

# FEDERAL INDIAN LAW

## Newsletter of the Federal Bar Association Indian Law Section

SPRING 2016

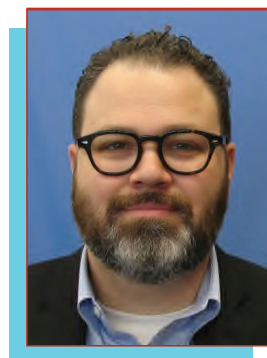
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### A WORD FROM THE EDITOR-IN-CHIEF

By Trent S.W. Crable, U.S. Department of Justice



Hello,

On April 7-8, the Section will hold its 41st Annual Indian Law Conference at the Salt River Pima-Maricopa Community's Talking Stick Resort, 9800 E. Indian Bend Road, Scottsdale, Arizona.

There will be panels on: the first ten years of the Robert's Court; the facts, fictions, and perceptions of tribal courts; expectations for tribal in-house counsel; a debate about the federal government's responsibility to Indian tribes; the future of the UN Declaration on the Rights of Indigenous Peoples; the intersection of self-determination and environmental law; reflections on the Obama Administration; shaping future Indian-law leaders; ICWA at the crossroads; the shifting boundary between tribes and states in Indian gaming; and regulating attorneys in tribal courts. The two-day event will also feature a luncheon keynote by Matthew L.M. Fletcher, and a presentation in memory of Professor Bill Rice. I hope you can attend.

The Section thanks the conference sponsors (as of press time): the Rothstein Law Firm; Walmart; Greenberg Traurig; Hobbs Straus Dean & Walker; Lewis Roca Rothgerber Christie; Osborn Maledon; and Thompson Reuters. Thanks also to friend of the conference Sonosky, Chambers, Sachse, Endreson & Perry, LLP.

I encourage anyone interested in contributing to the newsletter, to contact me at [trent.crable@gmail.com](mailto:trent.crable@gmail.com). We would very much like to return to publishing brief articles along with our regular updates.

I hope you enjoy the newsletter. ♦



Is your information updated with the national FBA office? If not, please contact the membership department at [membership@fedbar.org](mailto:membership@fedbar.org) or visit our website: [www.fedbar.org](http://www.fedbar.org). You can log in to the members only section of the website and update your information online.

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## INSIDE THE BELTWAY UPDATE

By Josh Clause, Sixkiller Consulting

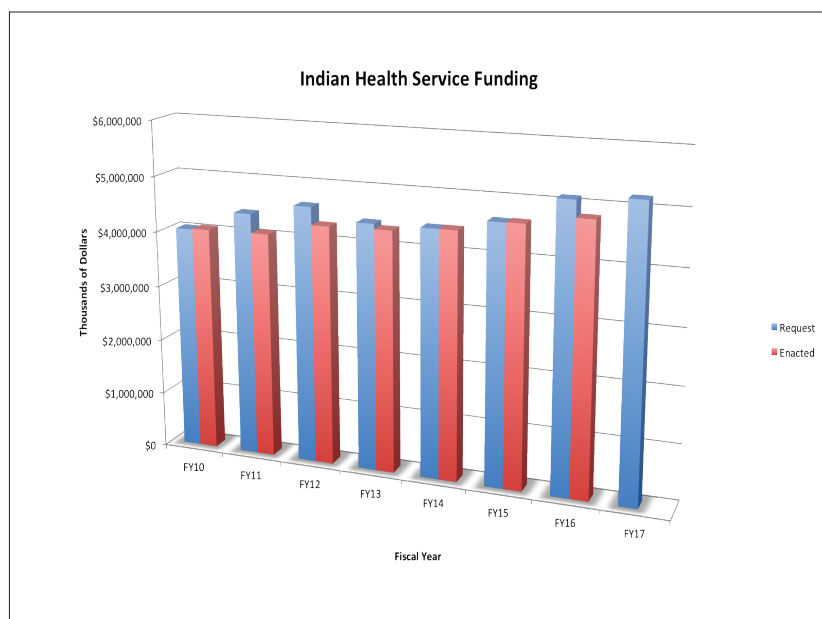
### President's Budget

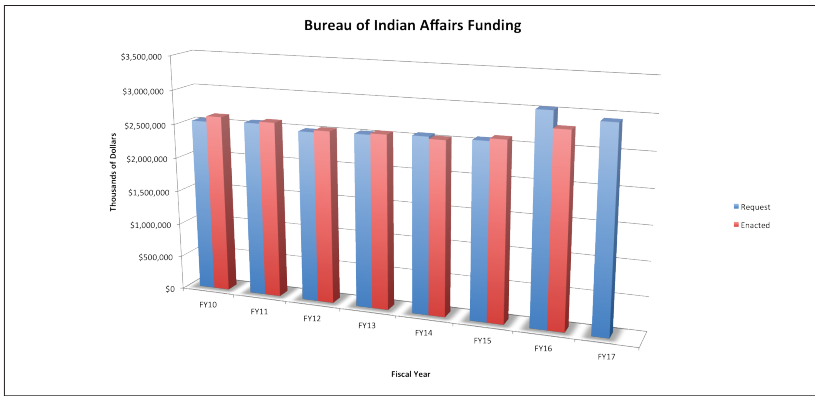
The White House Office of Management and Budget released President Obama's Fiscal Year ("FY") 2017 budget request on February 9. The President's budget request is a non-binding document that lays out the President's funding and policy priorities for the federal budget.

The FY17 request is strikingly different from President Obama's previous budget requests for two reasons. First, it was the last budget request of the Obama Administration. The President used it to share his vision for the future and what areas the United States will need to invest. He laid out several bold initiatives, including a \$1 billion "moonshot" initiative aimed at finding a cure for cancer, a \$10.25 per-barrel tax on oil to fund clean-transportation projects, and increased funding for Head Start and universal pre-K, among many other proposals. Second, as Congress and the President actually agreed to an FY17 funding level for the federal government through the Bipartisan Budget Act of 2015, this budget request is tied to real budgetary numbers and not aspirational funding levels as was typical of past requests during the Obama Administration.

Indian country has fared well in President Obama's budget requests. The President has consistently called for more funding to the Bureau of Indian Affairs ("BIA") and the Indian Health Service ("IHS"). Enacted funding levels for Indian country have grown in recent years, even as non-defense discretionary ("NDD") spending has declined. From FY10 to FY16, BIA's funding increased by 6.74% and IHS's funding increased by 18.64% while total NDD spending decreased by 14.45%. While the federal budget for Indian country is still painfully inadequate, the overall growth of the Indian country budget under the Obama Administration is a step in the right direction.

The President's budget called for increased funding across the board in Indian Country. The budget requested that the BIA receive \$2.9 billion (a 4.9% increase over the FY16 enacted level), the BIE receive \$912 million (a 7% increase over the FY16 enacted level), and the IHS receive \$5.2 billion (a 0.9% increase over the FY16 enacted level). It is now up to Congress to decide if it agrees with these funding levels, but whether Congress will be able to successfully complete the appropriations process remains to be seen.





### FY17 Budget: Failure to Launch

The House was expected to pass its FY17 Budget Resolution at the end of February/early March, but it has yet to receive a markup in committee and it may not move forward at all. The key challenge relates to Speaker Ryan’s and House Appropriations Chairman Rogers’s desire to maintain the October 2015 Bipartisan Budget Act (“BBA”) topline of \$1.07 trillion—by which the President’s budget request abides—and moving appropriations bills quickly this spring (the BBA deal was enacted in October 2015).

House Budget Chairman Price tried to find a compromise between the conservative Freedom Caucus, who threatened to withhold votes, and Speaker Ryan, who wanted to follow the BBA topline, by proposing that Congress adhere to the BBA discretionary caps while cutting \$30 billion from mandatory programs to “offset” the BBA’s increase over the sequestration level topline. Appropriators quickly dismissed his proposal, arguing they could not carry those mandatory cuts on their discretionary appropriations bills, making a lot more work for the authorizing committees. Fiscal hawks realized this meant that the path to enacting these cuts was likely doomed.

The House Republican Study Committee (“RSC”) created an additional obstacle in the budget debate at the end of February. The RSC understood mandatory cuts would never pass the Senate, much less become law, so they demanded that the cuts come exclusively from the non-NDD side. NDD cuts would protect and insulate defense funding. But this proposal contradicts the agreement struck between the White House and Congress in the BBA of increasing defense and non-defense programs equally. In short, the President will never agree to the RSC’s proposal.

Speaker Ryan is acutely aware that the majority of Republicans (167) voted against the BBA, and against the FY16 omnibus (PL 114-113), and would be unlikely to support a budget or appropriations bills that spend at the BBA’s topline level of \$1.07 trillion. The Speaker will be in a difficult position if

he must rely on Democratic votes, but there is no alternative path to additional cuts.

Republicans also want more conservative policy riders to be enacted this year than were attached to past compromise bills, when Democrats voted for higher spending only if riders were dropped. If the House relies on Democratic support for appropriations bills at the BBA level,



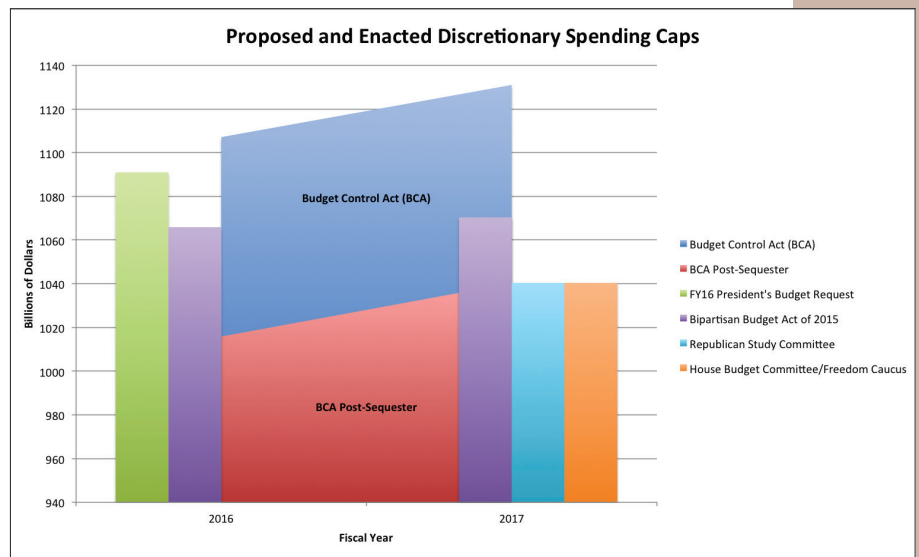
because they do not have enough Republican support, those bills will have few policy riders.

Meanwhile, on the Senate side, the Senate Budget Committee is in “wait and see” mode and may mark-up a budget if the House brokers a compromise, and if they decide it is beneficial to have a budget that has passed both chambers.

Whether the topline issue is resolved or not, the appropriations committees are planning to go forward with FY17 mark-ups beginning in mid-April, based on the BBA spending caps. Lurking beneath the surface is the familiar fight about whether to increase defense funding and how—either by cutting from non-defense (a non-starter for Democrats) or by increasing the Overseas Contingency Operations account which is not counted in the budget caps.

Appropriations subcommittee allocations will be determined in mid-to-late March to keep with the early mark-up plans. Considering Congress all but shuts down in late June, there is a very small window to get appropriations bills moving. A key dynamic is that the Senate does not want to move first. This is in part because Majority Leader Mitch McConnell wants to protect vulnerable Republican senators from taking difficult votes, as well as the natural

**BELTWAY** continued on page 15





## CALIFORNIA AND HAWAII UPDATE

By Adam P. Bailey, Hobbs Straus Dean and Walker

### *Big Lagoon Rancheria v. State of California*

In a unanimous decision, the eleven-member en banc court of the Ninth Circuit reversed the original appeals panel and upheld the district court's decision that the state of California had failed to negotiate a gaming compact in good faith with the Big Lagoon Rancheria. *Big Lagoon Rancheria v. State of California*, 789 F.3d 947 (9th Cir. 2015)

Importantly, in so ruling, the court held that the State could not collaterally attack the acquisition of trust lands for the Rancheria by the United States in 1994, or the United States' recognition of the Rancheria as an Indian tribe, and that in any event the six-year statute of limitations would have barred any such attack. The decision will protect trust acquisitions and tribal recognition decisions from collateral attack, and will subject any direct action challenging any such decision to the six-year statute of limitations applicable to Administrative Procedure Act ("APA") claims.

The original appeals panel reversed the district court, relying on *Carcieri v. Salazar*, 555 U.S. 379 (2009), and holding that the State did not need to enter into compact negotiations with the Tribe because one of the parcels on which the Tribe planned to conduct gaming had unlawfully been taken into trust in 1994. The analysis was based on an incomplete record that the Tribe was not "under federal jurisdiction" in 1934, and thus the Bureau of Indian Affairs was not authorized to make the 1994 acquisition.

The original panel decision subjected a trust acquisition to collateral attack, without the United States as a party, without regard to the passage of time or the doctrine of exhaustion of tribal remedies, and without a complete record or the views of the Department of the Interior. The decision raised the real possibility of collateral attacks to the status of tribal trust lands well beyond the six-year APA statute of limitations.

The en banc panel reversed the original appeals panel, and called out the fact that the State's arguments amounted to collateral attacks on the 1994 land entrustment. The Court distinguished *Carcieri* on the grounds that that case "involved a timely administrative challenge brought against the Secretary of the Interior," while "the instant case is a belated collateral attack." The court noted that it had held in earlier decisions that parties cannot use collateral attacks to "end-run the procedural requirements governing appeals of administrative determinations." The proper vehicle for challenging the land-in-trust determination, the court held, was a petition for review under the APA.

The court further held that had the State brought an APA claim, it would have been barred by the six-year statute of limitations applicable to APA claims. The court expressly rejected the reasoning of the panel decision which

had applied an exception to the application of the statute of limitations, reasoning that the exception did not apply because the State "understood the true state of affairs concerning the BIA's decision to take the eleven-acre parcel into trust by, the very latest, 1997 . . . ."

The case is also notable for its energetic oral arguments during the en banc hearing, which are available at the Ninth Circuit Court of Appeals' YouTube page: [www.youtube.com/watch?v=OQv67ol2wFk](http://www.youtube.com/watch?v=OQv67ol2wFk).

### *Robinson v. Jewell*

In a case brought by the unrecognized Kawaiisu Tribe over a large parcel of land at the Tejon Ranch in Kern County, the Ninth Circuit rejected the Tribe's land claim based on aboriginal rights that it ruled were extinguished by the Private Land Claims in the State of California Act of 1851, Pub L. No. 31-41. *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015). The case's factual background is complex, as are the facts surrounding the non-recognition of the Kawaiisu Tribe, the effect of the Treaty of Guadalupe Hidalgo (9 Stat. 922), and the unratified treaties of the 1840s and 1850s between the United States and many tribes in California. We will not summarize those here.

The Circuit Court laid heavy weight on the fact that the current owners of the land in question hold title because it was perfected by the California Land Claims Act Board of Commissioners, which gave landowners two years in 1851-1853 to file claims to perfect grants of land under Spanish or Mexican law. While the process was for *private* land grant holders, and while the U.S. Government purported to treat with tribes over the very same land, the court nevertheless held that any aboriginal title was lost when the Tribe did not file claims with the Commission. The court ignored that aboriginal title pre-existed both Spanish and Mexican law. The court also rejected claims from the Tribe that title to the claim was fraudulently acquired (partially based on the idea that too much time had elapsed) and that the Tejon Ranch was created as a reservation and never terminated.

The decision has been ably analyzed with a critical eye by former *Federal Indian Law* Editor-in-Chief, Professor Bill Wood. You can read his full analysis at the Turtle Talk blog at [turtletalk.wordpress.com/2015/06/29/guest-post-by-william-wood-commentary-on-the-ninth-circuit-opinion-in-robinson-v-jewell-and-aboriginal-title-in-california/](http://turtletalk.wordpress.com/2015/06/29/guest-post-by-william-wood-commentary-on-the-ninth-circuit-opinion-in-robinson-v-jewell-and-aboriginal-title-in-california/).

### *Cosentino v. Pechanga Band of Mission Indians & Cosentino v. Fuller*

The federal and state courts considered a pair of cases brought against the Pechanga Band and its gaming commissioners by an employee whose gaming license was revoked after he failed to tell the Tribe he was also working as an informant for the California Department of Justice.

Following notice and a hearing before the Tribal Gaming Commission, Cosentino's license was revoked, and he sued. In federal court, Cosentino sought to enforce arbitration, based on the theory that the Tribe's compact required a waiver of sovereign immunity for such a suit. The Southern District of California dismissed the case; the dismissal was upheld by the Ninth Circuit. The Circuit Court said the tort liability ordinance adopted by the Tribe did not waive immunity, the compact did not waive immunity for Cosentino's claims, and to the degree he argued the tort liability ordinance did not waive immunity to the degree that the tribal-state compact required, that he lacked standing. *Cosentino v. Pechanga Band of Luiseño Mission Indians*, No. 13-57113 (9th Cir. Feb. 22, 2016), available at [cdn.ca9.uscourts.gov/datastore/memoranda/2016/02/22/13-57113.pdf](http://cdn.ca9.uscourts.gov/datastore/memoranda/2016/02/22/13-57113.pdf).

Cosentino made more headway with the state courts. In his state action, Cosentino filed suit against individual members of the Pechanga Gaming Commission, claiming that they revoked his gaming license without cause and in retaliation for acting as an informant. The Riverside County Superior Court dismissed for lack of subject matter jurisdiction (due to sovereign immunity). The Fourth District Court of Appeals reversed, bypassing threshold considerations of review of tribal actions in state courts such as jurisdiction, redressability, and standing. Rather than looking at whether the Gaming Commission had authority to make licensing decisions for the Tribe—thus enjoying the Tribe's sovereign immunity from suit—the court delved into whether the gaming commission acted "properly." The court found that the record did not support a finding that the Commissioners acted within their scope of authority and reversed the trial court's dismissal. *Cosentino v. Fuller*, 237 Cal. App. 4th 790 (2015) (ordered depublished by Cal. Sup. Ct., Sep. 23, 2015).

The opinion drew immediate condemnation from many tribes, and seventeen tribes and tribal organizations filed requests for depublication of the opinion in the California Supreme Court. The California Supreme Court ordered the opinion depublished on September 23, 2015. The effect of depublication is that the case is not citable as precedent; however, the California Rules of Court provide that depublication "is not an expression of the court's opinion of the correctness of any law stated in the depublished opinion." The Fourth District Court of Appeal denied a request for rehearing the case, and the case was not appealed to the California Supreme Court. The case is now continuing as a jury trial in the Riverside County Superior Court.

### *Akina v. State of Hawai'i*

The Supreme Court, through Justice Kennedy acting under his assignment of Circuit Justice for the Ninth Circuit, granted an injunction to largely non-Hawaiian chal-

lengers of a recent vote taken to begin the process of instituting a system of self-governance for Native Hawaiians. The injunction halts ballot counting and certification, and allows an appeal of the election to move forward in the District of Hawai'i. The case, *Akina v. State of Hawai'i*, No. 15-cv-00322 (D. Haw.), alleges that the all-Native voter roll for the self-governance vote violates the Equal Protection Clause, the Fifteenth Amendment, the First Amendment, the Due Process Clause, the Civil Rights Act of 1871, and the Voting Rights Act. The State of Hawai'i refutes those claims, stating that the vote is self-administered by the Native Hawaiian people under the auspices of Na'i Aupuni, a non-profit group.

Some named plaintiffs are of Native Hawaiian descent, but refused to agree with one declaration on the voting registration form that states the declarant affirms "the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance." The issue has been unaddressed as of yet.

In October, the Department of Interior filed an amicus brief at the district court's invitation in support of the Native Hawaiian vote. The amicus stated that: the Native Hawaiians, as a collective, have power to determine their own membership, organize their documents, and conduct elections; like tribes, they could exclude non-Natives from membership and voting; such exclusion from tribal elections is routine; and federal law provides no basis for treating Native Hawaiians any differently than tribes on the mainland. The case is one to watch, as it will undoubtedly bring into focus the tensions between *Morton v. Mancari* (415 U.S. 535 (1974))—wherein the Court held Indian preferences were political classifications, not racial ones—and *Rice v. Cayetano* (528 U.S. 495 (2000))—which held that it was a violation of the Fifteenth Amendment to prevent non-native Hawaiians from voting in elections for the trustees of the state-run Office of Hawaiian Affairs that served Native Hawaiian interests. ♦





## SUPREME COURT UPDATE

By Joey Lenzmeier, Pierce County Department of Assigned Counsel and Ann Tweedy, Muckleshoot Indian Tribe

The Supreme Court decided one Indian law case this term: *Menominee Indian Tribe of Wisconsin v. United States*. Certiorari was granted in four cases, is pending in eleven cases, and has been denied in seven cases.

### Decided Case *Menominee Indian Tribe of Wisconsin v. United States*

On January 25, 2016, the Supreme Court affirmed the Court of Appeals for the District of Columbia Circuit in *Menominee Indian Tribe of Wisconsin v. United States*. Specifically, the Supreme Court held that equitable tolling did not apply to preserve the Menominee Tribe's contract reimbursement claims with the Indian Health Service ("IHS") because the Tribe failed to establish that extraordinary circumstances stood in the way of the Tribe's timely filing of its contract-support costs.

The Tribe had filed contract support reimbursement claims with IHS in 2005 for the contract years 1995–2004. The contract officer denied the Tribe's claims for the years 1996, 1997, and 1998 because the claims from those years were barred by the Contracts Dispute Act's six-year statute of limitations. The Tribe challenged the denials in federal court claiming that the statute of limitations should have been tolled for the 707 days that putative class action designation was pending, but ultimately denied, in *Cherokee Nation of Oklahoma v. United States*, 199 F. R. D. 357, 363–66 (E.D. Okla.). The District Court held that equitable tolling did not apply because no extraordinary circumstances beyond the Tribe's control caused the delay in filing for contract-support reimbursement. The Court of Appeals affirmed and the Tribe sought reversal by the Supreme Court.

As established by *Holland v. Florida* 560 U. S. 631, 649, "a litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements (1) that he has been pursuing his rights diligently and (2) that some extraordinary circumstance stood in his way and prevented timely filing." The Tribe argued "diligence and extraordinary circumstances should be considered together as two factors in a unitary test." But the Court held that the two components are distinct elements, both of which must be met in order for equitable tolling to apply.

Secondly, the Tribe objected to the Circuit Court's interpretation of "extraordinary circumstances" to mean an external obstacle. The Court, however, held that the extraordinary-circumstances element covers those matters that are outside of the litigants control and "cannot be a product of [the] litigant's own misunderstanding of the

law. . . ." The Court concluded that the Tribe was unable to satisfy the extraordinary circumstances element because "[i]ts mistaken reliance on the putative Cherokee Nation class action was not an obstacle beyond its control."

### Certiorari Granted

Certiorari was granted in four cases of interest: *United States v. Bryant*; *Sturgeon v. Masica*; *Nebraska v. Parker*; and *Dollar General Corporation v. Mississippi Band of Choctaw Indians*.

### *United States v. Bryant*

Certiorari was granted in *United States v. Bryant* on December 14, 2015, on the petition of the United States to determine "whether reliance on valid uncounseled tribal-court misdemeanor convictions to prove Section 117(a) [of Title 18, United States Code] predicate-offense element violates the Constitution." The Ninth Circuit ruled that the prior uncounseled domestic-violence convictions of Michael Bryant in Northern Cheyenne Tribal Court, which resulted in imprisonment, violated the Sixth Amendment of the Constitution when those convictions were used to trigger the federal domestic assault by a habitual offender statute.

In its petition, the United States argues that "a prior conviction that did not violate the Sixth Amendment when it was imposed also does not violate the Sixth Amendment when it is used to prove a defendant's recidivist status in a subsequent proceeding." The Petitioner relies on *Nichols v. United States*, 511 U.S. 738 (1994) where the Supreme Court held "that an uncounseled state misdemeanor conviction that did not violate the Sixth Amendment (because no term of imprisonment was imposed) could be relied upon to enhance a defendant's sentence for a later offense." The United States reasons that because the Sixth Amendment does not apply to Indian tribes, Bryant's underlying convictions had no constitutional defect and may be used to prove the predicate-offense element of the habitual offender statute.

The Respondent does not argue that the underlying convictions violated the Constitution, but rather, that use of the tribal-court convictions in federal court triggers the protections of the Sixth Amendment. This, the Respondent argues, leads to the conclusion that a "conviction obtained in a tribal court that did not afford a right to counsel equivalent to the Sixth Amendment right may not be used in a subsequent federal prosecution."

### *Sturgeon v. Masica*

Certiorari was granted in *Sturgeon v. Masica* on October 1, 2015, and oral arguments were held on January 20, 2016. *Sturgeon v. Masica* addresses the federal government's



ban on the use of a hovercraft on private land within the Yukon-Charley Rivers National Preserve in Alaska. The question presented is whether Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 (“ANILCA”) prohibits the National Park Service from exercising regulatory control over state, native corporation, and private Alaska land physically located within the boundaries of the National Park System (“NPS”). The Petitioner sought declaratory judgment to enjoin the NPS from banning the use of his hovercraft. The District court granted Summary judgment in favor of the NPS and the Ninth Circuit affirmed.

The Ninth Circuit ruled that privately held land within the Yukon-Charley conservation system unit (“CSU”) is not exempt from generally applicable laws, such as the hovercraft ban, as the ban applies to all federal land and not just public land within such units. The federal government contends that navigable waters are considered to be public lands and thus not subject to the limiting language in Section 103(c).

The Petitioner claims that the Ninth Circuit misinterpreted the statute. By pointing to the text of Section 103(c) of the ANILCA, the Petitioner claims NPS can regulate public lands only within the CSU, excluding, “lands which . . . are conveyed to the State, to any Native Corporation, or to any private party.” The Petitioner argues that the statutory language of Section 103(c) supports his claim that while non-public land within the CSU is subject to generally applicable federal laws, non-public land is not “subject to the regulations applicable solely to public lands within such units,” such as the hovercraft ban.

### *Nebraska v. Parker*

Certiorari was granted in *Nebraska v. Parker* and oral arguments were heard before the Supreme Court on January 19, 2016. The question presented is: whether Congress demonstrated a clear and plain intent to diminish the boundaries of the Omaha Indian Reservation by passing the Act of August 7, 1882 (“Act of 1882”). The case involves the Omaha Tribe’s regulation of liquor sales within the reservation’s boundaries via liquor control laws and taxation.

The Petitioner claims that the Tribe’s jurisdiction over the disputed land was diminished when Congress passed the Act of 1882 permitting the Tribe to sell portions of the reservation. The Petitioner bases its argument on *Solem v. Bartlett* 465 U.S. 463 (1984), which established that “States have jurisdiction over unallotted opened lands if the applicable surplus land act freed that land of its reservation status and thereby diminished the reservation boundaries.” In making such a determination, the Court should look to language of the act, the legislative history, and the events surrounding the passage of act (such as the demographics of the disputed

area). The Petitioner relies heavily on the events surrounding the passage of the Act of 1882; arguing that the State’s exercise of jurisdiction over the disputed land, the justifiable expectation of the people within the disputed land that they are not subject to tribal jurisdiction, and the lack of Indian character within the disputed land, all point to de facto diminishment

The Respondent, who also relies on *Solem v. Bartlett*, argues that “only Congress can divest a reservation of its land,” and diminishment will not be found without “clear and plain evidence of congressional intent to diminish.” The Respondent argues that the Act of 1882 contains no magic language (cession, relinquishment, or surrender) that supports congressional intent to diminish the Tribe’s reservation. The Respondent acknowledges that legislative history and surrounding events are part of the diminishment analysis, however, “[w]hen both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, courts are bound by [their] traditional solicitude for the Indian tribes to rule that diminishment did not take place.”

### *Dollar General Corporation v. Mississippi Band of Choctaw Indians*

Certiorari was granted in *Dollar General Corporation v. Mississippi Band of Choctaw Indians* and oral arguments were held on December 7, 2015. The case involves the Tribe’s exercise of civil jurisdiction over a tort action filed against Dollar General Corporation. The tort claim stems from the molestation of a minor, John Doe, by a store manager while Doe was participating in a youth training program at a Dollar General store that is operated on the Mississippi Choctaw Indian Reservation.

The Petitioner seeks review of the Fifth Circuit’s ruling that Dollar General’s consensual relationship with the tribe gives rise to tribal-court jurisdiction over Doe’s tort claims under *Montana v. United States*, 450 U.S. 544 (1981).

SUPREME continued on page 12





## PLAINS REGION UPDATE

By Nicole E. Ducheneaux, Fredericks Peebles & Morgan LLP

### *Two Shields v. Wilkinson*

The Eighth Circuit, in *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015), upheld a district court's order dismissing American Indian allottees' suit against individuals and oil and gas companies for aiding, abetting, and inducing the United States to breach its fiduciary duty on the grounds that the United States was a required party which could not be joined. Plaintiffs were Indians with interests in lands allotted to them by the United States who had leased their oil and gas mining rights to defendant individuals and companies. The BIA approved the leases under 25 C.F.R. § 212.20 as "in the best interest of the Indian mineral owner." Defendants subsequently sold the leases to a third party who in turn sold them for \$925 million, substantially more than the plaintiffs had received. Plaintiffs sued to recover from the lessees' profits alleging that defendants had been funded by an unknown third party with whom they schemed to acquire oil and gas leases from plaintiffs to sell for an unfair profit. Plaintiffs alleged that defendants had used political influence to install federal and tribal officials who would facilitate approval of the unfair leases. Plaintiffs also filed a separate complaint in the United States Court of Claims seeking monetary damages from the United States. The district court granted defendants' motion to dismiss on the basis that the United States was a required party that could not be joined and that dismissal was therefore required under Federal Rule of Civil Procedure 19. Plaintiffs appealed.

The Eighth Circuit upheld the dismissal, starting with the principle that "the United States, as the allotting agent, is the appropriate defendant in suits involving the right to an allotment." The Court noted that although the United States had not been named in Plaintiffs' suit, the suit would require a ruling on whether the United States had breached its fiduciary duty, which could affect similarly situated parties and therefore cloud the validity of other federal-trust-land decisions. *Id.* at 796 (citing *Nichols*, 809 F.2d at 1333). The Court rejected arguments based in the United States' third-party status and joint tortfeasor liability, reasoning that the United States is not a typical third party nor a usual tortfeasor in light of its substantive interest in the outcome of the litigation. *Id.* The Court concluded the United States therefore "is a required party which should be joined if feasible under Rule 19(a)." *Id.* at 797. The Court declined to consider the four factors outlined in Rule 19(b) concerning whether the action could nevertheless proceed without the required party in light of the fact that "[i]n the specific context of an immune sovereign entity that is a required party not amenable to suit, the Supreme Court has explained that the action

must be dismissed if the claims of sovereign immunity are not frivolous and 'there is a potential for injury to the interests of the absent sovereign.'" *Id.* (quoting *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 867 (2008)). The Court was not persuaded by Plaintiffs' argument that dismissal would deprive them of any remedy against the lessees, in part, because of the existence of the separate action against the United States in the United States Court of Claims, which had resulted in summary judgment in favor of the United States, but which was then on appeal. The Court also rejected Plaintiffs' claim that the United States would suffer no prejudice in its present suit as defendants could protect the government's interests in light of the fact that defendants and the United States were alleged co-conspirators and hence potentially in conflict. The Court therefore concluded that the district court did not abuse its discretion when it dismissed Plaintiffs' suit under Rule 19.

### *Sprint Communications Co. L.P. v. Wynne*

In *Sprint Communications Co. L.P. v. Wynne*, 121 F. Supp. 3d 893, (D.S.D. 2015), Sprint, a telecommunications firm, sued in federal district court for declaratory judgment that the Oglala Sioux Tribe Utilities Commission ("OSTUC") lacked regulatory authority over it and to enjoin OSTUC from proceeding against it in tribal court for violation of tribal regulations. The court denied Sprint's motion for preliminary injunction, ruling that Sprint had failed to exhaust tribal remedies, and stayed the case pending a ruling by the Oglala Sioux Tribal Court on whether the Tribe enjoys jurisdiction over Sprint. Before the court was Plaintiff's motion for a preliminary injunction.

The OSTUC is a subdivision of the Oglala Sioux Tribe that exercises regulatory authority over all utility systems on the Pine Ridge Indian Reservation. In 2014, the OSTUC issued an order under its rulemaking authority that established various requirements for utilities operating on the Reservation, including registration, fees, reporting, and systematizing consumer complaints and payments. The OSTUC then imposed a fine of \$1,000 per day penalizing utilities for each day they failed to register. Sprint resisted tribal regulation and deliberately failed to comply. The OSTUC therefore sued Sprint in tribal court for noncompliance. Sprint responded by filing suit.

After outlining the core components of tribal civil jurisdiction deriving from the United States Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), the district court reiterated the long-held principle that, as a function of the United States' policy of encouraging tribal self-government and in recognition of tribal sovereignty, "the doctrine of tribal exhaustion requires parties to challenge tribal jurisdiction in tribal court before seeking relief

in a federal court.” 121 F. Supp. 3d at 898 (citing *Nevada v. Hicks*, 533 U.S. 353, 358 (2001); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985)). Sprint, however, argued that it fell under an exception to the tribal exhaustion rule articulated by *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997), which noted that parties must not exhaust tribal remedies when “it is plain that tribal jurisdiction does not exist . . . .” *Id.* at 899 (quoting *Strate*, 520 U.S. at 459 n.14) (internal punctuation omitted)). Noting that “[e]xhaustion is only excused under *Strate*’s exception when the exercise of tribal jurisdiction ‘is frivolous or obviously invalid under clearly established law,’” *id.* (quoting *DISH Network Serv., L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013)), the district court proceeded to analyze whether tribal regulatory and adjudicative authority under *Montana* was obviously invalid. *Id.*

The district court rejected Sprint’s claims that its lack of physical location on the reservation was dispositive as “the focal point under *Montana* is the location of the non-members’ activities or conduct.” *Id.* (citing *Attorney’s Process & Investigation Servs., Inc. v. Sac & Fox of Miss. in Iowa*, 609 F.3d 927, 937 (8th Cir. 2010)). The Court explained that “Sprint’s position would exempt from tribal jurisdiction any business that had no physical presence on a reservation regardless of the degree of contact and involvement it had with tribal members or the impact on the tribe’s welfare,” and such a position would be “inconsistent with the increasingly electronic nature of modern commerce and the federal policy to encourage tribal self-government and self-sufficiency.” *Id.* at 900 (citing *F.T.C. v. Payday Financial, LLC*, 935 F. Supp. 2d 926, 939 (D.S.D. 2013)). The Court also rejected Sprint’s argument that the small number of Sprint customers on the reservation should preclude jurisdiction. Although courts may consider the degree of connection to a reservation in the jurisdictional equation, *id.* (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337–38 (2008)), unresolved factual and legal questions surrounded that analysis such that the Court determined it was unable to rule that the tribal court plainly lacked jurisdiction.

The Court concluded that the tribal court must be afforded the opportunity to resolve these questions. *Id.* at 901. The Court also did not find that federal law preempted tribal regulation as federal law had announced no express jurisdictional prohibition. *Id.* at 904. In light of the tribal exhaustion requirement, the Court issued a stay pending exhaustion of tribal remedies on the question of tribal court jurisdiction. Sprint has appealed the district court’s decision to the Eighth Circuit Court of Appeals. This appeal has been fully briefed since February 22, 2016. The parties have requested oral argument, which has not yet been scheduled. *Sprint Communications Company, L.P. v. Wynne*, Case No. 15-2954.

### *In re Tavian B.*

Finally, in *In re Tavian B.*, 874 N.W.2d 456, 292 Neb. 804 (Neb. 2016), the Supreme Court of Nebraska reversed the state district court’s denial of a motion to transfer an involuntary custody proceeding involving an Indian child under the Indian Child Welfare Act to tribal court. In this case, the state had moved to terminate parental rights approximately 16 months after the child’s removal. Shortly thereafter, the child became enrolled in the Oglala Sioux Tribe, which had accepted jurisdiction over the case. The child’s father then moved to transfer. The state denied the motion finding that the State proved that good caused existed to deny the transfer as the proceeding was at an advanced stage, a proper consideration under the 1979 BIA guidelines for state courts in ICWA cases (44 Fed. Reg. 67,584, 67,591 C.3(b)(i) (Nov. 26, 1979). 292 Neb. at 806–07. The child’s father appealed to the Nebraska Supreme Court. While the case was pending on the appeal, the BIA amended its guidelines to provide that the state court may not consider the advanced stage of a case when evaluating a motion to transfer. Consequently, the Nebraska Supreme Court found that the district court decision could not be based on the advanced stage of the proceeding. *Id.* at 808–11. Further, the court also rejected the State’s claim that a state court may consider the best interest of the child in rendering a decision on a motion to transfer. In so holding, it relied both in its prior precedent and the absence of such a rule in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). *Id.* at 811–12. Moreover, the court found that “allowing the state court to determine the best interests of the Indian child undermines the purpose of ICWA,” which is intended to “promote the stability and security of Indian tribes and families[, and to] reflect the unique values of Indian culture.” *Id.* at 812. The Nebraska Supreme Court therefore reversed and remanded with directions to transfer Tavian’s case to the Oglala Sioux Tribal Court. *Id.* at 813. ♦





## NORTHWEST REGION UPDATE

By Lauren J. King, Foster Pepper PLLC

### Washington

#### *State v. Shale (Washington State Supreme Court 2015): PL 280*

In *State v. Shale*, 182 Wash. 2d 882, 345 P.3d 776 (2015) (en banc) the Washington Supreme Court unanimously held that the State had jurisdiction to prosecute a non-member Indian residing on a reservation for failing to register as a sex offender in violation of state law. The defendant, Shale, is a member of the Yakama Nation who resided on the reservation of a different tribe, the Quinault Indian Nation. Washington is a Public Law 280 state. Under Revised Code of Washington 37.12.010 et seq.—the state’s codification of its PL 280 jurisdiction—the state does not have criminal jurisdiction over “Indians when on their tribal lands or allotted lands within an established reservation” unless the subject tribe has requested that “its people and lands be subject to” such jurisdiction. The court interpreted the language “when on *their* tribal lands” to refer only to the tribe in which the Indian is a member, meaning that the state *does* have criminal jurisdiction over an Indian who commits a crime on tribal lands of a tribe in which he is *not* a member. The court held that because Shale was not on Yakama lands, he was subject to state criminal jurisdiction, and could also be subject to prosecution by Quinault for failure to register as a sex offender.

#### *Idaho Rivers United v. U.S. Army Corps of Engineers (W.D. Wash. Feb. 9, 2016): Standing*

In *Idaho Rivers United v. U.S. Army Corps of Engineers*, NO. C14-1800JLR, 2016 WL 498911 (W.D. Wash. Feb. 9, 2016), the court dismissed a suit from the Nez Perce tribe and various environmental groups challenging sediment dredging activities by the U.S. Army Corps of Engineers in the lower Snake River, where Nez Perce has treaty fishing rights. The tribe and environmental groups claimed that the Corps didn’t adequately consider other methods for removing accumulated sediment, and that the Corps violated NEPA and the Clean Water Act by failing to undertake a public interest review or consider the impact on various fish species in the Snake River. Finding that the tribe and environmental groups failed to show “concrete and particularized harm” to the fish species from the dredging project and thus lacked standing, the court denied the plaintiffs’ motion for summary judgment and granted cross-motions for summary judgment in favor of the Corps.

#### *Swinomish Indian Tribal Community v. BNSF Railway Co. (W.D. Wash. Sept. 11, 2015): Rights-of-way, primary jurisdiction doctrine.*

In *Swinomish Indian Tribal Community v. BNSF Railway Co.*, No. C15-543RSL, 2015 WL 9839703 (W.D. Wash. Sept. 11, 2015), the Swinomish Indian Tribal Community sued

BNSF for breach of a right-of-way easement agreement and trespass after BNSF allegedly sought to increase its use of a right-of-way running across the north end of the Swinomish reservation in contravention of the terms of the easement agreement. BNSF moved to dismiss the case, claiming that Swinomish’s claims may be preempted by federal rail carrier regulations and that under the primary jurisdiction doctrine, the case should be transferred to the Surface Transportation Board—the agency with sufficient expertise in federal rail carrier regulations to determine (1) whether the claims were preempted and (2) the appropriate interpretation of federal regulations of common carriers. The court disagreed, holding that referral to the STB was neither efficient nor necessary. “If plaintiff’s breach of contract claim and request for injunctive relief are not preempted, their resolution will require a thorough knowledge of Washington contract law and a balancing of the various interests represented by the ICCTA and the Indian Right-of-Way Act of 1948. . . . The STB has no expertise in the other areas of law that will govern the outcome of this case, and in fact has recognized the primacy of the Bureau of Indian Affairs in handling disputes regarding rights-of-way granted by that agency.” *Id.* at \*2.

### Oregon

#### *Confederated Tribes & Bands of the Yakama Nation v. United States (D. Or. Dec. 18, 2015): CERCLA*

In *Confederated Tribes & Bands of the Yakama Nation v. United States*, No. 3:14-cv-01963-PK, 2015 WL 9942044 (D. Or. Dec. 18, 2015), the court awarded nearly \$100,000 to the Yakama Nation on summary judgment for response costs associated with the Army Corps of Engineers’ dumping of hazardous materials on Bradford Island and in the Columbia River, along with future costs associated with restoring fishing sites harmed by the materials. In ruling that the Nation was entitled to future costs, the district court disagreed with a magistrate judge’s ruling that the Nation was not entitled to such costs. The district court ruled that when a plaintiff establishes liability for response costs under CERCLA, the plaintiff is also entitled to a declaratory judgment that is binding on future cost recovery actions, as long as the plaintiff can demonstrate that the costs are “response costs” under CERCLA. The Nation will still need to establish the exact amount of response costs incurred at trial, including whether costs associated with the enactment of a fishing ordinance is a response cost under CERCLA (the court rejected this portion of the Nation’s motion for summary judgment, finding there were material issues of fact regarding whether the ordinance was released due to the Corps’ release of hazardous materials).

## Idaho

### *In re Doe (Idaho Supreme Court, Feb. 1, 2016): ICWA, sovereignty, sovereign immunity*

In *In re Doe*, No. 43165, 2016 WL 369450 (Idaho Feb. 1, 2016), an ICWA case, the Idaho Supreme Court held that any error in the trial court's finding that the subject child was not Indian was harmless because the trial court applied ICWA's placement preferences despite its finding that the child was not an Indian. Thus, the result would not have been different had the court determined the child to be an Indian; either way, ICWA would have applied in the placement determination. The Court also found that the trial court abused its discretion by compelling discovery of the child's father's application for tribal membership. Because the tribe had already furnished proof that the father was a member and because the father's membership determination was made "in the Tribes' sole discretion[,] [i]t does not matter how the [plaintiff adoptive parents], the trial court, or this Court interpret the Tribes' governing documents regarding eligibility for membership. Child's father's tribal status was conclusively established by Tribes." *Id.* at \*5. Furthermore, the Supreme Court found that the trial court abused its discretion by enjoining the tribe from processing or filing any application for the child's tribal membership. "The Tribes have exclusive power to determine membership and eligibility for membership. Any order by a trial court seeking to limit that power, however temporarily, is an abuse of discretion. Therefore, the order of the trial court preventing the Tribes from processing or filing any application for Child's membership in the Tribes was an abuse of discretion." *Id.* at \*6. Finally, the Supreme Court held that the trial court's award of attorney fees in the plaintiff adoptive parents' favor as the prevailing party and against the tribe was barred by the tribe's sovereign immunity. Emphasizing that a tribe must expressly waive its immunity to monetary damages in order to be liable for such damages, the court found that "[t]he Tribes in this case did not waive their immunity with respect to attorney fees, either by agreement or by requesting attorney fees of their own." *Id.* at \*8.

### *In re Verified Petition for Writ of Mandamus (Idaho Supreme Court Nov. 20, 2015): standing, writ of mandamus to compel non-discretionary ministerial duties*

In *In re Verified Petition for Writ of Mandamus*, No. 43169, 2015 WL 7421342, 999 (Idaho Nov. 20, 2015), the Coeur D'Alene Tribe successfully petitioned for a writ of mandamus to compel the Idaho Secretary of State to certify as law a Senate bill to repeal a statute allowing wagering on historical horse races; an untimely gubernatorial veto of the bill resulted in the bill becoming law. The governor did return a veto of the bill to the Senate, but did not submit it until seven days after it was presented to him. Despite receiving notifications that the veto was untimely and therefore invalid, the Senate held a vote to override the veto, which failed. The Tribe then requested that the Secretary of State certify the bill as law, and the Secretary refused to do so. The Tribe petitioned the Supreme Court for a writ of mandamus. The Idaho Supreme Court agreed with the Tribe that the governor's failure to veto

the bill within five days as required by the Idaho constitution resulted in the bill automatically becoming law. Interestingly, the court found that the tribe lacked standing because "it fail[ed] to present sufficient facts as to how S.B. 1011 impacts the Tribe's ability to benefit from gaming going forward." *Id.* at \*3. "Without providing facts to show actual or imminent losses of profit or rights greater than the average citizen, the Tribe has not demonstrated a 'distinct and palpable' injury sufficient to confer standing." *Id.* Nevertheless, the court exercised jurisdiction over the writ because, in cases seeking to compel public officers to perform non-discretionary ministerial duties, a citizen is not required to show "a special injury to himself or his property." *Id.* at \*4. The court awarded attorneys' fees to the Tribe as the prevailing party.

### *FMC Corp. v. Tribes, No. 4:14CV489-BLW, 2015 WL 6958066 (D. Idaho Nov. 9, 2015): tribal court exhaustion*

In *FMC Corp. v. Tribes*, No. 4:14CV489-BLW, 2015 WL 6958066 (D. Idaho Nov. 9, 2015), a Shoshone-Bannock tribal court found that FMC was required to obtain a permit to store hazardous waste on reservation fee lands owned by FMC, and owed \$20 million to the Tribe for ten years' worth of unpaid permits. FMC appealed the tribal court's ruling to the tribal appellate court, where the ruling was affirmed. FMC then sued in Idaho federal district court, alleging that it was not afforded due process in tribal court. FMC argued that its due process was violated because (1) the tribal courts were improperly influenced by the tribal council and (2) two judges on the tribal appellate court were biased against FMC. The Idaho federal district court found that FMC did not exhaust its first claim in the tribal courts and was therefore precluded from raising the argument in federal court. But the court found that FMC *did* exhaust its second claim in tribal court. FMC filed briefs in the tribal court arguing that the two judges were biased and pointing to a transcript of the judges' comments at a public legal conference that allegedly showed they were biased. It provided the same material to the federal court, and additionally sought to conduct discovery on the issue of bias. The court held that such discovery was not allowed because FMC failed to conduct discovery on the issue in tribal court. "To allow a litigant to conduct full-blown discovery here, after he failed to conduct discovery in the tribal court litigation, would ignore *National Farmers [Union Ins. Cos. v. Crow Tribe of Indians]*, 471 U.S. 845 (1985) and *Iowa Mutual [Ins. Co. v. LaPlante]*, 107 S. Ct. 971 (1987). Those cases directed that all issues be fully presented to the tribal court so that it might cure any problems and give the federal court the benefit of its expertise. If a due process issue like judicial bias is not fully developed through discovery before being presented to the tribal court—and the litigant simply sits on his discovery rights until he gets into federal court—the tribal court never gets a chance to review the discovery, apply its expertise, and cure any unfair judicial bias revealed by the discovery." *Id.* at \*3. Thus, the court held that FMC may raise the argument that the two tribal court judges were biased, but could not conduct discovery on the claim. *Id.* at \*4. ♦

*Montana* provides that “a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing.” Such other means, the Fifth Circuit concluded, includes tort claims.

Petitioners argue that “Tribal courts lack civil jurisdiction over nonmembers absent congressional authorization or the defendant’s unambiguous consent.” Furthermore, Petitioners contend that, regulation through civil torts is not within the “other means” *Montana* exception because non-members cannot knowingly consent to tribal rules “when regulation takes the form of civil suits in which tribal juries decide the meaning of unwritten tort law, the content of which is often impossible for nonmembers to determine in advance.” Petitioners urge the Court to hold, at a minimum, that tribes may not exercise civil jurisdiction over non-members in tort actions absent the defendant’s unambiguous consent.

Respondents argue that “[t]he ability to exercise adjudicative authority over nonmembers who have implicitly or explicitly consented to jurisdiction is essential to the ‘right of the Indians to govern themselves,’” and as such, the Court should not deny tribal governments the authority to exercise civil jurisdiction over tort claims. Respondents contend that the case fits squarely within the *Montana* exception permitting civil jurisdiction over non-members who enter consensual relationship with the tribe or its members. “In short, by establishing a Tribally licensed business on Tribal property and agreeing with the Tribe to take Doe on as an intern at the Tribe’s expense, petitioners manifested their consent to Tribal jurisdiction over claims that the agent charged with supervising Doe’s work sexually assaulted him on store premises during business hours.” Respondents ask the Supreme Court to affirm the Fifth Circuit’s ruling because the lower court’s decision comports with previous Supreme Court decisions in defining the boundaries of tribal civil jurisdiction over non-members.

### Pending Petitions

Writs of certiorari are currently pending in eleven cases of interest: *Seminole Tribe v. Stranburg*; *Soaring Eagle Casino and Resort v. NLRB*; *Little River Band of Ottawa Indians Tribal Government v. NLRB*; *Knight v. Thompson*; *La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee v. Department of Interior*; *Crow Allottees v. United States*; *Citizens Against Casino Gambling in Erie County v. Chaudhuri*; *Zepeda v. U.S.*; *Wasatch County, Utah, et al. v. Ute Indian Tribe of Uintah and Ouray Reservation*; *Alaska v. Organized Village of Kake, Alaska, et al.*; and *Jensen v. EXC, Inc.*

#### *Seminole Tribe v. Stranburg*

In *Seminole Tribe v. Stranburg*, the Seminole Tribe filed a petition for certiorari challenging the state of Florida’s tax on utility services that are provided to the reservation.

Florida Statute § 203.01 authorizes utility companies to include the utility tax on a customer’s bill, which obligates the customer to pay the tax to the utility company. The utility company then passes the payment to the state of Florida. A utility company however, is not required to pass the tax along to the consumer.

The Petitioner seeks the Supreme Court’s intervention to resolve a circuit split. The Tenth and Eleventh Circuits have held “where the taxing scheme does not require a seller to pass a tax along to a purchaser, the legal incidence of the tax necessarily remains with the seller.” The Sixth and Ninth Circuits have held, “the legal incidence of a tax can fall on a purchaser despite the absence of a mandatory pass-through provision.” The Tribe argues that the tax is impermissible because without Congressional approval, a “State is categorically without power to tax reservation lands and reservation Indians.”

#### *Little River Band of Ottawa Indians Tribal Government v. NLRB*

In *Little River Band of Ottawa Indians Tribal Government v. NLRB*, the Petitioner seeks review of the Sixth Circuit’s judgment that the National Labor Relations Act (“NLRA”) applies to the operation of the Tribe’s casino and governs the labor relations and collective bargaining for public-sector employees working on reservation lands. The Sixth circuit relied on the Supreme Court’s Statement in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) that “a general statute in terms applying to all persons includes Indians and their property interests.” The Sixth Circuit concluded that the Tribe is subject to NLRA regulation because application of the regulations does not undermine the Tribe’s right of self-governance in purely intramural matters, and there is no evidence that Congress intended for the NLRA not to apply to tribal governments.

The Tribe argues that the Court should adopt the approach of the Tenth Circuit that “tribal labor relations laws constitute a central sovereign concern and . . . that ‘Congress did not intend by its NLRA provisions to preempt tribal sovereign authority’ over such laws.” The Tribe also argues that its sovereignty cannot be diminished unless “Congress clearly manifests its intent to do so.” As the NLRA is silent as to its application to Indian tribes, the Tribe concludes that “the proper inference from silence . . . is that the sovereign power . . . remains intact” to regulate the collective bargaining activities of tribal government employees.

#### *Soaring Eagle Casino and Resort v. NLRB*

In *Soaring Eagle Casino and Resort v. NLRB*, the Petitioner casino, an enterprise of the Saginaw Chippewa Indian Tribe of Michigan, seeks reversal of the Sixth Circuit’s ruling that the NLRA applies to the Soaring Eagle Casino and Resort and that the NLRB has jurisdiction over the casino’s employment practices. The Sixth Circuit ruled that

it was bound by its own precedent established in *NLRB v. Little River Band of Ottawa Indians Tribal Government*, which held that “federal laws generally applicable throughout the United States apply with equal force to Indians on reservations.”

The Tribe argues that as the NLRA is silent as to jurisdiction over the tribes, the Sixth Circuit “fails to respect the historic deference that the Supreme Court has given to considerations of tribal sovereignty in the absence of congressional intent to the contrary.” Additionally, the Tribe argues that its treaty right to exclude and regulate on-reservation activities “prevent[s] application of the NLRA to the Casino’s activities.”

### *Knight v. Thompson*

In *Knight v. Thompson*, the question presented is whether Alabama’s prison grooming policy violates the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) by the extent that it prohibits Petitioners from wearing unshorn hair in accordance with their sincerely held religious beliefs. *Knight v. Thompson* was previously remanded back to the Eleventh Circuit in light of the Supreme Court’s decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015). The Eleventh Circuit, however, reissued its previous opinion holding that the grooming policy requiring all male inmates to wear short hair furthered compelling interests, and was the least restrictive means of further those compelling interests.

Petitioners argue that the Eleventh Circuit’s re-issued decision is inconsistent with the Supreme Court’s decision in *Holt v. Hobbs*. Under *Holt*, “when an accommodation is accepted in a large majority of states, a state denying that accommodation must offer evidence demonstrating that ‘its prison system is so different from the many institutions that allow [an accommodation that the accommodation] cannot be employed at its institutions.’” Petitioners also argue that an under-inclusive pick-and-choose approach to confronting the problems with which the institution is concerned is impermissible under *Holt*, as it suggests that those interests could be served by a less restrictive means. Lastly, Petitioners argue that *Holt* rejected the Eleventh Circuit’s holding that a prison’s interest in uniformity “is a sufficient justification for subjecting all inmates to a rigid no-exceptions rule” because “the very purpose of RLUIPA is to require such ‘granting specific exemptions to particular religious claimants.’”

### *La Cuna Aztlan Sacred Sites Protection Circle Advisory Committee v. Department of Interior*

In *La Cuna Aztlan Sacred Sites Protection Circle Advisory Committee v. Department of Interior*, Petitioners seek review of the Ninth Circuit’s ruling that the Petitioners failed to establish a record to support the claim “that the loss of access to [a] limited area. . . imposes a substantial burden.” The question presented is: “whether there is a Religious Freedom Restoration Act [“RFRA”] violation when the Government denies Native Americans access to land nec-

essary for religious rites by the threat of civil or criminal trespass prosecution.”

The Petitioners claim that, by denying access to land with religious significance by threat of civil or criminal sanctions, the Government is placing a substantial burden on the Petitioners’ exercise of religion in violation of RFRA. The Petitioners argue that the Ninth Circuit’s ruling conflicts with the Supreme Court’s ruling in *Holt v. Hobbs* 135 S. Ct. 853 (2015), where the Court held that the relevant inquiry into whether there is a sustainable burden placed upon an individual’s religious exercise is “whether the believer will face serious disciplinary action unless he forgoes the exercise. When the government puts [the plaintiff] to this choice, it substantially burdens his religious exercise.” Petitioners claim that they must refrain from visiting sacred sites, contrary to their religious beliefs, to avoid potential criminal charges, and that this violates RFRA. The case was distributed for conference on February 19, 2016.

### *Crow Allottees v. United States*

In *Crow Allottees v. United States*, the questions presented are: Can the water rights owned by individual Crow Indian allottees be awarded to the Crow Tribe in negotiations between the United States, the Tribe, and the State of Montana? Further, do the Montana Courts have jurisdiction to decide these questions of federal law related to allottees’ rights? The case involves a water rights compact out of the Montana Water Court, which had the purpose of “settling any and all existing water right claims of or on behalf of the Crow Tribe of Indians in the State of Montana.”

The Petitioners claim that their individual rights were separate from the reserved rights held by the Tribe and that their individual interests were not adequately represented in compact negotiations. The Petitioners argue that the Montana Water Court lacked jurisdiction over their water rights as that court “lacks jurisdiction to determine anything other than existing water rights,” and “issues of Indian law are within the exclusive jurisdiction of the federal courts.” The Petitioners further argue that the Montana Supreme Court erred in finding that the Petitioners water rights are derived from the reserved rights of the Crow Tribe. Such a finding, Petitioners contend, is in contradiction to *United States v. Powers*, 305 U.S. 527 (1939), which held “the waters were reserved to the individual Indians and not to the tribe.” While the extent of reserved water rights has not been fully determined, federal law recognizes water rights as a vested property right for the Petitioners. This vested right, Petitioners assert, entitles them to more than “just and equal share of the Tribal Water Right” which is not a property right in itself, but “an entitlement to participate in some future process related to what has now been wrongly classified as the Crow Tribe’s water rights.”

### *Citizens Against Casino Gambling in Erie County v. Chaudhur*

In *Citizens Against Casino Gambling in Erie County v.*

*Chaudhur*, Petitioners seek review of the Second Circuit’s ruling that land in New York acquired by the Seneca Nation under the Seneca Nation Settlement Act (“SNSA”) attained restricted-fee status when purchased and is therefore subject to tribal jurisdiction.

Petitioners argue that an abrogation of state sovereignty must be express, and assert that Congress did not manifest such an intent, through the SNSA, by which Congress appropriated funds to the tribe for various purposes, including to acquire lands. Petitioners contend that if Congress had intended to divest the State of its sovereignty, “it would have been required to make such a seismic event unequivocally clear.” Furthermore, Petitioners urge a limited construction of the Indian Commerce Clause; they acknowledge Congress’s authority to regulate commerce with the Indians, but question its authority to “unilaterally dismantle a state’s territorial integrity.” The case was distributed for conference on February 19, 2016.

### *Zepeda v. United States*

In *Zepeda v. United States*, the Petitioner seeks review of the Ninth Circuit’s ruling that for prosecution under the Major Crimes Act (“MCA”), the government must prove that the defendant has some quantum of Indian blood whether traceable to a federally recognized tribe or not. The Petitioner asks the Supreme Court to determine if such a construction discriminates on the basis of race.

The Petitioner argues that the Ninth Circuit’s holding that there is no requirement that an Indian defendant’s blood be traceable to a federally recognized tribe is impermissible because such an interpretation would convert the MCA to “a criminal statute whose application turns on whether a defendant is of a particular race.” The Petitioner contends that the second requirement for prosecution under the MCA, that the defendant have some affiliation with a federally recognized tribe, cannot save the test from discriminatory application as the test still turns on racial classification. This, the Petitioner concludes, offends the fundamental principles of equal protection.

### *Wasatch County, Utah, et al. v. Ute Indian Tribe of the Uintah and Ouray Reservation*

In *Wasatch County, Utah, et al. v. Ute Indian Tribe of the Uintah and Ouray Reservation*, Petitioners ask the Supreme Court to determine who has civil and criminal jurisdiction over enrolled Ute Tribal members on forest lands within the Uintah Valley Reservation. Petitioners claim that the Supreme Court’s decision in *Hagen v. Utah*, 510 U.S. 399 (1994), settles the question in favor of State and County jurisdiction. In *Hagen* the Supreme Court ruled that the Uintah Valley Reservation was diminished and that the portion diminished was no longer under the jurisdiction of the Tribe. The Ute Tribe, which won before the Tenth Circuit, argues that the Tribe never lost jurisdiction over the forest lands in question. The Tenth Circuit previously held, in what is known as *Ute V*, that while the Uintah Reservation had been diminished, the forest lands at issue

now remained under the jurisdiction of the Tribe because these lands were not addressed in *Hagen*.

Wasatch County has since attempted to exercise criminal jurisdiction over enrolled members for acts occurring within the forests lands. The Ute Tribe responded by filing a complaint in federal court to enjoin the County from acting. The Tenth Circuit granted the Tribe’s request for an injunction, categorizing the County’s exercise of jurisdiction as “a renewed campaign to undo the tribal boundaries” previously settled by the Tenth Circuit. Petitioners argue that the Tenth Circuit has created jurisdictional chaos and that a ruling from the Supreme Court is necessary to determine jurisdiction once and for all. Relying on *Hagen*, the Petitioners contend that the Tribe lacks jurisdiction over the forest lands within the Uintah Reservation because the Supreme Court previously held that land had been diminished and is no longer Indian country. The Ute Tribe argues that review is not warranted because the Tenth Circuit complied with the Supreme Court’s ruling in *Hagen*. The Tenth Circuit, the Tribe contends, clearly defined the boundaries of the Reservation in *Ute V* by ruling that “lands in the Uintah Indian Reservation that were opened to settlement in the early 1900s and not previously allotted to Indians or later restored to trust status are no longer within the Reservation. Everything else—including the Forest lands in question in this case—remains part of the Reservation.”

### *Alaska v. Organized Village of Kake*

In *Alaska v. Organized Village of Kake, Alaska, et al.*, Petitioner seeks review of the Ninth Circuit’s ruling that the Department of Agriculture (“Department”) violated the Administrative Procedure Act because the Department’s decision to change course, exempting the Tongass National Forest (“Tongass Forest”) from the Roadless Rule (“Rule”), was arbitrary and capricious as the Department did not provide sufficient justification for the policy change. The Rule, promulgated by the Department, limited road construction and timber harvesting in national forests. The Department, under the Clinton Administration, originally determined that exempting the Tongass Forest from the Rule would risk the loss of an important road-less area. But two years later, under the Bush Administration, the Department reversed itself by concluding that the application of the Rule in the Tongass Forest was unnecessary. The question presented is whether the Ninth Circuit’s decision contravenes the basic administrative law principle that an executive agency may change the policies of a previous administration based on the new administration’s different values and priorities, even though the relevant facts are unchanged.

The Petitioner argues that “courts must accept a new administration’s different values and priorities as a legitimate reason for changing policies so long as the explanation provided is reasonable” and that a more detailed justification is required only “if the change is based on factual findings that contradict factual findings underlying

the previous rule.” Petitioners contend that as there were no factual contradictions but only differing judgments between the administrations when balancing environmental and socio-economic interests, the Court should defer to the policy judgment of the executive branch that the Tongass Forest should be exempt from the Rule.

### *Jensen v. EXC, Inc.*

In *Jensen v. EXC, Inc.*, Petitioner seeks review of the Ninth Circuit’s ruling that the Navajo Nation lacked civil jurisdiction over a tort suit arising out of a highway accident between a tour bus and a car, occurring on an Arizona State Highway within the boundaries of the Navajo Reservation. The Ninth Circuit held that neither of the exceptions articulated in *Montana v. United States*, 450 U.S. 544 (1981), allowing a tribe to exercise civil jurisdiction over non-Indians applied here.

Petitioners contend that Supreme Court precedent requires courts to look to such things as “relevant statutes, treaties, and other materials” when determining civil jurisdiction over non-members. This, the Petitioners argue, the Ninth Circuit failed to do. Petitioners point to the Navajo Treaty of 1868 as a source of civil jurisdiction over non-members, arguing that “treaty language reserving Indian lands of a tribe’s exclusive use and occupation is a

valid source of tribal jurisdiction to regulate the conduct of non-members . . . .” Petitioners also argue that the Ninth circuit erred in concluding that the highway on which the accident occurred is the equivalent of non-Indian fee land, because the Ninth Circuit failed “to consider other factors in addition to the tribe’s allowing public access to a state maintained highway,” such as, the congressional purpose for constructing the roadway; the extent to which the granting instrument reserved specific rights to the tribe; and whether the Tribe received compensation for use of the land. Lastly, the Petitioners argue that the consensual relationship exception outlined in *Montana* applies in this case and was established by “the actions of the [tour bus company] in entering the reservation to conduct commercial touring activities,” subjecting the company to the civil jurisdiction of the Navajo Tribe. The case was distributed for conference on November 6, 2015.

### Denied Petitions

Certiorari was denied this term in seven cases of interest: *White v. Regents of the University of California, et al*; *Two Shields v. Wilkinson*; *Decker v. United States*; *Torres v. Santa Ynez Band of Chumas Indians*; *Sac and Fox Nation of Oklahoma v. Borough of Jim Thorpe*; *Oklahoma v. Hobia*; and *Wisconsin v. Ho-Chunk Nation*. ♦

### BELTWAY continued from page 3

tendency to have the House move bills first. A failed budget process could hamper the appropriations process from moving beyond the committee mark-ups.

### Legislative Action

The 114th Congress enacted more laws in its first session than during both sessions of 113th Congress (113-72). But of the one hundred and thirteen enacted laws only five were tribal specific and each of those six were germane to just one or a few tribal nations. The 114th Congress has not passed any broad Indian-country-specific legislation, leaving many priorities, such as a Carcieri-fix, NAHASDA reauthorization, and self-governance amendments unmet.

Forty-eight bills introduced in the Senate have been referred to the Senate Committee on Indian Affairs. The Committee has considered thirty-three of these bills, eight of which have been brought to the floor, and seven have passed the chamber. Three of these bills have been enacted into law: the Albuquerque Indian School Land Transfer Act (PL 114-69), a land conveyance bill for certain property to the Yukon Kuskokwim Health Corporation (PL 114-56), and the New Mexico Navajo Water Settlement Technical Corrections Act (PL 114-57).

Members of the House have introduced and referred eighty-seven bills to the House Subcommittee on Indian, Insular, and Alaska Native Affairs. The Subcommittee has considered all eighty-seven of these bills and ten have passed the House. Only two of the ten bills that made it out of the House were enacted into law, both relating to

the Miami Tribe of Oklahoma. H.R. 533 (114-28) revoked the charter of the Miami Tribe at its request and H.R. 487 (114-127) allows the Tribe to lease, sell, convey, or transfer any part of its interest in real property that is not held in trust by the United States. In addition to these two bills, House bill H.R. 2270 (PL 114-101) the Billy Frank Jr. Tell Your Story Act was signed into law. The Act renamed the Nisqually National Wildlife Refuge to the Billy Frank Jr. Nisqually National Wildlife Refuge and created a national monument within the refuge commemorating the signing of the 1854 Treaty of Medicine Creek.

One of the most far-reaching pieces of legislation enacted in the 114th Congress was the reauthorization of the Elementary and Secondary Education Act. In December 2015 Congress passed the Every Student Succeeds Act (“ESSA”), which replaces the No Child Left Behind Act. The ESSA permanently reauthorizes the State Tribal Education Partnership grant program, requires states to engage in meaningful consultation with tribal nations in the development of state plans for Title I funding, directs the Secretary of Education to conduct outreach to assist eligible local education agencies and BIE schools to apply for Title VII grants, and requires the Secretary of Education to provide more technical assistance to local education agencies. The ESSA also funds the expansion of Native language immersion programs in public schools.

### Executive Branch

The Obama Administration is working to achieve as

much for Indian country as possible before the President's term ends on January 20, 2017. Some new faces are at the helm to undertake this task. Assistant Secretary—Indian Affairs Kevin Washburn (Chickasaw Nation) stepped down in December 2015 to return to the University of New Mexico Law School after more than three years of service. During his tenure the Administration achieved numerous victories for Indian Country including taking thousands of acres of land into trust on behalf of tribal nations, promulgating the "Patchak Patch," improving the federal acknowledgment process, and addressing past disputes through the Ramah settlement. Principal Deputy Assistant Secretary Lawrence Roberts (Oneida Nation of Wisconsin) has assumed the role of Acting Assistant Secretary—Indian Affairs for the remainder of the Administration.

In November 2015 the White House also named Karen Diver (Fond du Lac Band of Lake Superior Chippewa) as Special Assistant to the President for Native American Affairs. Ms. Diver takes over for Jodi Gillette (Standing Rock Sioux Tribe) who left the Administration in May 2015 to join the law firm of Sonosky, Chambers, Sachse, Endreson & Perry, LLP, after more than six years of dedi-

cated service that spanned several agencies. Ms. Diver is the former chairwoman of the Fond du Lac Band of Lake Superior Chippewa and she is the first elected tribal leader to hold such a high-level position at the White House.

The Administration will look to reach its goal of placing 500,000 acres of land into trust on behalf of tribal nations before the President leaves office. In January 2016 the Department placed 89,978 acres in trust on behalf of the Pueblo of Isleta, the largest trust acquisition during the Obama Administration. To date the Administration has placed 397,268 acres into trust in the past seven years, which represents about 80% of its goal.

The Administration is also in its last push to promulgate regulations that will help Indian country. The Department is currently undertaking rulemaking efforts on rights-of-way, leasing, the Indian Child Welfare Act (state courts and agencies proceedings), and Indian trader regulations. It is generally understood that new regulations will need to be submitted to the Office of Management and Budget in April in order to be promulgated before the end of the Administration. ♦

**SAVE THE DATE!**

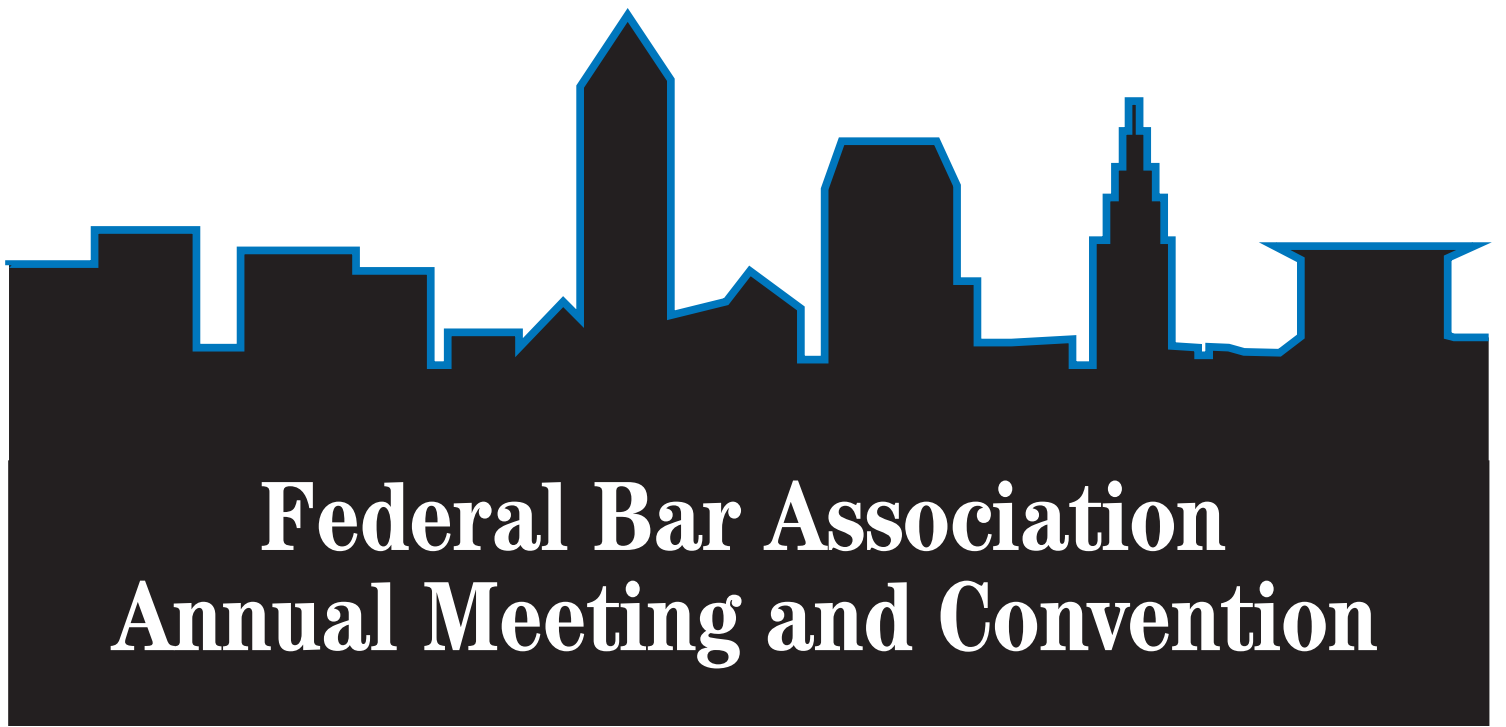
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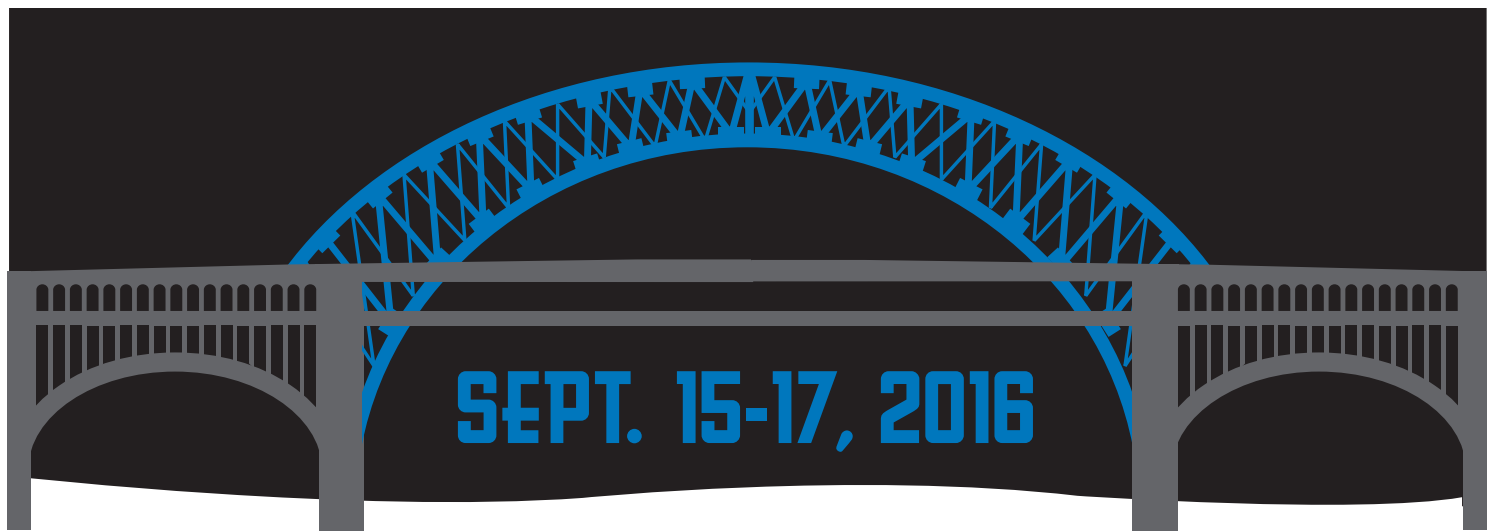






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