

to the “base offense level from the guideline for the substantive offense, plus any adjustments”); *Locklear*, 24 F.3d at 648 n. 4 (recognizing that U.S.S.G. § 2D1.2 might apply if the object of the drug conspiracy involved a protected person or location, but insisting that the defendant be convicted of such conspiratorial purpose before the sentencing court may use section 2D1.2).

Hence, under the circumstances here, we reject the government’s reliance on the Sixth and Eighth Circuit cases. Because the issue is not before us, we do not address the extent to which “relevant conduct” may be considered in determining the applicable guideline section for conspiracy or similar offenses. We hold only that the district court erred in using U.S.S.G. § 2D1.2 to calculate Crawford’s offense level for his conviction under 21 U.S.C. § 841.

V. Remand for Resentencing

[5] Under 18 U.S.C. § 3742(a), a defendant may appeal a sentence imposed in violation of law or as a result of an incorrect application of the Sentencing Guidelines. If the appellate court determines that the sentencing court misapplied the guidelines, it must remand for “further sentencing proceedings,” 18 U.S.C. § 3742(e)(1)(A), unless it determines that “the error was harmless, *i.e.*, that the error did not affect the district court’s selection of the sentence imposed.” *Williams v. United States*, 503 U.S. 193, 203, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992); *see United States v. Turner*, 881 F.2d 684, 688 (9th Cir.1989) (“[T]he overlapping of the Sentencing Guideline ranges was designed to minimize the need to resolve disputes where the same sentence would have been imposed under either of the . . . ranges urged by the parties.”).

[6] Based on the record, we cannot conclude that, absent the error in calculating his offense level, Crawford would have been sentenced to the same term of imprisonment. Although the district court expressed concern about Crawford’s prox-

imity to a school, it nevertheless imposed the lowest sentence possible under the range it calculated. The court offered no acknowledgment that the sentence given was also within the range Crawford proposed, and provided no indication that it would have selected a sentence near the top of that lower range. The district court would have been entitled to consider the school proximity in selecting a sentence within the applicable guideline range, but, on this record, we cannot determine the extent to which that factor would have affected the district court’s decision. We therefore remand for resentencing.

REVERSED and REMANDED.



OWENS VALLEY INDIAN HOUSING AUTHORITY, Plaintiff-Appellant,

v.

Gifford TURNER, Defendant-Appellee.

No. 96-16021.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 11, 1999.

Decided Aug. 2, 1999.

Indian housing authority brought unlawful detainer suit against tenant. The United States District Court for the Eastern District of California, Garland E. Burrell, District Judge, dismissed action for lack of subject-matter jurisdiction. Authority appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) District Court lacked subject-matter jurisdiction over suit since it did not arise under federal law, and (2) federal courts did not have subject-matter jurisdiction over suit against tenant by virtue of facts that tribe

lacked tribal courts competent to hear suit and that state courts were statutorily barred from hearing suit.

Affirmed.

Silverman, Circuit Judge, concurred and filed opinion.

1. Federal Courts ⇨195

Indian housing authority's unlawful detainer suit against tenant, seeking possession of housing unit and payment of damages pursuant to authority's rights as tenant's sub-lessor, did not arise under federal law, and district court thus lacked subject-matter jurisdiction; although authority's position as sub-lessor depended on its lease with tribe, and tribe's ability to lease land to authority derived from its federal right of possession, authority was asserting its rights as landlord, not tribe's federal right of possession, and adjudication of suit did not require interpretation of that federal right. 28 U.S.C.A. § 1331.

2. Federal Courts ⇨776

District court's dismissal for lack of subject-matter jurisdiction is reviewed de novo. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

3. Federal Courts ⇨161

As a general matter, federal common law can provide subject-matter jurisdiction under statute providing district courts with original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C.A. § 1331.

4. Indians ⇨10

Under federal common law, all tribal Indian land is held in trust by the United States.

5. Indians ⇨10

Under federal common law, Indians have an unquestioned right to the exclusive possession of their lands.

6. Indians ⇨12

Bishop Tribe has a federal right to possess the land constituting Bishop Reservation.

7. Indians ⇨27(1)

Concomitant with the federal right to possess and occupy tribal land, Indians have a federal common-law right to sue to enforce their aboriginal land rights.

8. Indians ⇨27(1)

Indians' federal common-law right to sue to enforce their aboriginal land rights includes a right to bring ejectment actions to remedy violations of the right of occupancy.

9. Indians ⇨32(10)

As agency of Bishop Tribe, Owens Valley Indian Housing Authority (OVIHA) could assert Tribe's federal right to bring ejectment actions where it was implicated.

10. Federal Courts ⇨192

Ordinary action to recover possession of land does not arise under federal law within meaning of statute providing district court jurisdiction over actions arising under federal law, despite a potential federal issue regarding the chain of title. 28 U.S.C.A. § 1331.

11. Federal Courts ⇨192

Federal jurisdiction attaches to action to recover possession of land only when resolution of the case requires interpretation of a federal right of possession. 28 U.S.C.A. § 1331.

12. Federal Courts ⇨195

Where an Indian tribe seeks damages from a non-Indian for trespass on the land, for restoration of the land to its original state or for irreparable injury to the land, federal jurisdiction exists because the Indian right of possession is at stake.

13. Federal Courts ⇨195

Federal courts did not have subject-matter jurisdiction over Indian housing authority's unlawful detainer suit against tenant by virtue of facts that Indian tribe lacked tribal courts competent to hear suit and that state courts were statutorily barred from hearing suit because it involved ownership or right to possession of real property belonging to Indian tribe or any interest therein. 28 U.S.C.A. §§ 1331, 1360(b).

14. Federal Courts ¶195

In matters of Indian law, federal jurisdiction does not necessarily follow from the absence of state jurisdiction.

Arthur J. Maillet, Bishop, California, for the plaintiff-appellant.

No appearance for the defendant-appellee.

Appeal from the United States District Court for the Eastern District of California. Garland E. Burrell, District Judge, Presiding. D.C. No. CV-95-05690-GEB.

Before: FLETCHER and SILVERMAN, Circuit Judges, and STAGG, District Judge.*

FLETCHER, Circuit Judge:

Appellant Owens Valley Indian Housing Authority (OVIHA) appeals from the district court's order dismissing its unlawful detainer suit against Appellee Gifford Turner. OVIHA brought the instant action as part of eviction proceedings against Turner. The district court dismissed the case for lack of subject matter jurisdiction. We affirm.

I.

OVIHA is a public housing agency specifically, an Indian housing authority as defined by 42 U.S.C. § 1437a(b)(6) & (11). It was created and chartered by four federally recognized Indian tribes—the Bishop, Big Pine, Fort Independence, and Lone Pine Tribes (the Tribes)—with reservation lands in Inyo County, California. The Tribes chartered OVIHA by ordinances conforming with federal regulations found at 24 C.F.R. § 905.101. As provided in the ordinances, OVIHA's purposes include “[a]lleviating the acute shortage of decent, safe and sanitary dwellings for families of low income.” OVIHA pursues this purpose by leasing reservation land

from the Tribes, constructing housing units on the land, and sub-leasing the housing units to eligible Indian families.

As a public housing agency, OVIHA receives federal funding from the United States Department of Housing and Urban Development. *See* 42 U.S.C. § 1437c. OVIHA is required by federal law to establish “satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of non-payment of rent.” 42 U.S.C. § 1437d(c)(4)(B). To that end, OVIHA adopted a “Low Rent Tenant Collection Policy.” Among other things, the Policy sets forth the procedure for OVIHA to follow when evicting a tenant. It provides that when seeking an eviction, after complying with the “procedures as set forth in this policy for breach of payment or non-payment obligations,” OVIHA “shall file a civil complaint with the appropriate Court.”

In 1979, OVIHA leased a plot of reservation land from the Bishop Tribe for the purpose of constructing low-rent housing thereon (the Original Lease). The Original Lease described the land as the “tribal assignment” of Gifford Turner, a member of the Bishop Tribe. An additional document signed contemporaneously by Turner and the Bishop Tribe (the Conditional Relinquishment), specified that under the terms of the Original Lease, OVIHA would “construct a house on the site and [Turner would] take possession under an occupancy agreement.”

In October, 1988, Turner signed a Low Rent Lease with OVIHA for a housing unit identified as Unit 107 on Bishop Indian Reservation. In July, 1995, OVIHA served Turner with a Notice of Termination of Low Rent Lease, alleging that he had breached the Lease in various ways. Turner did not respond to the Termination Notice. OVIHA then filed the instant action for unlawful detainer in federal district court. OVIHA claims it brought the

* Honorable Tom Stagg, Senior United States District Judge for the Western District of Lou-

isiana, sitting by designation.

action in federal court because “[t]he local state court refused to assume jurisdiction over this matter,” and because none of the Tribes have established tribal courts capable of hearing eviction cases. In its complaint, OVIHA sought possession of the premises and payment of damages. Turner did not answer the complaint.

On February 6, 1996, the district court issued an Order to Show Cause why the case should not be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. OVIHA submitted its written response on February 22. Turner continued not to make any appearance before the district court. On April 17, 1996, the district court dismissed the case for lack of subject matter jurisdiction. This appeal followed.¹

II.

[1,2] OVIHA contends that the district court has jurisdiction under 28 U.S.C. § 1331, which provides: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”² Specifically, OVIHA argues that this action arises under federal common law. We review the district court’s dismissal for lack of subject matter jurisdiction de novo. See *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir.1998).

[3–6] As a general matter, federal common law can provide subject matter jurisdiction under § 1331. See *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir.1980) (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 100, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972)). Under federal common law, all tribal Indian land is held in trust by the United States. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667–68, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (*Oneida I*); *Johnson v. M’Intosh*, 21 U.S.(8 Wheat.) 543, 587–91, 5 L.Ed. 681 (1823). Also under federal common law, Indians have an “‘unquestioned right’ . . . to the exclusive possession of their lands.” *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 235, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (*Oneida II*) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). Thus, the Bishop Tribe has a federal right to possess the land constituting Bishop Reservation, including Unit 107.

[7–9] Concomitant with the federal right to possess and occupy tribal land, “Indians have a federal common-law right to sue to enforce their aboriginal land rights.” *Oneida II*, 470 U.S. at 235, 105 S.Ct. 1245. This includes a right to bring ejectment actions to remedy violations of the right of occupancy. See *id.*; *Marsh v. Brooks*, 8 How. 223, 232, 12 L.Ed. 1056 (1850) (“That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question.”). As an agency of the Bishop Tribe, OVIHA may assert this federal right of action where it is implicated.³ The problem for OVIHA, however, is that this case does not

1. Turner filed nothing with this court in response to OVIHA’s appeal. At oral argument, counsel for OVIHA informed the court that Turner had recently died. Because we hold that dismissal of this action is proper for lack of subject matter jurisdiction under 28 U.S.C. § 1331, we need not decide whether Turner’s death also mandates dismissal on mootness grounds.

2. OVIHA also asserts jurisdiction under 28 U.S.C. § 1362, which provides:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body

duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

OVIHA concedes, however, that the district court’s jurisdiction under § 1362 is no more broad than its jurisdiction under § 1331. See *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 710–15 (9th Cir.1980). Thus, our analysis of § 1331 is dispositive.

3. It is clear that OVIHA, while not itself a “tribe” under federal law, is a “tribal organization” or “tribal agency.” See *United States v. Brame*, 657 F.2d 1090 (9th Cir.1981) (hold-

implicate the Bishop Tribe's federal right of possession. We take as our guide on this point the Supreme Court's decision in *Oneida I*. In *Oneida I*, the Oneida Indian Nation claimed that a 1795 cession of Indian land to the State of New York was invalid for lack of federal consent. See 414 U.S. at 664–65, 94 S.Ct. 772. Characterizing the claim as “essentially a possessory action,” the Supreme Court found that “the right to possession itself is claimed to arise under federal law in the first instance.” *Id.* at 676, 94 S.Ct. 772. That is, the complaint asserted the Oneida's federal common law right to occupy their land, and the case turned on whether that right of occupancy gave the Oneida a remedy against New York. Thus, the Court held that “[g]iven the nature and source of the possessory rights of Indian tribes to their aboriginal lands . . . , it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States.” *Id.* at 667, 94 S.Ct. 772.

[10, 11] The *Oneida I* Court also emphasized, however, that “a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress.” *Id.* at 676, 94 S.Ct. 772 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 570, 32 S.Ct. 704, 56 L.Ed. 1205 (1912)). One commentator sensibly reads this limitation to mean that “an ordinary action to recover possession of land does not ‘arise under’ federal law within the meaning of 28 U.S.C. § 1331 despite a potential federal issue regarding the chain of title.” F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 312 (1982 ed.). Thus, federal jurisdiction attaches only when resolution of the case requires *interpretation* of a federal right of possession. See *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir.

1973) (holding § 1331 jurisdiction attaches only if the complaint alleges a “substantial controversy between the parties regarding the interpretation or effect of federal law”); COHEN at n.354 (“the essential difference is . . . whether a plaintiff seeks only property rights under state law, such as possession in ejectment, or seeks construction of a federal statute [or federal common law right] upon which other rights depend.”).

[12] OVIHA contends that in seeking to evict Turner from Unit 107, it is asserting the Bishop Tribe's federal common law right to possess the property. Not so. OVIHA seeks possession of Unit 107 and payment of damages pursuant to its rights as Turner's sub-lessor. That is, OVIHA here asserts its rights as a landlord, not the Bishop Tribe's federal right of possession. To be sure, OVIHA's position as a sub-lessor does depend on its lease with the Bishop Tribe, and the Bishop Tribe's ability to lease land to OVIHA derives from its federal right of possession. But because adjudication of OVIHA's suit does not require an interpretation of that federal right, the suit does not arise under federal law. See *Oneida I*, 414 U.S. at 676, 94 S.Ct. 772; *Round Valley Housing Authority v. Hunter*, 907 F.Supp. 1343, 1348 (N.D.Cal.1995) (“Because landlord-tenant disputes are matters of state law, an action for eviction cannot be the basis for federal question jurisdiction.”); *Minnesota Chippewa Tribal Hous. Corp. v. Reese*, 978 F.Supp. 1258, 1266 (D.Minn. 1997) (“Because the [housing authority's] right to the property at issue does not depend on Federal law, ‘wholly apart from the application of state law principles which normally and separately protect a valid right of possession,’ . . . we find no basis upon which to invoke the Court's subject matter jurisdiction.”) (quoting *Oneida I*, 414 U.S. at 677, 94 S.Ct. 772).⁴

ing that Indian housing authorities are “tribal organizations” for purpose of the federal statute on embezzlement); *Dubray v. Rosebud Hous. Auth.*, 565 F.Supp. 462, 465–66 (D.S.D. 1983) (defining the Rosebud Housing Authority as a “tribal agency”). Thus, OVIHA is

competent to assert the Tribes' federal common law interest in tribal land, where it is implicated.

4. We also find it instructive that both parties to the instant action are part of the Bishop

III.

[13, 14] OVIHA maintains that the Bishop Tribe currently lacks tribal courts competent to hear this case, and that the state courts are statutorily precluded from hearing it. Thus, OVIHA contends that absent federal jurisdiction, it will be left without any forum in which to enforce its rights against tenants such as Turner. We agree that under 28 U.S.C. § 1360(b), state courts are barred from hearing this case because it involves "the ownership or right to possession of [real] property [belonging to an Indian tribe] or any interest therein." See *In re Humboldt Fir, Inc.*, 426 F.Supp. 292, 296 (N.D.Cal.1977), *aff'd* 625 F.2d 330 (9th Cir.1980) ("Where a dispute involves trust or restricted property, the state may not adjudicate the dispute nor may its laws apply."). In matters of Indian law, however, federal jurisdiction does not necessarily follow from the absence of state jurisdiction.

As a textual matter, § 1360(b)'s reference to actions involving the "ownership or right to possession of [tribal] property or any interest therein" sweeps more broadly than § 1331's reference to actions "arising under the . . . laws . . . of the United States." It is not at all anomalous that § 1360(b)'s preclusion of state jurisdiction would be greater than § 1331's grant of federal jurisdiction. Congress limits state jurisdiction over Indians in order to protect tribal sovereignty. Yet protecting tribal sovereignty does not require providing a federal forum whenever state jurisdiction is wanting. To the contrary, the Supreme Court has found that the interests of tribal self-government and self-determination are generally best served if

Tribe. This case does not, therefore, involve a non-Indian's alleged trespass or other encumbrance on Indian land. See *Pueblo of Isleta v. Universal Constructors, Inc.*, 570 F.2d 300 (10th Cir.1978); *Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336 (10th Cir. 1974). In such cases, where a tribe seeks damages from a non-Indian "for trespass on the land, for restoration of the land to its original state or for irreparable injury to the land," *Gila River*, 626 F.2d at 715 n. 8, federal jurisdiction exists because the Indian right

tribal courts preside over disputes involving Indians and arising on Indian land. See *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) ("We believe that examination should be conducted in the first instance in the Tribal Court itself."). This case involves a dispute between members of the Bishop Tribe on land belonging to the Bishop Tribe. The interests of tribal sovereignty will be best served by the formation of tribal courts competent to hear such cases.

IV.

For the foregoing reasons, we find that the district court properly dismissed the instant action for lack of subject matter jurisdiction.

AFFIRMED.

SILVERMAN, Circuit Judge,
concurring:

Although the majority makes a persuasive argument that this case does not arise under federal common law for purposes of § 1331, the question is not open-and-shut. In fact, in 1987, our very able colleague, Judge A. Wallace Tashima, then a district judge, considered this issue and came to the contrary conclusion. *All Mission Indian Hous. Auth. v. Silvas*, 680 F.Supp. 330 (C.D.Cal.1987).

What *is* open-and-shut is that the case is moot. The tenant in this eviction action died during the pendency of the appeal. There is no longer anyone to evict. The case is not saved from mootness by the fact that OVIHA also pled a claim for back

of possession itself is at stake. Similarly in *Oneida I*, the Oneida's suit against New York "rest[ed] on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands." 414 U.S. at 677, 94 S.Ct. 772. Here, however, the Bishop Tribe's possessory right to the land is not at stake. If the case were decided on the merits, vindication of the Tribe's rights would not depend on any particular outcome.

rent. No estate has been substituted for the decedent, nor is there any basis in the record to believe that an estate has been opened, will be opened, or even that the decedent had any survivors. Furthermore, no judgment was entered against the defendant; this case was dismissed at the default hearing stage. In any event, as of now, there is no defendant in this case.

Right or wrong, today's holding will have serious ramifications. Although OVIHA is required by Congress to establish "satisfactory procedures designed to assure the prompt payment and collection of rents and the prompt processing of evictions in the case of non-payment of rent[.]" 42 U.S.C. § 1437d(c)(4)(B), the majority's decision leaves OVIHA with absolutely no forum in which to fulfill that statutory obligation. And it does this in a litigation setting in which there has been no input from either the Bishop Tribe or the United States government.

This does not mean that the majority's conclusion is necessarily wrong. But it does suggest that the court should hesitate to reach out to decide a murky question of this magnitude—in a case that did not lend itself to the consideration of the views of other significantly affected parties—when an alternative jurisdictional basis is indisputably clear. Judicial restraint does not mean ducking hard questions. It means that generally speaking, "federal courts should exercise the least possible power adequate to the end proposed." *Stone v. City and County of San Francisco*, 968 F.2d 850, 861 (9th Cir.1992) (internal quotation marks and citations omitted).

I agree that this appeal must be dismissed, but on the ground that it has become moot. I would reserve for another day whether the complaint raised a federal question under § 1331.

Daniel J. FIDUCCIA; Edward H. Kohn, Plaintiffs–Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE; United States Department of Defense; United States Department of the Treasury, Defendants–Appellees.

No. 97–16420.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 10, 1998.

Decided Aug. 4, 1999.

Requesters brought action under Freedom of Information Act (FOIA) seeking documents from various agencies. The United States District Court for the Northern District of California, James Ware, J., entered partial grant of summary judgment for each side. Requesters appealed. The Court of Appeals, Kleinfeld, Circuit Judge, held that: (1) exceptional circumstances did not exist so as to warrant eight-year extension of time for Federal Bureau of Investigation (FBI) to comply with request; (2) Drug Enforcement Agency (DEA) was not required to provide requesters with *Vaughn* index; (3) Solicitor General's Office was not required to provide requesters with *Vaughn* index; (4) Immigration and Naturalization Service (INS) was not required to provide requesters with *Vaughn* index; (5) Internal Revenue Service (IRS) was not required to provide requesters with *Vaughn* index; (6) District Court, upon discovering that it had overlooked agency's affidavit, had power to correct its mistaken judgment; and (7) affidavit and form letter from FBI were not adequate to explain nondisclosures.

Vacated and remanded.

