Indian Law Newsletter

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Greetings from the 2010-11 WSBA Indian Law Section Chair

By Christina Parker

In these difficult economic times, we often need inspiration to motivate us to be involved in anything beyond our immediate comfort zone. I, personally, find inspiration in my family and community. Elders keep me centered and focused; children keep me energized; and community keeps my work purposeful.

My intention this year is to keep members of the Indian Law Section inspired by way of events and trainings. Events and trainings centered on what is happening in Native communities throughout Washington State and across Indian Country. My thoughts are that these events will inspire you to be active in our section, but more importantly active in your community. I think that your activism will in turn inspire someone else.

Additionally, I mean to have regular dialogue with our membership to ensure membership engagement and participation. Through communication I hope to inspire an engaged membership. Fortunately, through the WSBA's new technology enhanced facility, we can offer web-based programs to our statewide membership, without individuals incurring costly travel expenses.

Lastly, I am anticipating renewed collaboration with other groups with our shared interests to further this purpose to inspire. Recent and upcoming collaborative events include:

- **November 17th Washington Young Lawyers Division *"Open Section Night"*** 5:30-7:30pm at Davis Wright Tremaine, 1201 3rd Ave., #2200, Seattle;

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Indian Lawyers in the News

New Section Officers Selected

Congratulations to the newest members of the Section's executive board:

Quanah Spencer

- **Chair-elect**: Quanah Spencer (Yakama), Of Counsel at Williams Kastner
- **Secretary/Treasurer**: Andrea Smith (Native Hawaiian), Port Gamble S'Klallam Tribe
- **Trustee**: Brooke Pinkham (Nez Perce), Staff Attorney at Northwest Justice Project
- **Trustee**: Marc Greenough of Foster Pepper

Brooke Pinkham

New NIBA Officers Elected

Kudos to the new Northwest Indian Bar Association Governing Council:

Marvin Beauvais

- **President:** Bree Kame'enui-Ramirez (Native Hawaiian) – attorney at Bullivant Houser Bailey in Seattle
- **President-Elect:** Marvin Beauvais (Navajo/Crow) – solo practitioner in Spokane
- **Treasurer:** Direlle Calica (Warm Springs) – attorney at Schaff & Clark-Deschene, LLC in Portland, Oregon
- **Secretary:** Angelique EagleWoman (Sisseton-Wahpeton Dakota Oyate) – Associate Professor of Law at University of Idaho College of Law

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In This Issue

Indian Law News You Can Use

The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion

By Gabriel S. Galanda

The word "consultation" embodies the Obama Administration's approach to federal Indian policy.[1] So much so that federal agencies are actually engaging in tribal consultations *on tribal consultation*.[2] Still other federal agencies completely missed the memo on tribal consultation – literally President Obama's Tribal Consultation Memorandum – and, in specific instances, have failed to meaningfully consult with tribal governments concerning federal activity.[3] But the United States' obligation to consult with tribal governments about any federal matter implicating tribes is not a new mandate. Indeed, the consultation obligation has existed since at least treaty times under the express terms of certain treaties[4] and age-old international legal norms governing U.S. treaty obligations.[5] While the obligation is often attributed to President Clinton's Executive Order 13,175, the federal Indian consultation right was affirmed by President Lyndon Johnson as far back as 1968.[6]

The federal duty to consult in Indian Country runs deep. Since 1492, Indian tribal governments within what is now the United States have, as a group, lost up to 98 percent of their aboriginal land base.[7] As a result, the overwhelming majority of tribal properties of cultural and religious significance are located outside Indian reservations and federal trust lands.[8] As sovereign nations, tribes have an inherent responsibility to promote and protect the welfare of their people, which includes "the right to protect their cultural and religious properties and the right to be treated with respect by federal agencies."[9]

> The federal Indian consultation obligation arises from numerous federal statutes, regulations, and presidential orders; case law; and international legal norms. In these ways, the federal Indian consultation is both a sword and a shield that tribal governments should deploy when necessary to guard and protect their sovereignty. A paper tiger the right is not.

In this era of Indian self-determination and self-sufficiency, tribes are increasingly returning to their aboriginal or "ceded" lands or otherwise moving beyond the arbitrary confines of reservation boundaries, to grow their economies. The federal Indian treaty, trust and concomitant consultation obligations extend not only to on-reservation trust resources but to off-reservation tribal economic assets as well.[10] Indeed, because economic success in Indian Country is ultimately tied to cultural empowerment and sovereignty, Indian economies will not progress without the assurance that that treaty and trust resources will be kept intact.[11]

With that in mind, from 1968 onward, the federal government has increasingly recognized the importance and validity of tribal concerns regarding the protection of both on and off-reservation properties of cultural and religious significance.[12] Since then, an expressed right to "consultation" and a corresponding duty for federal agencies to "consult" has accompanied the recognition of tribal concerns, largely as a shield. Nonetheless, even today – some forty years after the right to consult was formally adopted – "federal agencies have been reluctant to comply" with their duty to implement it.[13]

Consultation on a government-to-government basis is not only the law, it is a "sound management policy" and, more practically, good governance and business.[14] Tribal opposition to a federally licensed, permitted or stimulus-funded project can cost contractors time and money – a

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Indian Law News You Can Use

Indian Law in the Scalia Era: Tribes Will Face a Skeptical Court in the 2010-11 Term

By Thane D. Somerville

When the United States Supreme Court convenes for its 2010-11 term, Justice Scalia will become the Court's senior justice. Since 1986, when Justice Scalia was appointed, the Supreme Court has decided 48 questions of Indian law.[1] During Justice Scalia's tenure from 1986-2010, the likelihood of tribal success at the Supreme Court has decreased substantially. Overall, tribes won 17 and lost 31 cases (35% win rate). Eight of the seventeen tribal victories occurred from 1986-1993. Since Justice Ginsburg joined the Court in 1993, tribes won 9 cases and lost 22 (29% win rate). Since Justice Roberts joined the Court in 2005, five Indian law cases have been heard and the tribes have lost them all (0% win rate).

Based on a review of the Supreme Court's opinions from 1986-2010, an Indian tribe is not likely to prevail before the current Supreme Court unless: (a) Congress has clearly spoken on the issue presented and the statutory language mandates an outcome in the tribe's favor or (b) Supreme Court precedent on the exact issue compels the Court to rule in favor of the tribe under principles of *stare decisis*. If statutory language is vague, or prior case law leaves room for interpretation, Indian tribes are almost certain to lose before the current Court.

> The voting records of Justices Scalia, Kennedy, and Thomas show that they are unreceptive to tribal sovereignty and will not infer tribal rights.... It is reasonable to assume that Justices Roberts and Alito share a similar judicial philosophy.

At minimum, an Indian tribe must persuade at least one member of the Court's "conservative" majority (Justices Scalia, Kennedy, Thomas, Roberts, and Alito) to rule in its favor. The voting records of Justices Scalia, Kennedy, and Thomas show that they are unreceptive to tribal sovereignty and will not infer tribal rights. These justices view Indian law through the lens of Congressional authority and federal pre-emption. They will not interpret "Indian country" expansively. These justices believe that states may broadly regulate non-Indians who interact with tribes unless Congress has expressly pre-empted such regulation, and they do not believe that tribes have inherent sovereign authority over non-members. These justices will typically interpret statutes as written, without resort to non-textual sources, and be less inclined to apply canons of construction that favor tribal interests. In a close case, where Congress has not clearly expressed its intent, and where the result could increase tribal sovereignty or jurisdiction, these justices are not likely to rule in favor of a tribe. It is reasonable to assume that Justices Roberts and Alito share a similar judicial philosophy.

Persuading one of the "conservative" majority is not all that is required for tribal success. Justices Ginsburg and Breyer have voted against Indian interests more often than not, and the views of Justices Sotomayor and Kagan on Indian law issues are simply not known. Based on the current Court membership's voting record since 1986, success for Indian tribes in the 2010-11 term may be hard to come by.

I. Analysis of Supreme Court Indian Law Decisions 1986-2010

A. Analysis of Tribal Victories

The make-up of the Court has changed significantly since 1986 – to the detriment of Indian tribes. At least four of the seventeen victories during the 1986-2010 timeframe (*Mille Lacs*, *Idaho*, *White Mountain Apache*, and *Brendale*) would probably not have been decided in the tribe's favor if heard by the current Supreme Court. *Mille Lacs* (1999), *Idaho* (2001), and *White Mtn. Apache* (2003) were all decided by 5-4 votes with Scalia, Kennedy, and Thomas in dissent. The portion of *Brendale* (1989) that the tribe won was also a 5-4 vote, with Scalia and Kennedy in dissent. If heard today, Alito and Roberts would likely join the Scalia, Kennedy, Thomas votes in these cases. These five justices have voted together in all five Indian law cases heard by the Roberts Court (2005-2010). It is also possible that *Cabazon* (1987) would be decided adversely if heard by the current Supreme Court.

Five of the seventeen tribal victories address unique statutes or circumstances that offer little guidance in terms of pure Indian law jurisprudence. *Holyfield* (1989) involved interpretation of the Indian Child Welfare Act (ICWA). *Arizona v. Cal.* (2001) involved doctrines of civil procedure. *Leavitt* (2005) required interpretation of the Indian Self Determination and Education Assistance Act (ISDEA). In *Hodel* (1987) and *Youpee* (1997), individual Indians prevailed in claims that the Indian Land Consolidation Act resulted in a taking of property rights under the Fifth Amendment of the U.S. Constitution. These cases would likely come out the same way under the current Court, but offer little insight into the justices' views of Indian law in general.

Five of the seventeen tribal victories involved principles of law that were clearly established and that the Court likely felt compelled to uphold under principles

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Perspectives on Tribal Land Acquisition in 2010: A Call to Action*

By Douglas Nash, Director, Center for Indian Law and Policy and Eric D. Eberhard, Distinguished Indian Law Practitioner in Residence

Great nations, like great men, should keep their word.[1]

On June 3, 2010, the Center for Indian Law and Policy hosted a symposium for tribal leaders, lawyers, law school professors, federal officials, bankers, environmental experts and others to review the status of efforts by Indian tribes to place land in trust for various purposes. The discussion at the symposium was transcribed by certified court reporters from the Seattle firm of Van Pelt, Corbett, Bellows. This report contains the agenda for the symposium, the transcript, copies of the materials used by those who made formal presentations and papers prepared by Professors Anderson and Skibine for inclusion in this report. The appendices include various documents related to the fee-to-trust process, including a paper prepared by Professors Rand and Light, all of which will be of interest to attorneys, tribal leaders, federal officials, students and Indian law scholars. Everything in the report is searchable and each document is linked to the table of contents to facilitate the use of the report.

> The Congress must act to address the Supreme Court's decision in *Carcieri*.... The Department must act now to narrowly interpret the holding in *Carcieri* and to provide clear guidance to tribes with regard to the factors the Department will evaluate when reviewing fee-to-trust applications to determine if the Secretary is authorized to take land into trust in light of the *Carcieri* holding.

We are grateful to all of those who attended and participated in the symposium. We thank everyone who made presentations and served on panels or as moderators. We particularly want to thank the tribal leaders who took the time to share their experiences and history. We also want to offer special thanks to Michael Black, director of the Bureau of Indian Affairs, Darryl LaCounte, special assistant to the director, Greg Argel, realty officer for the Northwest Regional Office of the BIA, Tom Caster, BLM Indian Lands surveyor; and Mary Anne Kenworthy, staff attorney in the Pacific Region Office of the Solicitor. All of these federal officials were in attendance for the entire symposium, offered valuable insights and information in their areas of expertise and were very attentive listeners.

Overview of Indian Trust Land

There are about 1.9 billion acres of land in the contiguous 48 states. The United States holds title to about 361 million acres for public uses. Federally recognized tribes have about 46 million acres held in trust and individual Indians have another 10 million held in trust. Between 1776 and 1871, the tribes made vast land cessions to the United States in exchange for treaty guarantees of protection of reserved lands and other rights. The United States repeatedly broke the promises to protect Indian land.[2] At the start of the statutory Allotment Era in 1887 tribes had about 138 million acres reserved in trust. During the Allotment Era 36 million acres were allotted and 60 million acres of trust land were opened to homesteading by being declared surplus. Of the 36 million acres that were allotted, about 26 million acres passed out of trust status by various means. By 1934 only about 52 million acres of tribal and individual Indian lands were still in trust – less than 3% of the land area of the United States. In the ensuing decades the tribes would lose even more land as a result of federal policies.

The Indian Reorganization Act

The enactment of the Indian Reorganization Act of 1934[3] (IRA) ended the Allotment Era, but it did not stop the loss of Indian land. The Termination Era of the 1950's and 1960's resulted in further erosion of the tribal land base and a net loss of the acres held in trust. Between 1954 and the end of the Termination Era, Congress terminated 110 tribes. All of the lands held in trust for those tribes passed out of trust status.[4]

Although the IRA authorized the Secretary of the Interior to acquire land in trust for both existing and newly recognized tribes and Congress has acted to restore trust land and federal recognition for several of the terminated tribes, the tribal land base has not experienced significant expansion in the last 76 years.[5] The IRA also authorized appropriations to assist tribes with the purchase of lands. Some funds were appropriated after enactment of the IRA, but no funds have been appropriated under the authorization in the IRA since 1943.[6] In the absence of federal funding, the tribes have lacked the means to achieve any meaningful restoration of their lands. Today, federally recognized tribes purchase land with their own funds or borrowed money and apply to the Secretary of Interior to have it acquired in trust.[7] There are an estimated 1,500 to

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What Is a "Prevailing" Party Under CERCLA's Citizens Suit Provision?: The Award of Fees and Costs in *Pakootas v. Teck Cominco Metals, Ltd.*[1]

By Richard A. Du Bey, Leslie C. Clark, and Stephanie G. Weir, Short Cressman & Burgess PLLC



The current litigation focuses on Teck Cominco Metals Limited's liability under CERCLA[2] for deposition of hazardous substances, in the form of slag and effluent, from the Trail Smelter into the Columbia River and the subsequent release of these hazardous substances in the United States.[3] The subject of this note is one of the claims in the original complaint, which is now on appeal before the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit will consider whether the district court erred when it awarded the costs of litigation for a citizen suit brought under §310 of CERCLA, 42 U.S.C. § 9659, to enforce an EPA Unilateral Administrative Order which was withdrawn after the execution of a non-CERCLA settlement agreement, to which Plaintiffs were not a party.

> To achieve "prevailing party" status, there must also exist a "judicial imprimatur" of the alteration of the parties' legal relationship. The Ninth Circuit has held that there must be "some" judicial sanction, without limiting what form the sanction must take, thus some uncertainty remains as to what may constitute "judicial imprimatur."

Background[4]

Teck Cominco Metals Limited (TCM), a Canadian corporation, operates a smelter in Trail, British Columbia, located approximately ten miles north of the United States – Canada border.[5] This smelter has been in operation for over one hundred years and in the 1930s and 1940s was the center of litigation and the subsequent international arbitration between the United States and Canada in one of the most famous transboundary pollution disputes, the *Trail Smelter Arbitration*.[6] The *Trail Smelter Arbitration* focused on smoke and emissions, primarily sulfur dioxide, that were carried by prevailing winds from Trail, British Columbia, into Washington State where the alleged damage occurred.

From 1999 to 2003, pursuant to the 42 U.S.C. §9605 petition submitted by the Confederated Tribes of the Colville Indian Reservation (Colville Tribes), the Environmental Protection Agency (EPA) conducted a site assessment of the Upper Columbia River Site (UCR).[7] Upon completion of the assessment in March 2003, the EPA determined that the UCR was eligible for listing on the EPA's National Priorities List (NPL) but delayed listing while engaged in negotiations with TCM to establish a Superfund Alternative plan.[8] These negotiations proved unsuccessful and, on December 13, 2003, the EPA ultimately issued TCM an Unilateral Administrative Order (EPA Order) directing TCM to undertake the preparation of a Remedial Investigation and a Feasibility Study (RI/FS).[9]

However, TCM informed EPA that the Agency did not have jurisdiction over the Trail Smelter and refused to implement the EPA's order. EPA itself took no further action to enforce its own order. In light of the absence of EPA enforcement action, in July 2004, two enrolled members of the Colville Tribe, Joseph Pakootas and Donald R. Michel, filed a complaint, under the "citizen suit" provision of CERCLA (42 U.S.C. §9659(a)(1)), against TCM seeking to enforce the EPA Order.[10] TCM filed a motion seeking dismissal of the suit, claiming TCM was not subject to United States law, which the Court denied. TCM lost on its subsequent appeal of the order denying TCM's motion to dismiss, TCM's petition for rehearing and rehearing en banc, as well as TCM's Petition for Writ of Certiorari to the Supreme Court.[11] During the pendency of the interlocutory appeal before the Ninth Circuit, TCM entered into an agreement with the EPA that substantially implements the requirements of the EPA Order, though the TCM/EPA Agreement did not require TCM to submit to jurisdiction under CERCLA. Under that agreement, EPA agreed to, and did, withdraw the EPA Order.[12]

In anticipation of the TCM/EPA Agreement and withdrawal of the EPA Order, the Plaintiffs moved for and were granted leave to file amended Complaints in which they withdrew their claims for injunctive and declaratory relief related to enforcement of the EPA Order and maintained their claims, among others, for attorneys' fees and costs incurred in seeking enforcement of the EPA Order.

Attorneys' Fees and Costs

42 U.S.C. §9659(f) permits the court to award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, when appropriate, for citizen suits brought under §9659. To be a "prevailing party" there must be some material

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Indian Law News You Can Use

I.R.S. Steps Up Audits of Tribes: What You Need to Know About the Hot Issues

By Wendy Pearson

In 2010, the Indian Tribal Governments (ITG) division of the I.R.S. expanded its staff by 40% from the fiscal year 2009 staffing, and will continue to hire new staff during its 2010/2011 fiscal year. The new hires include additional auditors, attorneys and other specialists in Indian tax law. While the I.R.S. intends to utilize this staff to increase awareness and understanding of tax issues effecting tribes, the increased staffing is also in support of the ITG goal of increasing the number of audits it conducts of tribal governments in order to crack down on tax avoidance and improper tax reporting.

The ITG "Work Plan" for the 2010/2011 fiscal year sets out the issues and areas of concern which will be the focus of increased scrutiny. The I.R.S. has concluded that the lowest level of voluntary compliance involves Information Reporting, so the audits will typically involve adequacy of reporting on Form 945, Form 941, Form 1099, Forms W-2 and W-2G, and Form 1042 (payments to foreign persons). The I.R.S. will also be stepping up their Banking Secrecy Act (BSA) audits and compliance checks.

Some insight into the substantive issues being examined is warranted. With this information, tribal governments should work proactively to address these areas of concern and to arm themselves for any forthcoming I.R.S. audit.

- *Employment Tax*. The I.R.S. is establishing a project across multiple divisions which will focus on misclassification of workers as independent contractors vs. employees. If the worker should have been treated as an employee, then the tribe will be liable for employment taxes it should have withheld. The I.R.S. shares information with other federal agencies and matches information reported by the tribe or enterprise and the worker to identify classification errors. The I.R.S. will also ask tribes and workers to complete questionnaires (Form SS-8) that identify factors used to determine worker classification. In addition to finding failure to pay employment tax due to misclassification, the I.R.S. is also scrutinizing fringe benefits, bonuses, and other payments to key employees of the Tribe to ensure proper reporting of those benefits. I.R.S. data shows ongoing problems with smaller tribal entities that have exhibited continuing noncompliance, so the I.R.S. will also focus its enforcement activities towards these entities.
- *Tip Income*. The I.R.S. will pursue compliance issues within tribal gaming and food service entities, including solicitation and maintenance of Tip Rate Determination Agreements (TRDA) and Gaming Industry Tip Compliance Agreements (GITCA). Nonparticipating employees and employees with unreported tip income will be reported to the Division of the I.R.S. responsible for collecting tax on unreported income.
- *Anti-Money Laundering (AML)*. The ITG, in conjunction with Bank Secrecy Act (BSA) staff, expects to conduct at least 30 more BSA audits this year to ensure that Indian tribal governmental entities have adequate AML programs and are meeting the BSA reporting requirements. Tribes with low levels of FinCEN Forms 103 (CTRCs) and 102 (SARCs) filings will be the targets of these audits. After an audit is complete, the ITG will return to conduct BSA Compliance Checks to validate that tribal entities are meeting requirements in regard to training, program oversight, and recordkeeping. Here are the common reporting deficiencies found in these audits.

> The ITG division of the I.R.S. has become a very robust and ever-increasing presence in Indian country. This makes it ever more important for tribes to manage and plan for anticipated areas of challenge to the federal tax treatment of their programs and activities.

1. SARCs – not using all available information and/or relying solely on personal observation, thus failing to report.
2. CTRCs – usually technical problems – SSN, P.O. box, incomplete address, unfiled.
3. Failure to create a procedure to establish due diligent effort to obtain address and SSN.
4. Failure to create due diligent procedures for mismatched SSNs as identified by the Enterprise Computing Center – Detroit on filed CTRCs.
5. Inadequate AML written program and employee training

Generally, the I.R.S. will issue a Letter 1112 identifying the deficiencies and the expected remedial measures to be taken by the Tribe. Typically, the I.R.S. has not been asserting penalties in cases with technical, minor,

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Indian Lawyer Commentary

Completing the Circle: Advancing Native Inmate Religious Rights

By Gabriel S. Galanda

On Father's Day, as I sweated with a group of Native inmates in a Monroe prison sweat lodge for the Summer Change of Seasons, I thought of my father, and how he had emerged from prison with a broken spirit.

I thought of Christmas 1975, when my mom was six-months pregnant with me, and my dad was in the county jail, and headed to serve time in the Walla Walla State Penitentiary. He was released when I was one-year-old – a bitter version of his former self. In prison, the pain he suffered from a childhood of abuse and neglect and the animosity he felt towards the state fermented into a full-blown self-destructive personality, which prevented my parents from being together, and me from meeting him until I was eight.

(l. to r.) Gabe Galanda, Lisa Monger, and Whaa ka dup, at the DOC CORE Academy graduation ceremony at Monroe Corrections Complex on November 1, 2010.

I realized that although my dad and I grew to become friends, we were never truly father and son. He passed on three years ago, at 56, from liver cirrhosis.

I also thought of my mom, who followed my dad's correctional path over 20 years later, serving two stints in the Purdy women's prison from 1998 to 2000. Her hitch corresponded with my three years of law school. I remembered when, after I graduated, she was released into my custody because Clallam County wouldn't have her back. Now, 10 years on, I am her legal guardian. She is 60, but suffers from schizophrenia and depression caused by over forty years of self-medication.

Neither my dad nor my mom nurtured their spiritual selves in prison. They found no peace in prison, and they left the system with broken spirits.

As I sweated with men who had already served far longer than my mom or dad, I realized that my parents' years in prison – especially my father's – forever changed my path, for the better. Even more profoundly, as the inmates around me sang and prayed, I knew that I had been called to Monroe that day to complete the circle; by helping them defend and advance their cultural and religious rights so that unlike my parents they might come out of prison with a chance at spiritual well-being.

***

In April, shortly after I started a new law firm, a local reservation attorney asked me if I would take on the *pro bono* cause of an Indian chaplain whose contract was terminated by the Washington Department of Corrections for bringing tobacco into Monroe on Easter Sunday, for the Native inmates' spring ceremony. Now free to take on whatever cases we see fit, my small firm quickly agreed. I soon met the chaplain, Whaa ka dup, a Tulalip Indian whose Anglo name is Robert Monger. He had done time, but is now clean, sober, deeply spiritual, traditionally religious, and committed to helping his relations in "the Iron House" find the Good Red Road. Whaa ka dup – whose persona is tough, blunt and no-nonsense – immediately inspired me. In those strong ways, he also reminded me of my dad.

Over the next several weeks, I learned that the Department of Corrections had recently made a series of changes to *its* policies concerning Native cultural and religious practices. The state had:

- Banned religious tobacco use during sweat lodge and Change of Seasons ceremonies;
- Combined Change of Seasons sweats with other, bi-monthly sweat lodge ceremonies;
- Restrained sweat practices by limiting the firewood needed to sufficiently heat the rocks/elders;
- Banned traditional Indian foods – salmon, buffalo, fry bread – from pow wows and ceremonies, and replaced American Indian fry bread with middle eastern flat bread;
- Prohibited prayer feathers and feather fans bigger than twelve inches long; and
- Reclassified Native herbs and medicines, like bitterroot, cedar, sage and sweetgrass, as "non-sacred," which exposed them to general property search and desecration.

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Tribal Leader Commentary

Phone (360) 466-3163
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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
11404 Moorage Way
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September 13, 2010

President Salvador A. Mungia
Bar Admissions Task Force
WSBA Board of Governors
c/o Paula C. Littlewood, Executive Director
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539

Dean Kellye Y. Testy
University of Washington School of Law
William H. Gates Hall
Box 353020
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Seattle University School of Law
P.O. Box 222000
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Re: Support for Maintaining Indian Law on Washington State Bar Exam

Dear President Mungia, Bar Admissions Task Force Members and Deans Testy, Martin & Clark:

I am the Chairman of the Swinomish Indian Tribal Community, located in the north Puget Sound and President of the Association of Washington Tribes, a consortium of the 29 federally recognized tribal government in Washington, and the President of the Affiliated Tribes of Northwest Indians (ATNI), an organization of 57 tribes from Oregon, Idaho, Washington, southeast Alaska, Northern California and Western Montana. As a Tribal Senator for 25 years, and Chairman for 14 years and as the President of the largest regional tribal government organization in the United States, I write to encourage you to maintain federal Indian law as a topic tested on Washington's bar examination, and to refrain from relegating the topic to any alternative form of testing.

In 2004, I was very pleased to be an active part of the movement that resulted in the inclusion of federal Indian law on our state's bar exam. My tribe engaged the State Bar – for the first time ever – through our local Governor, Eron Berg, to answer questions he had about Indian law and tribal-state relations and to convey our support for the proposal to include Indian law on the exam.

Also in 2004, ATNI's 57 member tribes formally resolved to support the State Bar's Indian Law Section and Northwest Indian Bar Association in "their endeavor to have the topic of Indian law tested by state bar associations, so the American public can better understand the inherent sovereign rights of our Indian nations."

The enclosed resolution went on to state that "if attorneys for the American public, particularly federal, state and local government, better understood the legal concepts of Tribal self-governance and Tribal jurisdiction, there would be fewer disputes and government- to-government dialogue would be greatly enhanced." I and my tribal leader colleagues are very pleased that since the State Bar Governors resolved to test federal Indian law on our state's exam, we have begun to see a noticeable change in understanding and attitude among the public and private legal practitioners we interact with on a routine basis. We tribal leaders and our lawyers now spend less time in discussions with other governmental leaders and lawyers having to lay the foundation of tribal sovereignty and jurisdiction. The role of tribes

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Tribal Leader Commentary

in the governmental structure of our nation seems to be both better understood and accepted. This often allows us to get on with discussing the substance of our differences, so we can work towards agreement and consensus with the state and local governments as well as private entities. That benefits the all of our Tribes' and our State's citizens.

In the Spring of 2005, I vividly recall attending a celebration of the Board of Governors' decision to include Indian law on our State's bar exam, at Seattle University Law School. I remember visiting with the late Prosecutor Norm Maleng, U.S. Attorney John McKay, Indian legend Billy Frank, Jr., and many of my fellow Tribal Chairman. I remember that Governor Christine Gregoire and Attorney General Rob McKenna each supported the addition of Indian law on the exam. Having fished all my life and recalling the "fish wars" from when I was a young man, I remember reflecting on how far tribal-state relations had come in my lifetime. The inclusion of Indian law on the bar exam has an impact that goes far beyond the obvious practical implications. It speaks to the role that Tribal governments play in the family of governments in our state and in the Nation.

I remember how overjoyed Washington Indian Country was in 2004-05 as news of the State Bar's new bar exam policy spread. To this day, our tribal communities are so very proud of the fact that the laws impacting them and the people they deal and interact with on a day to day basis, are now a part of the fabric of Washington State's legal profession and the education of new lawyers.

Because Native Americans have been facing legal struggles since the 1850s – struggles for United States citizenship, for voting rights, for religious freedoms, for our Treaty fishing rights, for our land, for our very sovereignty – the bar exam is perceived by Indians as one of the highest professional barriers that can be vaulted. Our members frequently attend law school for the specific purpose of practicing Indian law. When a tribal member passes the bar exam, the entire tribe celebrates because it is a momentous achievement for that individual, his or her family, and the entire tribal community. The inclusion of Indian law on our State's bar exam only made the bar exam more iconic in the eyes of Indian Country. It made tribal members feel like the Anglo-American and State justice system was finally relevant to their way of life.

Returning to the topic of today, I understand you are considering streamlining the bar exam to make it more cost-effective to administer and to that end, considering adopting a uniform bar exam that does not include federal Indian law and/or moving Indian law to an orientation or practicum for new lawyers.

While our tribal governments can certainly appreciate the need for a more cost-effective mode of service delivery during this global recession, Indian law is too important a topic to be eliminated or relegated to something other than the State bar exam. Federal Indian law is right where it belongs: on the Washington State bar exam and at the forefront of the minds of our State's lawyers and the hearts of Washington's tribal citizens. I am pleased to have learned that Washington State's Attorney General Rob McKenna agrees and has indicated as much to President Mungia.

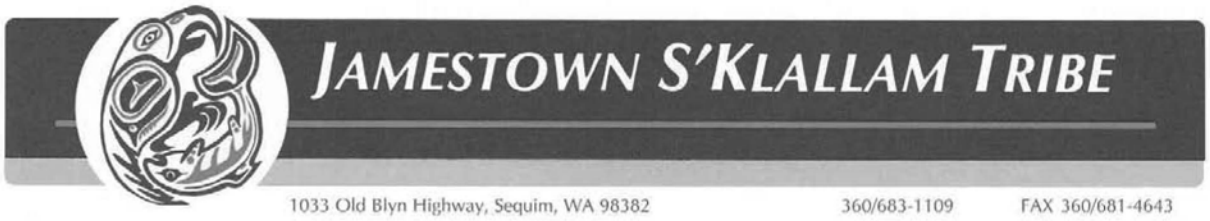
Thank you kindly for taking the time to consider my thoughts and opinions. Should any of you wish to speak with me, please do not hesitate to call me about this important issue.

With Respect,

Brian Cladoosby
Chairman, Swinomish Indian Tribal Community
Chairman, Association of Washington Tribes
President, Affiliated Tribes of Northwest Indians

cc: Professor Ron Whitener, Chair, WSBA Indian Law Section
Michael Douglas, President, Northwest Indian Bar Association
Gabriel Galanda, Chair, Indian Law on State Bar Exam Project, National Native American Bar Association

Tribal Leader Commentary



July 9, 2010

President Salvador A. Mungia
WSBA Board of Governors
c/o Paula C. Littlewood, Executive Director
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539

Dean Kellye Y. Testy
University of Washington School of Law
William H. Gates Hall
Box 353020
Seattle, WA 98195-3020

Dean Earl F. Martin
Gonzaga University School of Law
P.O. Box 3528
Spokane, WA 99220-3528

Dean Annette Clark
Seattle University School of Law
P.O. Box 222000
Seattle, WA 98122-1090

Re: Indian Law on the Washington State Bar Exam

Dear President Mungia and Deans Testy, Martin & Clark:

I am the Chairman of the Jamestown S'Klallam Tribe and President of the Washington Indian Gaming Association. I also serve as the Treasurer of the National Congress of American Indians (NCAI), having served on NCAI's Executive Committee since 1989 and as its President from 1995 to 1999. NCAI, founded in 1944, is the oldest, largest and most representative national American Indian and Alaska Native organization protecting and advocating for such Tribal interests as Tribal sovereignty, treaty rights, and cultural/traditional/religious rights.

I write you, as I wrote to the WSBA Board of Governors in 2004, to encourage the State Bar's continued support of testing federal Indian law on our Washington's bar exam. The inclusion of American Indian law on our State's bar exam is extremely important to Indian Country. It is so important that in 2004, NCAI considered and passed the enclosed Resolution "to have the topic of Indian law tested by state bar associations, so the American public can better understand the inherent sovereign rights of our Indian Nations."

We are pleased that after the Board of Governors adopted Indian law as a bar exam topic here in Washington, South Dakota and New Mexico did the same. Over the course of my nearly forty-year career in state, regional and national Indian politics, I have witnessed Washington State evolve towards the forefront of tribal/state relations. The Board of Governors' decision in 2004 was another example of our State's leadership in that regard.

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TRIBAL LEADER COMMENTARY

As the Judiciaries of the 29 Tribes in Washington mature, the state bar exam remains an important piece of law and order on our Reservations. Many Tribes' courts require lawyers to be state bar-licensed to appear in those courts. Many of our Tribal Courts require our trial court and appeals court judges to be state-bar licensed. It is therefore fitting that just as our Tribal judicial systems recognize and draw support from the State Bar and its licensing process, the Washington State bar exam incorporate tenants of federal Indian law and jurisdiction. As a result, we believe that the Tribes and our historical legal rights contribute to the education of lawyers who in turn represent, defend and teach Native and non-Native people throughout our State.

As a longtime elected Tribal leader, I feel an increasingly strong sense of a reciprocity and comity between our Tribal Governments and Washington State with regard to the inclusion of Indian law on the state bar exam – a feeling that must be honored, cherished and protected by us all of us in leadership positions for sake of our citizens and constituents.

I and my Tribe strongly encourage that you will maintain federal Indian law as a topic on the Washington State bar exam. If the Tribes in Washington can be of any assistance in that regard, or otherwise, please let me know and I will see what we can all accomplish together. I appreciate your time and your consideration of my encouragement and recommendation.

Sincerely,

W. Ron Allen
Tribal Chairman/CEO

cc: Gabe Galanda

Center for Indian Law and Policy at Seattle University School of Law

By Douglas Nash

The establishment of the Center for Indian Law and Policy at Seattle University School of Law in the fall of 2009 resulted in a significant number of new Indian law programs, projects and classes. The Center is staffed by Director Douglas Nash; Distinguished Indian Law Practitioner in Residence Eric Eberhard; and Attorney/Project Manager Lupe Ceballos with assistance and involvement from other faculty, adjunct faculty and practicing attorneys.

In addition to two survey courses in Indian law, the curriculum now includes Indian Law and Natural Resources, Indian Gaming Law, and Contemporary Issues in Indian Law. A new course on Indian Tribal Governmental Business Law is being developed and will be the next new course offered. A proposal has been made to offer a certificate in Indian Law for students successfully completing a designated course of class study and practical experience.

The new Tribal Governmental Business Law course will be based upon a new one-of-a-kind CLE currently being offered live and on-line. The Tribal Governmental Business Law CLE program will extend over two years and is offered once a month for a half-day. The course and the CLE are the result of work by Eric Eberhard. The CLE program is offered nationwide and includes a faculty of highly skilled practitioners from the northwest region and across the nation. Topics include Fundamentals of Indian Law; Conducting Basic Due Diligence; Forms of Tribal Business Entities; Finance; Taxation; and Sarbanes Oxley, Ethics and Federal Criminal Law. The second year of classes will include: Dispute Resolution; Insurance; Government Contracting; NEPA and Environmental Law; Labor and Employment; Construction Law, Tribal Gaming; and Energy and Natural Resources. Two classes have already been held and ten more are scheduled. Those completing the course will receive a certificate of completion at the end of the session.

The Institute for Indian Estate Planning and Probate is now part of the Center and continues to develop projects that deliver estate planning services to tribal communities. The Institute's summer intern program will begin its eighth year next summer. This project recruits law students, provides a week of intense training on Indian land history, the American Indian Probate Reform Act, Indian estate planning and the federal probate process; and then sends the interns out to provide estate planning services on assigned reservations on a full-time basis over the summer. Last summer, services were provided to seven reservations in Washington, Montana, Oregon and Idaho. It is significant that the tribes served have found the program to be of sufficient value to provide the financial support each summer. It is expected that even more tribes will be served next summer. A new project model, designed to provide estate planning services year around, has been developed and is being offered to tribes. An Indian Wills Clinic was established several years ago as part of the Law School's Clinical Program. The Indian Wills Clinic is offered each fall semester and is taught by Erica Wolf.

Since the Institute started in 2005, it and the projects it established have provided community education to over 24,000 individuals, served approximately 4,000 clients, and executed over 2,000 wills and 1,600 other estate planning documents.

A dispute resolution project has been established as one of the new projects under the Center. Based upon the experience of Nash and adjunct faculty member Michael Miranda, the project will offer alternative dispute resolution services in matters involving tribes and others where matters involving Indian law are at issue. The project will seek to not only resolve current issues between parties but to also secure a long-term, viable working relationship between them, especially in those matters involving natural resource issues.

A new, exciting and innovative development is the creation of an on-line Indian Law Journal that is being organized and will be operated by students. Expected to be available by 2012, the journal will solicit and publish articles on Indian law issues from students, professors and attorneys nationwide. Catherine O'Neil and Eric Eberhard have been serving as the faculty sponsors of the Journal.

Other programs and activities include an Indian Law Extern Program, a Speaker Program, providing contract services to tribal governments, the Native American Law Student Association chapter, and a full three-year scholarship that is provided to a first-year student who is a member of a federally recognized tribe.

For further information about the Center for Indian Law and Policy, contact Douglas Nash, *dnash@seattleu.edu*, 206 398 4376.

Indian Lawyers in the News *from page 1*

- **At-Large Member:** Dana Little (Turtle Mountain/Rocky Boy Chippewa) – Deputy Prosecuting Attorney at Snohomish County Prosecutor's Office
- **At-Large Member:** Saza Ozawa (Makah) – Associate Attorney General for the Quinault Indian Nation
- **At-Large Member:** Michael Douglas (Haida) – Immediate Past President of NIBA and Associate at Sonosky, Chambers, Sachse, Miller & Munson, LLP in Anchorage, Alaska

Bob Anderson Accepts Harvard Post

Robert "Bob" Anderson (Minnesota Chippewa/Bois Forte Band), associate professor of law and Director of the University of Washington School of Law's Native American Law Center, started a five-year term as the Oneida Nation Visiting Professor of Law at Harvard Law School this fall. The Oneida Indian Nation Professorship was established in 2003 by Ray Halbritter '90, an Oneida Nation Representative and CEO of Oneida Nation Enterprises, in order to "help create a better understanding of the complex legal issues faced by all American Indians today and in the future."

Angelique EagleWoman Chairs New Federal Indian Law Committee

Angelique EagleWoman has been named the chairperson of the Federal Bar Association Indian Law Section's new Development of Federal Indian Law Committee.

Quanah Spencer Named to "40 Under 40"

Quanah Spencer was recently named to the "40 Under 40" list of up and coming Native American professionals, by the National Center for American Indian Economic Development (NCAIED).

Michael Douglas Assumes Indian Legal Scholars Program Chairmanship

Michael Douglas has been named chairman of the Indian Legal Scholars Program, a joint venture of NIBA and the Indian Law Section. He is a former Indian Legal Scholars Program scholarship and bar stipend recipient.

Anthony Broadman Appointed Administrative Law Section Chair-elect

Anthony Broadman, a partner at Galanda Broadman, has assumed the chair-elect position for the WSBA Administrative Law Section for the 2010-11 year. He will serve as chair in 2011-12. Anthony, who is also a Section trustee, was recently appointed to serve as *Indian Law Newsletter* editor as well.

Gabe Galanda Appointed to Two National Bar Posts; Retires from Two Local Positions

Gabriel "Gabe" Galanda (Round Valley), a partner at Galanda Broadman, recently accepted nominations to serve on the Federal Bar Association Indian Law Section's new Development of Federal Indian Law Committee, as well as the ABA Business Law Section Gaming Law Committee's Indian Gaming Subcommittee. He recently retired from his service as chair of the Indian Legal Scholars Program, and as editor of *Indian Law Newsletter*, after nearly eight years at each post.

Greg Guedel Appointed Chair of ABA Native American Concerns Committee

The American Bar Association has appointed Greg Guedel of Foster Pepper as Chair of the ABA's Native American Concerns Committee. The Committee works to harness the vast resources of the ABA to guide the development of federal law in support of tribal sovereignty and self-governance, and furthers the federal trust responsibility and government-to-government relationship between Tribes and the United States. Committee members educate elected officials, the federal judiciary, and legal professionals on pressing issues of law and policy that affect Native Americans throughout the country.

Greetings from the 2010-11 WSBA Indian Law Section Chair *from page 1*

- **December 2nd Holiday Party Coat Drive** at the Foster Pepper Law Firm, 1111 Third Avenue, Suite 3400 Seattle – please bring winter coats to give to the Chief Seattle Club for homeless urban Indians in the area.
- **Northwest Indian Bar Association and Indian Law Section Winter Bar Stipend** – to individuals in need while prepared to take the Winter Washington State bar exam.

Thank you to the Indian Law Section Executive Committee and newsletter editors for your commitment. I look forward to a great year with the Indian Law Section.

Happy Holidays!

Christina Parker is a member of the Chippewa Cree Tribe of Northern Montana and a staff attorney for the Northwest Justice Project's Everett Field Office assigned to Indian Law and Tribal Law issues. She can be reached at (425) 252-8515, ext. 35 or christinap@nwjustice.org.

The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion *from page 2*

cost that ultimately runs to taxpayers – and may even stop a project dead in its tracks. To reduce these risks, it is extremely important for project managers to be sure that federal agencies "engage in meaningful consultation with concerned tribes and to do so early"[15] when a project is located near lands owned by an Indian tribe or its members, near an Indian reservation, or in areas where an Indian tribe may have an aboriginal or other traditional or cultural connection, including hunting and fishing rights, usufructuary rights and/or any other "reserved right."[16] If a federal agency has jurisdiction over a project, be it on- or off-reservation, then federal law *requires* that the agency meaningfully consult with any concerned tribe. By the same token, the United States, before encroaching into tribal governmental or business affairs, should, upon the request of a tribal government, consult.

The federal Indian consultation obligation arises from numerous federal statutes, regulations, and presidential orders; case law; and international legal norms. In these ways, the federal Indian consultation is both a sword and a shield that tribal governments should deploy when necessary to guard and protect their sovereignty. A paper tiger the right is not.

I. Preemptive Consultation

There are two general views of consultation. In the first one – the skeptical view – consultation is a method that perpetuates the betrayal of Indians by federal agencies.[17] In the second one – the optimistic view – the federal government "recognizes the wisdom of considering the unique perspectives of Native Americans during policy debate, and [makes] every effort to incorporate those views and interests in federal planning" and other activities.[18] In order for the second view to become a reality, consultation must be "meaningful." "Meaningful consultation means tribal consultation **in advance** with the decision maker or with intermediaries with clear authority to present tribal views" to the agency decision maker.[19] This usually comprises **a meeting**, during which the federal agency notifies the tribe of the proposed action and justifies its reasoning.[20] The tribe may then issue a motion of support for the decision, or reject the decision, **pursuant to tribal law or procedure**.[21]

Although this sounds relatively easy enough, a recent study has found that

> [M]any "consultations" were in fact merely opportunities for Agencies to inform Tribes of decisions that had been made, or that Agencies believed that consultation obligations could be met by sending a letter to Tribes inviting them to a "consultation" without first providing specific information about the proposed project upon which they could be prepared to comment.[22]

To be clear, a boilerplate letter to several tribes, informal communication with a tribal member or staffer, or a single meeting with a tribe, is *not* meaningful consultation.[23] A federal *fait accompli* is *not* meaningful consultation.[24]

Many tribes are realizing that consultation can and should be used as a sword – a kind of preemptive strike that forces federal agencies to consult before taking any legally permissible action even tangentially related to an Indian tribe – as well as a shield to guard from attacks on Indian sovereignty or tribal coffers. As it stands, some of the more intrusive federal agencies – the Internal Revenue Service (IRS), the National Indian Gaming Commission (NIGC) and the Environmental Protection Agency (EPA), to name a few – assume free reign over the promulgation and enforcement of their prerogative in Indian Country. Indeed, because federal laws of general applicability are presumed to apply to tribes, even on trust and reservation land,[25] these agencies' foray into Indian Country has received judicial sanction in most instances.[26] However, at each stage of United States incursion, federal law also requires meaningful consultation. It is this aspect of federal law that is often conveniently overlooked.

For example, the IRS, per its written protocols, requires its agents to consult with "tribal official(s) or a designee of the tribal official(s)" for "a discussion of the issues and information needed to complete [a] work assignment," be it for "educational/outreach endeavor, compliance review, or examination [audit]."[27] Likewise, the NIGC's consultation policy requires it, if not the Commission chairperson, to consult with a tribe when the agency carries out its "authority and responsibilities under [the Indian Gaming Regulatory Act[28]] to conduct investigations, take enforcement actions, and render regulatory and quasi-judicial decisions regarding the approval of tribal gaming ordinances and third-party management contracts, the suitability of management contractors to participate in Indian gaming, and tribal compliance with the Act."[29] The EPA's consultation mandates are also numerous, sprinkled throughout the Code of Federal Regulations and the EPA's own internal regulations.[30]

In practice, this means that the tribe should not turn over one shred of paper to the IRS or NIGC in response to an information or examination request, or allow federal agents any access to tribal facilities or enterprises, until the federal agency has consulted with the tribe about its efforts at hand. This notion of a pre-inquest government-to-government consultation will likely continue to be conveniently overlooked by federal agencies unless tribes aggressively assert their federal Indian consultation right.[31]

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II. Consultation as a Federal Mandate

Numerous federal statutes, presidential orders, and federal agency regulations (codified and otherwise) mandate meaningful consultation with Indian tribes prior to federal action. Although an exhaustive list of these laws and regulations is beyond the scope of this article[32] – especially now that the list seems to be growing at an exponential rate[33] – some pertinent illustrations are useful.

In 1971, the Bureau of Indian Affairs (BIA) promulgated an internal document titled: *Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs*. The guidelines set forth extensive consultation policies and urged Bureau managers to "seek ways in which … to accomplish the objectives of the consultation policy."[34] In *Oglala Sioux Tribe of Indians v. Andrus*,[35] the Tribe argued that the BIA violated the color and letter of these internal guidelines by failing to meaningfully consult before making personnel decisions affecting the Tribe. The court agreed with the Tribe, finding that the BIA's actions indeed deprived the Tribe "of fair notice of the agency's intentions" in violation of "those general principles which govern administrative decisionmaking."[36] The court issued an injunction in favor of the Tribe.[37]

In 1994, President Clinton issued a Presidential Document mandating that every federal agency "consult … with tribal governments prior to taking actions that affect federally recognized tribal governments."[38] In response, the Secretary of the Interior issued Secretarial Order 3175, and a subsequent Department Manual which required all Interior agencies to "consult with the recognized tribal government with jurisdiction over the trust property" that may be affected.[39] In *Lower Brule Sioux*,[40] the Tribe successfully used this mandate to obtain a writ of mandamus that forced the BIA to "follow its own guidelines and policies, including affording the tribe meaningful prior consultation…."[41] Specifically, the court found that, although a federal agency's interpretation of its own policies and regulations is generally given deference, when that interpretation "is plainly inconsistent with the wording of the regulation, or otherwise deprives affected parties of fair notice of the agency's intentions" it cannot stand.[42] Thus, the court held, because the BIA "violated its obligations of trust and fiduciary obligations" by failing to keep its promises to the Tribe, the BIA acted in an arbitrary and capricious manner in violation of federal law.[43]

III. Consultation as an Indian Trust Obligation

All federal agencies have a common law trust obligation to consult with tribes, as commanded by the "Indian trust doctrine."[44] In short, the doctrine was created in a set of three opinions known as the "Marshall Trilogy."[45] In those cases, Chief Justice John Marshall held that (1) tribes are "domestic dependent nations"; (2) as such, tribal sovereignty is subject to the overriding sovereignty of the federal government; but (3) the federal government must not haphazardly diminish tribal sovereignty, because "their relationship to the United States resembles that of a ward to his guardian."[46] Subsequent court decisions have construed this ward-to-guardian relationship as creating a fiduciary duty as to tribal lands and resources.[47] Thus, federal actions – as expressed in statutes, treaties, executive orders, and administrative regulations – affecting tribal resources are construed in light of the Indian trust doctrine. If agencies do not comply with these instructions, a trust duty is violated.[48] Further, absent a direct and express conflict with a statutory provision, the trust doctrine serves as a common law overlay to federal law and regulation.

The fiduciary duty to tribes includes consultation, as "[c]onsultations … can roughly be understood as communication by Indian beneficiaries of their desires to the federal trustees who make ultimate determinations about what happens with the lands Indians occupy."[49] This duty is triggered when an agency decision impacts the "value, use, or enjoyment" of Indian trust assets.[50] While the agency-tribal consultation undertaking may appear to be a small cog in the larger fiduciary machine, it is an essential element of a well-functioning trust system. It should not be surprising, then, that in the *Oglala* and *Lower Brule* cases discussed above, the court found a violation of the federal trust obligation as well as federal mandates.[51] Below are two more examples of how consultation is enforced as a fiduciary duty.

In *Klamath Tribes v. U.S.*,[52] the Tribes sought an injunction to prevent the U.S. Forest Service from implementing a forest plan and timber sale that, the Tribes argued, would "adversely impact the resources … on which the Tribes depend for their subsistence and way of life."[53] The court found that case law, presidential orders, and the agency's own internal regulations created a "substantive duty" to consult with Indian tribes in any decision-making process that could create adverse effects on tribal resources.[54] In holding for the Tribes, the court granted an injunction that prevented the U.S. Forest Service from selling timber "without ensuring, in consultation with the Klamath Tribes on a government-to-government basis," that the Tribes' resources would be protected.

Most recently, in *Confederated Tribes and Bands of the Yakama Nation v. U.S. Dept. of Agriculture*,[55] the Nation sought an injunction to stop the U.S. Department of Agriculture (USDA) from permitting a low-bid private contractor to move garbage imported from Hawaii over its ceded lands in Washington State. This case is noteworthy because it was one of the first where a tribe took a cumulative approach to enforcing its consultation right,

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arguing that the USDA's action violated the Treaty with the Yakama of 1855[56]; the National Environmental Protection Act (NEPA)[57]; Section 106 of the National Historic Preservation Act[58]; the American Indian Religious Freedom Act[59]; Presidential Executive Orders 13,175, 13,007, and 12,898; the Administrative Procedures Act (APA)[60]; *and* federal Indian trust common law.[61] In light of these federal laws, statutes and their implementing federal regulations, the court found that, because the path of the garbage was an "area in which tribal members exercise their 'in common' hunting, gathering, and fishing rights," there were "serious questions about whether [the USDA] adequately consulted with the Yakama Nation as required by … federal Indian trust common law."[62] The court issued the injunction.

It is important that tribes actively and aggressively assert their right to enforce the trust doctrine as a principle of federal restraint by way of meaningful consultation. If tribes are not consulted, "breaches of the trust obligation will become not only routine but seemingly sanctioned."[63] On the opposite end of the spectrum, the more that tribes use consultation preemptively the more likely it is that federal agencies will "seemingly sanction" *that* process – if nothing else out of necessity.

IV. Consultation as an Indian Treaty Obligation

In *Peoria Tribe of Indians of Oklahoma v. United States*,[64] the Tribe argued that the federal government violated its treaty rights in 1857 when it sold the Tribe's land without meaningful consultation. What made this case unique was a clause in the treaty that read: "it is agreed that the President may, from time to time, *and in consultation with the Indians*, determine how much shall be invested in safe and profitable stocks …."[65] The Court held that because the Tribe was not consulted, the treaty was violated and the United States was liable for the difference in price that the Tribe would have received for its property at public auction, plus interest.[66]

In *Peoria*, an explicit consultation clause was included in the treaty. Would it have made a difference if the consultation requirement were not made explicit? Likely not. To begin with, it is clear from the discussion above that meaningful consultation is required when any dispossession of treaty resources is involved.[67] Such is consistent with the preliminary injunction ruling in *Yakama*, wherein the court also noted that there were "serious questions about whether Defendants adequately consulted with the Yakama Nation as required by its Treaty of 1855" – even though, unlike in *Peoria*, the Yakama Treaty does not expressly require the President to consult the Nation regarding Yakama's guaranteed hunting, gathering, and fishing rights.[68] The treaty consultation obligation arises, in part at least, from the implicit duty to consult that is intrinsic in any bilateral agreement between nations. Per *Yakama*, that obligation now sounds in the federal common law.

Under principles of international law,[69] unless otherwise stated, all Treaties invoke mutually binding obligations between parties.[70] These obligations must be interpreted in "good faith," in a manner that fulfills the purpose of the treaty at the time of formation.[71] Termination or a change in the scope of a treaty can occur only by consent of the parties or pursuant to the terms of the treaty itself.[72] If a party wishes to terminate or alter the scope of a treaty responsibility, that party "must notify the other part[y]," and wait for a response.[73] The notification should be in writing, signed by competent authority, and "should indicate the measure proposed and the reasons therefore."[74] Except in cases of special urgency, the notification should "indicate a period for objections of not less than three months after its receipt."[75]

This is precisely the type of meaningful consultation that the court ordered in *Lower Brule*.[76] This is no coincidence. It is a foundational principle of federal Indian law that Treaties be interpreted in a manner that the signatory tribe would have understood them.[77] The practice of enforcing negotiated arrangements by reference to international law is indeed the very foundation of federal Indian law.[78] From the beginning, or, at least from the point in time when most Treaties were produced, tribal governments had an expectation of an international – *i.e.*, nation-to-nation – application.[79] Further, as Treaties are according to the United States Constitution, "the supreme Law of the Land [which] the Judges in every State shall be bound thereby,"[80] it is not far-fetched to say that tribes expected (and courts are therefore directed to interpret) Treaties to be regarded as supreme law. Tribes should take advantage of this often-overlooked aspect of asserting their *treaty* right to consolation.

As a side note, in the absence of an express treaty consultation right, the minutes from a tribe's treaty negotiations over 150 years ago may help bolster the federal treaty obligation to consult with the tribal signatory about potential impacts to tribal assets.[81] Perhaps even more profound is the idea that the federal government must follow international legal norms to consult with treaty tribal signatories when an agency action is likely to adversely impact a treaty resource.

V. Enforcing the Federal Indian Consultation Right

The duty to consult is procedural.[82] This means that consultation requires that the federal government must respect the desires of Native Americans to be involved in decisions that affect them, but does not bind federal agencies to anything resembling a commitment to the application of

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tribal input. As we have seen, that is not to say, though, that the federal Indian consultation right has no teeth. To the contrary, federal agencies have a duty to *seriously* consider tribal input. A failure to consult or to consider tribal input could put a quick end to a federal undertaking. Consider a few of the following procedural vehicles to enforce the federal Indian consultation right.[83]

a. The Administrative Procedures Act

Generally, the United States retains its sovereign immunity from suit unless it has expressly waived such immunity.[84] The APA acts as an express waiver in most suits against federal agencies.[85] Specifically, the APA provides a limited waiver of sovereign immunity for suits seeking "non-monetary" relief against federal agencies acting in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" when executing their duties.[86] An agency's action will be deemed arbitrary and capricious if the agency has not considered the relevant factors in making decisions.[87] As stated by the Supreme Court in the leading case:

> Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[88]

Thus, when federal agencies take action, such as issuing a permit or changing agency regulations, the action must be in compliance with relevant federal law.[89] Because a majority of the laws applicable to federal agencies do not provide a waiver of sovereign immunity in their own right, suits to enforce these laws must be brought pursuant to the APA.[90] Federal courts have frequently held that the APA establishes a strong presumption of judicial reviewability of agency action.[91] In most instances, the consultation requirement is enforced pursuant to the APA.

In order to bring suit under the APA, however, a federal agency's action must be "final."[92] To be deemed a "final agency action[,] the action should mark the consummation of the agency's decision-making process" and "the action must be one by which rights or obligations have been determined or from which legal consequences flow."[93] In many instances it is necessary that no "final agency action" will have amassed at the time that the tribe is requesting preemptive consultation – and the tribe therefore cannot receive instant enforcement of its consultation right via the APA. But when a "final agency action" does accrue, the tribe has the APA. Again, in *Yakama*, the Nation successfully invoked a kaleidoscope of federal statutes and regulations requiring consultation vis-à-vis the APA, to prevent Hawaiian garbage from being imported into its treaty-protected ceded lands.[94]

b. Injunction

What makes the APA important is that is gives tribes an "in" for injunctive purposes. Thus, the tribe may petition the court for an injunction against a non-final agency action pursuant to a violation of the APA vis-à-vis the consultation requirements discussed above.[95] In order to receive an injunction, the tribe must establish: (1) that it is likely to succeed on the merits (i.e., show a violation of the APA once the agency action is "final"), (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction would be in the public interest.[96] In *Oglala*, *Klamath*, and *Yakama* the tribes successfully met this burden, claiming breach of, *inter alia*, the federal Indian consultation right.

c. Writ of Mandamus

Another option is to seek a writ of mandamus against the head of the agency under 28 U.S.C. § 1361. This method is effective, but rarely used. In order to do this, the tribe must show that: "(1) the officer has a clear and nondiscretionary duty to perform the act in question [i.e., to consult], (2) the patent violation of agency authority or manifest infringement of substantial rights, and (3) the tribe has no adequate alternative remedy."[97] This option was successfully utilized by the Lower Brule Sioux Tribe in their attempt to force the BIA to consult.[98]

d. Treaty Breach

Per 28 U.S.C. § 1362, federal courts have jurisdiction to hear and decide claims by an Indian tribe against the United States for breach of treaty-guaranteed rights.[99] In *Yakama*, the Nation pled an independent basis to enjoin the federal Hawaiian garbage undertaking – breach of the Yakama Treaty of 1855.[100] Again, in issuing the injunction, the court questioned whether the United States adequately consulted with Yakama as required by the Treaty of 1855, despite the fact that the subject treaty rights to fish, hunt and gather are not expressly tethered to a federal consultation obligation.[101] In short, by the mere virtue of having a treaty, an enforceable right to consult when treaty rights are affected can be evoked pursuant to 28 U.S.C. § 1362 and now, the federal common law.[102]

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The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion *from previous page*

VI. Conclusion

The federal Indian consultation right is quite robust. However, caught up in the feds' own deadlines and priorities, which are often at odds with tribal ways and interests, federal agencies habitually neglect their now obvious duty to consult meaningfully with tribal governments. The net effect of this neglect is negative for both parties; but whereas the cost is pecuniary for federal agencies – not to mention contractors, project managers and American taxpayers – tribes pay in diminished sovereignty or treaty abrogation, if not physical invasion of tribal territory. Any such harm is irreparable.[103] For these reasons, it is time that tribal governments firmly take the reins and establish a preemptive stance on consultation.

I will end with an example: Say you are a tribal leader or lawyer, and one of the more intrusive federal agencies noted above begins appraising a tribal resource in order to commence a project or enforce a federal law or regulation. The agency clearly has the power to do so, authorized either by preemptive federal law, precedent, or both. At this point, you have two options: (1) Sit back and await the inevitable attack on tribal sovereignty – lamenting the injustice of the federal preemption doctrine and bad court decisions; or (2) Use consultation as a preemptive strike, demanding that the federal agency stop, look, and listen to – *and hear* – tribal concerns. Choose Option 2. It is hard to imagine a downside that would outweigh the upside to invoking your tribes' consultation right.

If asked by United States officials under what authority your tribe demands consultation, point to the agency's own regulations and policies – they should have them per Executive Order 13175.[104] If they do not, or ask you for more, show them federal law – direct them to your treaty and/or the Indian trust doctrine.[105] If they are still not convinced they owe your tribe a consultation duty, invoke international – nation-to-nation – legal norms.[106] If the federal agency still refuses to consult, it is time to wield your sword, if not your treaty, and seek an injunction or a writ of mandamus in the United States District Court. The Oglala and Lower Brule Sioux, Klamath, Peoria and Yakama Nations have forged your path there.

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1 *See generally* President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009) (hereinafter 2009 Presidential Memorandum). Kudos to Kimberly Teehee (Cherokee), Senior Policy Advisor for Native American Affairs, White House Domestic Policy Council. and Jodi Gillette (Standing Rock Sioux), Deputy Associate Director of the White House's Office of Intergovernmental Affairs, for spearheading the promulgation of the 2009 Presidential Memorandum. I have already witnessed firsthand how the policy pronounced in the Memorandum has staved off potentially ugly litigation and related fall out between tribal and federal sovereigns and in the process, strengthened tribal-federal relations. In that way, the 2009 Presidential Memorandum may represent one of the Obama Administration's most important federal Indian policy accomplishments to date.

2 Letter from David Hayes, Deputy Secretary, and Larry Echo Hawk, Assistant Secretary – Indian Affairs, United States Department of the Interior, to Tribal Leaders (Nov. 23, 2009), available at http://www.bia.gov/idc/groups/public/documents/text/idc002746.pdf.

3 *See e.g., Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Agriculture*, No. 10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010). Indeed, a year after President Obama issued the 2009 Presidential Memorandum, with much federal and tribal fanfare, several federal agencies have yet to honor the President's mandate that they provide a written tribal consultation plan within ninety days from the issuance of that Memorandum. Some of those offending agencies include, not surprisingly, those which increasingly commence inquests of tribal governments and enterprises per so-called federal laws of general applicability. *See generally* cases cited in note 26, infra; compendium of "Consultation and Tribal-Federal Relations" materials promulgated pursuant to the 2009 Presidential Memorandum, as assembled by the National Congress of American Indians (NCAI), available at: http://www.ncai.org/Consultation-and-Tribal-Federa.30.0.html. The White House and/or NCAI should insist that those offending agencies immediately come into compliance with the 2009 Presidential Memorandum.

4 *See e.g.,* Treaty with the Kaskaskia, Peoria, Etc., May 30, 1854, art. 7, 10 Stat. 1082, 1084.

5 Restatement (Third) Foreign Relations Law of the United States §§ 325, 337 (1986) (hereinafter Restatement).

6 *See e.g.,* President Lyndon B. Johnson, Special Message to Congress on the Problems of the American Indian: "The Forgotten American," 1 Pub. Papers 336 (Mar. 6, 1968) (hereinafter 1968 Johnson Congressional Message).

7 Gregory A. Smith, *The Role of Indian Tribes in the Section 106 National Historic Preservation Act Review Process*, SJ053 ALI-ABA 649 (2004).

8 John Petoskey, *Indians and the First Amendment*, *in* American Indian Policy in the Twentieth Century 221 (Vine Deloria, Jr. ed. 1985).

9 Smith, *supra* note 7, at 649.

10 *See Confederated Tribes and Bands of the Yakama Nation v. U.S. Dept. of Agriculture*, No. 10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010) (on preliminary injunction, observing that a threatened federal undertaking "would immeasurably harm the resources and waterways enjoyed by the Yakama Nation… as well as the Yakama Nation's logging industry.").

11 *See* Stephen Cornell & Miriam Jorgensen, *The Nature and Components of Economic Development in Indian Country* (Nat'l Cong. Am. Indians Pol'y Research Center, May 15, 2007), *available at* http://nni.arizona.edu/whatwedo/pdfs/Cornell-Jorgensen.pdf.

12 *See e.g.,* 1968 Johnson Congressional Message, *supra* note 6; 2009 Presidential Memorandum, *supra* note 1.

13 Smith, *supra* note 7, at 649.

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14 Sherry Hutt & Jaime Lavallee, Tribal Consultation: Best Practices in Historic Preservation 7 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf. As noted by one federal attorney: "(E)arly consultation with the public and affected States and Tribes … can help save money by identifying important issues and avoiding unnecessary or insufficient analyses. We anticipate cost savings from these initiatives of at least $9.0 million over the next five years." *Prepared Testimony of Robert R. Nordhaus, General Counsel, Department of Energy Committee on Energy and Natural Resources Subcommittee on Oversight and Investigations United States Senate*, Fed. News. Serv., June 7, 1995.

15 Dean B. Suagee, *Consulting With Tribes for Off-Reservation Projects*, 25 Nat. Resources & Env't 54, 55 (2010).

16 *See generally* Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 Nat. Res. J. 653 (2009).

17 Christy McCann, *Dammed If You Do, Damned If You Don't: FERC's Tribal Consultation Requirement and the Hydropower Re-Licensing at Post Falls Dam*, 41 Gonz. L. Rev. 411, 434 (2006).

18 Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 Am. Ind. L. Rev. 21, 24 (2000).

19 *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995) (citing *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1987)) (emphasis added).

20 *Id.*

21 *Id.*

22 Hutt & Lavallee, *supra* note 14, at 11.

23 Lower Brule, 911 F. Supp. at 401.

24 *Cf. id.*

25 Under the *Tuscarora-Coeur d'Alene* analysis, statutes that are silent on the issue of applicability to Indian tribes will apply in totality to tribal enterprises unless one of the three following exceptions applies: "(1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended (the law) not to apply to Indians on their reservations ….'" *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

26 *See e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western Dist. of Mich.*, 46 F.Supp.2d 689 (W.D. Mich. 1999) (NIGC); *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) (EPA); *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (IRS).

27 Internal Revenue Manual pt. 4.86.1.2, 2007 WL 2643664, (Jan. 1, 2003) (Protocol for Contacting Tribes).

28 25 U.S.C. §§ 2701-2721. The relevant regulations are at 25 C.F.R. §§ 501-577.

29 National Indian Gaming Commission, Government-to-Government Tribal Consultation Policy, 69 FR 16973-01 (Mar. 31, 2004), § III.G.

30 *See* Haskew, *supra* note 18, at 39.

31 As noted by one tribal attorney, "(i)t is difficult to avoid the conclusion that 'consultation' is the latest federal codeword for lip service." *Id.*, at 73.

32 For lists of these mandates *see* William H. Rogers, Jr., Envt. L. Indian Country § 1:16 (2010); Haskew, *supra* note 18, at n.3; The White House Indian Affairs Executive Working Group, Consultation and Coordination Advisory Group, List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance (2009), available at http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20ACHP%20version_6-09.pdf.

33 *See* Haskew, *supra* note 18, at 22 (noting a "proliferation of tribal consultation requirements in federal statutes and policies").

34 *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717 (8th Cir. 1979).

35 *Id.*

36 *Id.* at 718, 721.

37 *Id.* at 712-13 (finding that the lower court, upon remand, has the authority to issue the injunctive relief requested).

38 President William J. Clinton, Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994). This Memorandum was updated in 1998 with Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998), and later supplanted by Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 6, 2000). The Obama Administration has recently issued a Presidential Memorandum that ordered federal agencies to promptly implement President Clinton's 2000 Executive Order. *See* 2009 Presidential Memorandum, *supra* note 1.

39 Department of the Interior, Departmental Manual: Part 512 American Indian and Alaska Native Programs, *Departmental Responsibilities for Indian Trust Resources* § 2.2 (1995).

40 911 F. Supp. 395.

41 *Id.* at 402.

42 *Id.* at 399 (citing *Oglala Sioux*, 603 F.2d at 718).

43 *Id.* at 400-401.

44 Because of the derivation of the doctrine and subsequent case law, the Indian trust doctrine has its own legal filaments and fragments, and works for and cuts against tribal interests. In *U.S. v. Kagama*, 118 U.S. 375 (1886), the Court opted to replace the sovereign-based trust model for a (racist) dependency model that justified nearly total federal authority over tribes, despite any textual basis for the change in federal law. Today, both models are used, usually one for the other at the whim of the Court.

45 *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

46 *Cherokee Nation*, 30 U.S. at 17.

47 This doctrine extends to all federal agencies (Nance, 645 F. 2d 701), requires "procedural fairness" before the federal government can take actions affecting tribal interests (*Morton v. Ruiz*, 415 U.S. 199 (1974)), and measures adherence by a fiduciary standard. *Seminole Nation v. U.S.*, 316 U.S. 286 (1942).

48 *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 788 (9th Cir. 2006).

49 Haskew, *supra* note 18, at 31.

50 U.S. Dep't of the Interior, Protection of Indian Trust Resources Procedures Manual 13 (1996).

51 *See* Oglala Sioux, 603 F.2d at 721 (the BIA violated "the distinctive obligation of trust incumbent upon the Government") (internal quotations omitted); *Lower Brule Sioux*, 911 F. Supp. at 400 ("The BIA ignored its own rules and representations and violated its obligations of trust and fiduciary obligations.").

52 No. 96-381-HA, 1996 WL 924509 (D. Or. Oct. 2, 1996).

53 *Id.* at *1.

54 *Id.* at *8.

55 No. 10-3050, 2010 WL 3434091.

56 12 Stat. 951.

57 42 U.S.C. §§ 4321-4370e.

58 16 U.S.C. §§ 470 *et seq.*

59 42 U.S.C. §§ 1996 *et seq.*

60 5 U.S.C. §§ 551 to 599.

61 A recent string of cases from the Supreme Court of Canada have found a duty to consult in similar situations arising from the Indian trust common law. *See Haida Nation v. British Columbia* (Minister of Forests), 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia* (Project Assessment Director), 2004 SCC 73; *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage), 2005 SCC 69.

62 Yakama Nation, 2010 WL 3434091, at *4.

63 Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 Envtl. L. 733, 749 (1995).

64 390 U.S. 468 (1968).

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65 Treaty with the Kaskaskia, Peoria, Etc., May 30, 1854, art. 7, 10 Stat. 1082, 1084 (emphasis added).

66 Peoria Tribe, 390 U.S. at 471-73.

67 *See* Klamath Tribes, 1996 WL 924509, at *8 ("In practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources.").

68 Yakama Nation, 2010 WL 3434091, at *4.

69 "International law" here meaning international law as it applies to the United States and domestic law that has substantial significance for the international relations of the United States.

70 Restatement, *supra* note 5, at § 325.

71 Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (hereinafter Vienna Convention).

72 Restatement, *supra* note 5, at § 332.

73 *Id.* at § 337.

74 *Id.* (citing Vienna Convention, art. 67)

75 *Id.* (citing Vienna Convention, art. 65(2)). Professor James Anaya, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, has recently promulgated a report on the duty to consult that is very instructive. See Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, U.N. Doc. A/HRC/12/34 (July 15, 2009).

76 911 F. Supp. at 401.

77 *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

78 *See* cases cited in note 30, *supra*.

79 See Mikisew Cree First Nation, 2005 S.C.C. 69.

80 U.S. Const. Art. VI, Cl. 2.

81 *See e.g.* Isaac Ingalls Stevens, *A True Copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley*, 1855, 66, 74 (Darrell Scott ed., 1985); *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (Treaty minutes accurately capture what Governor Stevens and General Joel Palmer told the Yakamas at the Treaty negotiations at the Walla Walla Council in 1855).

82 *See* Klamath Tribes, 1996 WL 924509, at *8.

83 These examples in no way constitute an exhaustive list of potential actions against federal agencies failing to comply with their obligation to meaningfully consult. The examples are meant to be a mere exhibit of the tactics most often used.

84 *United States v. Sherwood,* 312 U.S. 584, 586 (1941). Interpretation of these waivers must be strictly construed "in favor of the sovereign," and "must be unequivocally expressed in statutory text …." *Lane v. Peña*, 518 U.S. 187, 192 (1996).

85 APA claims are subject to a six-year statute of limitations. *Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923, 931 (9th Cir. 2010).

86 *Lester v. U.S.*, 85 Fed.Cl. 742, 746 (2009).

87 *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

88 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

89 *Chemical Weapons Working Group, Inc. v. U.S. Dept. of the Army*, 111 F.3d 1485 (10th Cir. 1997).

90 *See e.g., Greater Yellowstone Coalition v. Kempthorne*, 577 F.Supp.2d 183, 189 (D. D.C. 2008) ("NEPA creates no private right of action and therefore challenges to agency compliance with NEPA must be brought pursuant to the APA …."); *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 235 F.R.D. 521, 528 (D. D.C. 2006) (holding that suits brought to enforce an "agency's own regulations … must be brought pursuant to the APA").

91 *See e.g. Spencer Enterprises, Inc. v. U.S.*, 345 F.3d 683 (9th Cir. 2002).

92 5 U.S.C. § 704.

93 *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

94 Yakama Nation, 2010 WL 3434091.

95 *See e.g. id.*

96 *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374 (2008).

97 *Oglala Sioux*, 603 F.2d at 718, 398.

98 *See generally id.*

99 *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Flathead Irr. and Power Project*, 616 F.Supp. 1292, 1295 (D. Mont. 1985) (citing *Gila River Indian Community v. Henningson, Durham and Richardson*, 626 F.2d 708, 711 (9th Cir. 1980)). 28 U.S.C. § 1362 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.

See generally Confederated Salish and Kootenai Tribes, 616 F.Supp. 1292 (issuing a temporary restraining order against the federal agency for a breach of treaty claim brought pursuant to 28 U.S.C. § 1362).

100 Yakama Nation, 2010 WL 3434091.

101 *Id.* at *4.

102 *Id.*

103 *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1516 (W.D. Wash. 1988) (A violation or loss of rights guaranteed by Treaty and protected under the Constitution is considered "irreparable in the equitable sense.") (citing *Los Angeles Memorial Coliseum v. National Football League*, 634 F.3d 1197, 1202 (9th Cir. 1980)); *United States v. Washington*, 384 F.Supp. 312, 404 (W.D.Wash. 1974), aff'd 520 F.2d 676 (9thCir. 1975), cert. denied, 423 U.S. 1096, substantially aff'd sub nom. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (Indian Treaty rights are unique and damages sustained by Treaty Indians are generally insusceptible of monetary determination).

104 *See e.g.,* National Indian Gaming Commission, Government-to-Government Tribal Consultation Policy, *supra* note 29; Internal Revenue Manual pt. *4.86.1.2, supra* note 27; Internal Revenue Service, *Consultation Procedures*, http://www.irs.gov/govt/tribes/article/0,,id=150031,00.html (last visited Oct. 13, 2010); Envtl. Prot. Agency, Nat'l Envtl. Justice Advisory Council, Indig. Peoples Subcomm., Guide on Consultation and Collaboration with Indian Tribal Governments and The Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making (2000), *available at* http://yosemite.epa.gov/R10/ocrej.nsf/eb1daa9965e73fdf88256b800071a40b/280e766a6452517e882570ad00833d22/$FILE/ips_consultation_guide.pdf.

105 *See supra* notes 64-81 and accompanying text.

106 Although discussion is beyond the scope of this article, it is worth noting that the United States has signed and ratified a number of international human rights treaties, including the International Convention of the Elimination of All Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights. Although not a binding Treaty, the United States, as an Organization of American States member state, has also agreed to comply with the American Declaration of the Rights and Duties of Man, observed by the Inter-American Commission. All of these documents have potential to compel government-to-government consultation between tribes and the various federal agencies. *See e.g. Case of the Saramaka People v. Suriname*, 2007 Inter-Am. C.H.R. (ser. C) No. 172 (Nov. 28, 2007). The Declaration on the Rights of Indigenous Peoples, which the Obama Administration is currently considering adopting, also provides an obligation to consult, both "before adopting and implementing legislative or administrative measures that may affect (indigenous peoples)," and "prior to the approval of any project … affecting their land." U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

of *stare decisis*. Specifically, *Okla. Tax Commission (OTC) v. Citizen Band* (1991); *OTC v. Sac and Fox* (1993); and *OTC v. Chickasaw* (1995) all upheld the principle that states have no authority to tax tribes and tribal members in Indian country. Each of these decisions was by a 9-0 vote, indicating that this issue is firmly established in the law and would continue to be upheld by the current Court. Likewise, *County of Yakima* (1991) prohibited state imposition of an excise tax on sales of land by tribal members, also by a 9-0 vote. Finally, the doctrine of tribal sovereign immunity was upheld 9-0 in *Citizen Band* (1991) and by a narrower 6-3 vote in *Kiowa Tribe* (1998). In *Kiowa*, Kennedy, Scalia, and Breyer expressed little enthusiasm for tribal sovereign immunity, but nevertheless upheld it. These five cases show that the current Court will apply principles of *stare decisis* and uphold "categorical" principles of Indian law, such as tribal sovereign immunity and tribal immunity from state taxation in Indian country.

The other two tribal victories in this time period are *LaPlante* (1987) and *Lara* (2004). *LaPlante* offers little insight into the current Supreme Court, since it was decided by an 8-1 margin in 1987 and involved a relatively well-established doctrine of tribal court exhaustion. In *Lara*, the Court held by a 7-2 vote that an Indian non-member could be prosecuted criminally in federal court, despite being previously tried in tribal court. *Lara* confirms that Justices Breyer and Ginsburg are firm believers in broad congressional authority to regulate and govern Indian affairs. These justices found that Congress had authority to re-vest Indian tribes with sovereignty to prosecute non-member Indians. Justices Kennedy and Thomas concurred in the result, but not in Breyer's opinion. Justice Kennedy did not find it necessary to address the tribal sovereignty issues and Justice Thomas opined that the whole doctrine of tribal sovereignty should be revisited, concluding that the doctrines of tribal sovereignty and Congressional plenary authority over tribes are mutually inconsistent. Scalia joined Souter's dissent, which argued that tribes had no inherent authority to prosecute non-members.

B. Analysis of Tribal Losses

Cases that tribes have lost since 1986 make four principles clear. First, the Court will narrowly interpret the authority of tribes to regulate the conduct of non-Indians within the reservation. Other than the mixed result in *Brendale* (1989), tribes have not won a *Montana*[2] case (i.e., a case addressing tribal authority over non-Indians on the reservation) in the 1986-2010 time-period. In *Brendale*, Scalia and Kennedy took the view that the tribe had no authority to regulate non-Indian land use on the reservation. In *Bourland* (1993), the Court found that Congress abrogated tribal rights to regulate non-Indian hunting and fishing on the reservation. *Duro* (1990), *Strate* (1997), *Atkinson Trading* (2001), *Hicks* (2001), and *Plains Commerce* (2008) all involved questions of tribal regulatory or adjudicative jurisdiction over non-Indians. *Venetie* (1998) also involved tribal authority over non-members. All of these decisions were adverse to the tribes.

Second, the Court is unlikely to find disputed lands to be "Indian country." Since 1986, the Supreme Court has decided two reservation diminishment cases, *Hagen* (1993) and *Yankton Sioux Tribe* (1998). Two other cases, *Venetie* (1998) and *Sherrill* (2005), involved the related question of whether or not certain lands qualified as "Indian country." *Carcieri* (2009) addressed the authority of the United States to take lands into trust for tribes. The affected tribes lost all five cases. The Couer d'Alene Tribe did successfully argue (by a 5-4 margin) that certain lands were part of its reservation in *Idaho* (2001), but it is unlikely that case would come out the same way under the current Supreme Court membership.

Third, the Court will broadly interpret the authority of states to tax non-Indians engaging in business with tribes. The Court has heard six cases on this issue since 1986, all resulting in losses for tribes. *Cotton Petroleum* (1989) affirmed state authority to tax non-Indian mineral leases within the reservation and disagreed that federal law or inherent tribal authority pre-empted such taxes. *Milhelm Attea* (1994) affirmed state authority to impose requirements on non-Indian cigarette wholesalers who sell to tribes. *Blaze Construction* (1999) affirmed state authority to tax a non-Indian contractor rendering services on the reservation. *Wagnon* (2005) affirmed state authority to tax non-Indian fuel distributors selling fuel to tribal retailers. The Court also affirmed state authority to impose sales tax to on-reservation purchases made by non-Indians in *Citizen Band* (1991) and state authority to tax income of Indians who live off-reservation in *Chickasaw Nation* (1995).

Fourth, the Court will allow state taxation of Indians where it finds that Congress has expressly authorized such taxation. In *County of Yakima* (1991), *Negonsett* (1993), and *Cass County* (1998), the Court in largely unanimous opinions affirmed state authority to tax certain tribal interests after finding that Congress had expressly authorized such taxation in the statutory language.

II. Analysis of Individual Justices' Indian Law Voting Record

The membership of the Supreme Court in the 2010-11 term is Scalia, Kennedy, Thomas, Ginsburg, Breyer (a block which has served on the Court together since 1994) and the newer justices Roberts, Alito, Sotomayor, and Kagan, of which little is known of their views on Indian law.

A. Justice Scalia (1986)

Justice Scalia is the senior member of the Court, serving since September 1986. Since joining the Court, Scalia has voted against tribes in 80% of Indian law cases. Since

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Scalia wrote *County of Yakima* in 1991, he has ruled against the tribal position in 28 of 33 cases (85% adverse).

Scalia has authored only four opinions on Indian law topics. In *Blatchford* (1991), Scalia wrote that states are immune to suits from tribes under the 11th Amendment. In *County of Yakima* (1991), he wrote that Congress expressly authorized state *ad valorem* taxation of fee-patented Indian lands, but did not authorize excise tax on sales of such land. This opinion evidences Scalia's judicial philosophy of strictly interpreting statutes as they are written. In *Hicks* (2001), Scalia wrote a majority opinion that the tribe lacked jurisdiction over state officers executing a warrant on tribal lands. While Scalia's opinion was adverse to the tribe and confirmed that the *Montana* test can be applied to all land within the reservation, his opinion did not go as far as the concurrence by Kennedy and Thomas, which directly attacked the concept of inherent tribal power over non-members. Recently, in *Navajo II* (2009), Scalia authored a unanimous opinion that the tribe lacked a cause of action against the United States for breach of trust.

Scalia is well known for strict statutory construction. He typically refuses to look beyond the text of a statute to determine congressional intent. For example, in *Leavitt* (2005), Scalia concurred in the opinion, but objected to the use of legislative history as a tool of statutory analysis. Likewise, in *Negonsett* (1993), Scalia declined to join the portion of the opinion that relied on legislative history to interpret the Kansas Act. However, Scalia made no objection to the review of legislative history in *Hagen*, *Yankton Sioux*, or *Venetie*.

B. Justice Kennedy (1988)

Since Justice Kennedy was appointed in February 1988, he has ruled against the tribal position in 32 of 40 cases (80%). He is the author of three majority opinions and one concurring opinion in Indian law issues. Kennedy wrote *Duro* (1990), holding that tribes did not have inherent authority to prosecute non-member Indians, and also wrote *Kiowa Tribe* (1998), which is a reluctant affirmance of tribal sovereign authority. He wrote the majority opinion in *Cayetano* (2000) and a concurring opinion in *Lara* (2004) where he declined to address the disputed tribal sovereignty issues. Kennedy's most surprising vote was his joining in Ginsburg's dissent in *Wagnon* (2005). While Justice Kennedy is often described as the "swing-vote" in Supreme Court cases, he is firmly in the Scalia/Thomas voting block in Indian law cases. Kennedy has voted with Scalia in 37 of 40 Indian law cases (92.5% consistency) and with Thomas in 31 of 34 Indian law cases (91%).

C. Justice Thomas (1991)

Since Justice Thomas was appointed in October 1991, he has authored six majority Indian law opinions in which the tribes all lost. He authored a dissent in *White Mountain Apache* (2003) and a concurrence in the result in *Lara* (2004) in which he supported a thorough reconsideration of the entire doctrine of inherent tribal sovereignty. Since joining the Court, he has voted against tribes in 26 of 30 cases (87% adverse). Since 1998, he has dissented in five of the seven cases that tribes have won in the Supreme Court (the only exceptions being *Leavitt* (2005) regarding interpretation of the ISDEA and his concurring opinion in *Lara*).

D. Justice Ginsburg (1993)

Justice Ginsburg joined the Court in August 1993. She has drafted many Indian law-related opinions. Many of her majority opinions have been adverse to tribes, including significant decisions such as *OTC v. Chickasaw Nation* (1995), *Strate* (1997), *C&L Enterprises* (2001), *Navajo* (2003) and *City of Sherrill* (2005). More recently, she wrote favorable dissenting opinions in *Wagnon* (2005) and *Plains Commerce* (2005). She also dissented in part in *Carcieri* (2009), arguing that the case should be remanded for a factual determination of whether the tribe was under federal jurisdiction in 1934. Ginsburg also was the only member of the Court to join Justice Stevens' dissent in *Cayetano* (2000) in which they argued that the majority had ignored Hawaii's unique history in ruling that the native-based voting restrictions violated the Fifteenth Amendment.

Justice Ginsburg has ruled against tribes in 20 of 31 cases since she joined the Court (65% adverse). In addition to opinions noted above, she joined favorable majority opinions in *Mille Lacs* (1999) (5-4), *Idaho* (2001) (5-4), *White Mountain Apache* (2003) (5-4), and authored the *Arizona v. Cal*. (2001) (6-3) tribal win.

A recent law review article by Professor Carole Goldberg argues that Justice Ginsburg opinions on Indian law have evolved since she joined the bench, and that she has gained a much better understanding of Indian law as a body of law, tribal sovereignty, and the realities of tribal governments and economics.[3] This understanding, argues Professor Goldberg, is evidenced by her recent dissents in *Plains Commerce* and *Wagnon*. Of most concern is Justice Ginsburg's majority opinion in *Sherrill*, which rejected the Oneida Nation's claims on "equitable" grounds, ignoring the effect of the Indian country statute, 18 U.S.C. § 1151. Justice Ginsburg is a crucial vote for Indian tribes at the Supreme Court.

E. Justice Breyer (1994)

Justice Breyer joined the Court in August 1994. He has drafted four Indian law opinions, most significantly the dissent in *OTC v. Chickasaw Nation* (1995), in which he argued that the state could not tax income of Indians earned on the reservation even if they lived off-reservation, and his opinion in *Lara* (2004) that Congress could re-vest tribes with sovereignty to prosecute non-members. He also authored *Leavitt* (2005), a unanimous opinion that the

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United States must honor its contracts entered into under the ISDEA and *Chickasaw v. US* (2001), ruling that tribes are not exempt from federal tax on gambling revenues.

Overall, Breyer has ruled against the tribal position in 17 of 28 cases since he joined the Court (60% adverse). Beyond that, his voting record is difficult to analyze. On the positive side, he joined the majority opinions in *Kiowa Tribe* (1998) (6-3), *Mille Lacs* (1999) (5-4), *Arizona v. Cal*. (2001) (6-3), *Idaho* (2001) (5-4), *White Mountain Apache* (2003) (5-4), and drafted a favorable opinion in *Lara* (2004). He also wrote the dissent in *Chickasaw Nation* (1995), joined the dissent in *Plains Commerce* (2008) and joined O'Connor's *de facto* dissenting opinion in *Hicks* (2001). Justice Breyer generally appears supportive of tribal sovereignty and has been willing to apply Indian canons of construction and interpret historic documents (i.e., in *Mille Lacs* and *Idaho*) in a manner that favors tribes. However, on the negative side, Breyer joined majority opinions in *City of Sherrill* (2005), *Wagnon* (2005), and *Carcieri* (2009). Justices Breyer and Ginsburg have voted on the same side in tribal cases 25 of 29 times (86% consistency).

F. Roberts, Alito, Sotomayor, and Kagan (2005-2010)

Four justices who sit in the 2010-2011 term offer little Indian law jurisprudence to evaluate. Given the cases decided by Justices Roberts and Alito to date, it seems probable that they would vote in sync with Scalia, Thomas, and Kennedy on most Indian-law matters. The votes of Justices Sotomayor and Kagan are more difficult to predict.

Since joining the Court in 2005, Justice Roberts has authored *Plains Commerce* (2008) and joined four other cases adverse to tribes. Before joining the Court, Roberts successfully argued *Venetie* (1998) on behalf of Alaska and unsuccessfully argued *Cayetano* (2000) on behalf of Hawaii at the Supreme Court. Justice Alito has authored one case related to Indian law, *Hawaii v. OHA* (2009). Alito was previously a circuit appeal judge in the 3rd Circuit, which covers a geographic area without any recognized Indian tribes. He wrote only one Indian-related opinion while at the 3rd Circuit, *Blackhawk v. Pennsylvania*, 381 F.3d 202 (2004), in which he ruled in favor of a Native American holy man who kept black bears on his property for religious ceremonies.

The views of Justices Sotomayor and Kagan on Indian law issues are not yet well known. Justice Sotomayor drafted majority opinions in two Indian law cases as a circuit court judge, *Catskill Development v. Park Place Entertainment* (2008) and *United States v. White* (2001), but neither provide much insight. *Catskill Development* involved the authority of the National Indian Gaming Commission to review and interpret gaming management contracts. Perhaps relevant, Justice Sotomayor ignored the result of the tribal court proceeding in the case. *White* involved the federal prosecution of Mohawk Indians for failure to report income to the IRS. Sotomayor also voted with the majority in *Bassett v. Mashantucket Pequot* (2000), a case affirming tribal sovereign immunity. Justice Kagan has no record as a judge, and her views on Indian law are not well known at this point. None of her articles address Indian law. History has proven that a new justice's lack of familiarity with the history, purpose, and unique aspects of Indian law does not generally bode well for tribes at the Supreme Court.

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1 *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Lyng v. Northwest Indian Cemetary Protective Association*, 485 U.S. 439 (1988); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Cotton Petroleum Corp v. New Mexico*, 490 U.S. 163 (1989); *Brendale v. Confed. Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990); *Okla. Tax Commission v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Blatchford v. Native Village of Notak and Circle Village*, 501 U.S. 775 (1991); *County of Yakima v. Confed. Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Negonsett v. Samuels*, 507 U.S. 99 (1993); *Okla. Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Hagen v. Utah*, 510 U.S. 399 (1994); *Dep't of Taxation and Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *Okla. Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995); *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998); *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998); *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998); *Arizona Department of Revenue v. Blaze Construction Co., Inc.*, 526 U.S. 32 (1999); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Arizona v. California*, 530 U.S. 392 (2000); *C&L Enterprises, Inc., v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001); *Idaho v. United States*, 533 U.S. 262 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Chickasaw Nation v. United States*, 534 U.S. 84 (2001); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *Inyo County, California v. Paiute Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003); *United States v. Lara*, 541 U.S. 193 (2004); *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008); *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009); *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009); *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009). Three of these cases contained two discrete questions of Indian law, resulting in a total of 48 Indian law questions subject to this analysis.

2 *Montana v. United States*, 450 U.S. 544 (1981).

3 Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, Ohio State Law Journal, Vol 70:4 (2009).

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1,900 fee-to-trust applications pending in the Department of the Interior.[8] While we do not know the total acreage involved in those applications, it is safe to say that if all of the applications were approved tomorrow, the effect on the total acreage held in trust for tribes would be negligible compared to the total acreage the tribes lost through the allotment process and termination.

The process of placing land into trust has never been easy or inexpensive for tribes. With the enactment of NEPA in 1969, it became necessary for the Secretary to require an EA or EIS for many fee-to-trust decisions.[9] The BIA requires the tribes to bear all costs associated with compliance with NEPA, in spite of the fact that NEPA imposes that burden on the BIA.[10] Those costs can require tribes to expend millions of dollars.[11] Litigation challenging determinations under NEPA has often been used by opponents of tribes to generate lengthy delays and add enormous costs to the process.[12] The formal promulgation of regulations to govern the processing of fee-to-trust applications in 1980 – forty-six years after the enactment of the IRA – added more complexity and expense to the fee-to-trust process.[13] As is discussed more fully below, the 1995 amendments to the regulations required the Secretary to consider the proximity of lands that are the subject of a fee-to-trust application to the reservation and to give weight to the concerns or objections of state and local governments, along with other Indian tribes.[14] Other amendments to the regulations promulgated in 1996 created a new source of delay and expense by permitting third parties to file appeals from decisions by the Department to take land into trust.[15] These appeals are filed in the Interior Board of Indian Appeals and the federal courts and can take years to resolve.

The Indian Gaming Regulatory Act

The enactment of the Indian Gaming Regulatory Act (IGRA)[16] in 1988 was certainly not intended to make it more time consuming and costly for tribes to successfully place land into trust status, but it has clearly had that effect.[17] This has been true even though IGRA limited Indian gaming to lands that were held in trust on October 17, 1988 with some narrow exceptions that made it very difficult for any tribe to successfully place land into trust for gaming purposes after 1988.[18] In 2008 – twenty years after the enactment of IGRA – the Department promulgated formal regulations governing fee-to-trust acquisitions under Section 20 of IGRA.[19] However, both prior to 2008 and subsequent to the promulgation of the regulations, the Department issued a bewildering array of memoranda and guidance that purports to govern the fee-to-trust process for lands acquired in trust for any purpose, including gaming.[20] It is not uncommon today for a tribe to spend decades and millions of dollars in an effort to put land into trust for gaming.[21] Placing land into trust for non-gaming purposes is all too often as costly and time consuming. The costs and delays affect all tribes, but tend to hit small tribes and newly recognized tribes the hardest.[22]

The Supreme Court's "Backward Looking Perspective"

In February 2009 the U.S. Supreme Court issued its opinion in *Carcieri v. Salazar*.[23] The Court held that the Secretary lacked the authority under the IRA to take land into trust for the Narragansett Tribe because the tribe was not under federal jurisdiction at the time of the enactment of the IRA. The Court's decision had the effect of freezing the consideration of almost all fee-to-trust applications during 2009 and, as of early October 2010, throughout 2010 as well while the Department of Interior considered the impact of the decision on the Secretary's authority to take land into trust under the IRA.[24] Although the lands involved in the *Carcieri* case were intended to be used for housing, the Court's concern about gaming, its solicitude for non-Indian interests and its failure to apply long standing canons of statutory construction when interpreting a statute enacted for the benefit of Indians can be seen in the following exchange between the Justices and the attorney for the Department during oral argument before the Court on November 3, 2008:

> CHIEF JUSTICE ROBERTS: This is – we are talking about an extraordinary assertion of power. The Secretary gets to take land and give it a whole different jurisdictional status apart from State law and all – wouldn't you normally regard these types of definitions in a restrictive way to limit that power instead of saying whenever he wants to recognize it, then he gets the authority to say this is no longer under Rhode Island jurisdiction; it is now under my jurisdiction?
>
> MS. MAYNARD: Well, there is – there is a competing presumption there that I think is – Chief Justice Roberts, which is that Indian statutes are interpreted to the benefit of the Indian. And this was supposed to be a new deal for the Indians –
>
> CHIEF JUSTICE ROBERTS: Well, how do we know which one of them benefits the Indian? I mean, have the Indians benefitted from Federal jurisdiction in the last 50 years?
>
> MS. MAYNARD: Well, the Indians are the ones who made the request to have the land taken into trust. And I assume they know – that they believe it's in their interest to have the land taken into trust.
>
> CHIEF JUSTICE ROBERTS: What are the plans the Indians have of doing with the land once it's determined to be Indian land subject to the trust of the Federal government?

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MS. MAYNARD: The administrative record reveals that HUD loaned the – or granted the tribe money to build housing.

CHIEF JUSTICE ROBERTS: Yes, of course, the use of that land would not be limited to housing, right? They could engage in other activities that Indian tribes can engage in, correct?

MS. MAYNARD: According to the administrative record, there are some HUD restrictions on the land. If what you are concerned with is the specter of gaming, our interpretation of the Indian Gaming Regulatory Act is the tribe could not unilaterally decide to game on this property were it taken into trust.

But as to your point, the – with respect to the clarity of these definitions, the term "Indian tribe," "organized band," "Pueblo," they have been interpreted by this Court in 1934 several times. In –

JUSTICE KENNEDY: The Chief Justice's question, and I was going to put the same question to Mr. Olson [the attorney for Governor Carcieri] is whether or not there is – is some canon of construction, some principle of Federalism which makes us be very cautious before we take land out of the jurisdiction of the State. It sounds to me plausible. Is there any authority for the proposition I just stated? Have we said that in cases or –

MS. MAYNARD: Well, you've said –

JUSTICE KENNEDY: Or have we said the opposite, that there is no –

MS. MAYNARD: Here I think it's very clear that the purpose of section 5 was to allow the Secretary to take land into trust for Indians. And then –

JUSTICE KENNEDY: But is there any overriding principles about which we must be most cautious before we interpret the statute as depriving the State of the ownership and jurisdiction of this land? Is there anything in the cases either way on that point?

MS. MAYNARD: I don't know – I don't know standing here and, Petitioners haven't cited anything for that principle in their brief, although they suggest – of that. There is a competing principle that Indian sovereignty is not to be lightly set aside.

One important point I think is that the purpose of this statute – that the Secretary's interpretation makes more sense. The – the purpose of this statute was a forward looking one. It was to revitalize and reorganization rights.

CHIEF JUSTICE ROBERTS: Of course your friend on the other side says the exact opposite. It was backward looking. They had had the allotment policy, which they decided was not a good idea, and yet, that had resulted in Indian land being turned over to in fee simple and this is a way to compensate for the discredited allotment policy.

So if you weren't recognized in 1934, you were not penalized by the allotment policy, so you didn't need the benefit. I think that backward looking perspective seems to make perfect sense.[25]

With their eyes firmly fixed on the "backward looking perspective", the majority in *Carcieri* found that the Narragansett Tribe was not entitled to the benefits of the IRA since it was not federally recognized until 1983 and had not challenged the assertion of the State of Rhode Island that it was not under federal jurisdiction in 1934. As Professor Anderson noted in his remarks at the June 3, 2010 symposium, the Court's holding in the *Carcieri* case can and should be read as a very narrow interpretation of the rules the Court uses to govern the appeals that are filed with it.[26] The Narragansett Tribe's failure to file a timely objection to the State's assertion that the Tribe was not "under federal jurisdiction" in 1934 allowed the Court to accept the State's position and to treat the Tribe's failure to object as a waiver of that fact.[27]

Unfortunately, the Department has not taken formal action to either amend the regulations governing fee-to-trust acquisitions or to provide guidance to its personnel and federally recognized tribes on how fee-to-trust applications will be processed in light of the Carcieri decision. Ms. Mary Anne Kenworthy, staff attorney in the Pacific Regional Office of the Office of the Solicitor for the Department of the Interior, informed the participants in the June 3rd symposium that the Department views the 1947 Haas List as dispositive of the issues raised by *Carcieri* for those tribes that are included on the list,[28] but the Department has not taken any formal action to notify tribes of this position and it is not clear how widely shared this view is within the Department. We are including the Haas List in Appendix A of this report so that interested tribes can more readily determine if they are on it.

Ultimately, Congress is the institution that can most efficiently and effectively correct the damage done by the Supreme Court in the *Carcieri* decision. Three bills have been introduced in the Congress: S. 1703, H.R. 3697 and H.R. 3742.[29] During 2009 hearings were held in the Senate Committee on Indian Affairs and an amended version of S. 1703 was ordered to be favorably reported out of the Committee on December 17, 2009.[30] The House Committee on Natural Resources held hearings on H.R. 3697 and H.R. 3742 on November 4, 2009. No further action has been taken in the Committee on Natural Resources. The bills would amend the IRA to provide the Secretary with authority to

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take land into trust for any federally recognized tribe by revising 25 U.S.C. § 479 to strike the words "any recognized Indian tribe now under Federal jurisdiction" and insert "any federally recognized Indian tribe" in their place.

On July 22, 2010, the House Appropriations Subcommittee on Interior, Environment and Related Agencies adopted an amendment offered by Representative Cole as part of its markup of the appropriations bill for the 2011 fiscal year.[31] The amendment contains the bill language from H.R. 3697 and H.R. 3742. At the present time the Senate Appropriations Committee has not acted on the Interior, Environment and Related Agencies appropriations for the 2011 fiscal year, but consideration is being given to the inclusion of the language from S. 1703 in the bill. Senator Feinstein, who chairs the Appropriations Subcommittee on Interior, Environment and Related Agencies, has reportedly signaled her intention to accept the amendment to the IRA to resolve the issues raised by *Carcieri,* but she apparently intends to try to use the appropriations bill to amend Section 20 of IGRA to restrict the application of the exceptions that apply to lands acquired in trust after the enactment of IGRA on October 17, 1988.[32]

Absent final action by the Congress or formal direction from the Department, tribes are left with no certainty about how to proceed with fee-to-trust applications in the wake of the *Carcieri* decision, nearly two years after it was announced. As Professor Skibine noted in the June 3rd symposium and set forth in detail in *Towards a Trust We Can Trust: Taking the Duty to Transfer Land into Trust for Indian Tribes Seriously* the IRA was enacted in furtherance of the federal trust responsibility. And, as Professor Anderson shows in *Carcieri v. Salazar and the Meaning of "Under Federal Jurisdiction,"* the Court's flawed reasoning should not stop the Department from moving forward with fee-to-trust transfers. Justice Breyer provided the roadmap for the Department to follow in his concurring opinion in *Carcieri*. As Professor Anderson explains, the fact that a tribe is federally recognized is sufficient evidence that a tribe meets the requirements of the IRA and that the Secretary is authorized to take land into trust for the tribe if the Department properly interprets and carries out its trust responsibility.[33]

The failure of the Department to provide direction and take action to address the issues raised by *Carcieri*, is inconsistent with the trust responsibility – at a minimum. The uncertainty caused by the Department's inaction and the failure of the Congress to pass the amendments to the IRA adds to the time and cost for any tribe seeking to have land taken into trust. It also negatively impacts the ability of the tribes to obtain financing, build infrastructure, public facilities, housing and take advantage of economic opportunities.[34] Whether it is intentional or not, the purposes for which both the IRA and IGRA were enacted are now being frustrated by all three branches of the federal government in varying degrees. The resulting harm falls heavily on the tribes – the intended beneficiaries of both statutes.

The Push to Restrict Fee-to-Trust Transfers to the Reservations

The failure to take action to address *Carcieri* is further compounded by the manner in which the Department has consistently interpreted the authority of the Secretary to take land into trust for tribes more and more narrowly in recent years. Professor Skibine observed that the IRA "was enacted pursuant to the trust doctrine to remedy wrongs inflicted on Indian tribes during the Allotment era." However, the Department seems to be more concerned "with the effect such transfer into trust would have on state tax rolls, on potential creation of jurisdictional conflicts, and with how many miles lands are from existing reservations."[35]

Although the IRA expressly authorizes the Secretary to take "lands within or without existing reservations" into trust,[36] the Department has steadily moved toward imposing geographical constraints on the exercise of the Secretary's authority. This first became manifest in 1991 when the Department published proposed amendments to 25 CFR Part 151 to "establish several criteria and requirements … to assist the Secretary in reviewing requests for the acquisition of tribal lands in trust when such lands are located outside of and noncontiguous to the tribe's reservation."[37] The stated purpose for the proposed changes in the regulations was to address an increase in requests for off-reservation lands to be taken into trust for economic development and gaming purposes as a means for the tribes to achieve economic and financial self-sufficiency.[38] The fact that these were among the stated purposes of the IRA and IGRA did not receive the same attention that the Department proposed to give to the fact that such acquisitions were "highly visible and controversial" to the local non-Indian governments due to the potential loss of "regulatory control and the removal of property from the tax rolls."[39] The changes that were proposed in 1991 under the Bush administration were modified and then promulgated as a Final Rule in 1995 under the Clinton administration.[40]

As amended in 1995, the regulations at 25 CFR Part 151.11 require the Secretary to give a higher degree of scrutiny to applications to take land into trust when the lands are off of the reservation or not contiguous to the reservation. The greater the distance from the reservation, the greater the scrutiny will be of the benefits to the tribe and greater weight will be given to the concerns of state and local governments regarding the impacts on tax revenues and regulatory jurisdiction. The tribe's application for the transfer must include a plan that "specifies the anticipated economic benefits" the tribe will receive if the land is placed in trust.[41] These factors worked their

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way into the consideration of gaming and gaming-related fee-to-trust applications in 2008 with the issuance of the Artman Guidance and the promulgation of the Part 292 regulations.[42]

IGRA prohibits gaming on lands that were not held in trust on October 17, 1988, with four very narrowly drawn exceptions that apply to: (1) the restored lands of a tribe; (2) lands awarded as part of the settlement of a land claim; (3) the initial reservation of a newly recognized tribe; and (4) with the concurrence of the governor of the state in which the lands are located when the Secretary determines that the proposed gaming activity is in the best interest of the tribe and will not be a detriment to the surrounding communities – the so-called "two-part" determination.[43] In the twenty-two years since the enactment of IGRA a total of only five off-reservation fee-to-trust transfers have been approved using the "two-part" determination.[44] A total of 36 applications have been approved under the other exceptions in IGRA, known as the "equal footing" exceptions.[45]

The movement toward limitations on the Secretary's authority to take off-reservation land into trust for gaming is all the more striking in light of the fact that as recently as 2004, most of the senior attorneys who advised the Secretary on these matters concluded that IGRA contemplated off-reservation gaming and that the IRA contemplated off-reservation fee-to-trust acquisitions:

> "Through the passage of IGRA, Congress made clear that the purpose of IGRA is to 'provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments.' In IGRA, Congress provided a statutory basis for tribes to engage in Indian gaming off-reservation as a means to promote tribal economic development. The statutory two-part determination [of 25 U.S.C. § 2719] provides for specific Departmental review and an independent decision by the Governor of the state. Also, it appears self-evident that Congress, in enacting the two-part determination, was fully aware that the tribes could seek to have land taken into trust pursuant to the IRA, thus making off-reservation gaming a possibility. While some now argue that, in 1988 Congress may not have envisioned that states and tribes would enter into compacts that would locate gaming sites on lands located far from the reservation, there is no evidence that Congress intended to include a limitation on that activity within the law. Moreover, the suggestion that "reservation shopping" has run amok is without a basis. To the contrary, states have exercised their statutory prerogative to deny tribes access to lands for gaming under the two-part determination in all but three instances, proving that the framework of IGRA has been working.
>
> ….
>
> Neither IGRA nor the IRA evince Congressional intent to prohibit off-reservation gaming or to limit it to close proximity to existing reservation lands. If IGRA was intended to bring substantial economic development opportunities to Indian tribes where none could be achieved solely because of the remoteness of reservation lands, Congress provided tribes the potential to prosper on Indian lands a distance from remote reservations. Conversely, if IGRA was intended to spur on reservation economic development only – or on lands that are so close that for all intents and purposes they are on-reservation – the purpose of the law would fail because existing isolated reservation lands would not provide the potential of the law. Accepting the inherent market limitations within some rural states, distance limitations should not be grafted onto IGRA. To do so could deny the very opportunity for prosperity from Indian gaming that Congress intended IGRA to foster." [46]

The Congress has been the source for at least some of the impetus for the Department's efforts to restrict the fee-to-trust process to the reservations and lands that are contiguous or nearby. Between 2005 and 2008 the Senate Committee on Indian Affairs held at least seven hearings on fee-to-trust applications for all purposes, including those that are gaming-related.[47] Among other actions the Department took in an apparent response to the hearings was the May 20, 2005, decision to disapprove the compact between the Confederated Tribes of the Warm Springs Reservation and the State of Oregon for the regulation of Class III Gaming at a gaming facility to be constructed off of the Tribes' reservation at Cascade Locks on the Columbia River. The compact was disapproved based on the Department's determination that the Secretary only has the authority under Section 2710(d)(8)(A) of IGRA "to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such tribe." Because the proposed site for the casino at Cascade Locks had not yet been acquired in trust for the Tribe, the Department determined that the Secretary lacked the authority to approve the compact.[48] The Department reached this conclusion despite the fact that since the enactment of IGRA in 1988 it had consistently approved compacts when the proposed site for the casino had not yet been taken into trust.[49]

Several of the hearings during this period in the Senate Committee on Indian Affairs resulted in proposed legislation in 2006 to repeal the "two-part" determination

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exception in IGRA and limit the use of the initial reservation, restored lands and land claims or "equal footing" exceptions in IGRA.[50] In response to criticism directed at the Department during the hearings in 2005, 2006, 2007 and 2008, Assistant Secretary Artman published new "Guidance on taking off-reservation land into trust for gaming purposes" in January 2008.[51] The Guidance was issued without prior notice or consultation with tribes and no opportunity for interested parties to comment.[52] It introduced the requirement of "commutable distance" into any determination involving the Secretary's acquisition of off-reservation lands in trust for gaming purposes. A "commutable distance is considered to be the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off-reservation."[53] Among the questions the Guidance requires to be asked and answered as part of the review to determine if an application for an off-reservation gaming related fee-to-trust acquisition will be of benefit to the tribe are:

- "What is the unemployment rate on the reservation? How will it be affected by the operation of the gaming facility?
- How many tribal members (with their dependents) are likely to leave the reservation to seek employment at the gaming facility? How will their departure affect the quality of life on the reservation?
- How will the relocation of reservation residents affect their long-term identification with the tribe and the eligibility of their children and descendants for tribal membership?
- What are the specifically identified on-reservation benefits from the proposed gaming facility? Will any of the revenue be used to create on-reservation job opportunities?"[54]

In assessing the impact on the off-reservation community where the land to be acquired in trust is located, the Guidance requires the application to "include copies of any intergovernmental agreements negotiated between the tribe and the state or local governments, or an explanation as to why no such agreements exist. Failure to achieve such agreements should weigh heavily against the approval of the application."[55] The application must also include a "comprehensive analysis as to whether the proposed gaming facility is compatible with the current zoning and land use requirements of the state and local governments…."[56]

A few months after the issuance of the Artman Guidance, the Department promulgated 25 CFR Part 292 to govern the application of the IGRA exceptions for taking land into trust for gaming purposes after October 17, 1988.[57] The new regulations continued the Department's emphasis on limiting the Secretary's authority to take land into trust. If the land is part of a newly recognized tribe's initial reservation, part of a land claim settlement or is part of a restored tribe's restored lands, the tribe must show that it has a "significant historical connection" to the land by proving that the land is within the boundaries of the tribe's last reservation or by documentation of the existence of villages, burial grounds or occupancy or subsistence use of the land, unless Congress specifically requires or authorizes the Secretary to take the land into trust for the tribe.[58] Restored tribes must also prove that:

- the lands are in the state where the tribe is now located
- the land is within reasonable commuting distance from the tribe's existing reservation or near where a significant number of the tribe's members reside if there is no reservation
- the land is within 25 miles of the tribe's headquarters
- there is a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration[59]

The Secretary is required to notify and solicit review from any local or tribal government within 25 miles of the site of the proposed gaming facility. A tribe or local government located more than 25 miles from the site can "petition for consultation" if it can establish that its "governmental functions, infrastructure or services will be directly, immediately and significantly impacted" by the gaming facility.[60]

For applications filed under the two-part exception in §2719, tribes must provide detailed information to prove that the proposed gaming activity will benefit the Tribe and will not be detrimental to the surrounding community, including:

- Pro forma financial statements.
- Employment projections.
- Tourism benefits.
- Proposed uses of projected income.
- Projected benefits to the relationships with the tribe's non-Indian neighbors.
- Distance of the land from the tribe's headquarters.
- Evidence of significant historical connections to the land.
- Any consulting and financial agreements relating to the proposed gaming activity.
- Any other agreements of any kind relating to the land or proposed gaming activity.

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- Information regarding environmental impacts and proposed mitigation.
- Anticipated impacts on social structure, infrastructure, services and land use patterns.[61]

A New Direction or More of the Same?

On June 18, 2010, just a few weeks after the June 3rd symposium, Secretary Salazar issued two memoranda to Assistant Secretary Echo Hawk regarding the fee-to-trust process. In the memorandum entitled "Processing Land-into-Trust Applications Not Related to Gaming" the Secretary stated that

> "Taking land into trust is one of the most important functions that this Department undertakes on behalf of Indian tribes. … Tribes use lands taken into trust for a variety of vital purposes: including housing, health care, education, agriculture, energy, and economic development. The large majority of land-into-trust applications processed by the Department are for these self-determination purposes, and have no connection to Indian gaming. Of the more than 1900 trust land applications currently pending before the Bureau of Indian Affairs, over 95% are for non-gaming purposes."[62]

The memorandum calls for the processing of the applications in a "transparent and orderly fashion" and for decisions to be made in a "lawful and timely" manner.[63] On June 24, the director of the BIA, Michael Black, formally issued 52 IAM 12 to establish procedures "to acknowledge receipt of applications for fee-to-trust land acquisitions; define timeframes with regard to gathering information to complete fee-to-trust applications on a timely basis" and for other purposes.[64] Among other things, the new procedures establish timeframes for the process of determining if an application for a fee-to-trust transfer is complete, notification to the tribe if an application is not complete and the return of the application to the tribe if the tribe fails to submit necessary information in a timely manner.

The other memorandum issued by Secretary Salazar on June 18th pertains to "Decisions on Indian Gaming Applications."[65] In this memorandum the Secretary noted that IGRA prohibits gaming on lands acquired after its enactment on October 17, 1988, and characterized the exceptions in 25 U.S.C. §2719 as involving either "off-reservation" or "equal-footing" applications. The "off-reservation" applications involve the two-part determination under Section 2719, and only five of those have been approved since IGRA was enacted. There are currently nine of the two-part applications pending in the Department. "For these, I recommend that you undertake a thorough study of these issues and review current guidance and regulatory standards to guide the Department's decision-making in this important area. During your review, your office should engage in government-to-government consultations consistent with the policy of this administration to obtain input from Indian tribes."[66] The Secretary recognized that this review and consultation would cause delay, but the Department should take the "necessary time to identify and adopt principled and transparent criteria regarding such gaming determinations."[67]

With regard to the 24 equal-footing applications pending before the Department, the Secretary noted that "their approval largely depends upon a legal determination as to whether the application or request meets one of the delineated exceptions under IGRA. I recommend that you obtain such a legal determination from the Solicitor's Office." The Secretary then went on to note that if the lands are determined to be eligible under one of the equal-footing exceptions, then gaming may be possible on those lands "pursuant to a negotiated and approved tribal-state gaming compact."[68]

It remains to be seen what results these memoranda may generate. During August 2010 the Bureau of Indian Affairs did take formal action to publish notice of several gaming related Final Environmental Impact Statements and one draft EIS.[69] Those notices are a necessary step toward taking final action on the underlying fee-to-trust applications, although the BIA has still not issued any decisions on any gaming related discretionary fee-to-trust applications. During August 2010 the BIA took action toward the acquisition of land in trust for the benefit of the Tohono O'odham Nation in Glendale Arizona.[70] This was a mandatory acquisition pursuant to a statute that authorized and directed the Secretary to take land into trust for the Tribe as compensation for the taking of the Tribe's Gila Bend reservation for a reservoir. It is notable that the tribe filed its fee-to-trust request as an application to use the land for gaming purposes, but the BIA did not determine if the land is eligible for gaming under 25 U.S.C. §2719.[71]

Professors Rand and Light have suggested that the Secretary's memorandum on processing the gaming related fee-to-trust applications may signal the start of the development of a more fact-based review of the applications and the ultimate revision of the Artman Guidance.[72] One indication that the Rand and Light analysis of the memorandum may be correct can be found in the fact that the Department is now engaged in a formal consultation process with the tribes on three topics: "(1) the January 3, 2008 [Artman], Memorandum regarding Guidance on Taking Off-Reservation Land into Trust for Gaming Purposes; (2) whether there is a need to revise any of the provisions of 25 C.F.R. Part 292, Subpart A (Definitions) and Subpart C (Two-Part Determinations); and (3) whether the Department of the Interior's process of requiring compliance with

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25 C.F.R. Part 151 (Land into Trust Regulations) should come before or after the Two-Part Determination."[73]

The Secretary's interest in and attention to the fee-to-trust process is certainly a welcome development. If there is a serious and sustained effort in the Department to move forward on fee-to-trust applications, to repudiate the Artman Guidance and to revise the Part 292 regulations, the Secretary's memoranda may be viewed as a positive step forward. On the other hand, the push to restrict fee-to-trust transfers to the reservations over the last twenty years has been continuous and has strong advocates in both political parties in the Congress and among employees in the Department. The Secretary will be under pressure in the years ahead to continue to impose limits on off-reservation transfers for any purpose. And, even with the issuance of the Salazar memoranda in June, there still has not been any serious movement toward the approval of any of the fee-to-trust applications that are discretionary.

Conclusion

The history of the federal government's Indian land policies does not reflect well on the United States. The failure to keep the commitments made to the tribes in the treaties is well documented. But the injustices are not ancient or non-recurring. The Supreme Court's abrupt and unexplained abandonment of basic Indian law doctrines in the *Carcieri* case to reach a result that is clearly inconsistent with the statute and more concerned with the perceived interests of state and local governments than those of the tribes has had the effect of eviscerating the promise of a key part of the IRA. The Department of the Interior's long term drift away from the stated purposes of both the IRA and IGRA by imposing limits on off-reservation land acquisition not found in the statutes has made it a near impossibility for many tribes to improve their economic situation, with all of the adverse effects on health, education and social well-being that are so evident in too many places in Indian country. The picture that emerges from a review of the symposium transcript is one of continuing struggle and unnecessary delay and expense for most tribes. It is clear beyond any doubt that the tribes are being asked to carry the financial, economic, political and social costs that are the result of broken federal promises and failed federal policies – both past and present.

The Congress must act to address the Supreme Court's decision in *Carcieri*. There is no factual basis to support an effort in the Congress to tie amendments to Section 20 of IGRA to the legislation needed to correct the Court's flawed reasoning in *Carcieri*. The Congress and the Department should reject any effort to do so as unwarranted and inconsistent with the purposes of both the IRA and IGRA. In the twenty-two years since IGRA was enacted, the exceptions for subsequently acquired lands have worked as intended. The hysteria over "reservation shopping" has been proven to be just that – hysteria. The facts are to the contrary.

The Department must act now to narrowly interpret the holding in *Carcieri* and to provide clear guidance to tribes with regard to the factors the Department will evaluate when reviewing fee-to-trust applications to determine if the Secretary is authorized to take land into trust in light of the *Carcieri* holding. Justice Breyer has identified the kind of factors that the Department should consider. There is no reason for the Department to continue to shirk its trust responsibility to take land into trust under the IRA.

Beyond that, the Congress and the Department must act to address the fact that the fee-to-trust process is increasingly imposing burdens the tribes cannot meet and never should have been required to meet. The promises of the IRA and IGRA are hollow for many tribes. Federal policy seems more concerned with the perceived burdens of non-Indians on matters like jurisdiction and taxation than it does with ensuring that the tribes are treated fairly. The tribes did not create the problems that have arisen from the federal government's Indian land policies. But it is the tribes that are most often required to bear the full burden of those policies.

It is time for the federal government to keep its word and make it possible for the tribes to achieve a fair measure of the simple justice and economic opportunity they seek. If doing so creates some impacts or burdens on non-Indian communities, it is the responsibility of the federal government to provide appropriate redress, not to use its enormous power and resources to deny the tribes land and condemn all too many of them to a future of poverty with all of its attendant ills. It is the responsibility of the federal government to provide the financial resources that are needed to address the consequences of its policies, both in terms of land acquisition and in terms of remediating adverse impacts, if any, on state and local governments and their taxpayers. For their part, the tribes have already paid their share and more in the form of lands wrongfully taken from them.

**Editor's Note: This paper is adapted from the Foreword to the full report from the Symposium. The report is available on CD from the Center. It includes over 800 pages of primary source material.*

1 *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99,142 (1960) (Justice Black, Dissenting Opinion).

2 Transcript, *Perspectives on Tribal Land Acquisition 2010: A Call to Action* at 121-126, 204-222 (June 3, 2010, Seattle University School of Law); P.VanDevelder, *Savages & Scoundrels, The Untold Story of America's Road to Empire Through Indian Territory, passim.* (2009); C. Wilkinson, *Indians, Time and the Law* 19-23 (1987); W. Washburn, *Red Man's Land White Man's Law, passim.* (1971); A. Debo, *And Still the Waters Run, The Betrayal of the Five Civilized Tribes, passim.* (1940) and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

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3 25 U.S.C. §§461 et seq.

4 *Cohen's Handbook of Federal Indian Law* §1.06 (2005); C. Wilkinson & E. Biggs, *The Evolution of The Termination Policy*, 5 AM. Ind. L. Rev. 139 (1977) An indeterminate number of tribes were effectively terminated through the failure of the Department of the Interior to include them on one or more lists. See R. Anderson, *Carcieri v. Salazar and the Meaning of "Under Federal Jurisdiction,"* at 2 (2010).

5 See A. Skibine, *Towards A Trust We Can Trust: Taking the Duty to Transfer Land Into Trust for Indian Tribes Seriously* at 12 (2010), *infra.*

6 Transcript at 47-48.

7 *Id.* at 48-49, 183-84.

8 *Id.* at 113; Appendix U at 1.

9 *Id.* at 52-54; 25 C.F.R. §151.10(h).

10 *Id.* at 224-25.

11 *Id.* at 184.

12 *Id.* at 85, 88-92, 177, 184.

13 *Id.* at 49-51, 63.

14 60 Fed Reg 32879 (June 23, 1995) (Appendix F).

15 61 Fed Reg 18082 (Apr. 24, 1996) (Appendix G). This change was made in response to the decision in *South Dakota v. United States*, 69 F. 3d 878 (8th Cir. 1995), vacated at 117 S. Ct. 286 (1996), wherein the Court of Appeals for the 8th Circuit determined that the regulations failed to provide due process because the regulations did not afford parties adversely affected by a decision to take land into trust any right of review of that decision due to the operation of the Quiet Title Act, 28 U.S.C. §2409a.

16 25 U.S.C. §§2701 et seq.

17 Transcript at 182 and following, 204 and following, 217 and following.

18 25 U.S.C. §§2703(4) and 2719.

19 25 C.F.R. Part 292; Appendix P.

20 See, for example, Appendices M, N, O, Q, R, S, T.

21 Transcript at 159 et seq, 182 et seq, 204 et seq.

22 *Id.*

23 129 S.Ct. 1058 (2009).

24 Transcript at 235-36.

25 Transcript of oral argument, *Carcieri v. Kempthorne*, No. 07-526, Nov. 3, 2008, at 36-39; available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-526.pdf.

26 Transcript at 22-23.

27 129 S.Ct. at 1068 (2009); R. Anderson at fn. 2.

28 *Id.* at 237; Appendix A. Theodore Haas was the Chief Counsel of the United States Indian Service. The 1947 List was compiled as a report on the implementation of the IRA. It includes lists of every tribe that voted on an IRA constitution; every tribe that was organized under a constitution that was approved by the Secretary under the IRA, the Oklahoma Welfare Act or the Alaska Reorganization Act; all of the tribes that accepted the IRA but were organized under constitutions adopted prior to the enactment of the IRA; and, all of the tribes that did not accept the IRA but which are organized under constitutions.

29 S. 1703 (Introduced on September 24, 2009 by Senator Dorgan and others); H.R. 3697 (Introduced on October 1, 2009 by Representative Cole) and H.R. 3742 (Introduced by Representative Kildee). Appendix Y.

30 S. Rept. 111-247, 111th Cong., 1st Sess. (August 5 2010); Appendix Z.

31 Appendix CC.

32 See *Feinstein's 'Carcieri Fix' Would 'Devastate' Trust Land for Gaming*, Indian Country Today (October 5, 2010).

33 R. Anderson at 8, 9.

34 Transcript at 168-70, 173-74.

35 Skibine at 11, 12.

36 25 U.S.C. §465.

37 56 Fed. Reg. 32278 (July 15, 1991); Appendix E.

38 *Id.*

39 *Id.*

40 60 Fed. Reg. 32874 (June 23, 1995); Appendix F.

41 25 C.F.R. §§ 151.11.

42 Transcript at 54, 60-62; See, for example, 25 C.F.R. §§ 151.10 and 151.11 and 25 C.F.R. 292.17(g)).

43 25 U.S.C.§§2703(4) and 2719.

44 Forest County Potawatomi (Wisconsin, 1990); Kalispel Tribe (Washington, 1998); Keweenaw Bay Indian Community (Michigan, 2000); Ft. Mohave (California, 2008) and Northern Cheyenne (Montana 2009). Appendix L at 13, n.36 and Appendix V at 2. The Department has approved at least a dozen other two-part applications which ultimately have not been approved by the state governor and were therefore denied. As intended by IGRA, off-reservation gaming that is not approved by the governor of the state where the site is located, will not be allowed to go forward. Appendix L at 13, n. 36.

45 Appendix FF.

46 M. Rossetti et al, *Indian Gaming Paper* at 12-13 (February 20, 2004)(Footnotes Omitted); Appendix L.

47 See, for example, http://indian.senate.gov/hearings/index.cfm?t=session&c=110&s=2&p=oversight; http://indian.senate.gov/hearings/index.cfm?t=session&c=110&s=1&p=oversight; http://indian.senate.gov/hearings/index.cfm?t=session&c=109&s=2&p=oversight; and http://indian.senate.gov/hearings/index.cfm?t=session&c=109&s=1&p=oversight.

48 Letter from James E. Cason, Associate Deputy Secretary, to the Honorable Theodore R. Kulongoski, Governor, State of Oregon (May 20, 2005), Appendix N. This policy appears to have continuing vitality in the Obama Administration. Letter from the Director of the Office of Indian Gaming, Paula L. Hart, to The Honorable Bert Johnson Regarding Indian Gaming Policies, June 16, 1010, Appendix T.

49 Appendix N; Transcript at 59.

50 See, S. Rept. 109-261, 109th Cong., 2d Sess. (June 6, 2006) at 13-18.

51 Appendix O.

52 Transcript at 61-62.

53 Appendix O at 3.

54 *Id.* at 4.

55 *Id.* at 5.

56 *Id.*

57 73 Fed. Reg. 29354 (May 20, 2008); Appendix P.

58 25 CFR §§292.2, 292.5, 292.6 and 292.7.

59 25 C.F.R. §292.7.

60 25 C.F.R. §§292.2

61 25 C.F.R. §§292.16, 292.17, 292.18

62 Memorandum from the Secretary to the Assistant Secretary – Indian Affairs, *Processing Land-into-Trust Applications Not Related to Gaming* at 1, June 18, 2010; Appendix U.

63 *Id.*

64 Indian Affairs Directives Transmittal Sheet, *Processing Discretionary Fee-to-Trust Applications*, 52 IAM 12, June 24, 2010; Appendix W.

65 Memorandum from the Secretary to the Assistant Secretary – Indian Affairs, *Decisions on Indian Gaming Applications*, June 18, 2010; Appendix V.

66 *Id.* at 2.

67 *Id.*

68 *Id.* at 3.

69 Appendix DD.

70 *Id.* The decision was immediately challenged in federal court by the Gila River Indian Community (Appendix AA) and the City of Glendale (Appendix BB).

71 Appendices AA, BB, DD; 75 Fed. Reg. 52550 (Aug. 26, 2010); Transcript at 111-112. The Department also completed a mandatory acquisition for the Graton Rancheria on October 1, 2010, following years of litigation. See, *Appeals Court Rejects Challenge to Rohnert Park* Casino, Santa Rosa Press Democrat, (June 4, 2010) and *Old Casino Bill Tarnishes Boxer's Green Image*, Sacramento Bee (October 10, 2010); 73 Fed. Reg. 25766 (May 7, 2008).

72 K. Rand & S. Light, *The Obama Administration's "Path Forward on Indian Gaming Policy" and What it Signals for "Off-Reservation" Gaming*, Gaming Law Review and Economics, Vol. 14, No. 6 (Reprinted with Permission); Appendix X.

73 *Echo Hawk Announces Tribal Consultation on Indian Gaming Land into Trust Determinations*, August 31, 2010; Appendix EE.

What Is a "Prevailing" Party Under CERCLA's Citizens Suit Provision? … *from page 5*

alteration of the parties' legal relationship and a "judicial imprimatur" of that alteration.[13]

In his recent opinion granting the Plaintiffs' attorneys fees, Judge Suko held that the legal relationship between the parties was materially altered when TCM agreed with EPA to perform an RI/FS that was modeled upon and substantially implemented the EPA Order.[14] The Court reasoned that the TCM/EPA Agreement effectively satisfied the injunctive relief sought by the Plaintiffs. The Court found that the Plaintiffs need not be party to the TCM/EPA Agreement in order for that agreement to constitute a material alteration of the parties' legal relationship.[15] The Court reasoned that by filing a citizens suit in the instant case, the Plaintiffs "stood in the shoes of EPA" to fill a gap in enforcement and that when TCM reached an agreement with EPA, the Plaintiffs' goal of enforcement was achieved.[16]

To achieve "prevailing party" status, there must also exist a "judicial imprimatur" of the alteration of the parties' legal relationship. The Ninth Circuit has held that there must be "some" judicial sanction, without limiting what form the sanction must take, thus some uncertainty remains as to what may constitute "judicial imprimatur."[17] Accordingly, TCM urged the Court to narrowly read the Supreme Court and Ninth Circuit authority to require a judgment, order, or decree to constitute judicial imprimatur.[18]

The District Court declined to do so; rather, the Court found that because the TCM/EPA Agreement specifically provides that the United States District Court for the Eastern District of Washington shall have jurisdiction to enforce TCM's obligations under the EPA/TCM Agreement, sufficient judicial sanctions exist to satisfy the Ninth Circuit's judicial imprimatur standard.[19] As noted above, the matter is scheduled to be fully briefed by June 2010, and will likely be scheduled for oral argument by the end of the year.

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1 Article previously published in *A.B.A. Toxic Torts and Environmental Law Committee Newsletter, Spring 2010*, at 7,8.

2 42 U.S.C. §§ 9601-9675 (2006).

3 *Pakootas v. Teck Cominco Metals Ltd.*, U.S. District Court for the Eastern District of Washington, No. CV-04-256-LRS.

4 The history of the Site and the current litigation is complex, for greater detail *See* Richard Du Bey, Michelle Ulick Rosenthal & Leslie C. Clark, *Upper Columbia River Contamination – A Transboundary Application of CERCLA,* The Water Report, May 15, 2005 at 1; Richard Du Bey & Jennifer Sanscrainte, *The Role of the Confederated Tribes of the Colville Reservation in Fighting to Protect and Clean-up the Boundary Waters of the United States: A Case Study of The Upper Columbia River and Lake Roosevelt Environment*, 12 *Penn St.* Envl. L. Rev.335, (2004); Richard Du Bey & Michelle Ulick Rosenthal, *Tribal Water Quality Standards,* The Water Report, August 15, 2005, at 1.

5 Upper Columbia River Site, Docket No. CERCLA-10-2004-0018, at 2 (EPA Dec. 11, 2003) (Unilateral Administrative Order for Remedial Investigation/Feasibility Study), *available at* http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement (follow "scanned Unilateral Administrative Order" hyperlink) (hereafter EPA Order).

6 *See* Trail Smelter (*U.S. v. Canada*), 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib. 1938); Trail Smelter (*U.S. v. Canada*), 3 R.I.A.A. 1938 (Trail Smelter Arb. Trib. 1941).

7 The UCR is defined as the "aral extent of contamination in the Upper Columbia River in the Upper Columbia River in the United States, and all suitable areas in the United States in proximity to the contamination necessary for implementation of response action;" EPA Order, *supra* note 4, at 2.

8 EPA Order, *supra* note 4 at 4.

9 EPA Order, *supra* note 4.

10 *Pakootas, supra* note 2.

11 *See Teck Cominco Metals, Ltd. v. Pakootas*, 552 U.S. 1095, 128 S. Ct. 858 (2008); *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006); *Pakootas v. Teck Cominco Metals, Ltd.*, U.S. Dist. LEXIS 23041 (E.D. Wash., 2004).

12 Teck Cominco, Agreement for Remedial Investigation and Feasibility Study (R/FS) (June 2, 2006), available at http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement (hereafter TCM/EPA Agreement). While the Agreement is not subject to CERCLA, the Agreement draws heavily on CERCLA and the UAO. Specifically, the agreement incorporates definitions taken from CERCLA, the agreed to SOW was patterned after the UAO SOW, and the EPA retained the right to insist on its interpretation of the SOW and application of the NCP. The Agreement provides that the RI/FS process will be "consistent with the National Contingency Plan (NCP), 40 CFR 300," that the work performed shall be consistent with applicable EPA guidance, and that the RI/FS may be modified or finalized by EPA.

13 *P.N. v Seattle Sch. Dist. No. 1,* 474 F.3d 1165, 1170-71 (9th Cir. 2007).

14 *Pakootas v. Teck Cominco Metals, Ltd.,* No. CV-04-256-LRS, 2009 (E.D. Wash. March 9, 2009), at 4-7 (order granting Plaintiffs motion for Award of Costs of Litigation Including Attorney Fees).

15 *Id* at 7.

16 *Id* at 7, 9.

17 *P.N. supra* note 12 at 1173.

18 *Pakootas, supra* note 13, at 8.

19 *Id.*

I.R.S. Steps Up Audits of Tribes: What You Need to Know About the Hot Issues *from page 6*

non-intentional, or infrequent deficiencies. But, that could change and definitely will change for any tribe who has been warned previously.

- *Per Capita vs. General Welfare.* A primary focus will remain on the use of gaming revenues. The I.R.S. will continue to look for distributions to members as disguised per capita payments. That is, for any distribution to a tribal member from net gaming revenue, the I.R.S. will assert that it is a taxable distribution and must be reported on a Form 1099. And, the I.R.S. will continue to challenge any tribe's claim that its member benefit programs are exempt from tax under the "general welfare" doctrine, unless the tribe proves the individual's financial need. (The general welfare doctrine provides that payments to individuals by governmental units under legislatively provided social benefit programs for the promotion of the general welfare are not includible in a recipient's gross income. Rev. Rul. 74-205, 1974-1 C.B. 20; Rev. Rul. 98-19, 1998-1 C.B. 840). I disagree that financial need is the only "need" countenanced by the general welfare exclusion. Nevertheless, you can expect the I.R.S. to assert that a Form 1099 is required for benefits paid under the following types of programs:

  1. housing assistance
  2. utility payments
  3. loans
  4. senior programs
  5. cultural education, particularly travel
  6. burial benefits
  7. life insurance
  8. higher education benefits outside of Internal Revenue Code Section 117 (e.g., room, board, parking)
  9. "gifts"
  10. food/meal service

- *Forms 1099.* The I.R.S. continues to focus a great deal on the accuracy of Forms 1099 filed for vendors and other payees. This can be an area of significant liability for the tribe. Improper, late or non-filed Forms 1099 can result in $100 per violation. In addition, if the tribe did not obtain the payee's Social Security Number (SSN) or Employer Identification Number (EIN) at the time of payment, then the I.R.S. imposes a 28% backup withholding obligation. If the tribe failed to withhold or timely obtain an EIN/SSN, the 28% backup withholding obligation will be assessed in the audit. The I.R.S. will look to ensure that the tribe timely obtains Forms W-9 from payees to ensure they have the proper name, address and SSN/EIN. Over the past several years, the I.R.S. has emphasized education and outreach to tribes to ensure the tribes are complying with these reporting and record keeping obligations. However, you can expect the I.R.S. to shift their efforts to enforcement, specifically if the I.R.S. has worked with the particular Tribe in the past on this issue.

- *Abusive Schemes and Fraud.* The I.R.S. will continue its increased investigations of "abusive schemes" involving companies and individuals that do business with Indian tribes. In a news release last December, the I.R.S. stated, "The growth in tribal economies, the fact that tribes are not subject to federal income tax, and the self-governance rights of tribes, has made them an area where unscrupulous individuals can gain a foothold for illegal and/or unethical activities that include tax schemes." The I.R.S. urges anyone with information about schemes involving any Indian tribes to send the information to: I.R.S. investigators at P. O. Box 227, Buffalo, NY 14225-0227, or email *tege.itg.schemes@I.R.S..gov*. The I.R.S. will also challenge any effort on the part of the tribe to intentionally structure its transactions for the principal purpose of avoiding tax. Examples of current abuses and schemes under investigation are listed below:

  1. Improper sheltering of taxable gains by passing third-party transactions through Indian tribes
  2. Disguising of enterprises to appear as tribally owned so as to evade Federal Unemployment Tax and oversight by state insurance regulators
  3. Embezzlement from tribal enterprises
  4. Use of tribal credit cards for personal gain
  5. Use of casino comps for purposes unrelated to gaming play
  6. Illegal activities (*i.e.* bribes and kickbacks) in enterprises where tribes lack adequate internal control
  7. Misrepresentation of federal status of tribe to attempt to obtain tax advantages
  8. Misrepresentation of treaty provisions to claim improper tax relief
  9. Claiming nonresident alien status through the filing of false Forms W-8BEN
  10. Schemes related to income derived from the land

(continued on next page)

Completing the Circle: Advancing Native Inmate Religious Rights *from page 7*

When I arrived on Father's Day, each of the Indian men in the Monroe Main Unit greeted me with a forearm handshake, signaling brotherhood. Many of the men had been eager to teach me their protocols and cultural and religious ways, including many things I had not been taught before, having been raised far away from my reservation. But to my surprise, not one of the men lobbied me about being innocent, made any excuse for why they were imprisoned, or asked me for free legal help. Many had told me they were there for life. I was struck by the honor, honesty and humility with which they – society's and Indian Country's outcasts – had carried themselves.

In the sweat, I witnessed – heard, saw, felt – the pain and frustration that the state's new "reformatory" policies were causing the men. They were particularly pained that Whaa ka dup, their spiritual leader and role model, could no longer join them for ceremonies. It was palpably obvious that their roads to rehabilitation and inner peace were being impeded by the state's policy changes.

While in the lodge, the painful feelings about my father that I had unknowingly suppressed came rushing back to me. It felt so good to be cleansed those ill feelings. After various emotions rushed over me, I felt gratitude. I knew in my mind and heart that I would not be the man I am today – clean and sober, lawyer, husband, soon-to-be father – had my parents not travelled the roads they travelled, including through Washington prisons from the year I was born until the year I passed the bar.

Still, I asked myself: Could my parents have healed during their time in the Washington correctional system? What might a figure like Whaa ka dup have done for my mother or father? Could something different have been done, at the top or the ground level of the System, that would have put them on a road toward spiritual well-being? More importantly: Could something now be done to make sure that our Native inmates are allowed an opportunity to find rehabilitation and redemption? Vocational training and GEDs are great, but if we take away what it means to be Indian – or Muslim or Christian or whatever – from inmates, what does any other rehabilitation matter?

I am not particularly spiritual; I was baptized, raised and confirmed Catholic. But that day in the sweat lodge I obtained a newfound appreciation for spirituality – in my thinking, a path deep within one's self, toward a greater connectedness. I left the prison that day determined to do what I could to help restore Native inmates' civil rights so their spiritual paths would not be obstructed.

Thankfully, Washington tribal governments are politically and legally powerful, especially in relation to the State. I reached out to the tribes and their staff attorneys for help.

By early August, eight tribes had signed letters to Washington's Governor and Corrections Secretary, decrying the treatment of their and other tribes' members by Washington Corrections. The Confederated Tribes and Bands of the Yakama Reservation wrote: "In our eyes, Yakama inmates are no less Yakama than our members who freely live on our Reservation or elsewhere. They still enjoy our Treaty rights and privileges, and they should still be afforded respect for their traditional Yakama customs and ways, including their religious and cultural practices." Those letters soon resulted in a meeting between Tribal and state leaders.

To the state's credit, it apologetically admitted the mistakes it made by changing its policies concerning Native cultural and religious practices. The Department of Corrections quickly restored fry bread in time for the inmates' summer pow wows. The agency promised to again allow ceremonial tobacco use, to otherwise reconsider its policies concerning Native cultural/religious practices, and to seek advice from tribal leaders on all issues affecting Native inmates. The Department even invited the tribes to help author its new Indian tobacco policy. The Department of Corrections invited Whaa ka dup to attend its training academy, with a view towards reuniting him with his brothers at Monroe. Summing it all up, the Corrections Secretary wrote the tribes: "It is my hope that out of this 'teaching moment' will grow a long term working relationship between the Department and Tribes, not just on prison policy but also working together to enhance Tribal offender reentry into the Community."

(continued on next page)

I.R.S. Steps Up Audits of Tribes: What You Need to Know About the Hot Issues *from previous page*

11. Selling memberships in tribal groups not recognized by the federal government, and purporting such membership confers special tax benefits
12. Misrepresentation of federal status of a tribe to attempt to obtain tax advantages
13. Claiming Native American individuals are not subject to tax under any circumstance.

The ITG division of the I.R.S. has become a very robust and ever-increasing presence in Indian country. This makes it ever more important for tribes to manage and plan for anticipated areas of challenge to the federal tax treatment of their programs and activities.

Wendy Pearson is a tax attorney with a national practice focused on I.R.S. audits and tax planning to optimize tax compliance and tax-favored opportunities. Ms. Pearson regularly represents tribes and is a frequent contributor on matters of tax policy and practice affecting Indian tribal governments. She can be reached at wendy.pearson@wspearson.com *or 425-512-8850.*

Completing the Circle: Advancing Native Inmate Religious Rights *from previous page*

Not only did the tribal leaders graciously agree to counsel Corrections regarding Indian cultural and religious issues and other topics of mutual concern to the Tribes and state, but they offered to help pay for or otherwise provide the wood, salmon, buffalo, etc., for the Native inmates' ceremonial use. The Indian leaders also spoke to the state of an inter-tribal vision: building a regional Indian prison, where the tribes would create and foster an environment in which incarcerated Indians will heal and find peace in cultural, religious, rehabilitative and other ways traditional to Native people.

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While the Department of Corrections' remedial work and the tribes' prison plans are ongoing and will take time, I cannot help but feel like the circle has already been completed. Last month, the Native inmates' Chief in Walla Walla, where my dad served time 35 years ago, wrote me: "I am truly impressed with all the support from the different tribes. In the almost 23 years I have been down I have never seen such support for us."

Gabriel S. Galanda, an enrolled Round Valley Indian, is a lawyer in Seattle and a partner at Galanda Broadman, PLLC. He can be reached at (206) 691-3631 or gabe@galandabroadman.com.

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