Aaniin! It has been a very busy time and there is much to share.

35th Annual Indian Law Conference; Santa Fe, N.M., April 8-9, 2010

We hosted our 35th Annual Indian Law Conference April 8-9 at the Hilton Buffalo Thunder Resort on the Pueblo of Pojoaque. Conference chair Professor Kristen Carpenter and co-chairs Professor Angela Riley, Paul Spruhan, and Tracy Toulou did an excellent job of putting together a fabulous conference, which may have been our best conference yet! Conference sessions addressed the contemporary status of governmental functions in Indian Country, including Indian health services, criminal justice, and the enforcement of tribal protective orders. Specialized panels contemplated the constitutional status of tribes, tribal sovereign immunity in the commercial law context, re-engaging the executive branch, and confidentiality in tribal representation. Focus group sessions allowed smaller audiences to discuss topics including legal services in Indian Country, tribal language and the law, cultural resources protection, and the federal/tribal dialogue. The section was also able to accommodate a panel discussion on a recent “hot topic”: the proposed Cobell settlement.

During the conference, John Echohawk was named the third recipient of the Lawrence Baca Lifetime Achievement Award in recognition of his tremendous contributions to Indian country over his long and stellar career. Much to my surprise, I was incredibly humbled to receive the section’s Service Award. A tremendous thank you goes to the section’s Award Committee, chaired by Hon. D. Michael McBride III and composed of Matthew Fletcher, associate professor of law and director of the Indigenous Law & Policy Center at Michigan State University College of Law; Heather Kendall-Miller, staff attorney, Native American Rights Fund, Anchorage, Alaska; and Arvo Mikkanen, president of the Oklahoma Indian Bar Association and assistant U.S. attorney for the Western District of Oklahoma.

We look forward to seeing you at our 36th Annual Conference, which will again be hosted by the Hilton Buffalo Thunder Resort, on April 7-9, 2011. We have already started to plan for the upcoming 2011 annual conference. I am pleased to announce that Kristen Carpenter will again serve as conference chair, and Professor Angela Riley, Paul Spruhan, and Tracy Toulou will serve as conference co-chairs. If you have a suggestion relating to the upcoming 2011 annual conference, please feel free to contact either Kristen Carpenter or me.

2010 Midyear Conference; Washington, D.C., Nov. 5, 2010

On Nov. 5, we—together with the National Native American Bar Association and the Native American Bar Association of Washington, D.C.—hosted the midyear conference at the National Museum of the American Indian in Washington.
Chair continued from page 1

This year’s conference co-chairs were Katie Morgan, associate, Akin Gump Strauss Hauer & Feld LLP, and Bryan Newland, policy advisor to the deputy assistant secretary for Indian Affairs, U.S. Department of the Interior. The conference covered several important and timely topics, including U.S. Supreme Court Update; Looking to 1934: Perspectives on Fee-to-Trust Process; Tribal Law and Order Act; International Legal Issues Facing Tribes; and Conflicting Duties of Loyalty when Representing the United States. The keynote was presented by Patricia Millett, partner and co-chair of the Supreme Court Practice at Akin Gump Strauss Hauer & Feld LLP.

The conference was possible only because of the incredibly generous donations of our conference sponsors, including platinum sponsors Akin Gump Strauss Hauer & Feld LLP, Drinker Biddle & Reath LLP, and Greenberg Traurig LLP, and silver sponsors Dykema Gossett PLLC and Holland & Knight LLP. The section is very thankful for the continued support of these firms.

FBA Annual Meeting and Convention; New Orleans, La., September 2010

The national FBA held its annual conference in New Orleans this past September. The national conference unfortunately marked the end of the tenure of Lawrence Baca, founder of the FBA Indian Law Section, as FBA national president. He was the first American Indian to serve as president of the FBA. In addition to celebrating Lawrence’s numerous accomplishments as FBA president this past year, the annual FBA conference was also an opportunity to celebrate the many accomplishments of other FBA volunteers. Our newsletter was again recognized for its significant accomplishments and contributions. Additionally, our entire section was recognized as one of the most accomplished sections this year. A big kudos to all of those who have contributed so much to our section!

FBA Indian Law Section Election Results

We held annual elections for the Indian Law Section Executive Board earlier this fall. I am pleased to announce that the following individuals were elected to the Executive Board: Elizabeth Kronk, chair; Jennifer Weddle, deputy chair; Andrew Adams III, secretary; and Matthew L.M. Fletcher, treasurer. Congratulations to the new Executive Board. I am really excited for the upcoming year!

Development of Federal Indian Law Committee

The newly formed Development of Federal Indian Law Committee (DFILC) is up and running. The DFILC combines the former Development of Federal Indian Law, Legislation, and Incorporation of Indian Law on Bar Exam Committees. The DFILC is charged with keeping the Executive Board updated on important developments in Indian country, as well as recommending when the section and potentially the Federal Bar Association should take action. The section is very fortunate as Angelique EagleWoman, associate professor of law at the University of Idaho School of Law, agreed to serve as chair of the DFILC.

Warrington, and Sarah Wheelock. The section is exceptionally fortunate to have such a talented group serving on the DFILC. I look forward to great contributions from this committee.

Other section committees include: Development of Federal Indian Law, Newsletter, Nominations, Elections, and Awards, and Membership. If you have an interest in serving on a section committee or would like additional information on the responsibilities of the committees, or if you have any other questions or concerns, please contact me at (406) 243-6781 or elizabeth.kronk@umontana.edu.

Chi Miigwetch! 

INSIDE THE BELTWAY UPDATE

By Timothy Q. Evans

On the Hill

Legislation

Throughout the summer and into the fall, the Washington political agenda was dominated by congressional efforts to enact financial regulatory reform legislation, as well as both legislative and administrative responses to the BP oil spill in the Gulf of Mexico. Within that context, several issues in Indian Country have moved forward on the legislative front, but at a snail’s pace and as time permitted.

Cobell Settlement

The congressional approval of the Cobell v. Salazar Indian trust fund litigation settlement has continued to be a point of contention. The litigation, originally filed in 1996, alleged federal mismanagement of billions of dollars in trust funds owed to thousands of American Indians. In December 2009, officials from the Departments of Justice and the Interior announced a settlement consisting of a $1.4 billion fund for payments to individual Indians and a $2 billion land consolidation trust fund, even though the original lawsuit sought an historical accounting and compensation for billions of dollars more in royalty funds that flowed from the use of natural resources on Indian land. By its own terms, the Cobell settlement agreement must be approved by Congress. Many members of Congress reacted positively to the initial announcement of the proposed settlement, but no legislation was introduced immediately to approve it. The original agreement called for congressional approval by the end of 2009, but the parties were forced to extend that deadline.

In October 2010, U.S. District Judge Thomas F. Hogan said he was “hopeful that the Senate would take up Cobell independent of other issues” and set Jan. 11, 2011, for the next court review of the case.

Before adjourning on Nov. 19, the Senate approved the Cobell settlement, included in a bill to extend the Temporary Assistance for Needy Family (TANF) program and approve an agreement to settle African-American farmers’ discrimination claims against the Department of Agriculture. Also included within this bill passed by the Senate were several water rights settlements affecting, respectively, various Indian tribes: the White Mountain Apache Tribe; the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque (for water rights at issue in the decades-ongoing Aadmodt litigation); the Crow Tribe; and Taos Pueblo.

On Nov. 30, the House approved H.R. 4783, the Claims Resolution Act of 2010—which included the Cobell settlement and the tribal water rights settlements—by a 256-152 vote. The legislation now moves to the President, who is expected to sign the bill into law on Dec. 8, 2010.

Tribal Law and Order Act

On July 29, 2010, at a White House ceremony attended by many tribal leaders, President Obama signed into law the Tribal Law and Order Act (TLOA), which Congress passed as part of the Indian Arts and Crafts Amendments Act of 2010. The TLOA is intended to strengthen law enforcement efforts on reservations and in Alaska Native communities. Among other things, it will encourage increased prosecution of crimes in Indian country; increase penalties for on-reservation criminal offenders; reauthorize key programs and establish consistent protocols to address sexual violence; require the U.S. Department of Justice to justify the cases it declines to prosecute in Indian country; and allow tribal courts to impose sentences of up to three years.

Carcieri Fix Legislation

The U.S. Supreme Court’s 2009 decision in Carcieri v. Salazar has raised uncertainty over the validity of actions by the Department of the Interior to take land into trust for tribes since 1934, as well as the ability of tribal communities to undertake future trust land acquisitions. Three bills currently before the Congress seek to “fix” the decision and affirm the authority of the secretary to take land into trust for all federally recognized tribes regardless of their status at the time of IRA enactment: (1) S. 1703, introduced by Sen. Byron Dorgan (D-N.D.), chair of the Senate Committee on Indian Affairs, which the committee favorably reported to the full Senate on August 5, 2010, in its report, S. Report 111-247; (2) H.R. 3742, introduced by Rep. Dale Kildee (D-Mich.), co-chair of the Congressional Native American Caucus; and (3) H.R. 3697, introduced by Rep. Tom Cole (R-Okla.), the caucus’s other co-chair. Reps. Kildee and Cole have co-sponsored each other’s bills.

Tribal leaders met on Capitol Hill on July 13, 2010, as part of a summit led by the National Congress of American Indians and United South and Eastern Tribes to push the Carcieri fix legislation. Interior Secretary Ken Salazar spoke at the summit, asserting that Carcieri was wrongly decided, that it shows the U.S. Supreme Court is not sensitive to tribal issues, and that it is important to pass a legislative fix. He noted that if a legislative fix is not passed, then the department will work with its solicitor’s office to see

BELTWAY continued on page 4
if there is a way to process trust land applications in spite of the limitations imposed by the Carcieri decision. However, Secretary Salazar said he did not want to go down alternative paths until a legislative fix is attempted.

On July 22, 2010, the House Subcommittee on Interior Appropriations, lead by Chair Jim Moran (D-Va.), unanimously approved an amendment to the fiscal year 2011 Interior appropriations bill offered by Rep. Tom Cole (R-Okla.) to “fix” the U.S. Supreme Court’s Carcieri decision. The amendment included language similar to that in the three Carcieri fix bills that would reaffirm the authority of the Secretary of the Interior to take land into trust for all federally recognized tribes. Nevertheless, because of Congress’s failure to consider and pass all 12 individual annual appropriations bills for fiscal year 2011 prior to the start of the new fiscal year on Oct. 1, it had to enact a continuing resolution (CR) to generally fund the federal government at fiscal year 2010 levels. Unlike the individual House Interior Appropriations bill, the CR did not include a Carcieri fix. The CR was set to expire on Dec. 3, 2010, but the House passed another CR that continues through Dec. 18, at which point Congress will either have to have completed work on the 12 individual FY 2011 appropriations bills, passed a longer-term CR, or enacted an omnibus appropriations bill. As such, the fate of the Carcieri fix is uncertain.

If it is not considered during the lame duck session—which began when Congress returned from its mid-term election recess on Nov. 15 and is expected to last only weeks before Congress adjourns again for the Christmas holiday recess—the Carcieri issue will have to wait until next year. The National Congress of American Indians and United South and Eastern Tribes organized a strategy session and meetings with key members of Congress on Thursday, Nov. 18.

**Indian Veterans Housing Opportunity Act**

On Oct. 12, 2010, President Obama signed into law the Indian Veterans Housing Opportunity Act, which ensures that Indian veterans who receive federal disability and survivor benefits are not denied support under the Native American Housing Assistance and Self Determination Act.

**Hearings and Mark-Ups**

**U.S. Senate**

The Senate Committee on Indian Affairs (SCIA), under the leadership of Sen. Byron Dorgan—who is retiring from Congress at the end of this session—held various hearings during the spring and summer.

On April 22, the SCIA held a hearing on a discussion draft of the Indian Energy Promotion and Parity Act of 2010. Opening statements from committee members indicated that Indian energy was one of the highest priorities of the SCIA. Statements from witnesses highlighted the energy challenges in Indian country, with special mention of the language in the bill permitting state and local municipalities to tax certain tribal renewable energy projects.

On April 29, the committee held a legislative hearing on S. 439, the Indian Development Finance Corporation Act; S. 2802, the Blackfoot River Land Settlement Act; and S. 1264, the Pine River Indian Irrigation Project Act. Witness testimony focused on S. 439, and witnesses were supportive of the concept of a development finance corporation and expressed the need for a vehicle that will addresses economic development in Indian country when commercial avenues are unavailable. Although statements and questions from members of the committee otherwise were sympathetic to the need for economic development and recognized that potential development is difficult due to a lack of capital, Sen. Dorgan indicated that this bill is not likely to see much movement.

On July 22, 2010, the SCIA held a legislative hearing on S. 2956, the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act, and S. 3290, the Blackfeet Water Rights Settlement Act. Statements from members of the committee and witnesses highlighted the two bills’ importance for securing water supplies for the affected tribes and local communities.

The committee held several oversight hearings as well. On May 13, the SCIA held an oversight hearing on school safety. Opening statements from senators and testimony from witnesses highlighted the severe safety issues that affect the 184 schools operated under the Bureau of Indian Education (BIE), where nearly 44,000 students and staff work, attend, and in some cases, live. The consensus at the hearing was that these safety concerns are due in large part to the historical chronic underfunding of the BIE, with a further proposed cut of $9 million to BIE construction in President Obama’s fiscal year 2011 budget request. Members of the SCIA asked the BIE for recommendations to identify a clear path for the agency to follow and what funds are needed to solve this problem.

The SCIA held an oversight hearing on Indian education on June 17, 2010. The hearing focused on the No Child Left Behind Act, which expired in 2008 and will soon be considered for reauthorization, and sought recommendations to ensure that the needs of Indian students are made a priority in that new law. On June 30, the committee held an oversight hearing on the diabetes crisis in Indian Country. Statements from committee members and witnesses highlighted the severe diabetes problem in Indian Country, which has reached epidemic proportions. A discussion ensued over how poverty
plays into Indian health and how understanding the cultural perspective of diabetes is critical for successful interventions in reducing the risk of diabetes, but that the key components of diabetes prevention remain weight loss and exercise.

On July 29, the committee held an oversight hearing on Indian gaming and to review practices at the National Indian Gaming Commission (NIGC). The committee heard testimony from Tracie Stevens, chairwoman of the NIGC; Ernest Stevens, Jr., chair of the National Indian Gaming Association; and Mark Brnovich, director of the Arizona Department of Gaming. Statements from members of the committee and witnesses addressed the positive impact that Indian gaming has had on individual tribes and communities, but also the need and the importance of a collaborative regulatory framework. The SCIA held a hearing on Chairwoman Stevens’ nomination on May 26, in which she made commitments to work collaboratively with NIGC commissioners, consult with stakeholders, and review best practices to streamline public engagement with the NIGC.

The SCIA also held various business meetings. On June 10, 2010, there was a business meeting to mark up proposed legislation relating to tribal lands and to consider several of President Obama’s nominees for federal appointments. In this meeting, the committee reported favorably with an amendment by voice vote S. 2802, the Blackfoot River Land Settlement Act of 2009; reported favorably an amendment by voice vote S. 2906, a bill to add the Puyallup Tribe of Indians to the list of tribes whose Indian lands are authorized to be leased for a maximum of 99 years; reported favorably without amendment by voice vote S. 1448, a bill to authorize the Coquille Indian Tribe, the Confederated Tribes of Siletz Indians, the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw, the Klamath Tribes, and the Burns Paiute Tribe to obtain 99-year lease authority for trust land; reported favorably by voice vote the nomination of JoAnn Balzer to serve as a member of the Board of Trustees of the Institute of American Indian and Alaska Native Culture and Arts Development (Balzer was confirmed by the full Senate on June 22, 2010); and reported favorably by voice vote the nomination of Cynthia Chavez Lamar to serve as a member of the Board of Trustees of the Institute of American Indian and Alaska Native Culture and Arts Development (Lamar was confirmed by the full Senate on June 22, 2010).

On June 30, the committee held a business meeting to approve two Indian housing bills and discuss management issues at the Indian Health Service (IHS) facility located on the Turtle Mountain Chippewa Reservation. During the meeting, the SCIA approved by voice vote H.R. 3553, the Indian Veterans Housing Opportunity Act (which then was passed by the full Senate and signed into law on Oct. 12, 2010), and S. 3235, the Helping Expedite and Advance Responsible Tribal Homeownership Act, which allows tribes to develop land leasing regulations. Also during the meeting, Sen. Dorgan announced that he had launched an investigation into the mismanagement issues at the IHS facility located on the Turtle Mountain Chippewa Reservation.

Several committees in the House with jurisdiction over issues affecting tribal communities also held hearings and markups.

The House Natural Resources Committee (HNRC), under the leadership of Chair Nick Rahall (D-W.Va.), convened a hearing on June 9, 2010, on H.R. 4347, a bill introduced by Rep. Dan Boren (D-Okla.) that would amend Title IV of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, to provide for Indian tribes to enter into certain leases without prior express approval from the secretary of the Interior. On July 22, the HNRC held a full committee meeting to mark up proposed legislation relating to tribal lands and tribal self-governance, among other bills related to the Department of the Interior. In that mark-up, the committee favorably reported with an amendment in the nature of a substitute by voice vote H.R. 2523, the HEARTH Act (a bill to amend the act of Aug. 9, 1955, to provide for Indian tribes to enter into certain leases without prior express approval from the secretary of the Interior) and H.R. 4347, the Department of the Interior Tribal-Self Governance Act of 2009.

On July 28, the HNRC held a legislative hearing on H.R. 5023, the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act (RESPECT Act), a bill to prescribe procedures for effective consultation and coordination with tribes.
by federal agencies with federally recognized Indian tribes regarding federal activities that impact tribal lands and interests; H.R. 4384, a bill to establish the Utah Navajo Trust Fund Commission; and H.R. 5468, the Bridgeport Indian Colony Land Trust, Health, and Economic Development Act of 2010, a bill to take certain Federal lands in Mono County, Calif., into trust for the benefit of the Bridgeport Indian Colony. Statements from members of the committee and witnesses addressed the frustration from Indian Country about the federal government’s failures to effectively consult with tribes despite an Executive Order that mandates federal agencies consult and collaborate with tribal officials in the development of federal policies that impact tribal communities. Following discussion of the RESPECT Act, the discussion focused on the proposed Utah Navajo Trust Fund Commission.

On May 19, 2010, the House Ways and Means Committee, under the leadership of Rep. Sander Levin (D-Mich.), held a hearing to discuss the current tax laws and reporting requirements applicable to Internet gambling in the United States. The hearing, which focused on the committee’s tax jurisdiction over the legislative proposals before it, was called in response to two bills pending in the House to license and regulate Internet gambling activities. The Internet Gambling Regulation, Consumer Protection, and Enforcement Act (H.R. 2267), which is being championed by Rep. Barney Frank (D-Mass.), would eliminate the current ban on domestic Internet gambling and establish a nationwide federal regulatory structure for it, including provisions for the collection of Internet gambling-related taxes. A companion measure, the Internet Gambling Regulation and Tax Enforcement Act (H.R. 2268), which was introduced by Rep. Jim McDermott (D-Wash.), would tax revenues and income from Internet gambling. The potential effects of Internet gambling on tribal casinos and the inclusion of language in the proposed bills to permit tribes to engage in Internet gambling have been parts of the ongoing discussions surrounding these bills.

The House Financial Services Committee, led by Rep. Barney Frank (D-Mass.), held a hearing on H.R. 2267, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act, on July 21, 2010. The opening statements and questions to witnesses from members in opposition to the bill pointed to how increased revenue from taxing internet gambling will only lead to growth of the federal government bureaucracy and the increased social costs associated with gambling will outweigh any diminution in personal freedoms caused by not allowing Internet gambling. Rep. Frank and others supporting the bill argued and asked questions to show that Internet gambling is already a huge industry and Americans obviously want to take part in it, so it is better to structure, regulate, and tax it to provide a source of revenue, rather than attempt to ban it; that American consumers should have the personal freedom to gamble on the Internet in the privacy of their homes; and that the Unlawful Internet Gambling Enforcement Act enacted in 2006 is an unfair burden on credit unions and other small financial institutions who cannot afford to comply with its requirements of correctly identifying and rejecting Internet gambling transactions. The House Financial Services Committee held a full committee meeting and marked up H.R. 2267 on July 28.

On April 10, 2010, the House Financial Services Subcommittee on Housing and Community Opportunity, under the leadership of Rep. Maxine Waters (D-Calif.), held a field hearing in Window Rock, Ariz., to address the unique housing needs of Native American veterans with disabilities. Witnesses included representatives of tribal and veterans service organizations as well as officials from the Department of Housing and Urban Development. A major topic addressed at the hearing was currently proposed legislation aimed at ensuring that disabled Native American veterans, their families, and their survivors are not denied support through the Native American Housing Assistance and Self Determination Act because they receive veterans’ or survivor benefits.

On June 23, the House Agriculture Subcommittee on Department Operations, Oversight, Nutrition and Forestry, under the leadership of Rep. Joe Baca (D-Calif.), held a hearing to review food distribution programs on Indian reservations. Opening statements from subcommittee members and testimony from witnesses focused on the Food Distribution Program on Indian Reservations, which is administered by the Food and Nutrition Service within the U.S. Department of Agriculture. Witnesses outlined their experiences with the program and offered suggestions for improvements, including the use of local and traditional Native foods and the integration of health promotion and disease prevention in the Program’s mission.

Executive Branch

In Spring 2010, Indian Country lost one of its great leaders in the passing of the former Principal Chief of the Cherokee Nation, Wilma Mankiller. On April 6, 2010, the White House released a statement by President Obama on Mankiller’s passing, and on April 14, the House passed H.R. 1237, a bill honoring the life of Wilma Pearl Mankiller and expressing condolences of the House of Representatives on her passing. Mankiller was the first female Principal Chief of the Cherokee Nation and a recipient of the Presidential Medal of Freedom.
Federal agencies also issued several final rules affecting Indian Country this spring and summer. On May 27, 2010, the U.S. Postal Service issued its final rule, which became effective on June 29, on the treatment of cigarettes and smokeless tobacco as nonmailable matter, in order to implement the Prevent All Cigarette Trafficking Act of 2009, Public Law 111-154. The PACT Act and its regulations have been of much concern to tribal smoke-shops with Internet and telephone ordering services that depend upon the Postal Service for delivery.

On June 4, the Indian Health Service and the Bureau of Indian Affairs (BIA) issued a final rule pertaining to the appeals procedures for Indian Self-Determination Act contracts and annual funding agreements. The final rule, which took effect on July 6, made limited technical amendments to the joint regulations governing contracts and annual funding agreements under the Indian Self-Determination and Education Assistance Act, in order to update appeals procedures.

On June 18, the BIA issued its notice of final determination for federal acknowledgment of the Shinnecock Indian Nation. The determination deemed the Shinnecock Indian Nation of New York to be entitled to be acknowledged as an Indian tribe within the meaning of federal law. After a challenge to the determination was rejected by the Interior Board of Indian Appeals, BIA announced that as of Oct. 1, 2010, the Shinnecock Indian is an Indian entity recognized and eligible to receive services from the BIA.

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Also on June 18, Secretary of the Interior Ken Salazar issued two memoranda to Assistant Secretary-Indian Affairs Larry EchoHawk pertaining to the department’s policy for processing gaming and non-gaming trust land acquisition applications. The memos urged movement on the severe backlog of fee-to-trust applications as part of the department’s trust responsibility towards tribes.

Following the issuance of these memos, Assistant Secretary-Indian Affairs Larry EchoHawk announced on Aug. 31 that the Office of Indian Gaming (OIG) would conduct six consultations with federally recognized tribes on Indian gaming land into trust determinations. These tribal consultations are in response to the June 18 memoranda from Secretary Salazar to the Assistant Secretary EchoHawk in which the secretary reaffirmed the authority of the DOI to take land into trust for the gaming purposes. The tribal consultations took place on Sept. 23 in Spokane, Wash.; Oct. 5 in Sacramento, Calif.; Oct. 14 in Verona, N.Y.; Oct. 21 in Prior Lake, Minn.; Nov. 16 in Albuquerque; and on Nov. 18 in Las Vegas.

The BIA conducted consultations with tribes on the implementation of the Tribal Law and Order Act of 2010 on Oct. 12 in San Diego; Oct. 14 in Billings, Mont.; Oct. 20 in Albuquerque; and Oct. 21 in Prior Lake, Minn. The BIA also conducted consultation meetings on draft Buy Indian Act regulations on April 26 in Portland, Ore.; April 28 in Rapid City, S.D.; and April 30 in Tulsa.

The U.S. State Department held several tribal consultations on the United Nations Draft Declaration on the Rights of Indigenous Peoples during the summer and fall regarding the U.S. government’s review of its position on the declaration. Initial consultations were held on June 21 in Rapid City, S.D., and July 7 at the Department of State in Washington, D.C. Another consultation with tribal leaders was held at the Department of State on Oct. 14, followed by an NGO and key stakeholders meeting on Oct. 15.

The National Indian Gaming Commission held regional consultations with tribes on various topics, including the formulation and implementation of revisions to the NIGC’s government-to-government consultation policy, the NIGC’s draft National Environmental Policy Act manual, and the NIGC’s 1997 records retention policy. The consultations were held on June 17 in Mobile, Ala.; July 15 in Shelton, Wash.; July 29-30 in Northern California; Aug. 3 in Minneapolis; Aug. 10 in Niagara Falls; Aug. 19 in Bernalillo, N.M.; Aug. 24 in Tulsa; and Sept. 17 in Scottsdale, Ariz.

On Nov. 18, the NIGC issued a combined Notice of Inquiry and Notice of Consultation in the Federal Register to advise the public that it is conducting a comprehensive review of all regulations implementing the Indian Gaming Regulatory Act. According to the notice, the commission is taking a fresh look at its rules in order to determine whether amendments are necessary to more effectively implement IGRA’s policies of protecting Indian gaming as a means of generating tribal revenue, ensuring that gaming is conducted fairly and honestly by both the operator and players, and ensuring that tribes are the primary beneficiaries of gaming operations.

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The notice invites comments and information that will assist the NIGC in understanding the need for revising any or all of the regulations outlined in the notice. Comments must be submitted by Feb. 11, 2011. The notice also sets forth a schedule of eight tribal consultations to be held throughout the country in January and February 2011. More information about the combined notice and these consultations, including the specific dates and locations, is available on the NIGC’s website at www.nigc.gov.

On Oct. 19, 2010, the Department of Justice and the Department of Agriculture announced a $760 million settlement to resolve the Keepseagle lawsuit brought in 1999 by Native American farmers and ranchers who claimed that the Agriculture Department discriminated against them in federal loan programs dating back to 1981. Under the terms of the settlement, which must still be approved by the district court, the United States will provide $680 million in damages and $80 million in debt forgiveness. According to the Justice Department, the settlement will not require congressional approval because the money will come from the Judgment Fund.

NOMINATIONS AND APPOINTMENTS

On Aug. 5, 2010, the U.S. Senate, by a 63-37 vote, confirmed Elena Kagan as a U.S. Supreme Court Associate Justice. She replaced Justice John Paul Stevens, who at age 89 had spent 34 years on the high court’s bench and retired at the end of the last term.

On April 26, Assistant Secretary-Indian Affairs Larry EchoHawk named Michel Black as the director of the Bureau of Indian Affairs. Black, a member of the Oglala Sioux Tribe, had been serving as the acting BIA director since March 18. He takes over from Jerry Gidner, who is now a special counselor in the Office of the Assistant Secretary-Indian Affairs.

On June 30, Tracie Stevens, a member of the Tulalip Tribes, was sworn in by Secretary of the Interior Ken Salazar as the chairwoman of the National Indian Gaming Commission. Stevens had been serving as a senior advisor to the assistant secretary-Indian affairs since July 2009. Stevens subsequently chose Lawrence Roberts, a member of the Oneida Nation of Wisconsin, to serve as NIGC general counsel and Paxton Myers, a member of the Eastern Band of Cherokee Indians, to serve as chief of staff. More on the appointments of Stevens, Roberts, and Myers (and NIGC Commissioner Daniel Little) can be found in the “Features” portion of the newsletter.

On May 13, President Obama announced the appointment of six new members to the National Advisory Council on Indian Education: Thomas Acevedo, a member of the Salish and Kootenai Tribes; Hon. Derek Bailey, chair, Grand Traverse Band of Indians; Robin Butterfield, a member of the Winnebago Tribe of Nebraska; Robert Cook, a member of the Oglala Sioux Tribe; Deborah Jackson-Dennison, a member of the Navajo Nation; and Alyce Spotted Bear, a member of the Mandan, Hidatsa, and Arikara Tribes of the Fort Berthold Indian Reservation. On June 28, President Obama announced the appointment of four more new members to the council: Sam McCracken, a member of the Fort Peck Tribes of Montana; Mary Jane Oatman-Wak Wak, a member of the Nez Perce Tribe of Idaho and president of the National Indian Education Association; Alapaki Nahale-a, a Native Hawaiian; and Alan Ray, a member of the Cherokee Nation. The NACIE consists of 16 members total and advises the U.S. Department of Education on Indian education issues.

And on Oct. 14, the Environmental Protection Agency announced the appointment of 30 new tribal, local, and state officials from across the United States to serve on the agency’s Local Government Advisory Committee. Among those appointed were Aaron Miles of the Nez Perce Tribe and Steve Ortiz of the Prairie Band Potawatomi Nation.

WHITE HOUSE TRIBAL NATIONS CONFERENCE

President Obama’s second White House Tribal Nations Conference will be held on Dec. 16, 2010, inside the Sydney Yates Auditorium at the main Department of the Interior building in Washington, D.C. Each federally recognized tribe is invited to send one representative. ✦
The Supreme Court has not decided an Indian law case so far this term, but it heard argument in one case, United States v. Tohono O’odham Nation, on Nov. 1. The Court also granted certiorari in Madison County v. Oneida Indian Nation, and several petitions for certiorari are pending before the Court.

In Tohono O’odham Nation, the United States seeks review of the U.S. Appeals Court for the Federal Circuit’s decision upholding the Nation’s ability to bring separate suits in both the Court of Federal Claims (CFC) and a U.S. district court based on breaches of federal trust responsibility related to the Tohono O’odham Nation’s trust assets. The United States argues that 28 U.S.C. § 1500, which divests the CFC of jurisdiction over “any claim for or in respect to which the plaintiff ... has ... any suit or process against the United States” pending in another court, precludes the CFC from hearing the case. The Federal Circuit held that §1500 does not obviate the CFC’s jurisdiction because the Tohono O’odham Nation seeks different relief in its two actions: it seeks primarily equitable relief in its district court action, where its focus is on an accounting that would amount to specific performance, and it seeks damages, or relief at law, in its CFC action. More specifically, the district court action, according to the Federal Circuit, is focused on “old money”—for example, existing trust assets that should have appeared in federal records but did not because of mismanagement. The CFC action, on the other hand, is based on “new money,” or money that the Tohono O’odham Nation should have earned as profits but did not due to mismanagement. The Federal Circuit determined that §1500 bars the maintenance of a CFC action and a simultaneous action in another court only if the two actions are based on the same set of operative facts and seek the same relief. It determined that, since the actions did not seek the same relief, § 1500 did not bar the CFC action. The United States argues that the Federal Circuit interpreted § 1500 too narrowly and, moreover, that its interpretation threatens significant adverse consequences. Specifically, the United States argues that (1) the Federal Circuit’s statutory interpretation is inconsistent with the text of § 1500, (2) that the Tohono O’odham Nation does not actually seek different relief in the two actions, and (3) the Federal Circuit’s interpretation disregards established principles of jurisdiction and sovereign immunity. The United States also argues that the Federal Circuit’s decision “imposes a substantial litigation burden on the United States and the courts and threatens inconsistent judicial rulings.”

In Madison County v. Oneida Indian Nation, Madison and Oneida Counties (in New York) are asking the Court to overturn the U.S. Court of Appeals for the Second Circuit’s opinion holding that tribal sovereign immunity barred the counties from using the remedy of foreclosure to recover unpaid property taxes on the lands at issue in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) and County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (Oneida II). In addition to the sovereign immunity question, the counties raise the question of whether the Oneida Indian Nation’s reservation was diminished or disestablished, an issue that the Second Circuit decided in the Oneida Indian Nation’s favor in 2003.

Five petitions for certiorari of interest are currently pending before the Supreme Court.

1. On June 15, 2010, the United States sought review of the U.S. Court of Appeals for the Federal Circuit’s decision in Eastern Shawnee Tribe of Oklahoma v. United States that 28 U.S.C. § 1500 does not bar the Eastern Shawnee Tribe of Oklahoma from pursuing a breach of trust claim in district court seeking an accounting and other relief while simultaneously pursuing a claim based on the same set of operative facts in the Court of Federal Claims that seeks money damages stemming from claims revealed as a result of the accounting. The tribe filed its opposition brief on Sept. 15, and the United States filed its reply brief on Sept. 29. As this case presents a question similar to that presented in Tohono O’odham Nation v. United States (discussed above), it is on hold until the Court decides that case.

2. On Aug. 2, 2010, Leslie Dawn Eagle filed a petition for certiorari review of the U.S. Court of Appeals for the Ninth Circuit’s denial of her habeas corpus petition in Eagle v. Yerington Paiute Tribe, in which Eagle had argued that her child abuse conviction in tribal court was invalid because the prosecution had not proved her Indian status, and that issue she raised for the first time during closing argument in the tribal court, beyond a reasonable doubt. The tribe’s opposition brief was filed on Nov. 8, and the
petitioner’s reply brief was filed on Nov. 17.
3. In Schwarzenegger v. Rincon Band of Luiseño Mission Indians, the state of California is asking the Court to overturn the Ninth Circuit’s finding that the state negotiated in bad faith with the Rincon Band when it demanded, in tribal-state compact negotiations under the Indian Gaming Regulatory Act, that the Rincon Band pay revenues into the state’s general fund and did not offer it sufficient concessions in return. The questions presented are: (1) “whether a state demands direct taxation of an Indian tribe in compact negotiations under Section 11 of the Indian Gaming Regulatory act, when it bargains for a share of tribal gaming revenue for the State’s general fund”; and (2) “[w]hether the court below exceeded its jurisdiction to determine the State’s good faith in compact negotiations ... when it weighed the relative value of concessions argued by the parties in those negotiations.” The Rincon Band’s opposition brief was filed on Nov. 12, and the state filed its reply brief on Nov. 22.
4. The question presented by the United States in United States v. Jicarilla Apache Nation is “[w]ether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe.” The court below held that the United States, as the fiduciary, could not block the Jicarilla Apache Nation from discovering information otherwise protected under the attorney-client privilege (documents and communications between the United States and its attorneys) when the information relates to fiduciary, including trust mismanagement. The Jicarilla Apache Nation’s brief in opposition was filed on Nov. 19.
5. On Oct. 22, the Osage Nation filed its cert petition in Osage Nation v. Irby, seeking reversal of the U.S. Court of Appeals for the Tenth Circuit’s opinion holding that the Osage Nation’s reservation had been disestablished. One of the questions presented by the Osage Nation is “[w]ether Congress disestablished an Indian reservation, express statutory text, unequivocal legislative history, and the expert view of the Executive Branch are controlling, as the Second, Eighth, and Ninth Circuits have ruled, or whether, instead, other indicia external to the statutory text and federal government’s view, such as modern demographics, can override ambiguous statutory text, as the Tenth Circuit and Seventh Circuit have held.”

Thirty-two petitions for certiorari have been denied so far over the Court’s past two terms: Attea v. Department of Taxation and Finance of New York; Arctic Slope Native Ass’n v. Sebelius; Barrett v. United States; Benally v. United States; Davis v. Minnesota; Elliott v. White Mountain Apache Tribal Court; Glacier Electric Cooperative v. Sherburne; Gould v. Cayuga Indian Nation; Harjo v. Pro-Football; Harvest Institute Freedman Federation v. United States; Hendrix v. Cofey; Hoffman v. Sandia Resort and Casino; Hogan v. Kalag Tribal Council; Idaho v. Mayhee; Jeffredo v. Macarro; Metlakatla Indian Community v. Sebelius; North Country Community Alliance, Inc. v. Salazar; Oglala Sioux Tribe v. U.S. Army Corps of Engineers; Pyke v. Cuomo; Roy v. Minnesota; Schaghticoke Tribal Nation v. Kempthorne; Sharp v. United States; In re Shinnecock Smokeshop; Smith v. Commissioner of the IRS; Smith v. Shulman; Stymiest v. United States; United States v. Begay; Upper Skagit Indian Tribe v. Washington; Ute Distribution Corp. v. Salazar; and Zephier v. United States.

Additionally, the petition for writ of certiorari in Cobell v. Salazar was voluntarily withdrawn. (More information on the Cobell litigation can be found in the “Inside the Beltway” section of this newsletter.) In other Supreme Court news, a new associate justice, Elena Kagan, was confirmed by the Senate to serve on the Supreme Court. For commentary on Justice Kagan, see the pieces in the Features section by Matthew Fletcher and Richard Guest.
Several recent cases from the Northeast region involved land rights. In *Bingham v. Commonwealth of Massachusetts*, 616 F.3d 1 (1st Cir. 2010), two individual descendants of the South Sea Indians, now known as the Mashpee Wampanoags, brought a Takings Clause suit against the Commonwealth of Massachusetts and the Town of Mashpee. The plaintiffs, acting individually and not on behalf of the now federally recognized Mashpee Wampanoag Tribe, sought compensation and return of lands they argued were granted to them in perpetuity in the mid-1660s. Specifically, the two plaintiffs argued that two Massachusetts statutes enacted in the late 1880s removed restrictions on alienation contained in the deeds, allowing the lands to be later sold. The appeals court upheld the district court's dismissal of the case, finding that the plaintiffs failed to show a personal injury by not establishing that “the deeds conveyed to plaintiffs’ individual ancestors discrete property interests that passed through successive generations” to them.

In *N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corizone*, No. 9-683, 2010 WL 1674565, 2010 U.S. Dist. LEXIS 66605 (D.N.J. June 30, 2010), the court dismissed all fifteen counts of the tribe’s second amended complaint seeking relief from misappropriation of lands over 200 years ago by the state of New Jersey. Among the dismissed counts were alleged violations of the due process clause of the Fourteenth Amendment, violations of the Non-Intercourse Act and the Native American Graves Protection and Repatriation Act and a violation of the 1758 Treaty of Easton, which guarantees hunting and fishing rights. The lower court noted that the plaintiffs may submit another motion to amend.

In *Oneida Indian Nation v. Madison County*, 605 F.3d 149 (2d Cir. 2010), the U.S. Court of Appeals for the Second Circuit affirmed the lower court’s decision and held that the Oneida Indian Nation (OIN) is immune from Madison and Oneida counties’ foreclosure action for failure to pay county taxes. At issue were parcels of lands purchased by OIN in the 1990s, which the Supreme Court subsequently held in *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, did not fall under the sovereign dominion of the tribe and therefore were exempt from taxation. The Second Circuit rejected the counties’ interpretation of *Sherrill* which argued that “the land in question is not sovereign tribal land, and it is therefore subject to taxation ….” Noting that the counties’ “argument improperly conflates two distinct doctrines,” the appeals court distinguished between the doctrine of tribal sovereignty and tribal sovereign immunity. Citing *Kiowa Tribe v. Manufacturing Technologies Inc.*, the court explained that “Sherrill dealt with ‘the right to demand compliance with state laws.’ It did not address ‘the means available to enforce’ those laws.” The Second Circuit also upheld the district court’s denial of the Stockbridge-Munsee Community Band of Mohican Indians’ motion to intervene in the case. The Stockbridge-Munsee Community “sought to intervene for the sole purpose of seeking dismissal of this case insofar as it relates to the parcels of land that are allegedly part of the Stockbridge reservation.” In affirming the district court’s decision, the Second Circuit noted that the boundaries of the two tribes’ reservations were not at issue in this case. Madison County appealed the decision to the U.S. Supreme Court, which granted certiorari.

In another case involving the Oneida Nation’s lands, *New York v. Salazar*, 701 F. Supp. 2d 224 (N.D.N.Y. 2010), the plaintiffs, which include not only the state of New York but also the counties of Madison and Oneida, are challenging the Interior secretary’s decision to take about 13,000 acres of land into trust on behalf of the Oneida Indian Nation. In this particular proceeding, the plaintiffs sought the assistance of the court with regard to “disputes over the documents withheld from the administrative record upon which the court will base its administrative review, a request for limited discovery in order to probe the fairness of the process leading up to the determination and the issue of OIN tribal recognition, and a determination of whether the Department of the Interior has fulfilled its obligation to comply with several requests by the plaintiffs pursuant to the Freedom of Information Act for documents associated with the process.” Addressing first the FOIA issue, the magistrate judge held that the court did not have jurisdiction to decide this.
issue since the plaintiffs’ arguments under FOIA essentially required a decision on the merits of two of their claims, and as result “must be addressed by the assigned district judge.” As to the issue of documents withheld from the administrative record, the magistrate judge held that the government’s “deliberative process privilege imposes no restriction on plaintiffs’ access to pre-decisional materials, and all documents withheld from the administrative record on this basis must therefore be produced.” Finally, the court allowed the plaintiffs to take limited discovery on the issue of bias and bad faith with regards to the DOI’s determination but denied the plaintiff’s motion to take discovery on whether OIN was a federally recognized tribe at the time of the enactment of the IRA in 1934, concluding that addresses the merits of the case.

In *Citizens Against Casino Gambling in Erie County v. Hogen*, 704 F. Supp. 2d 269 (W.D.N.Y. 2010), a citizens’ group challenges the legality of a casino the Seneca Nation of Indians plans to operate in Buffalo, N.Y. The land on which the casino is to operate was purchased in 2005, and was subsequently determined to be “Indian country” and approved for gaming in early 2009. The district court was faced with two motions: first, the defendants’ motion to dismiss one of the plaintiffs’ three claims for relief; and second, a motion to intervene from the Seneca Nation. The court granted, in part, the defendants’ motion to dismiss and denied the Seneca Nation’s attempt to intervene in the case. The court dismissed two parts of the plaintiffs’ first claim of relief, but allowed one to stand. Specifically, the lower court found untimely the plaintiffs’ arguments that (1) the Seneca Nation Settlement Act was unconstitutional; and (2) the tribal-state compact between the Seneca Nation of Indians and the State of New York did not apply to the land at issue. The court let stand the plaintiffs’ argument that the land is neither “Indian country” under 18 U.S.C. § 1151, nor “Indian land” under the Indian Gaming Regulatory Act (IGRA), and “that to be Indian land under the IGRA, land must be within the limits or boundaries of an existing reservation.” As to the motion to intervene, the court ultimately found the motion untimely, but also noted that the remaining factors did not weigh in favor of intervention.

In *City of New York v. Golden Feather Smoke Shop Inc.*, 597 F.3d 115 (2d Cir. 2010), an interlocutory appeal of a district court order preliminarily enjoining the sale of untaxed cigarettes by the Unkechaug Indian Nation to nonmember Indians, the Second Circuit certified two questions to the New York court of appeals regarding certain provisions of New York’s tax code. The City of New York brought suit against several smoke shops located on the Poospatuck Reservation selling cigarettes to both members of the Unkechaug Nation and the general public, complaining that the defendants were selling unstamped cigarettes in bulk which were then “trafficked into the City where they are resold at below-market prices, without the payment of City or State taxes.” Establishing first that the city was not required to make a showing of irreparable harm to obtain an injunction under either the state Cigarette Marketing Standards Act or the federal Contraband Cigarette Trafficking Act, but must demonstrate a likelihood of success on the merits of its claims, the court went on to review New York’s cigarette taxing framework including applicable case law. Of particular relevance to this case, the appeals court focused on sections 471 and 471(e) of the New York Tax Law. Section 471 provides for a tax “on all cigarettes possessed in the state by any person for sale” except when the “state is without power to impose such tax.” Concluding that this is a matter under statutory interpretation of state law, the court decided to certify two questions: “(1) Does N.Y. Tax Law § 471-e, either by itself or in combination with the provisions of § 471, impose a tax on cigarettes sold on Native American reservations when some or all of those cigarettes may be sold to persons other than members of the reservation’s nation or tribe? [and] (2) If the answer to Question 1 is ‘no,’ does N.Y. Tax Law § 471 alone impose a tax on cigarettes sold on Native American reservations when some or all of those cigarettes may be sold to persons other than members of the reservation’s nation or tribe?”
In the spring, the U.S. District Court for the Western District of North Carolina decided several cases involving the Federal Debt Collection Procedures Act’s (FDCPA) application to Indian tribes and tribal members. In United States v. Welch, No. 2:05cr08, 2010 WL 780175 (W.D.N.C. Mar. 3, 2010), the court denied the defendant’s petition to withdraw the court’s prior garnishee order. As part of his sentence, the defendant had been ordered to pay restitution. The court subsequently entered an order of garnishment as to the defendant’s per capita gaming revenue payments from the Eastern Band of Cherokee Indians. The defendant argued that such order should be withdrawn because he was already making periodic restitution payments to the Bureau of Prisons. The court, however, found that the government is entitled to seek payment from any income source pursuant to the Federal Debt Collection Procedures Act (with very narrow exceptions that did not apply in this case), and therefore the defendant’s payments do not affect the government’s ability to garnish his per capita payments.

In United States v. Bird, No. 2:09cr15, 2010 WL 1849011 (W.D.N.C. May 7, 2010), the federal government moved for a writ of garnishment as to the Eastern Band of Cherokee Indians in order to reach tribal gaming proceeds that were to be paid to a criminal defendant. The tribe moved to quash the writ application, arguing that the defendant’s per capita payments were immune from garnishment because of the tribe’s sovereignty. The court held that Congress unequivocally waived tribal immunity under the Federal Debt Collection Procedure Act. It further found that the act defined a “garnishee” as “any person who has custody of any property in which the debtor has a nonexempt interest” and that Congress had included tribes in the definition of a “person” under the act. Because the tribe held per capita payments on behalf of the defendant, the court held that it could compel the tribe to pay over such monies to the federal government. The court made similar rulings in two related cases decided the same day, United States v. Owl, No. 2:08cr21-2, 2010 WL 1849008 (W.D.N.C. May 7, 2010), and United States v. Lambert, No. 2:07cr23, 2010 WL 1849005 (W.D.N.C. May 7, 2010).

The other cases discussed in this update were decided by (or appealed from) the U.S. District Court for the Southern District of Florida. In Tiger v. Osceola, No. 10-60499, 2010 WL 2079673 (S.D. Fla. May 7, 2010), the plaintiff filed a §1983 claim against various officials of the Seminole Tribe for his alleged unlawful arrest on the tribe’s reservation, claiming that the officials listed him as a nontribal member in order to gain state jurisdiction for prosecution purposes. The court, in dismissing the complaint, found that the plaintiff’s claims were not cognizable in a civil rights case but rather should have been brought under a habeas corpus action since they may affect the existence or duration of his criminal confinement.

In Henin v. Cancel, No. 09-22965, 2010 WL 1737106 (S.D. Fla. Apr. 28, 2010), the plaintiff alleged claims for negligence, assault and battery, and intentional infliction of emotional duress after purportedly being hit, denied medical care and supplies, and subjected to further abuse at the hands of police officers following an arrest on the Miccosukee Tribe’s reservation. The plaintiff claimed that the officers were the agents and/or employees of the United States acting within the scope of their employment pursuant to a tribal self-determination contract between the Miccosukee Corporation and the United States and pursuant to law enforcement commissions granted by the Bureau of Indian Affairs. The United States filed a motion to dismiss based on a lack of subject matter jurisdiction, arguing that it had not waived its sovereign immunity under the Federal Tort Claims Act (FTCA). Specifically, the U.S. asserted that the FTCA preclude the assault and battery claim and that because the negligence and intentional infliction of emotional distress claims arose out of the alleged assault and battery, such claims were precluded as well. As to the assault and battery claim, the U.S. argued that it did not waive its sovereign immunity under the FTCA because the four Miccosukee police officers fall within the FTCA exclusion of federal employees who are not “investigative or law enforcement officers of the United States Government,” which are defined under the FTCA at 28 U.S.C. § 2680(h) as including any “officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.” Based on the declaration of a special agent of the BIA, the court found that the tribe had not entered into a deputation agreement with the BIA and none of the police officers involved operated under a Special Law Enforcement Commission with the BIA; therefore, the court dismissed the plaintiff’s assault and battery claim. The court also dismissed the claims for negligence and intentional infliction of emotional distress because the plaintiff did not make a showing that such claims were independent of the alleged intentional tort of assault and battery.

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Rather, according to the plaintiff’s own complaint, all of the claims were part of the chain of events surrounding the alleged assault and battery and thus “arise out of the” alleged intentional tort for assault and battery, placing them outside of the FTCA’s sovereign immunity waiver language.

Several of the cases from the U.S. District Court for the Southern District of Florida involved the ongoing litigation related to the Miccosukee Tribe’s water management dispute with the federal government and the state of Florida. In Miccosukee Tribe of Indians of Florida v. United States, 697 F. Supp. 2d 1324 (S.D. Fla. 2010), the tribe brought an Endangered Species Act (ESA) action against the federal government. The tribe asserted that biological opinions issued by the U.S. Fish & Wildlife Service (FWS), which found that the Army Corps of Engineers plan to restrict the flow of water in an Everglades marsh benefited the endangered Cape Sable Seaside Sparrow, failed to consider the effect on two other endangered species, the Everglades Snail Kite and the Wood Stork. On cross-motions for summary judgment, the district court entered summary judgment in favor of the government, and the appeals court affirmed in part and reversed and remanded in part. In the instant case, the tribe moved to enforce the appellate court mandate, alleging that an amended incidental take statement (ITS) was invalid. (If any agency’s ITS uses habitat markers as a surrogate trigger to numbers, the agency must establish that numerical values could be practically obtained and the opposite conclusions as to the Everglades Snail Kite and Wood Stork, and accordingly upheld the amended ITS’s use of surrogate habitat markers for these two species, with only slight modification.

In United States v. South Florida Water Management District, No. 88-1886, 2010 WL 1292275 (S.D. Fla. Mar. 31, 2010), the court reviewed alleged violations of the consent decree entered in 1992 by the U.S. and the State of Florida to address restoration of the Everglades by limiting phosphorus concentration levels. The court noted that the parties to the consent decree, along with environmental groups, supported the state of Florida’s purchase of the U.S. Sugar Corporation’s lands to assist in the restoration efforts. However, it also found that the size of the land purchase is diminishing because of the state’s budget constraints while the restoration projects designed to remedy past consent decree violators are at a standstill. As such, the court adopted the special master’s report and recommendation from 2006, finally putting the court’s weight behind the special master’s remedial scheme some 18 years after the consent decree was first entered, and instructing the special master to update the scheme to the extent outdated. The court also found that the recent phosphorus excess in the Loxahatchee National Wildlife Refuge violated the consent decree and referred the matter to the special master for evidentiary and remedial hearings. Finally, the court required the state to complete the construction of a deep-storage reservoir in the Everglades Agricultural Area as mandated by the Water Resources Development Act of 2000 (even though it was not part of the special master’s report), because the state previously made a commitment to the special master to do so and because the tribe’s lands will bear the brunt of any continued failure to meet such commitment.

In a related case, Miccosukee Tribe of Indians of Florida v. United States, 706 F. Supp. 2d 1296 (S.D. Fla. 2010), the tribe and environmental groups challenged the state’s water quality standards in the Everglades Protection Area based on excessive phosphorus levels. The district court had previously granted the plaintiffs’ motion for summary judgment and remanded the case to the Environmental Protection Agency (EPA), based on the court’s finding that it

Several of the cases from the U.S. District Court for the Southern District of Florida involved the ongoing litigation related to the ongoing water management dispute that the Miccosukee Tribe of Indians of Florida has with both the federal government and the state of Florida, with several cases dealing with issues involving the Everglades.
was unacceptable under the Clean Water Act for the EPA and the state to suspend enforcement and compliance with state water quality standards for an undetermined period of time. The plaintiffs then moved to compel the state and federal government to comply with the summary judgment order. The district court held that the EPA’s determination that the state was in compliance, even though the state had in effect postponed the implementation of required water standards, violated the court’s summary judgment order and the Clean Water Act. The court also held that the state’s National Pollution Discharge Elimination System (NPDES) permits had to be modified and reissued, and new permits issued, by the EPA until the state comes into full compliance with the Clean Water Act.

And in Friends of the Everglades v. South Florida Water Management District, 605 F.3d 962 (11th Cir. 2010), the U.S. Court of Appeals for the Eleventh Circuit declined a petition for rehearing en banc. A summary of the court’s earlier opinion, Friends of the Everglades v. South Florida Water Management Dist., 570 F.3d 1210 (11th Cir. 2009), can be found in the Summer 2009 edition of Federal Indian Law.

In a case not involving a water management issue, the Eleventh Circuit in Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Co., 607 F.3d 1268 (11th Cir. 2010), ruled against the tribe in a case involving a contract dispute that raised several jurisdictional issues. Kraus-Anderson Construction Company sued the tribe in the Miccosukee Tribal Court for breach of a construction contract, and the tribe counterclaimed. The tribal court denied Kraus-Anderson’s claims and awarded the tribe $1.65 million on its counterclaim. Kraus-Anderson petitioned the tribe’s business council for leave to appeal to the tribe’s general council, which serves as the tribe’s court of appeals, but the business council denied the leave request. Kraus-Anderson refused to pay the judgment, and the tribe brought an enforcement action in federal district court. As an affirmative defense, Kraus-Anderson alleged that the tribe’s business council had denied it due process of law in denying its appeal request, rendering the judgment void. On cross-motions for summary judgment, the district court found the tribal court judgment unenforceable and granted Kraus-Anderson summary judgment. The district court concluded that it had subject matter jurisdiction since the case sought the enforcement of a tribal court judgment against a non-Indian party, and therefore presented a federal question under 28 U.S.C. § 1331. The court then held that comity, rather full faith and credit, was the appropriate framework to analyze the tribal court judgment, but that comity should not be extended to the judgment because the business council was an interested party in the litigation and therefore its denial of Kraus-Anderson’s appeal request constituted a denial of due process.

The tribe appealed to the Eleventh Circuit, which reversed and remanded the case back to the district court with instructions to dismiss the tribe’s case for lack of subject matter jurisdiction. The Eleventh Circuit court stated that under 28 U.S.C. § 1331, district courts have original jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States” but that such jurisdiction does not exist merely because an Indian tribe is a party to the litigation or a party to a disputed contract. The court held that the tribe had failed to explain the specific type of federal common law that enables it to maintain this action. The court went further to examine another potential basis for federal question jurisdiction, namely that the issue of whether a tribal court had adjudicative authority over nonmembers presents a federal question based on federal common law. The court found that a dispute over tribal court jurisdiction is the equivalent of a dispute over tribal sovereignty and as such would be a matter of federal law to which § 1331 applies. However, in this instance, the appeals court found there to be no dispute over the tribal court’s jurisdiction—both parties agreed that the tribal court possessed jurisdiction based on their contract terms—and the tribe was instead asking that the federal court domesticate a tribal court judgment, which is not considered a claim under either federal statutory or common law. Therefore, the appeals court found that the district court lacked federal question jurisdiction. The appeals court also summarily dismissed potential arguments for finding federal diversity jurisdiction under 28 U.S.C. § 1332 because tribes have been found not to be citizens of any state, and for finding federal jurisdiction under the full faith and credit statute at 28 U.S.C. § 1738 because precedent established that § 1738 alone does not confer jurisdiction on a district court to domesticate a judgment rendered by another jurisdiction’s courts.
This update discusses cases from the U.S. Courts of Appeal for the Eighth and Tenth Circuits and the U.S. District Court for South Dakota.

In *Iowa Tribe of Kansas and Nebraska v. Salazar*, 607 F.3d 1225 (10th Cir. 2010), the Tenth Circuit determined that the Indian lands exception to the Quiet Title Act (QTA), 28 U.S.C. § 2409a, foreclosed the appellants' challenge to the United States' title to real property held in trust on behalf of the Wyandotte Tribe of Oklahoma. The case has a complex factual history, dating back to the 1990s. At the time the appellants (who include the Governor of Kansas) originally filed their action, the United States had not accepted the parcel of land at issue into trust. While the case was pending, however, the United States accepted the land into trust. Therefore, the United States ultimately claimed that the QTA barred the appellants' claim. The court found that the land is in trust for purposes of the QTA, and that the United States had not waived sovereign immunity to suit. Rejecting the appellants' argument, the court determined that the time-of-filing rule did not apply to allow the suit. While recognizing a circuit split as to this issue, the court found that it must narrowly construe waivers of sovereign immunity and that sovereign immunity "is an ongoing inquiry rather than a determination to be made based on the existence of a waiver at the time of filing."

In *Yellowbear v. Attorney General of Wyoming*, No. 09-8069, 2010 WL 2053516 (10th Cir. May 25, 2010), the court affirmed the district court's order denying petitioner Yellowbear's petition for federal habeas under 28 U.S.C. § 2254, arguing that the crime at issue occurred on a federal Indian reservation. The petitioner was convicted in state court for murder, but argued that the state court did not have jurisdiction because the crime occurred on the Wind River Indian Reservation. The Wyoming Supreme Court found that the Wind River Reservation had been diminished and that the site of the crime was not within the reservation. Rejecting the petitioner's argument for a more deferential standard of review than is set forth in § 2254(d)(1) because the issue before the court involved an issue of federal law, the Eleventh Circuit found that the Wyoming Supreme Court properly ruled on the jurisdictional issue.

In *Fort Peck Housing Authority v. United States Dep't of Housing and Urban Dev.*, 367 Fed. Appx. 884 (10th Cir. 2010), the court determined that the Department of Housing and Urban Development (HUD) correctly promulgated regulations implementing the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Through NAHASDA, HUD provides housing assistance to Indian families. The Fort Peck Housing Authority brought an action against HUD alleging that the regulation at 25 C.F.R. § 1000.318, which impacts the way that HUD distributes funds under NAHASDA, violated the Administrative Procedures Act. The court found that HUD's regulation conformed with NAHASDA.

In *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), the Eighth Circuit upheld the U.S. Army Corps of Engineers' transfer of land that had been within the boundaries of the Yankton Sioux Tribe to the state of South Dakota. The Army Corps had acquired the land at issue for a project to construct dams along the Missouri River. Thereafter, pursuant to the Water Resources Development Act of 1999, Congress directed the Corps to transfer lands "located outside of the external boundaries of a reservation of any Indian tribe" that the corps had acquired for a particular project to the state of South Dakota. The tribe argued that various parcels of land transferred to the state are not outside of the external boundaries of its reservation and, thus, should not have been transferred to the state. The court found that the transfer was proper because the parcels at issue were not within the reservation when the Army Corps acquired them, and that the parcels were not within the reservation when the corps transferred the parcels to the state.

In *Gillette v. North Dakota Disciplinary Bd. Counsel*, 610 F.3d 1045 (8th Cir. 2010), the court applied Younger abstention in an action for declaratory and injunctive relief seeking to prevent the disciplinary board of the Supreme Court of North Dakota from disciplining a North Dakota-barred attorney for alleged misconduct in the Three Affiliated Tribes' tribal court. The court disregarded the appellant's claim that the Three Affiliated Tribes bar board had exclusive authority to regulate the appellant's conduct because the court found that the conduct to be regulated was appellant's right to practice law in the state of North Dakota.

In another Eighth Circuit case, *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa (Sac and Fox Tribe)*, 609 F.3d 927 (8th Cir. 2010), the court determined that the tribal court of the Sac and Fox Tribe could exercise jurisdiction over a claim against a non-Indian for, among other things, trespass. But it remanded the appellee's conversion claim to the district court for
a determination of whether the claim had a sufficient nexus to a consensual relationship in order to allow the tribal court to exercise jurisdiction over it.

In Cottier v. City of Martin, 604 F.3d 553 (8th Cir. 2010), the Eighth Circuit, sitting en banc, determined that the City of Martin did not violate § 2 of the Voting Rights Act of 1965 by impairing Native American Indians from participating in the political process. In Cottier, members of the Oglala Sioux Tribe, among others, brought an action against the city, alleging that the city’s Ordinance 122 (establishing the boundaries of voting wards within the city) diluted the votes of Indians in each ward, thereby violating § 2. The district court rejected the members’ claims, finding that the members did not satisfy one of the three preconditions for vote dilution. The members appealed. On appeal, a divided panel of the Eighth Circuit reversed, finding that the district court erred in finding that the precondition was not satisfied and remanded the case to the district court with instructions to make findings of fact. On remand, the district court determined that all three preconditions for a vote dilution claim were satisfied and adopted one of the members’ proposed remedies. A divided panel of the Eighth Circuit affirmed, and the court granted rehearing en banc. Finding that it was not constrained as a matter of law to accept the panel decisions, the en banc court found that the members had not established a voter dilution claim because they had not met their burden of demonstrating the usual defeat of the Indian-preferred candidate. Four judges dissented, contending that the court should not reconsider the panel’s prior determination and that the case should be remanded for reconsideration of the appropriate remedy.

In Yankton Sioux Tribe v. Podhradsky, 606 F.3d 994 (8th Cir. 2010), the court affirmed the district court’s determination that some 37,600 acres of trust land remained part of the Yankton Sioux Tribe’s reservation and that land continuously owned in fee simple by tribal members were part of the reservation, as long as the allotments never passed out of Indian ownership. The state appealed to the Eighth Circuit, asking the court to revisit its prior determination that the Yankton Sioux Reservation was not disestablished and challenging the district court’s findings regarding the scope of the tribe’s reservation. The Eighth Circuit declined to review its previous holdings in the case, stating that there was no basis for doing so. The court also determined that allotments still held in trust retain reservation status, and (rejecting the state’s argument to the contrary) it found that land taken into trust pursuant to the IRA retained its reservation status. As to miscellaneous trust lands, the court found that those lands likewise retained reservation status because they constituted “dependent Indian communities.” Finally, the court found that two issues were not ripe for review: whether the former allotments have been continuously held in fee by Indian owners; and whether the tribe’s reservation boundaries were frozen in 1934.

The U.S. District Court for South Dakota issued several opinions on May 18, 2010. In Native American Council of Tribes v. Weber, No. 09-4182, 2010 WL 1999452 (D.S.D. May 18, 2010), the Native American Council of Tribes (NACT) brought an action against the defendants, including

Pursuant to the Water Resources Development Act of 1999, Congress directed the U.S. Army Corps of Engineers to transfer lands “located outside of the external boundaries of a reservation of any Indian tribe” that the corps had acquired for a particular project to the state of South Dakota.

not reconsider the panel’s prior determination and that the case should be remanded for reconsideration of the appropriate remedy.

In Yankton Sioux Tribe v. Podhradsky, 606 F.3d994 (8th Cir. 2010), the court affirmed the district court’s determination that some 37,600 acres of trust land remained part of the Yankton Sioux Tribe’s reservation and that land continuously owned in fee simple by individual Indians also qualified as the tribe’s reservation. The case involved the tribe’s action against the state of South Dakota and others concerning the boundaries of the Yankton Sioux Reservation. In a prior appeal, the Eighth Circuit had determined that the tribe’s 1894 cession of certain land to the United States diminished the reservation but remanded the case to the district court to determine the scope of the diminishment. The district court held that all outstanding allotments that maintained their trust status and all lands taken into trust pursuant to the Indian Reorganization Act (IRA) were reservation land. The court also determined that former allotments presently owned in fee simple by tribal members were part of the reservation, as long as the allotments never passed out of Indian ownership. The state appealed to the Eighth Circuit, asking the court to revisit its prior determination that the Yankton Sioux Reservation was not disestablished and challenging the district court’s findings regarding the scope of the tribe’s reservation. The Eighth Circuit declined to review its previous holdings in the case, stating that there was no basis for doing so. The court also determined that allotments still held in trust retain reservation status, and (rejecting the state’s argument to the contrary) it found that land taken into trust pursuant to the IRA retained its reservation status. As to miscellaneous trust lands, the court found that those lands likewise retained reservation status because they constituted “dependent Indian communities.” Finally, the court found that two issues were not ripe for review: whether the former allotments have been continuously held in fee by Indian owners; and whether the tribe’s reservation boundaries were frozen in 1934.

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had not suffered an “injury in fact” and, thus, lacked standing under Article III of the U.S. constitution.

In Chipps v. Oglala Sioux Tribal Court, No. 10-5028, 2010 WL 199458 (D.S.D. May 18, 2010), the court found that the plaintiff failed to state a cause of action against the Oglala Sioux Tribe under the Indian Civil Rights Act for violation of the right to a speedy trial. The petitioner filed an application for writ of habeas corpus, alleging a violation of his rights under the Indian Civil Rights Act (ICRA) for violating his right to a speedy trial under 2 U.S.C. § 1302(6). The court declined Chipps’ request for relief, finding that the ICRA does not impose the same restrictions on tribal governments as the Bill of Rights and the Fourteenth Amendment. The court found that ICRA provided only “a limited mechanism for federal judicial review of tribal actions,” and that ICRA’s habeas corpus provision was not applicable because Chipps had not exhausted his tribal court remedies, even though the relief was slower than the petitioner desired.

The dispute in Alltel Communications, LLC v. Oglala Sioux Tribe, No. 10-5011, 2010 WL 1999315 (D.S.D. May 18, 2010) arose out of a breach of a service agreement between the Defendant Oglala Sioux Tribe and WWC License LLC (WWC LLC), a wireless carrier, that was later acquired by Alltel Communications. The tribe filed an action in tribal court, seeking injunctive relief to prohibit the sale of some communications equipment. While the tribal court was considering the issues presented to it, the plaintiff filed an action in federal court seeking to enjoin the defendant from further proceeding in tribal court and compelling arbitration. The tribe moved to dismiss the federal court action based upon tribal sovereign immunity, inter alia. The court denied the tribe’s motion to dismiss, finding that the service agreement contained a limited waiver of sovereign immunity and that the waiver applied to Alltel. The court rejected the tribe’s arguments that the waiver only applied to WWC LLC because the court determined that the limited waiver was tied to the arbitration agreement and that there are some instances in which a nonsignatory party may enforce an arbitration agreement. The court found that nonsignatory Alltel qualified as a nonsignatory to seek enforcement of the right to arbitration. The court reasoned that because Alltel so qualified, it would be unfair to allow the tribe to rely on the service agreement but to disavow the availability of the arbitration clause in the same agreement. The court therefore held that “[b]ecause Alltel is entitled in federal court to assert the application of the arbitration paragraph of the Service Agreement, Alltel is likewise entitled to enforce the limited waiver of sovereign immunity which the Tribe granted under the Service Agreement.” The court denied Alltel’s request for injunctive relief in the interest of comity, recognizing that the tribal court found that it has “ancillary jurisdiction over tribal interests that are subject exclusively to Tribal jurisdiction.” Finally, the court granted Alltel’s request to compel arbitration, finding that the disputed issues must be resolved in arbitration under the Federal Arbitration Act.

In Crow Creek Tribal Farms, Inc. v. United States Internal Revenue Service, 684 F. Supp. 2d 1152 (D.S.D. 2010), court denied the Crow Creek Tribal Farms Inc.’s and the Crow Creek Sioux Tribe’s request for injunctive relief to halt the Internal Revenue Service (IRS) from auctioning tribal land owned in fee simple. The auction arose out of arrearages in employment taxes. The tribe sought an order directing the IRS to cease and desist any actions directed towards seizing and selling the land. The court found that the tribe had not satisfied the irreplaceable harm element because the tribe had a 180-day right of redemption upon after the sale of the property. As to the likelihood of success on the merits, the court was undecided as to whether the tribe would prevail on its argument that the Indian Nonintercourse Act prevented the sale or whether the IRS was correct that the Anti-Injunction Act prohibited the court from entertaining the action because it was an action to restrain the collection of taxes under 26 U.S.C. § 7421(a). Thus, the court declined to enter injunctive relief.

In Crow Creek Sioux Tribe v. Donovan, No. 09-3021, 2010 WL 1005170 (D.S.D. Mar. 16, 2010), the court dismissed the Crow Creek Housing Authority’s action against officials of the U.S. Department of Housing and Urban Development (HUD) for failure to adhere to its tribal consultation policy. The action arose out of a HUD official’s
In Runyan v. River Rock Entertainment Authority, No. A126108, 2010 WL 2097059 (Cal. App. 1st Dist. May 26, 2010), the California court of appeals affirmed a superior court case dismissing a former employee’s attempt to compel arbitration based on the defendant tribal entity’s sovereign immunity. The plaintiff previously filed suit against the tribe seeking general and punitive damages based on a variety of claims including breach of contract, wrongful termination, but the court dismissed the case and held that he could not rely on an employment agreement’s arbitration clause to maintain a suit for breach of contract and tort damages. The former employee then filed a petition seeking to compel arbitration of the same contract and tort claims. Based upon the undisputed facts that the plaintiff entered into a voluntary settlement agreement with the tribe under which he agreed to terminate the employment agreement and release any current or future claims he might have against the tribe and that he did not attempt to rescind the settlement agreement, the court concluded that the employment agreement containing the arbitration provisions Runyan sought to enforce was terminated. The court thus held that it lacked jurisdiction over the tribe.

In Elem Indian Colony of Pomo Indians v. Pacific Dev. Partners X LLC, No. 09-01044 (N.D. Cal. May 19, 2010), the U.S. District Court for the Northern District of California upheld an arbitration award in favor of the tribe. The tribe’s former chairman and the claimant, owner of Pacific Development, entered into a memorandum of agreement (MOA) to work exclusively towards the development of a casino contract. After the MOA was entered, the chairman was recalled, and the tribe’s executive committee voted to terminate the MOA. The tribe then sent a letter to the National Indian Gaming Commission (NIGC) asking for review of the MOA. Approximately nine months later the NIGC determined that the MOA was a management contract that was void without the NIGC Chairman’s approval—which was never sought or granted. Pacific Development then filed suit in the district court seeking to recover losses, and the tribe sought declaratory and injunctive relief on grounds that the MOA was void under IGRA. The case was submitted to arbitration, where the tribe prevailed and was granted attorney’s fees.

In upholding the arbitration award, the court the court rejected Pacific Development’s arguments that the arbitrator exceeded his authority based on a manifest disregard for the law. The court found that although the arbitrator spent a considerable amount of time discussing tribal approvals of the MOA, he also wrote that the MOA “should have received NIGC approval before it became operative.” Therefore, the court stated, “[t]he arbitrator’s ruling must stand because his determination regarding regulatory approval was not in manifest disregard for the law.” In reviewing the record, the court determined that the arbitrator’s conclusion that the MOA was a management contract was reasonable because the contract states that Pacific Development “shall exclusively manage the day-to-day operations of the casino(s)” on the tribe’s land; binds the tribe to entering into a management contract with Pacific Development to manage all such casinos, and forbids the tribe from operating a gaming operation on its own; and contains provisions relating to accounting and reporting, length of the management relationship, and compensation, and that the tribe must enter into an additional agreement to solidify management terms. The court determined that the MOA was void because the Indian Gaming Regulatory Act requires that management contracts be approved by NIGC and the tribe and Pacific Development did not receive such approval.

In California Valley Miwok Tribe v. California Gambling Control Comm’n, No. D054912, 2010 WL 1511744 (Cal. App. 4th Dist. Apr. 16, 2010), reversed a judgment of the superior court dismissing the tribe’s challenge to the California Gaming Commission’s suspension of its portion of gaming revenue sharing funds. The tribe is a federal recognized, nongaming tribe that is entitled to receive $1.1 million in revenue sharing under California’s gaming compacts. The commission withheld the tribe’s quarterly disbursements based on a decision by the Bureau of Indian Affairs (BLA) to suspend the tribe’s Indian Self Determination Education and Assistance Act funding on grounds that there was no recognized tribal government to take action on behalf of the tribe or sustain a government to government relationship. The BLA eventually resumed funding payments, recognizing one individual within the tribe as a “person of authority,” but refused to recognize a tribal government. Federal litigation pursued on that issue. The superior court dismissed the tribe’s action, finding that it lacked capacity or standing to sue because of the tribal leadership dispute. In reversing, the appeals court stated that “there is no basis to question the Miwok Tribe’s standing to bring this lawsuit, even if it is involved in a leadership dispute ... it is undisputed that the law lawsuit was brought by the Miwok Tribe itself as the sole plaintiffs [and] ... is undoubtedly a real party in interest ... “ The court also concluded that the tribe had capacity to sue, noting that no applicable authority was cited suggesting that
a tribe involved in internal disputes lacks capacity to sue, and that the tribe was being granted access to the federal courts in the on-going litigation with the BIA. The court went on to hold that even tough the tribe was a third-party beneficiary of the gaming compacts, it could seek an action for declaratory and injunctive relief to recover its revenue sharing payments because such an action is not one to enforce the terms of the compacts. The court explained that the causes of action in the case were not dependant on enforcement of compact contractual terms, but rather the commissioner’s duty, as trustee of the revenue sharing fund, to make payment to noncompact tribes under California law.

In Rincon Band of Luiseno Mission Indians v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010), the U.S. Circuit Court of Appeals for the Ninth Circuit affirmed the district court’s ruling that the state of California negotiated in bad faith over amendments to the Rincon Band’s tribal-state gaming compact. The decision was based on the state’s repeated insistence that Rincon pay a portion of its net revenue for additional machines into the state’s general treasury fund. In reaching its decision, the Ninth Circuit agreed with the district court that the state’s demand constituted an impermissible tax in violation of section 2710(d) (4) of IGRA. In 2003, Rincon notified the state that it wanted to renegotiate certain provisions contained in its 1999 compact, including the provision to add additional class III gaming machines beyond the 1600 devices it already operated. In 2005, the state offered the tribe an additional 900 machines and exclusivity on the condition that it agree to pay into the state’s general fund 15% of its net win on the new devices and an additional fee equal to 15% of the tribe’s 2004 net revenue for existing machines. The tribe rejected this offer, countering that any fees paid to the state were limited to paying for costs related to gaming and not general state fiscal concerns, and that, to the extent it was offered exclusivity, it was a meaningless concession since the California law already provided for tribal gaming exclusivity. Thus, the exclusivity provision offered could not provide the tribe with any economic advantage that would warrant additional payments. Rincon filed suit in 2004 to expedite negotiations, but the state held firm in its demand that a portion of the tribal gaming revenues be paid into the general fund. In one of the state’s last offers, it offered to lower the payment for additional machines from 15% down to 10%, and its own expert calculated that if Rincon accepted the offer the state would gain $38 million for its general fund and Rincon would retain $61 million in net revenue. If, however, Rincon maintained its operations under the 1999 compact, it was expected to retain $59 million in net revenue and make no additional payments to the state. Under this analysis, the tribe stood to gain only $2 million for an additional 900 machines. In 2006, having reached an impasse, both parties filed cross-motions for summary judgment.

The Ninth Circuit explained that under California law, the general fund was used for monies received and not required by law to be credited to any other fund, and that Black’s Law Dictionary defined a tax as “‘a charge, usually monetary, imposed, by the government on persons, entities, transactions, or property to yield public revenue.’” (emphasis in opinion). Based on these principles, the court concluded that “[n]o amount of semantic sophistry can undermine the obvious: a nonnegotiable, mandatory payment of 10% net profits into the State treasury for unrestricted use yields public revenue, and is a ‘tax.’” The court also pointed out that during negotiations the state never showed a willingness to take the general fund payments off the table. In light of IGRA’s purpose in ensuring that tribes are the primary beneficiaries of gaming, the court found it particularly persuasive that the revenue sharing demand would result in a net gain to the state of $38 million and only $2 million to the tribe. The court also found that the state offered no meaningful concessions to rebut the “strong suggestion” of bad faith. The court rejected the state’s contentions, concluding instead that any financial gain to the tribe was negligible and exclusivity existed independently (under the California Constitution) of the tribe’s compact negotiations and could not be used as a negotiating concession to support to the state’s position in renegotiating tribal-state compacts.

And in Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California, 618 F.3d 1066 (9th Cir. 2010), a case involving the ongoing litigation between tribes and the state of California over the proper number of slot machine licenses in the statewide pool established under the 1999 tribal-state compacts, the Ninth Circuit determined that the size of the license pool was 40,201 licenses—some 8,000 more than the state was arguing existed, but fewer than the 42,700 licenses the district court concluded were in the pool. The appeals court also upheld the district court’s order requiring a license draw for the newly available licenses.

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In Menominee Tribal Enterprises v. Solis, 601 F.3d 669 (7th Cir. 2010), an entity of the Menominee Indian Tribe of Wisconsin sought review of an order of the Occupational Safety and Health Review Commission that upheld the Department of Labor’s citations for violations of the Occupational Safety and Health Act in connection with the tribe’s sawmill on its reservation, rejecting the tribe’s contention that it was exempt from OSHA. The tribe argued that OSHA should not apply to the tribe’s sawmill operation based on a treaty between the tribe and the United States. The court rejected this argument and instead held that: 1) OSHA does not contain an exception for Indian tribes; 2) statutes of general applicability not mentioning Indians or tribes are usually held to apply to them; 3) the sawmill was a commercial enterprise, not a part of the tribe’s governance structure; and 4) the tribe admittedly sought to comply with OSHA. The tribe’s petition for review was denied.

In City of Duluth v. Fond du Lac Band of Lake Superior Chippewa Indians, 708 F. Supp. 2d 890 (D. Minn. 2010), the city and the tribe entered into an agreement in 1986 under which the tribe would acquire land in the city, the land would be taken into trust, the tribe would operate a gaming facility and the city and the tribe would split profits. After the Indian Gaming Regulatory Act (IGRA) was enacted in 1988, the parties litigated the issue whether the agreement complied with IGRA’s requirement that only a tribe may hold a proprietary interest in an Indian gaming enterprise. The issue was settled in 1994 by a consent decree (approved by the National Indian Gaming Commission) that provided for sublease payments to the city equal to 19% of gross revenues. In 2009, the tribe discontinued the payments, arguing that recent NIGC rulings demonstrated that the sublease payments gave the city an illegal proprietary interest in the enterprise. The city sued to enforce the 1994 agreement. The district court held that recent NIGC interpretations of IGRA did not constitute a change in the law sufficient to justify reopening the consent decree under Federal Rule of Civil Procedure 60, and the court would not address whether the sublease payments were illegal under IGRA.

In Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott, 779 N.W.2d 320 (Minn. App. 2010), the plaintiff, a noncorporate entity of the Mdewakanton Sioux Community (Tribe), obtained tribal court judgment in the amount of $516,871.46 against Prescott, a former tribal official. Because Prescott lives on tribal land and his per capita payments from the tribe are exempt from liens, the tribe docketed the tribal judgment in state court. The state court refused to recognize the judgment. The state court of appeals reversed, holding that although not applicable to tribal court judgments as a matter of law, Minnesota’s Uniform Foreign Country Money Judgments Recognition Act would be used for guidance, independent review of the tribal court judgment by the state district court was inappropriate, and the state district court improperly concluded that previous tribal court judgments were in conflict.

In re Civil Commitment of Johnson, 782 N.W.2d (Minn. App. 2010) involved the authority of the state of Minnesota to civilly commit to confinement enrolled members of the Minnesota Chippewa Tribe under Minnesota’s sexually dangerous persons (SPD) law. The tribal members contended that the proceedings infringed upon the tribe’s sovereignty and was not authorized by Public Law 280. The Minnesota court of appeals agreed, holding that SDP commitment is a form of civil regulation, not civil litigation between private parties, and was therefore not authorized by Public Law 280. The court nonetheless upheld the proceedings on the grounds that (1) the Minnesota SPD law did not infringe tribal sovereignty because the Minnesota Chippewa Tribe had its own SPD law, and (2) exceptional circumstances justified the application of the law to the petitioners based on the state’s “compelling interest in protecting the health and safety of the public, including persons both on and off tribal land, from dangerous and repeat sex offenders.”
Alaska has been fairly quiet since the last update. There are two legislative developments and two cases to discuss. On the legislative front, Sens. Begich and Murkowski announced that they had introduced a bill that would eliminate the law requiring Alaskans to purchase “duck stamps for subsistence purposes (S. 3403, introduced May 24, 2010). Earlier this year, the U.S. Fish and Wildlife Service announced that it would begin strictly enforcing a requirement that all Alaskan subsistence hunters purchase a duck stamp and carry the stamp on them at all times when hunting for ducks or gathering eggs. This purportedly presented a substantial burden on subsistence hunters in rural Alaska because the stamps are not readily available in most villages and would present a financial hardship for many subsistence hunters at a time when seasonal unemployment is about 80%. Currently, there are exceptions in the law for those under the age of 16, federal and state institutions, taking birds for propagation, and for landowners whose property is being damaged by the birds. The bill would add subsistence hunters to that list. The bill has been referred to the Committee on Environment and Public Works.

The second legislative development is a bill to convey certain lands to the Bering Straits Native Corporation in partial fulfillment of their land entitlements under the Alaska Native Claims Settlement Act. Originally introduced on March 4, 2009, the salmon Lake Land Selection Resolution Act (S. 522) ratifies a pre-existing agreement between the corporation, the state of Alaska and the United States to permit the corporation to select lands adjacent to Salmon Lake on the Seward Peninsula of Alaska. It was referred to the Committee on Energy and Natural Resources in March 2009 and later reported by Sen. Bingaman with an amendment in the nature of a substitute in March 2010. It has now been placed on the Senate legislative calendar under General Orders (No. 280).

The Alaska Court of Appeals confronted the Sixth Amendment right to an impartial jury trial and Fourteenth Amendment right to equal protection in Lestenkof v. State, 229 P.3d 182 (Alaska 2010). Lestenkof was indicted for second-degree assault for “recklessly causing injury” to his girlfriend. Since the crime allegedly occurred on the small island community of Saint Paul in the Bering Sea, a superior court judge traveled to the community to begin jury selection. He discovered, however, that it would be very difficult to empanel a jury because most potential jurors were related to the defendant, had knowledge of the facts of the case, or admitted their inability to be impartial because of prior contact with the parties involved. The judge determined that it was impossible to empanel a jury in this small Native community and decided to change venue to Dillingham, Alaska, where Lestenkof was convicted.

On appeal, Lestenkof argued that the residents of Saint Paul “are a distinctive group for jury selection purposes”—meaning that he was entitled to a jury from his own Native community, not just any Native community. The appellate court rejected this notion, essentially holding that this was a question of fact: “Lestenkof has not established that any cognizable group was systematically excluded from the jury selection process conducted in Dillingham.” Lestenkof also argued on appeal that exclusion of Saint Paul Natives in particular violated his equal protection right because the change of venue effectively excluded the “racial group” of Saint Paul Natives. The court also rejected this claim, observing that the change of venue was due to practical problems rather than discriminatory intent and that there was no discriminatory impact because there was no evidence presented that Alaska Natives were underrepresented in the juror lists. The conviction was affirmed.

On Oct. 4, 2010, the U.S. Supreme Court denied certiorari in Hogan v. Kaltag Tribal Council. This case is noteworthy if only because it is an average case—with facts familiar to tribes across the country—that was fought all the way to the Supreme Court. The Kaltag case concerned a tribal court adoption in which all parties are Native and the child and birth mother are members of the Kaltag Tribe. The adoptive parents had chosen the tribal court, and the birth parents did not contest jurisdiction or the forum. The adoption was completed, at which time the adoptive parents submitted a request for a new birth certificate to the state of Alaska Bureau of Vital Statistics. The state refused on the grounds that by denying a new birth certificate, the state had denied full faith and credit to the tribe as required under ICWA. This argument was based on the premises that tribes have no jurisdiction over children who reside off-reservation, and that jurisdiction is not inherent but received by grants from Congress.

The tribe and adoptive parents sued on the grounds that by denying a new birth certificate, the state had denied full faith and credit to the tribe as required under ICWA. In 1991, the Native Village
of Venetie had won a similar case against the state, and thus there was clear precedent for the rule. The district court, being bound by its own circuit precedent, reached the same result and held that Kaltag's adoption order was entitled to full faith and credit from the state. In so doing, the district court rejected the state's argument that tribes could adjudicate cases transferred from state courts, but not initiate them on their own. The district court's decision was affirmed on appeal. In a one-page decision, the U.S. Court of Appeals for the Ninth Circuit reaffirmed that “[t]he district court’s decision that full faith and credit be given to the Kaltag court’s adoption is compelled by this circuit’s binding precedent.” The Ninth Circuit added that the lack of a reservation did not matter because a “Tribe’s authority over its reservation or Indian Country is incidental to its authority over its members.”

The state petitioned for certiorari on March 1, 2010. The reasons provided by the state for granting certiorari were: (1) the rule prevented states from exercising their parens patriae right of protecting children; and (2) that nonmembers residing off-reservation were not subject to tribal court jurisdiction. The Kaltag Tribal Council responded by echoing the decisions of the district court and Ninth Circuit that land status was not relevant, especially where a tribe seeks concurrent—not exclusive—jurisdiction, and that by the terms of ICWA itself, it is the membership of the child that triggers ICWA (not the membership of all parties involved). The Supreme Court denied certiorari on Oct. 4, 2010.

Suspension continued from page 18

In a case involving the Indian Child Welfare Act (ICWA), In re Emma v. Geneo, 782 N.W.2d 330 (Neb. Ct. App. May 11, 2010), the Nebraska court of appeals determined that there is not an enhanced burden of proof for adjudicating a minor child homeless, destitute, without proper support, or abandoned within the meaning of Neb. Rev. Stat. Sec. § 43-247(3)(a). The state of Nebraska filed a petition alleging that Emma was a child within the meaning of § 43-247(3)(a). The petition stated that the case involved an “Indian family,” but it did not reference ICWA. Thereafter, the Omaha Tribe of Nebraska intervened, alleging that Emma was an “Indian child” under ICWA. The Nebraska separate juvenile court determined, by clear and convincing evidence, that the allegations in the state's petition were true and that while efforts to prevent breakup of the Indian family were made, they were unsuccessful. Emma's father appealed to the Nebraska court of appeals, contending that the juvenile court erred by adjudicating Emma as a child within the meaning of § 42-247(3)(a) and that the state has a heightened burden in this case because it involved an Indian family.

The Nebraska appeals court affirmed in part and reversed in part, finding that the juvenile court properly determined that Emma was a minor child within the meaning of § 42-247(3)(a). The court also found that the juvenile court applied the proper standard, reasoning that at the adjudication stage (in order for the court to assume jurisdiction of minor children under § 42-247(3)(a)), the state must prove the allegations by preponderance of the evidence, and that standard likewise applies to Nebraska's ICWA statute because that statute does not contain a heightened or enhanced burden of proof. However, the court determined that the juvenile court erred by determining that the state made active efforts to provide remedial services and rehabilitative programs to prevent the breakup of an Indian family under Neb. Rev. Stat. § 43-1505(4).
On Aug. 7, 2010, Solicitor General Elena Kagan was sworn in as the 112th justice of the Supreme Court of the United States, replacing Justice John Paul Stevens. The confirmation of Justice Kagan represents the first time in history that three women will serve together on the court. This article provides an overview of her experience with federal Indian law and some thoughts on what her appointment may offer for Indian Country.

A Brief Biography

Elena Kagan was born in New York City in April 1960, the only daughter of Robert Kagan and Gloria Kittelman Kagan. Her mother was an elementary school teacher in Harlem who then moved to Hunter College Elementary, a publically funded school for intellectually and academically gifted students. Her father, a graduate of Yale Law School, was a lawyer who initially worked to secure federal protections for Native Americans and then focused on representing apartment tenants during co-op conversions. The Kagan family lived in Stuyvesant Town, a post World War II housing project on the East Side, before moving to Manhattan’s West Side. Kagan’s early years were no doubt shaped, in part, by the political passions of her parents, described by one relative as “people who had a very keen sense of social justice.”

Elena Kagan attended Hunter College High School, an intellectually rigorous all-girls private school on the Upper West Side of Manhattan. She displayed her judicial ambitions early and was pictured in the high school yearbook wearing robes and carrying a gavel during graduation. After graduation she attended Princeton University, where she worked on the student newspaper and graduated summa cum laude with a bachelor’s degree in history in 1981. A scholarship enabled her to study at Worcester College at Oxford University in England, where she received a Master of Philosophy in 1983. She then completed her Juris Doctor, magna cum laude, at Harvard Law School in 1986, where she was supervising editor of the Harvard Law Review. After law school, she clerked for Judge Abner Mikva, an outspoken liberal on the U.S. Court of Appeals for the D.C. Circuit. She then went on to clerk for Justice Thurgood Marshall—the civil rights legend—on the Supreme Court of the United States.

After two years of private practice as an associate attorney at Williams & Connolly in Washington, D.C., Kagan accepted a position in 1991 as an associate professor at the University of Chicago Law School, where she focused on constitutional law, particularly First Amendment free speech jurisprudence. In 1995, Kagan accepted a position as associate counsel in the Office of the White House Counsel, where she addressed a number of legal issues affecting President Clinton, including decisions to sign or veto legislation. In 1997, Kagan became the deputy assistant to the President for domestic policy and the deputy director of the Domestic Policy Council, which advises the President on domestic policy and helps create legislation to effect policy goals. As discussed below, during her time in the Clinton White House, Kagan was exposed to issues affecting Native Americans, including tribal gaming, tobacco regulation, Indian education, and crime in Indian country. In 1999, President Clinton nominated Kagan to become a judge on the U.S. Circuit Court of Appeals for the D.C. Circuit. However, the Senate Judiciary Committee, chaired by Sen. Orrin Hatch (R-Utah), never scheduled a hearing on her nomination.

In 1999, Kagan returned to academia as a visiting professor at Harvard Law School, becoming a full professor two years later. At Harvard, she taught courses in administrative law, civil procedure, constitutional law, and Presidential law and lawmaking. In 2003, she became the first female dean of Harvard Law School. That same year, the Oneida Nation of New York endowed the Oneida Nation Chair—a professorship of Indian law—helping to create one of the strongest Indian law programs in the Northeast. On Jan. 5, 2009, President-elect Barack Obama nominated Kagan to serve as solicitor general of the United States, the federal official responsible for litigation involving the United States before the Supreme Court and the U.S. Circuit Courts of Appeal. The Senate confirmed Kagan by a 61-31 vote; she became the first woman to hold the post of solicitor general.
Kagan’s Federal Indian Law Experience

An extensive review of Kagan’s academic and administrative record reveals that she has had limited exposure to, but no direct experience with, federal Indian law. Unlike her recent predecessors in the confirmation process—Chief Justice Roberts, Justice Alito, and Justice Sotomayor—Kagan has never served as a judge and therefore has no judicial record on Indian law cases. During her tenure as a clerk for Justice Marshall, the Court considered two important Indian law cases involving religious freedom: Employment Division v. Smith and Lyng v. Northwest Indian Cemetery Protective Ass’n.7 Tribal interests lost in both cases. Justice Marshall did not write an opinion in either case, but he did sign onto Justice Brennan’s dissent in both cases. A thorough search through the Marshall Papers at the Library of Congress did not turn up any memos, writings, or notes authored by Kagan in relation to these two cases.3

As solicitor general of the United States, Kagan no doubt participated in discussions regarding petitions for writ of certiorari involving questions of Indian law, including cases where the interests of the United States were adverse to tribal interests.4 No Indian law cases were argued on the merits during her tenure as solicitor general. The Court, however, did grant review in one case involving tribal interests to be argued this term: United States v. Tohono O’odham Nation.5 Although Tohono O’odham originated as a claim for money damages stemming from federal mismanagement of trust assets, the government sought certiorari on a narrower question of statutory interpretation: namely, whether federal law barred the tribe’s claim in the Court of Federal Claims where the tribe had filed a similar claim for equitable relief in federal district court. As the government’s brief notes, the determination of this question in the government’s favor could have an adverse impact on tribes’ ability to seek full relief in trust mismanagement cases, since it has arisen in “more than 30 pairs of Indian tribal trust cases currently pending in the [Court of Federal Claims] and district court.”6 It is difficult to impute the views of the United States in this litigation to Kagan, but she is certainly aware of the case and its implications given her summary description of the case in a May 2010 speech to the Court of Federal Claims.7

While dean of Harvard Law School, Kagan spoke at a number of gatherings related to Native issues. In 2004, when the editors of the revised version of Cohen’s Federal Indian Handbook gathered at Harvard, Kagan stated, “Federal Indian law is an important and rapidly expanding field, and I believe Harvard has an obligation to support research and teaching in this area.”8 In 2006, the Navajo Supreme Court held oral arguments at Harvard. In her opening remarks welcoming the tribal justices, Kagan stressed the importance of “understanding tribal legal systems because increasing numbers of us will find our practice intersecting with these systems” and praised the Navajo peacemaking court system as a model in “an age of global conflict.”9 She also spoke at the Native American Alumni Celebration in 2007 and the Harvard University Native American Program Event in 2008, but there is no record of her comments. In 2008, Kagan accepted an appointment to the advisory board of the American Indian Empowerment Fund, a nonprofit organization linked to the Oneida Nation that focuses on improving the lives of Native Americans. Kagan noted that the fund was dealing with difficult issues and stated “I hope I can contribute, in some small way, to making progress on them.”10

Although incomplete, the recent release of the Clinton Library documents reveals Kagan’s involvement within the Clinton Administration—first as associate counsel within the Office of the White House Counsel and then as deputy director for the Domestic Policy Council—in decisions relating to a number of regulatory matters, policy initiatives and legislative proposals affecting Indian country.

Office of White House Counsel (1994-1996)

The bulk of Kagan’s involvement with Indian law during her tenure as associate counsel came in the area of gaming.11 Most of these cases did not directly involve the Office of the White House Counsel, but Kagan appeared to stay abreast of developments in key Indian gaming cases, particularly Seminole Nation v. Florida.

Massachusetts and the Wampanoag Tribe of Gay Head (Aquinnah)

After the passage of the Indian Gaming Regulatory Act (IGRA), the Wampanoag Tribe entered into negotiations with the State of Massachusetts for the creation of a casino in the Boston area. A draft compact was reached which promised payments from the casino in return for exclusivity in the greater Boston area, excepting slot machines at racing tracks. However, the project encountered two difficulties at the federal level. First, the plan anticipated condemning land for the casino, a procedure the Bureau of Indian Affairs (BIA) opposed. Second, the BIA argued that approval of the revenue-sharing provision would violate its trust relationship with the tribes since it would allow de facto state taxation and suggested a quid pro quo in return for state approval. The BIA had approved a similar agreement between the Mashantucket Pequot Tribe and the State of Connecticut, which provided statewide exclusivity in return for revenue sharing. However, the BIA claimed that only statewide exclusivity was satisfactory, and in late 1995, the assistant secretary of the Interior for Indian affairs disapproved the compact.

These complicated considerations led to conflict between Rep. Barney Frank (D-Mass.) and the Aquinnah Wampanoag Tribe (who were anxious to secure approval for the compact) on the one hand and
the BIA on the other, with frequent tense letters dispatched between the offices. The compact ultimately failed when it did not pass the state legislature. Kagan became involved in early 1996, after the Department of the Interior had already disapproved the compact. While many of her notes and memoranda to White House Counsel Jack Quinn have been redacted, the materials that survive suggest she had extensive conversations with officials at the department over the issue. She also wrote in a very brief memo to Jack Quinn, “[T]he more I think about Interior’s position [disapproving the compact], the more legally vulnerable it seems to me.”

WISCONSIN AND THE MCCAIN INQUIRY

In 1995, the Department of Interior (DOI) denied an application by three Wisconsin Indian tribes to take land in trust for the development of a casino. A year later, The Wall Street Journal published an article that suggested other Minnesota and Wisconsin tribes had used political influence as Democratic donors to secure White House support to kill the project. Sen. John McCain (R-Ariz.) sent letters to President Clinton and his staff asking for additional information regarding these allegations. Secretary Bruce Babbit, Harold Ickes, and the White House Counsel all responded with letters denying the charges and offering strong evidence that other factors led the DOI to deny the application. Kagan helped draft the White House response to McCain’s inquiry strongly denying the accusations of improper influence, and facilitated communications between the White House Counsel’s Office and the DOI.

NEW MEXICO AND THE 1995 GAMING COMPACTS

In 1995, after 14 Indian tribes had entered gaming compacts with the State of New Mexico, the state Supreme Court issued two decisions that challenged the status of the tribal-state compacts. In State ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995), the court determined that the governor had exceeded his authority by approving the gaming compacts. In Citation Bingo v. Otten, 910 P.2d 281 (N.M. 1995), the court decided that casino gambling was not legal in New Mexico, a ruling that posed difficulties given the IGRA-based framework that allowed Indian casino gaming only if similar gaming was legal in the state. The U.S. Department of Justice reviewed the rulings and their impact on the tribal-state compacts. Kagan was involved in these discussions. She received updates on the situation from Herbert Becker, director of the Office of Tribal Justice. The controversy was ultimately resolved through state legislation.

FLORIDA AND THE SEMINOLE TRIBE

Perhaps the most important gaming case decided during Kagan’s tenure at the White House Counsel’s Office was Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), which invalidated much of the enforcement mechanism of IGRA. IGRA provides that when states failed to negotiate a Class III gaming compact with a tribe in good faith, the tribe could file suit against the state in federal court. Overturning precedent, the court held that Congress did not have the power to abrogate state sovereign immunity under the Indian Commerce Clause, and therefore states could not sue unless the state waived immunity. Kagan had little role in the case itself even though copies of all the briefs in the case are within Kagan’s folders (without any handwritten comments). However, Kagan appears to have been primarily responsible for coordinating the administration’s response to the ruling. Kagan wrote a lengthy memo to Harold Ickes and Jack Quinn detailing the ruling’s impact. Kagan also attended meetings to determine what measures should be taken to repair IGRA’s regulatory enforcement mechanism. Her handwritten notes stress the need for some type of remedy. She recorded the exploration of a number of potential options, focusing mostly on the potential use of Interior’s rulemaking power to circumvent state sovereign immunity.

Domestic Policy Council (1997-1999)

TRIBAL SOVEREIGNTY

The Clinton Administration placed considerable emphasis on respect for tribal sovereignty. President Clinton issued an Executive Memorandum in 1994 that directed all departments and agencies to work with tribes within a government-to-government framework. In 1997, the White House Chief of Staff requested reports on the memorandum’s implementation. Agencies were urged to adopt a policy on government-to-government relations and describe their efforts to support tribal self-government, coordinate with other executive departments, and improve working relations with tribes. Kagan played a role in helping produce the report on agencies’ development of the government-
Perhaps the most important gaming case decided during Kagan’s tenure at the White House Counsel’s Office was Seminole Tribe of Florida v. Florida, which invalidated much of the enforcement mechanism of the Indian Gaming Regulatory Act.

Crime in Indian Country

In 1997, the Clinton Administration explored potential solutions to a dramatic upswing in crime in Indian country. President Clinton directed the secretary of the Interior and the attorney general to draft proposed remedies to the crisis. An “Executive Committee for Indian Country Law Enforcement” was formed, chaired by representatives from the Department of Justice and the Bureau of Indian Affairs, and with a variety of tribal leaders, U.S. attorneys, and representatives of law enforcement agencies participating. After consulting with tribes about their law enforcement needs, the committee issued its final report in October 1997. The report found that law enforcement in Indian country was severely lacking, primarily due to scarce funding, and proposed a $585 million project to provide better resources to Indian tribes. The Office of Management and Budget resisted fully funding the initiative, providing only $205 million, most of which came from redirected grant sources. In fiscal year 2000, only $164 million was directed toward the Departments of Justice and Interior to fund the initiative. Kagan was closely involved in the determination of policy on this issue: her handwritten notes indicate she was present at the initial meetings, and she was copied on most of the emails and faxes. David W. Ogden, counselor to the attorney general, thanked Kagan for “all the help you have provided on this issue.” However, little regarding her own views was recorded, except a brief note expressing concern over the high cost of the Executive Committee’s report.

Economic Development in Indian Country

In 1998, President Clinton was the keynote speaker at the Native American Economic Development Conference. In his remarks, he announced plans for the federal government to work to improve technology infrastructure in Indian country, develop a strategic plan to coordinate economic development, and create
streamlined access to mortgage lending on the reservation. He also announced the disbursement of $70 million to assist in the creation of technology startups among seven tribes. The following year, the administration secured funding for the creation of a toll-free number at the BIA for tribes to access information on how the federal government could assist with development efforts. Kagan’s role in these policy initiatives is unclear. Although she received copies of the relevant memoranda, she does not seem to have been involved in crafting any of these policies.

What Kagan’s Confirmation Means for Indian Country

As a replacement for Justice Stevens, who served on the Court for nearly 35 years, Elena Kagan offers another fresh opportunity for Indian Country to reenergize its efforts to slow and eventually reverse the erosion of tribal sovereignty by the Court. As we at the Native American Rights Fund noted last year during the confirmation of Justice Sotomayor, there is very little possibility that Kagan’s vote on the Court, by itself, will change the outcome in future Indian law cases. Nonetheless, Indian Country needs a champion on the Court—a justice (or two) who will look beyond just the last 30 years of Indian law. As Dean David Getches noted in his 2001 article, Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color Blind Justice, and Mainstream Values, Indian Country needs an intellectual leader to emerge among the Justices—one who “can assume the hard work of understanding Indian law, its historical roots, and its importance as a distinct field.” Indian Country needs a strong voice and a determined spirit to counter Justice Scalia’s subjective view of Indian law:

[Opinions in this field have not posited an original state of affairs that can be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be taking into account all legislation, and the congressional ‘expectations’ that it reflects, down to the present day.]

Now that Justice Kagan has been confirmed, Indian Country can extend her an invitation to visit tribal courts, meet with tribal leaders and judges, and to observe firsthand the challenges confronting tribal governments.

Endnotes

1Amy Goldstein, The Battle to Define Kagan, Washington Post, May 11, 2010. No further information has been discovered regarding the nature and scope of Robert Kagan’s work for Native Americans early in his career.

2Employment Division v. Smith, 485 U.S. 660 (1988) (remanded to the Oregon Supreme Court on the question of whether peyote use for religious purposes is prohibited under Oregon law); Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439 (1988) (although the Forest Service decision to pave road and allow timber harvesting in area of religious significance to Native Americans would have serious adverse impacts on ability of Indians to practice their religion, effects are incidental and not in violation of the First Amendment’s Free Exercise Clause).

3During Kagan’s clerkship with Judge Mikva on the U.S Court of Appeals for the D.C. Circuit, only two Indian law cases were decided: New Mexico Energy and Minerals Dept., Mining and Minerals Div. v. U.S. Dept. of the Interior, 820 F.2d 441 (1987) (state regulatory jurisdiction over “Indian lands” under Surface Mining Act); and James v. U.S. Dept of Health and Human Services, 824 F.2d 1132 (1987) (intra-tribal dispute between factions of a nonfederally recognized tribe regarding federal grant funding). Judge Mikva did not author either of these opinions, but he wrote a very brief concurrence in the New Mexico case.

4The United States did not petition for review in any cases involving tribal interests, except for Tohono O’odham Nation v. United States (No. 09-846) in which review has been granted (discussed in text). The United States did file briefs in opposition as respondents in several cases involving Indians and Indian tribes which have been denied review, including Barrett v. U.S. (No. 09-32); Bennally v. U.S. (No. 09-5429); North County Community Alliance v. Salazar (No. 09-800); Wolfchild v. U.S. (No. 09-579); and Sharp v. U.S. (No. 09-820).


6Reply Brief for the Petitioner, United States v.
On Aug. 7, 2010, former Solicitor General Elena Kagan was sworn in as the fourth woman ever to sit as a Supreme Court justice. Indian Country generally appears to have supported her candidacy. But the reality is that no one knows much of anything about how she would vote in Indian law cases. Like any sitting justice, tribal interests will have to work to persuade her.

Kagan’s Indian law record is very, very sparse, but there are a few highlights. The first highlight is that she, as dean of Harvard Law School, spoke very kind words about the Navajo Nation Supreme Court, which had been invited to hold oral arguments at Harvard. She noted the integrity, fairness, and quality of the court, as well as its innovative efforts to incorporate tribal customs and traditions. Few justices ever have had anything nice to say about tribal courts, so it was nice to see this. But the importance of her comments can be exaggerated. During Kagan’s marathon Senate confirmation hearing, she noted that she had also given an introduction for a controversial Israeli judge, and that it was her job to say nice things about visitors to the law school.

Another highlight is that Kagan worked on several Indian issues, mostly related to controversial Indian gaming disputes of the mid-1990s. The Native American Rights Fund has published a great overview of her work during this period (see the Richard Guest article in this newsletter), but few conclusions about her views can be drawn. The key to this point is that she is at least somewhat aware of Indian gaming issues. Of note, it appears she spent many long hours strategizing a remedy for Supreme Court’s evisceration of the enforcement mechanisms in the Indian Gaming Regulatory Act. As a lawyer with the Office of Legal Counsel, her work seemed merely to support the legal positions adopted by her clients, the President, and, more indirectly, the Department of Interior. However, unlike Chief Justice John Roberts, who worked in the same office during the Reagan Administration, Kagan’s writings were more circumspect than Roberts’ memos, which were openly hostile toward tribal interests.

Kagan’s more recent work as solicitor general placed her in the position of supervising the lawyers that prepared briefs opposing cert petitions by tribal interests, though it is unlikely she participated heavily in that stage. She certainly authorized and perhaps participated in the government’s cert petition in United States v. Tohono O’odham Nation, which the Court will hear in the next term. Justice Kagan has recused herself from this case (which means the Nation, as respondent, will only have to persuade four justices in order to prevail). Tohono O’odham, however, is not an Indian law case per se, and largely focuses on an obscure aspect of civil procedure that may impact certain tribal interests significantly. As solicitor general, she represented the United States and was put in a position only to do the work ordered by her client. Again, very little should be drawn from her record.

One area in which Justice Kagan could concern tribal interests may involve the numerous cases around the country in which tribal interests are trying to avoid the application of the Master Settlement Agreement arising out of the massive tobacco suit filed by 50 states in the 1990s. From within the White House, Kagan became well known for leading the charge toward the settlement of that suit. The MSA, however, virtually eliminates the ability of most American Indian tobacco wholesalers to compete in the new regime. One would expect, perhaps, that if an Indian wholesaler prevails in an appellate court on the question of the applicability of the MSA to Indian Country, the Supreme Court would decide to hear the case. Justice Kagan probably should not be counted on as a vote sympathetic to tribal interests in the case, though as always we won’t know until the moment such a case comes down, if ever.

Kagan’s nomination caused a powerful reaction from several law professors of color who noted that during her tenure as dean of Harvard Law School, the school hired more professors than ever before (about three dozen), but only one was a person of color. While typically a law school dean has relatively little control over the hiring practices of a law school, largely exonerating Kagan, the White House still found it important enough to issue a lengthy

Matthew L.M. Fletcher is a professor of law and director of the Indigenous Law and Policy Center at the Michigan State University College of Law.
The Tribal Law and Order Act: Justice for All Americans

by Troy A. Eid

After pressing for months, the chief criminal prosecutor for the Navajo Nation, Bernadine Martin, finally persuaded the U.S. Department of Justice to release its internal statistics on felony investigations. It turns out federal agents last year made just 28 arrests in sexual assault cases on an Indian reservation the size of West Virginia.

That's an arrest rate in sexual assault cases of about 11 per 100,000 people. By comparison, Denver's arrest rate in the same category in 2008, the most recent year reported data are available, was 38 per 100,000. In other words, federal agents investigating sexual assaults on the Navajo Nation made less than one arrest for every three made by Denver police.

It was this kind of unfairness that prompted the Tribal Law and Order Act, sponsored by retiring Sen. Byron Dorgan (D-N.D.) and signed by President Obama. Despite the good intentions of many fine public servants, the federal government isn't getting the job done. Violent crimes on Indian reservations are two-and-a-half times the national average, yet tribal lands are served by half the number of police as comparable communities.

Federal agents, prosecutors, and judges are chiefly responsible for enforcing the most serious felonies, called “major crimes,” at Navajo and many other Indian reservations. The Tribal Law and Order Act doesn’t change this unfortunate division of labor, which has federal officials performing local governmental functions.

However, the new law does make these officials more accountable to the people they serve. Federal prosecutors will now be required to report when they decline to prosecute felonies and explain why, while still protecting the confidentiality of victims and defendants. Credit for this change goes to Denver Post reporter Mike Riley, whose 2007 investigative series focused on the lower priority some U.S. attorney’s offices give Indian country cases.

The Tribal Law and Order Act relaxes federal restrictions on tribal courts’ sentencing ability, letting them impose stiffer fines and jail terms and use traditional dispute resolution such as peacemaking. It also requires federal officials to provide onsite training to tribal, state, and local law enforcement officers to fight Indian country crime.

This part of the law was based on a successful experiment in Colorado. Three years ago, Sen. Dorgan reached out to the Southern Ute Indian Tribe’s justice chief, Janelle Doughty, and me to learn about a program we’d created in Colorado’s U.S. attorney’s office to help Southwestern Colorado law enforcement agencies work together to boost prosecutions. Now all U.S. attorneys’ offices will be required to provide similar training.

Dorgan introduced his legislation with bipartisan support, including Sen. John Thune (R-S.D.) and other conservatives. I, along with many others, was encouraged when it passed the Senate unanimously in June.

But then the bill faced opposition from some House Republicans, including Rep. Doug Lamborn (R-Colorado Springs), who attacked the bill on budget grounds—even though it doesn’t require new spending or appropriate funds. So I went to Washington as a volunteer to urge the House Republican leadership to support it.

Much of the opposition was election-year politics: Republicans didn’t want a victory for the other party. But supporters pushed hard, and the bill passed 326-92 on party lines with the two-thirds margin needed to avoid a conference committee, which would have delayed the bill and likely killed it.

Colorado Republicans have experienced our share of tribulations lately. The Tribal Law and Order Act is a reminder that Republicans would have fewer worries if we focused less on scoring partisan points and more on advancing our own principles. That includes respect for law and order, making the bureaucracy leaner and more accountable, and freeing all Americans from federal command-and-control policies.

Fortunately, 78 House Republicans saw it that way. Our nation will be safer as a result.

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Former U.S. attorney for Colorado Troy A. Eid co-chairs the American Indian Law Practice Group at Greenberg Traurig LLP in Denver and is an adjunct professor in the American Indian Law Program at the University of Colorado Law School.
American Indian nations have long been innovators in tribal governance, economic empowerment, and cultural revitalization. Accordingly, this year's conference takes a deliberate look at some of the “best practices” in federal Indian law as a means of approaching our most intractable problems. Panel discussions will cover topics including Indian finance, criminal justice, civil jurisdiction, land re-acquisition, gaming, taxation, and the environment—looking, in each instance, at a continuing Indian law challenge and the ways that tribes, agencies, legislators, courts, and others are responding to it. Other sessions will address domestic and international advocacy, along with ethical considerations in Indian law. Break-out sessions will provide “nuts and bolts” information and strategies on water rights, tribal code development (on probate, family, and child welfare issues), religious freedoms, and tribal in-house attorney issues. A special program will honor the Native American Rights Fund’s 40th Anniversary and its leadership role in best Indian law practices. We hope you will join us for a forward-thinking, practically-oriented, and inspiring conference!

More details to come in Spring 2011!
Please visit www.fedbar.org for the latest information.
The National Indian Gaming Commission (NIGC), which is responsible for providing federal regulatory oversight of gaming on Indian lands to implement the statutory responsibilities provided by the Indian Gaming Regulatory Act, has provided and approved the following profiles of its new chairwoman, associate commissioner, chief of staff, and chief counsel.

**Tracie L. Stevens**

Tracie Stevens, NIGC chairwoman, was nominated by President Barack Obama, confirmed by the U.S. Senate on June 22, 2010, and sworn in by Interior Secretary Ken Salazar on June 29, 2010.

Stevens is the first woman to head the agency that oversees the $27 billion a year Indian gaming industry. Previously, she served as the senior advisor to the assistant secretary for Indian affairs at the U.S. Department of Interior beginning in July 2009. In this role, Stevens provided policy guidance to the assistant secretary regarding tribal issues such as gaming, law enforcement, energy, tribal consultation, economic development, land-into-trust, tribal government disputes, budget priorities, and treaty and natural resource rights. She was active in rebuilding the nation-to-nation relationship between tribes and the Department of Interior.

From 2006-2009, Stevens was a senior policy analyst with the Tulalip Tribe’s government affairs office. Prior to that, she served as a legislative policy analyst and as executive director of strategic planning for the Tulalip Casino. In her capacity as senior policy analyst with the Tulalip Tribes, Stevens also served as the chair of the Gaming Subcommittee for the Affiliated Tribes of Northwest Indians (2003-2009), the secretary of the Board of the Directors for the Washington Indian Gaming Association (2002-2009) and as the Northwest delegate for the National Indian Gaming Association (2003-2009). Stevens is a member of the Tulalip Tribes of Washington. She received a Bachelor of Arts degree in Social Sciences from the University of Washington-Seattle. Stevens and her family reside in western Maryland.

**Daniel J. Little**

On April 19, 2010, Daniel Little was sworn in as NIGC associate commissioner by Department of the Interior Secretary Ken Salazar. Prior to joining the NIGC, Little served as manager of National Governmental Affairs for the Mashantucket Pequot Tribe and Foxwoods Resort Casino. In this role, he provided guidance to the tribe and gaming enterprise on federal regulatory and compliance issues.

Additionally, before joining the Mashantucket Pequot Tribe, Little was employed by the Connecticut State Legislature in Hartford, Conn., and served more than 10 years in the U.S. Army Reserve. He holds a B.A. degree from Florida Atlantic University.

**Paxton Myers**

In August 2010, Paxton Myers joined the commission as chief of staff. He came to the commission from the office of Rep. Dale Kildee (D-Mich.), co-chair of the House Native American Caucus where Myers served as the congressman’s Policy Advisor on Native American issues and director of the Congressional Native American Caucus. In his role with Rep. Kildee, Myers played a key role in advising the congressman and other members of Congress on legislation and issues affecting Native American communities.

In his capacity as chief of staff, Myers is chief advisor on major policy matters, oversees the agency staff operations, and serves as a liaison between the commission and other divisions within the agency. Additionally, he serves as a liaison between congressional staff, officials of other federal entities, and officials of tribal, state and local governments.

With broad experience working in various positions with the Eastern Band of Cherokee Indians, Myers also brings in depth knowledge of the tribal perspective. Between 2000 and 2009, he worked for both a tribal government and a tribal gaming operation, which included serving as chief of staff to Michell Hicks, principal chief of the Eastern Band of Cherokee Indians, as well as casino marketing manager at the tribe’s gaming facility.
Myers is an enrolled member of the Eastern Band of Cherokee Indians of North Carolina. He received a Bachelor of Science degree from Western Carolina University and currently resides in Washington, D.C.

Larry Roberts

Roberts joined the commission in July 2010 as general counsel. In this capacity, Roberts is the chief counsel of the agency and provides legal advice and counsel to the commission that enables the commission to fulfill its statutory mandates in regulating, establishing standards for, and monitoring gaming on Indian lands pursuant to the Indian Gaming Regulatory Act.

With 15 years of federal Indian law experience, Roberts brings a wealth of knowledge to the commission. He started his legal career in the U.S. Department of Justice’s Honors Program. As a trial attorney, Roberts handled a variety of administrative law and federal Indian law cases including matters involving: tribal jurisdiction, regulatory authority and reservation boundaries, tribal reserved treaty rights, recovery of tribal lands and resources, and the Indian Gaming Regulatory Act.

Roberts recently worked in EPA’s Office of General Counsel, providing counsel on the implementation of federal environmental programs in Indian Country. Most recently, he worked in private practice on federal Indian law matters, including the Indian Gaming Regulatory Act, and environmental law, including the National Environmental Policy Act. Roberts has received numerous awards during his previous federal service. He is also a former chair of the Native American Resources Committee of the American Bar Association Section of Environment, Energy, and Resources. He is a member of the Washington, D.C., Bar and the Wisconsin Bar. Roberts received his undergraduate degree from the University of Wisconsin at Madison and his J.D. from the University of Wisconsin Law School. Roberts is a member of the Oneida Tribe of Wisconsin and resides with his family in northern Virginia.

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Tohono O’odham Nation (No. 09-846), 2010 WL 1321424.


10June Q. Wu, HLS Dean Joins Indian Fund Board, HARV. CRIMSON, Apr. 24, 2008.

11Although Kagan was involved in other cases, her involvement was minimal. These cases included Klamath Tribes v. United States (U.S. Forest Service sales of timber violated tribal hunting rights secured by treaty); and Navajo-Hopi (legislative solution to the ongoing border dispute between the Hopi and Navajo tribes).

12For a summary of Justice Stevens’ record on Indian law cases, see Matthew Fletcher, The Indian Law Legacy of Justice Stevens (Apr. 10, 2010), available at turtletalk.wordpress.com/2010/04/09/the-indian-law-legacy-of-justice-stevens/.


Commentary continued from page 29

rebuttal to these charges. What is disheartening about this exchange is that Harvard, like nearly all elite law schools, rarely hires professors of color at all. In fact, Harvard Law School is the beneficiary of a major donation by the Oneida Indian Nation of New York, which offered millions to fund a permanent chair in Indian law—a chair in which the Harvard faculty seems to maintain that no Indian person is qualified to sit. Kagan is a product of that elite law school hiring culture, as well as a product of an elite legal culture that frequently disrespects (and sometimes downright mocks) tribal interests in the Supreme Court and in Congress. Indian Country must hope that Justice Kagan is not of this ilk.

What is heartening about Justice Kagan is that she appears to have an open mind, and a sense of humor. Supreme Court justices, namely Chief Justice Roberts and Justices Alito, Scalia, and Thomas, often seem to vote reflexively in Indian law cases. Tribal interests will be exceptionally hard-pressed to persuade these justices under nearly all circumstances, whereas Elena Kagan is someone who at least appears to be open to tribal positions.
Welcome and Thanks to our 2010 New Section Members!

- Andrew Adams III, Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C., St. Paul, MN
- David Adams, Pueblo of Laguna, Laguna, NM
- S. Craig Alexander, U.S. Department of Justice, Washington, DC
- Jasmine T. Andrews, California Indian Legal Service, Bishop, CA
- David Adams, Pueblo of Laguna, Laguna, NM
- S. Craig Alexander, U.S. Department of Justice, Washington, DC
- Jasmine T. Andrews, California Indian Legal Service, Bishop, CA
- Shawn R. Attakai, Navajo Nation Judicial Branch-Kayenta Judicial Dist, Kayenta, AZ
- Chastity E. Bedonie, Akin Gump Strauss Hauer & Feld, Washington, DC
- Fred Bellefeuille, Union of Ontario Indians, North Bay, ON, Canada
- David N. Blackorby, Walmart Stores Inc, Bentonville, AR
- Kathleen Bliss, U.S. Dept. of Justice, Las Vegas, NV
- Nancy A. Bogren, Attorney at Law, Paw Paw, MI
- Annette Nikki, Borchardt, Luebben Johnson & Barnhouse LLP, Los Ranchos De Albuquerque, NM
- Jeffrey N. Boudreaux, Kean, Miller, Baton Rouge, LA
- Jack N. Brill II, Brill Law Firm, Neosho, MO
- Matthew L. Campbell, Cuddy & McCarthy, Albuquerque, NM
- Daron T. Carreiro, Pillsbury Winthrop Shaw Pittman LLP, Washington DC
- Andrew Caulum, Office of the Solicitor, U.S. Dept. of the Interior, Madison, WI
- Nelva Cervantes, John D Wheeler & Assoc, Alamogordo, NM
- Heather L. Chapman, Keweenaw Bay Indian Community Baraga, MI
- Britt E. Clapham II, Tohono O’odham Gaming Enterprises, Tucson, AZ
- Joshua Clause, Washington, DC
- Donna M. Connolly, Rothstein Law Firm, Santa Fe, NM
- Timothy P. Connors, 2nd Circuit Court, Ann Arbor, MI
- Henry S. Czauski, Washington, DC
- Christopher R. Darneal, Ada, OK
- Dani J. Daugherty, Tribal Government BIA, Aberdeen, SD
- Samuel Daughety, Tohono O’odham Nation Sells, AZ
- James V. DeBergh, Sonsosky, Chambers, Sachse, Endreson & Perry, LLP, Alexandria, VA
- Jerllyn Decoteau, Law Firm of Tod J. Smith, Eldorado Springs, CO
- Candace Des Armo Coury, Stockbridge-Munsee Tribe/Mohican Nation, Bowler, WI
- John Dossett, National Congress of American Indians, Washington, DC
- Casey M. Douma, Pueblo of Laguna, Laguna, NM
- Marina Fast Horse, Shoshone-Bannock Tribes/Tribal Ct, Fort Hall, ID
- Brandt B. Fenner, Fredericks Peebles & Morgan LLP, Omaha, NE
- Maymangwa Flying Earth, Denver, CO
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