affirmed, holding that: (1) plaintiffs' complaint could be fairly construed to articulate viable claim for federal common-law trespass for which allotment statute provided jurisdiction, but (2) plaintiffs' consent to tribe's presence on allotment precluded recovery for trespass.

Hydro Res., Inc. v. U.S. E.P.A., 608 F.3d 1131 (10th Cir. 2010) (en banc). Mining company that sought to operate uranium mine and New Mexico Environmental Department petitioned for review of Environmental Protection Agency's (EPA) decision to implement, pursuant to Safe Drinking Water Act (SDWA), federal underground injection control program on company's lands. The Court of Appeals dismissed the petitions and remanded. On remand, the EPA determined that land fell within a dependent Indian community, and company petitioned for review. The Court of Appeals denied the petition, and company petitioned for rehearing en banc. The Court of Appeals en banc, vacated, holding that: (1) petitioner suffered injury in fact such that it had standing to contest EPA's determination; (2) "dependent Indian communities" under statute providing primary federal criminal jurisdiction over certain territories consist only of lands explicitly set aside for Indian use by Congress or its designee and federally superintended; and (3) petitioner's land did not fall within a "dependent Indian community," so as to subject proposed mine to EPA regulation.

United States v. Williams, 549 F. App'x 813 (10th Cir. 2013). On panel, voted with majority. Defendant was convicted in the United States District Court for the Western District of Oklahoma of conspiring to misbrand prescription drugs, and he appealed. The Court of Appeals affirmed, holding that: (1) district court did not have to instruct jury on meaning of "adequate directions for use," and its failure to do so did not result in constructive amendment of indictment; (2) pharmacy did not need to have internet website to qualify as online pharmacy under the Controlled Substances Act (CSA); and (3) fact that online pharmacy run by defendant's company was owned by Indian tribe and operated off of Indian land, or that tribe had issued a tribal pharmacy license and allegedly had regulatory authority over pharmacy, did not prevent, on tribal immunity grounds, the federal criminal prosecution of defendant.

Bonnet v. Harvest (U.S.) Holdings, Inc., 741 F.3d 1155 (10th Cir. 2014). On panel, voted with majority. Petroleum landman, and his sole proprietorship, brought action against various companies and individuals arising from Tribe's termination of his contract to provide independent consultant services. Plaintiff served Tribe with non-party subpoena duces tecum requesting documents. The United States District Court for the District of Utah denied the Tribe's motion to quash based on tribal immunity. Tribe appealed. The Court of Appeals reversed, holding that: (1) denial of motion to quash based on tribal immunity was immediately appealable collateral order, and (2) as matter of first impression in Circuit, subpoena itself was "suit" against Tribe triggering tribal sovereign immunity.

Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288 (10th Cir. 2008). Tobacco distributor brought action against tobacco manufacturer, a tribal enterprise, and individuals, alleging breach of contract and civil conspiracy. The United States District Court for the Northern District of Oklahoma granted defendants' motions to dismiss, and distributor appealed. The Court of Appeals affirmed, holding that: (1) manufacturer had sovereign immunity as enterprise of the tribe; (2) manufacturer was not equitably estopped from asserting its immunity; (3) distributor failed to state a civil conspiracy claim under the Sherman Act against individual defendants; and (4) distributor failed to state a price discrimination claim under the Robinson–Patman Act against individual defendants.

Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012). On panel, voted with majority. Member of Indian tribe petitioned for writ of habeas corpus, seeking relief from tribal court convictions and his sentence. The United States District Court for the District of New Mexico dismissed petition. Petitioner appealed. The Court of Appeals affirmed, holding that: (1) member was required to exhaust his tribal court remedies before filing his petition for writ of habeas corpus in federal court; (2) member had tribal court remedies that he had to exhaust; and (3) failure of member to file habeas petition in tribal court could not be excused from requirement to exhaust.

Muscogee (Creek) Nation v. Oklahoma Tax Comm'n, 611 F.3d 1222 (10th Cir. 2010). On panel, voted with majority. Indian tribe brought action under § 1983 against the Oklahoma Tax Commission (OTC) and its commissioners in their official capacities, alleging OTC and the commissioners deprived the tribe of due process of law and violated its Fourth Amendment rights in stopping tribe vehicles outside Indian country, searching them for cigarettes failing to bear a tax stamp, and seizing unstamped cigarettes. The United States District Court for the Northern District of Oklahoma dismissed the complaint for lack of subject matter jurisdiction and for failure to state a claim. Tribe appealed. The Court of Appeals affirmed, holding that: (1) Eleventh Amendment barred claims against the OTC; (2) Eleventh Amendment did not bar claims against the commissioners to the extent they requested a declaratory judgment that OTC's stops and searches of tribe vehicles were unlawful and a prohibitory injunction directing commissioners to cease interfering with tribe's vehicles and their lading; (3) Eleventh Amendment barred claims against commissioners to the extent they requested an injunction directing the return of the seized cigarettes or damages to compensate tribe for monetary value of the cigarettes; (4) tribe did not constitute a “person” entitled to bring suit for prospective relief against commissioners under § 1983; and (5) Indian Commerce Clause did not, by itself, automatically bar or preempt state of Oklahoma from enforcing its cigarette tax laws outside Indian country.

Miami Tribe Of Oklahoma v. United States, 656 F.3d 1129 (10th Cir. 2011). On panel, voted with majority. Indian tribe brought action alleging that Bureau of Indian Affairs' (BIA) decision denying tribe member's application to transfer portion of his interest in restricted land to tribe in trust status violated Indian Land Consolidation Act (ILCA) and was breach of trust. After case was remanded to BIA for further proceedings, BIA approved application but denied request to convey land in trust status. The United States District Court for the District of Kansas affirmed

BIA's revised decision, and BIA appealed. The Court of Appeals vacated and remanded, holding that: (1) BIA had standing to appeal interlocutory order; (2) tribe did not have jurisdiction over property; and (3) BIA's determination that approval of transfer was not warranted was not arbitrary and capricious.

Gilmore v. Weatherford, 694 F.3d 1160 (10th Cir. 2012). On panel, voted with majority. Indian tribal members with restricted, undivided interests in mine tailings, or “chat,” that was being sold and removed by other parties who also had interest in chat brought cause of action against these other parties, as well as against the Secretary of the Interior and several Bureau of Indian Affairs (BIA) officials, seeking to compel accounting, to obtain other equitable relief, and to recover on theory that private party defendants were guilty of conversion in removing/selling this chat without approval of the Secretary of the Interior. The United States District Court for the Northern District of Oklahoma dismissed claims against federal defendants based on plaintiffs' failure to exhaust their administrative remedies, and later ruled that it did not have federal question jurisdiction over plaintiffs' accounting and conversion claims against private parties. Plaintiffs appealed. The Court of Appeals affirmed in part and reversed and remanded in part, holding that: (1) doctrine of exhaustion of administrative remedies applies as matter of judicial discretion to common law claims, abrogating *Otoe–Missouria Tribe v. Kempthorne*, 2008 WL 5205191; *Tonkawa Tribe of Indians of Oklahoma v. Kempthorne*, 2009 WL 742896; and *Seminole Nation v. Salazar*, 2009 WL 919435; (2) district court did not abuse its discretion in requiring tribal members to first exhaust their administrative remedies, as prerequisite to pursuing claims against federal defendants; (3) state law accounting claim asserted against private parties who also had interest in chat was not claim over which district court could exercise federal question jurisdiction; but (4) conversion claim necessarily presented a substantial question of federal law over which district court could exercise federal question jurisdiction.

Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012). On panel, voted with majority. Indian tribe brought action alleging that Oklahoma's tobacco tax-stamp scheme violated federal law and tribal sovereignty. The United States District Court for the Eastern District of Oklahoma dismissed complaint, and tribe appealed. The Court of Appeals affirmed, holding that: (1) district court had subject matter jurisdiction over matter; (2) requirement that retailers on Indian reservations obtain state tax exemption certificates was not preempted by federal statute; (3) requirement that tribally-licensed retailers purchase tobacco products from state-licensed wholesalers did not impermissibly infringe on tribal self-governance; (4) use of probable-demand formula to limit number of tax-free stamps did not impose impermissible burden on tribal self-governance; (5) state's practice seizing cigarettes outside Indian country that did not have tax or tax-free stamp did not impermissibly infringe on tribe's sovereignty; (6) statutes did not unduly interfere with tribal members' ability to buy cigarette brands of their choosing; and (7) Indian trader statute did not preempt statutes requiring tobacco manufacturers that did not join master settlement agreement (MSA) to pay into escrow fund.

Indian or Tribal Party – No Indian law issue

United States v. Dolan, 571 F.3d 1022 (10th Cir. 2009), aff'd, 560 U.S. 605, 130 S. Ct. 2533, 177 L. Ed. 2d 108 (2010). Wrote majority opinion. Defendant pleaded guilty in the United States District Court for the District of New Mexico to assault resulting in serious bodily injury. Both the perpetrator and victim were Indian and the crime occurred on the Mescalero Indian Reservation. Defendant was sentenced to 21 months in prison and to pay victim \$250 monthly in restitution. Defendant appealed restitution order. On rehearing, the Court of Appeals affirmed lower court, holding that: (1) district court's error in failing to award restitution within 90 days of sentencing did not deprive it of authority to award restitution, and (2) restitution award of \$250 per month adequately accounted for defendant's financial condition.

Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014). Wrote majority opinion. Native American prisoner in state custody commenced action against individual prison officials, seeking prospective injunctive relief against them for violations of Religious Land Use and Institutionalized Persons Act (RLUIPA). The United States District Court for the District of Wyoming granted summary judgment for prison personnel. Prisoner appealed. The Court of Appeals vacated and remanded, holding that factual issue existed as to whether preventing state prisoner from exercising his sincerely held religious belief that using sweat lodge cleansed and purified his mind, spirit, and body served compelling governmental interest and that it was least restrictive means of furthering that interest.

Prather v. Hedgecoth, 378 F. App'x 805 (10th Cir. 2010). On panel, voted with majority. Native American homeowner, proceeding pro se and in forma pauperis, brought action against state, state tax commission, and county tax assessment officials, challenging an increase in his property taxes and county's tax procedures, and alleging claims under § 1983 for violation of his equal protection and due process rights and conspiracy to violate his civil rights, as well as state law claims for invasion of privacy, intentional infliction of emotional distress, fraud, and negligence. The United States District Court for the Northern District of Oklahoma dismissed the complaint. Homeowner appealed. The Court of Appeals affirmed, holding that: (1) state and tax commission had Eleventh Amendment immunity, and (2) Tax Injunction Act deprived District Court of subject matter jurisdiction over the action.

United States v. Island, 316 F. App'x 804 (10th Cir. 2009). On panel, voted with majority. Defendant was convicted, in the United States District court for the Western District of Oklahoma, of embezzlement and conspiring to embezzle Indian tribal funds, and she appealed. The Court of Appeals affirmed, holding that: (1) finding that defendant, the secretary/assistant of chairman of Indian tribe's business committee, was knowing and active participant in misappropriation of tribal funds, and was not simply doing “what she was told by those who had

authority over her job and over the money,” was sufficiently supported by evidence; and (2) defendant who was found to have participated in conspiracy to embezzle in excess of \$15,000 in Indian tribal funds was properly convicted of felony conspiracy, notwithstanding the substantive embezzlement counts of which she was convicted were misdemeanor counts for embezzlements of less than \$1,000.

Greene v. Impson, 530 F. App'x 777 (10th Cir. 2013). On panel, voted with majority. Great grandson of Choctaw Indian Freedman, who was African American former slave, filed suit against regional director of Bureau of Indian Affairs and Bureau's superintendent, under *Bivens*, asserting denial of due process from denial of application for Certificate of Degree of Indian Blood (CIDB), in order for grandson to be federally recognized as Native American, for purposes of government assistance. The United States District Court for the Eastern District of Oklahoma dismissed complaint, and grandson appealed. The Court of Appeals affirmed, holding that grandson's allegations did not state claim for violation of due process.

United States v. Sandoval, 371 F. App'x 945 (10th Cir. 2010). On panel, voted with majority. Prisoner moved to vacate, set aside, or correct his sentence on allegations of ineffective assistance of counsel and that his sentence was in violation of First Amendment. The United States District Court for the District of New Mexico denied motion. Prisoner sought certificate of appealability. The Court of Appeals dismissed, holding that: (1) one year limitation period for prisoner, who did not file direct criminal appeal, to file motion to vacate, set aside, or correct his sentence began to run 10 days after district court entered judgment on prisoner's conviction; (2) ignorance of limitation period to file motion to vacate, set aside, or correct a sentence, even for incarcerated pro se prisoner, did not excuse untimely motion; and (3) prisoner had to identify existence of reasoned, nonfrivolous argument on the law and facts in support of issues raised on appeal to be entitled to proceed in forma pauperis (IFP).

Romero v. Goodrich, 480 F. App'x 489 (10th Cir. 2012). On panel, voted with majority. Petitioner sought a writ of habeas corpus following a tribal court conviction. The United States District Court for the District of New Mexico dismissed, and the petitioner appealed. The Court of Appeals affirmed, holding that petition was properly dismissed as moot because petitioner no longer in tribal custody.

Yellowbear v. Wyoming Atty. Gen., 525 F.3d 921 (10th Cir. 2008). On panel, voted with majority. During his state murder trial, petitioner filed pro se habeas corpus petition under § 2241 on basis that state court lacked jurisdiction over crime. Petitioner was convicted of murder in state court. The United States District Court for the District of Wyoming dismissed petition under *Younger* abstention doctrine, directing petitioner to exhaust state remedies, and petitioner appealed. In interim, defendant's conviction was affirmed on direct appeal. The Court of Appeals reversed and remanded, holding that: (1) no basis remained for *Younger* abstention; (2) proper avenue for pursuing habeas relief after conviction was § 2254; (3) court would not automatically recharacterize petition as one under § 2254, given risk that subsequent petition challenging conviction on other bases would be second or successive.

Muscogee (Creek) Nation Div. of Hous. v. U.S. Dep't of Hous. & Urban Dev., 698 F.3d 1276 (10th Cir. 2012). On panel, voted with majority. Indian tribe brought action against Department

of Housing and Urban Development (HUD) under Administrative Procedure Act (APA), challenging limitation of investment of grant money awarded under the Native American Housing Assistance and Self-Determination Act (NAHASDA) to a period of no longer than two years. The United States District Court for the Eastern District of Oklahoma granted HUD's motion to dismiss. Tribe appealed. The Court of Appeals affirmed, holding that: (1) HUD did not exceed its statutory authority by promulgating requirement that investments of block grant funds not exceed two years in length; (2) court had subject matter jurisdiction to consider whether HUD was authorized to demand remittance of interest earned in violation of that requirement; and (3) HUD's demand for remittance was consistent with federal law.

Needs Further Consideration

WildEarth Guardians v. U.S. E.P.A., 759 F.3d 1196 (10th Cir. 2014).

This case does not have tribal party and does not have an Indian law issue, but federal plan being challenged is promulgated by EPA, rather than the state, because power plant is in Indian Country.

On panel, voted with majority. Environmental group filed petition pursuant to Clean Air Act (CAA) for review of federal implementation plan (FIP) promulgated by Environmental Protection Agency (EPA) to reduce regional haze by regulating emissions from coal-fired power plant located on Indian reservation. Utility intervened, and petition was transferred. The Court of Appeals denied petition, holding that: (1) group's claim that EPA was required to require emissions filtering devices on three of plant's units was moot; (2) Court of Appeals would not consider group's suggestions in post-briefing letters; (3) group member alleged sufficiently concrete and particularized injury to establish standing; and (4) EPA had no duty to consult with Fish and Wildlife Service (FWS).