

# FEDERAL INDIAN LAW

Newsletter of the Federal Bar Association Indian Law Section

SPRING 2011

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## A WORD FROM THE CHAIR

By Elizabeth Ann Kronk

Aaniin! I hope this note finds you well. Since I last wrote, we have been preparing for the annual Indian Law Conference and with other ongoing section activities. Below is a short update on these activities.

### 36th Annual Indian Law Conference; Santa Fe, New Mexico (April 7-8, 2011)

As previously mentioned, we are again hosting our 36th Annual Indian Law Conference, “Best Practices & Continuing Challenges in Federal Indian Law,” on April 7 and 8 at the Hilton Buffalo Thunder Resort on the Pueblo of Pojoaque. Our conference co-chairs include Chair Professor Kristen Carpenter and Co-Chairs Professor Angela Riley, Paul Spruhan, and Tracy Toulou. The conference takes a deliberate look at some of the “best practices” in federal Indian law as a means of approaching challenges faced by American Indian, Alaskan Native, and Native Hawaiian peoples.

Panel discussions will cover several important areas, including Indian land and trust law, finance, criminal justice, gaming, taxation, and the environment—looking, in each instance, at a continuing legal 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 of in-house tribal legal counsel. Focus group panels will provide “nuts and bolts” information and strategies on water law; tribal family, women, and children’s programs; religious freedoms; civil jurisdiction; and environmental justice. We hope you can join us for a forward-thinking, practically oriented, and inspiring conference! To register for the 36th Annual Indian Law Conference or for additional information, please go to [www.fedbar.org/Education/Calendar-CLE-events/36th-Annual-Indian-Law-Conference\\_1.aspx](http://www.fedbar.org/Education/Calendar-CLE-events/36th-Annual-Indian-Law-Conference_1.aspx).



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## Lawrence Baca Lifetime Achievement and Indian Law Section Outstanding Service Awards

At the 36th Annual Indian Law Conference, we will award the Lawrence Baca Lifetime Achievement Award and Indian Law Section Outstanding Service Award on April 8, 2011. Prior recipients of the Lawrence Baca Lifetime Achievement Award include Lawrence Baca, Professor Phillip Frickey, and John EchoHawk. Prior recipients of the Indian Law Section Outstanding Service Award include Jack Lockridge, Hon. D. Michael McBride III, and Professor Elizabeth Kronk. The Award and Nomination Committee, which is responsible for selecting the recipients of these awards, is chaired by past FBA president and Indian Law Section chair emeritus Lawrence Baca. Other committee members include Hon. D. Michael McBride III, director at Crowe & Dunlevy P.C. in Tulsa, Okla., and justice for the Supreme Court of the Pawnee Nation, and Andrew Adams III, associate at Jacobson, Buffalo, Anderson & Hogen P.C. in St. Paul, Minn. The deadline for nominations for both awards was Feb. 25, 2011. The committee received several excellent nominations for both awards.

## Potential Amicus Brief in *United States v. Jicarilla Apache Nation*

As reported in our last newsletter and as a result of a recommendation from the section's Development of Federal Indian Law Committee (DFILC), the section is considering whether to submit an amicus brief in *United States v. Jicarilla Apache Nation*, currently pending before the U.S. Supreme Court. We have been participating in the Supreme Court Project through the Native American Rights Fund to determine whether the section should submit an amicus brief. To this end, Indian Law Section Board Member Hon. D. Michael McBride III, DFILC Member Brent Leonard, and I participated in a conference call with other potential amici on Feb. 25, 2011, to discuss options. Amici briefs in this case are due to the Court on March 31, 2011. I will continue to update you regarding the section's involvement in this matter.

## FBA Midyear Conference; Washington, D.C. (March 18-19, 2011)

The annual FBA Midyear Conference was held in Washington, D.C. on March 18 and 19. The section was well represented, as FBA Director and Indian Law Section Past Chair Hon. D. Michael McBride III and I attended the conference. It was a wonderful opportunity to work with the FBA national leadership as well as chapters, divisions, and other sections to help improve our section. Additionally, the conference had many wonderful panel presentations, as well as the annual FBA moot court competition. For more information on the FBA Midyear conference, please visit [www.fedbar.org/Education/Calendar-CLE-events/2010-Midyear-Meeting.aspx](http://www.fedbar.org/Education/Calendar-CLE-events/2010-Midyear-Meeting.aspx).

## National Native American Law Students Association Moot Court Competition

The National Native American Law Students Association (NNALSA) held its annual moot court competition at Columbia Law School in New York City on Feb. 25 and 26, 2011. I was honored to be asked by the competition coordinators to represent the FBA Indian Law Section on the final round judging panel. The FBA was also represented on the final round bench by Judge Gustavo Gelpi of the U.S. District Court for the District of Puerto Rico. The competition would not have been possible without the moot court problem written by Professor Matthew L.M. Fletcher, who is a member of the section's Executive Board. This year's



moot court problem asked the competitors to consider the extent of a federally recognized tribe's civil jurisdictional authority over a non-member Indian. NNALSA and the Columbia Law School NALSA Chapter did a wonderful job of hosting the annual competition. Congratulations to all the students who participated in this excellent annual event! And, MAHALO to the team of Keani Alapa and H. Maxwell Kopper from the University of Hawaii, who won the competition.

**Welcome!**

I would like to welcome several new additions to the Indian Law Section. First, it is my pleasure to welcome three new regional editors to the Newsletter Committee. Christina Morrow, a senior attorney in the U.S. Department of Health and Human Services' Indian Health Branch, will now serve as the Southeast regional editor, as Tim Evans, an associate at Holland & Knight LLP, is once again serving as our Washington, D.C./Beltway regional editor. Also, Yonne Tiger, general counsel for the Muscogee Creek National Council, is now the Oklahoma editor, and Cheryl Williams, an attorney at Williams & Cochrane LLP, is our new California/Hawaii editor. Welcome to the team—we sincerely appreciate your willingness to serve the section in these important roles.

It is also my pleasure to welcome several new

members to the Indian Law Section. Please join me in welcoming Jeffrey Boudreaux, Regina Brzozowski, Andrew Caulum, John Clark, Joshua Clause, Christopher Darneal, James DeBergh, Randal Evans, Jocelyn Fabry, William Gillis, Craig Houghton, Kathryn Isom, Breeann Johnson, James Kilbourne, Sandra McCandless, Raquel Myers, Rebecca Redelman, Constance Rogers, Micah Runnels, Catherine Stevens, Robert Thompson, and Jennifer Webb. It is through your continued support

of the section that we are able to serve Indian country. Without our members, the section would simply cease to function. We sincerely hope that you will find your membership valuable. Please do not hesitate to contact me should you wish to participate in the section's committees or activities.

I very much look forward to hopefully seeing you at our section's annual Indian Law Conference. I am confident this will be our best conference ever, and am especially excited for the return of the Thursday night BBQ! In the meantime, we will continue to work hard to serve the Indian Law Section. As always, please feel free to contact me at any time with questions or concerns, [elizabeth.kronk@umontana.edu](mailto:elizabeth.kronk@umontana.edu). Chi Miigwetch! ♦

**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.

**Your username:** the email you have on file with the national FBA  
**Your password:** your last name, all lowercase



## INSIDE THE BELTWAY UPDATE

By Timothy Q. Evans

### On the Hill

#### CONTINUING RESOLUTIONS AND REMAINING FY 2011 APPROPRIATIONS

During the first week of February, the House Republican Conference dominated news on Capitol Hill with its internal debate over how much to reduce spending levels in a Continuing Resolution (CR) that would fund the remainder of Fiscal Year (FY) 2011. The talks over the CR took on more urgency as the March 4 expiration of the current CR approached. Fiscally conservative House Members pressed for cuts in excess of \$100 billion, and on Feb. 9, 2011, House Appropriations Committee Chair Hal Rogers (R-Ky.) released a partial list of 70 programs that may see significant cuts. The final proposed long-term CR included approximately \$60 billion in cuts for the remainder of FY 2011 and passed the House on Feb. 19. Programs primarily serving tribes and their members were not included in the targets for significant funding reductions. However, House Republicans were unable to garner support in the Senate for their proposed long-term CR. In order to avoid a government shutdown after the March 4 deadline, House Republicans introduced and passed a short-term two-week CR that included prorated cuts of \$4 billion. The Senate agreed to the two-week CR and President Obama signed it into law on March 2. On March 15, the House passed a three-week CR to fund the government through April 8 while cutting current spending levels by roughly \$6 billion. At the time this newsletter went to press, the Senate had not yet voted on the measure.

#### 8(A) PROGRAM & VIRGINIA TRIBAL RECOGNITION BILLS

Two issues that saw much debate in last year's 111th Congress have come up again in the current session. On Jan. 31, Sen. Claire McCaskill (D-Mo.) introduced S. 236, a bill to eliminate "the preferences and special rules for Alaska Native Corporations" under the Small Business Administration's 8(a) program. The bill has been referred to the Small Business and Entrepreneurship Committee for further consideration. Rep. Bennie Thompson (D-Miss.) introduced a companion bill in the House, H.R. 598, which has been referred to the Committees on Natural Resources and Small Business.

Federal recognition of tribes in Virginia is also being considered again in the current Congress. On Feb. 17, Sen. Jim Webb (D-Va.) introduced a bill, S. 379, to extend Federal recognition to six of Virginia's tribal groups: (i) the Chickahominy Indian Tribe; (ii) the Chickahominy Indian Tribe-Eastern Division; (iii) the Upper Mattaponi Tribe; (iv) the Rappahannock Tribe Inc.; (v) the Monacan Indian Nation; and (vi) the Nansemond Indian Tribe. The bill was referred to the Senate Committee on Indian Affairs for further consid-

eration. Rep. Jim Moran (D-Va.) introduced a companion bill in the House, H.R. 783, which has been referred to the Committee on Natural Resources.

#### SENATE COMMITTEE ON INDIAN AFFAIRS

On Feb. 16, the Senate Committee on Indian Affairs (SCIA) held an organization business meeting to formally elect Sen. Daniel Akaka (D-Hawai'i) as chair and Sen. John Barrasso (R-Wyo.) as vice chair. During the meeting, committee members pledged to continue the panel's tradition of bipartisanship throughout the 112th Congress. Sen. Akaka most recently served as chair of the Senate Veterans Affairs Committee, but decided to give up that gavel to continue his efforts to enact legislation that would extend federal recognition to Native Hawaiians. After the meeting, Sen. Akaka announced that he would be retiring upon expiration of his term in 2012, meaning that he has two years at most to pursue his legislative priorities. During the meeting, the committee approved by unanimous consent two rules amendments offered by vice chair Barrasso which require that any bill considered at a committee business meeting be made publicly available at least three days in advance, and that any bill amendments to be filed with the clerk at least 24 hours in advance. Also on Feb. 16, Sen. Akaka announced the appointment of Loretta Tuell as the staff director/chief counsel of the SCIA. She replaces outgoing staff director Allison Binney. The committee held its first oversight hearing of the 112th congress on March 15.

#### HOUSE SUBCOMMITTEE ON INDIAN AND ALASKA NATIVE AFFAIRS; TRANSPORTATION, INFRASTRUCTURE, AND ECONOMIC DEVELOPMENT ROUNDTABLE

On March 8, the House Subcommittee on Indian and Alaska Native Affairs held its first hearing of the 112th Congress, to discuss funding for Indian programs. Assistant Secretary-Indian Affairs Larry EchoHawk and Acting Special Trustee Ray Joseph testified at the hearing. On March 2, Rep. Nick Rahall (D-W. Va.), the ranking Democrat on the House Committee on Transportation and Infrastructure, hosted a Native American Transportation, Infrastructure, and Economic Development Roundtable in Washington, D.C. The purpose of the event was to hear from Indian tribes about their priorities on economic development, transportation, water resources, and other related issues.

### Executive Branch

#### PRESIDENT'S FISCAL YEAR 2012 BUDGET REQUEST

President Obama released his FY 2012 budget request on Feb. 14. Because Congress has only enacted short-term stop gap measures known as continuing resolutions for FY 2011, which essentially maintained funding levels

from the previous FY 2010 enacted budget, the basis for comparing the President's proposed FY 2012 budget is the FY 2010 congressionally-enacted budget, or his previously proposed budget for FY 2011.

Overall, the White House adhered to its previous proposal calling for significant reductions in domestic funding levels. Notwithstanding those cuts, the President's FY 2012 request largely protects, and even modestly increases, Indian program funding. It contains modest but real increases in tribal contract support funding, tribal law enforcement funding (including increased monies for detention services and tribal courts), and funding of fixed costs for tribal governments, even as it holds other Interior budgets at or below FY 2010 levels. The most notable budget line items for Indian country are as follows:

- The budget for the Bureau of Indian Affairs (BIA) provides most of the funding for essential governmental services provided by or for Indian tribes. Most of the funding is organized under the Operation of Indian Programs (OIP) account. The President's FY 2012 budget request for the OIP account would be approximately 1.5 percent lower than his FY 2011 request but still 1 percent higher than the FY 2010 enacted level.
- The budget for the Indian Health Service (IHS) provides most of the funding for health services and facilities administered by or for Indian tribes. The Indian Health Services account includes funding levels for hospitals and clinics programs, other health services, Contract Medical Care (also known as Contract Health Services or CHS), and other service-based programs. The Indian Health Facilities account includes funds for facilities and equipment. The services account is overall modestly increased in the President's proposed FY 2012 budget, but contains a substantial increase in CHS funding. The President's request also would provide a 2.8 percent increase in the facilities account over his FY 2011 proposed budget.
- Tribal communities receive significant levels of funding from Native American Housing Block grants under the Native American Housing and Self-Determination Act (NAHASDA) as well as from Indian community development block grants (ICDBG), both administered by the U.S. Department of Housing and Urban Development. The President is requesting \$700 million for Indian housing block grants, the same as enacted in FY 2010, but further requests \$65 million in new obligations for the ICDBG account.
- Federal Indian education funding supports the elementary and secondary education of Indian children through two separate channels. The BIA and its Bureau of Indian Education (BIE) provides funding from within the Operation of Indian Programs (OIP) account described above. In addition, the U.S. Department of Education and its Office of Indian Education (OIE) provided \$127 million in FY 2010

to public, tribal, and BIE schools serving Native American students. The President's FY 2012 budget request asks for the same amount for FY 2012. For higher education, the President's FY 2012 request for tribally-controlled community colleges is \$60 million, the same as enacted in FY 2010; its request for Alaska Native and Native Hawaiian-serving colleges is \$30 million, up from the \$28 million enacted in FY 2010; and its request for Native American-serving nontribal institutions is \$9 million, up from the \$3 million enacted in FY 2010.

#### DOI SOLICITOR'S OFFICE INDIAN LAW PRACTITIONERS CONFERENCE

On March 3, Department of the Interior Solicitor Hillary Tompkins convened the Solicitor's Office's second annual tribal attorneys conference at the department's Washington, D.C., headquarters. The conference consisted of four panels focusing on the internal structure and workings of DOI and the Solicitor's Office, how DOI works with tribal governments on issues such as tribal records sharing, litigation the Solicitor's Office files on behalf of tribes and individual tribal members, and the future priorities of the administration in Indian Country. The conference included a special appearance and remarks by Interior Secretary Ken Salazar, who reiterated the administration's commitment to correcting the federal government's past wrongs in its dealings with tribes.

#### TRIBAL NATIONS SUMMIT FOLLOW UP MEETING

On March 3, the White House convened a meeting among tribal leaders and federal agencies as part of the National Congress of American Indians' Executive Council Winter Session in Washington, D.C, to follow up on the Tribal Nations Summit held by the President in December. The meeting focused on issues and ideas that emerged from the December summit and enabled further discussion among federal agency representatives and tribal leaders. The meeting included panel talks in five areas: (i) the nation-to-nation relationship between tribes and the federal government; (ii) economic development, housing, and infrastructure; (iii) education, health care, and community services; (iv) tribal land, cultural protection, and natural resources; and (v) public safety and homeland security.

#### POLITICAL APPOINTMENTS

During the week of Feb. 7, the White House named Charles Galbraith, an enrolled member of the Navajo Nation, to the position of associate director of the Office of Intergovernmental Affairs and Public Engagement. Galbraith most recently served as a deputy associate counsel in the White House Office of Presidential Personnel. He previously worked as an assistant U.S. attorney for the District of Arizona and as an aide to Sen. Tim Johnson (D-S.D.). Galbraith replaces Jodi

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## SUPREME COURT UPDATE

By Ann Tweedy and Cameron Fraser



So far this term, the Supreme Court has heard argument in one Indian law case, *United States v. Tohono O'odham Nation*, and granted certiorari in *United States v. Jicarilla Apache Nation*. The Court also granted certiorari in *Madison County v. Oneida Indian Nation*, but remanded the case before briefing was finished. Several petitions for certiorari are pending before the Court, and the Court has asked the acting solicitor general to file briefs expressing the views of the federal government in three cases: *Brown v. Rincon Band of Luiseño Mission Indians*, *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Company*, and *Osage Nation v. Irby*.

In *Madison County v. Oneida Indian Nation*, Madison and Oneida Counties (in New York) asked 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 raised the question of whether the Oneida Indian Nation's reservation was diminished or disestablished, an issue that the Second Circuit decided in the nation's favor in 2003. On Jan. 10, 2011, the Supreme Court vacated the judgment and remanded the case in light of the Oneida Nation's passing a Nov. 29, 2010, ordinance that waived its sovereign immunity from actions to enforce real property taxes.

On Nov. 1, 2010, the Court heard argument in *Tohono O'odham Nation*, where the United States seeks review of the U.S. Court of Appeals 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 for causes of action against the United States based on alleged breaches of federal trust responsibility related to the 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 appeals court held that § 1500 does not obviate the CFC's jurisdiction because the Oneida Indian Nation seeks different relief in its two actions. The nation seeks primarily equitable relief in its district court action, where the nation's focus is on an accounting that would amount to specific performance; 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"—i.e., 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"—i.e., money that the nation should have earned as profits but did not due to mismanagement. The appeals court 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 appeals court interpreted § 1500 too narrowly and, moreover, that its interpretation threatens significant adverse consequences. Specifically, the United States argues that (1) the appeals court's statutory interpretation is inconsistent with the text of § 1500 and disregards established principles of jurisdiction and sovereign immunity, and (2) the nation does not actually seek different relief in the two actions. 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."

On Jan. 7, 2011, the Court granted certiorari in *United States v. Jicarilla Apache Nation*. The question presented is "[w]hether 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 U.S. Court of Appeals for the Federal Circuit 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 case has been set for argument on April 20, 2011.

Eleven petitions for certiorari of interest are currently pending before the Supreme Court: *Brown v. Rincon Band of Luiseño Mission Indians*, *Eastern Shawnee Tribe of Oklahoma v. United States*, *Henzler v. Salazar*, *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Company*, *Native Wholesale Supply v. Oklahoma*, *Navajo Nation v. Equal Employment Opportunity Commission*, *Osage Nation v. Irby*, *Rosales v. United States*, *South Dakota v. Yankton Sioux Tribe*, and *Winnemucca Colony Council v. Wasson*.

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*. The appeals court held that 28 U.S.C. § 1500 does not bar the tribe 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, 2010, 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), which the Court heard on Nov. 1, it is on hold until the Court decides that case.

The Osage Nation filed its cert petition in *Osage Nation v. Irby* on Oct. 22, 2010, 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 nation is "[w]hether, in determining whether 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." The case was distributed for conference of Feb. 18, 2011, and on Feb. 22, 2011, the Court invited the acting solicitor general of the United States to file a brief expressing the federal government's views.

On Nov. 29, 2010, petition for certiorari was filed in *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Company*. The case, which arose out of a contract dispute between the Tribe and the company, began in Miccosukee tribal court. It eventually wound up in the U.S. Court of Appeals for the Eleventh Circuit, which remanded the case to the U.S. district court with instructions to dismiss for lack of subject matter jurisdiction. The tribe asks the Court to answer "whether an action to obtain recognition of a tribal court judgment presents a federal question under 28 U.S.C. 1331, based on the common law and federal character of Indian law, and whether the Eleventh Circuit was incorrect in its holding, which conflicts with other circuit court and Supreme Court precedents, that the district court lacked subject matter jurisdiction to enforce the Miccosukee Tribal Court judgment in this case." The construction company filed a brief in support of the tribe's position on Dec. 21, 2010. On Jan. 24, 2011, the Court invited the acting solicitor general to file a brief expressing the views of the United States.

The Court has also invited the acting solicitor general to file a brief in *Brown v. Rincon Band of Luiseño Mission Indians*, where 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 band pay revenues into the state's general fund and did not offer the band sufficient concessions in return. The questions presented are (1) "[w]hether 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."

Petition for certiorari in *Native Wholesale Supply v. Oklahoma* was filed on Dec. 3, 2010. It is an appeal from the Supreme Court of Oklahoma, which concluded that (1) an Oklahoma court is a constitutionally sanctioned forum for the exercise of personal jurisdiction to adjudicate an alleged violation of a state statute by Native Wholesale Supply, a nonresident corporation that claims to have no minimum contacts with Oklahoma; and (2) federal law bars Oklahoma from enforcing state law against Native Wholesale Supply, a tribally chartered corporation wholly owned by an individual of Native American ancestry. Native Wholesale Supply asks the Supreme Court to consider the following questions (1) whether a contract entered into by an Indian tribe and fully performed outside the exterior boundaries of the state in which the tribe's reservation is located can constitutionally subject the out of state vendor to the personal jurisdiction of the state in which the tribe's reservation is located; and (2) whether a state can prohibit an Indian tribe located within its boundaries from purchasing goods from Indians on a reservation outside the state. The state of Oklahoma initially waived its right to respond, but the Court requested a response, which is due March 21, 2011.

On Jan. 14, 2011, the heirs of Dick George, an Athabascan Indian, sought certiorari review of the Ninth Circuit's decision in *Henzler v. Salazar* holding that the Department of Interior had not denied George due process of law when it revoked approval for an allotment he had applied for under the Alaska Native Allotment Act. The petition for review raises the question of whether the revocation denied George due process (1) because it was effected by a written letter although the Department knew that George could not read or (2) because the written letter did not inform George of his legal rights and the department knew that George could not reasonably be expected to educate himself about those rights.

On Jan. 28, 2011, the Navajo Nation filed a petition seeking certiorari review of the Ninth Circuit's decision in *Navajo Nation v. Equal Employment Opportunity Commission*. In the underlying suit, the EEOC challenges Peabody Coal's employment prefer-

ence for Navajos under Title VII of the Civil Rights Act of 1964. In its petition for writ of certiorari, the nation specifically challenges Ninth Circuit rulings that the Navajo Nation can be joined in the suit for res judicata purposes and that the suit can proceed “in equity and good conscience” under Rule 19 of the Federal Rules of Civil Procedure without the joinder of the secretary of the Interior because the secretary will be subject to third party impleader claims under Rule 14 of the Federal Rules of Civil Procedure by the nation or Peabody Coal, should the EEOC prevail.

On Jan. 18, 2011, the state of South Dakota and several of its political subdivisions (state petitioners) sought certiorari review of the Eighth Circuit’s decision in *Yankton Sioux Tribe v. Podhradsky*, and, on Feb. 22, 2011, the tribe filed a conditional cross-petition. The state petitioners challenge the Eighth Circuit’s decision that the tribe’s reservation was not disestablished by the 1894 Act, and the tribe conditionally seeks to raise the question of whether the Eighth Circuit correctly held the tribe’s reservation to be diminished by land sales that occurred after the 1894 Act.

Also, on Feb. 22, 2011, the Yankton Sioux Tribe filed a petition for writ of certiorari in *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, a companion case to *Yankton Sioux Tribe v. Podhradsky*. In *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, the tribe asks that the instant petition be held pending the Court’s actions with respect to the petitions in *Podhradsky*. *Yankton Sioux Tribe v. U.S. Army Corps of Engineers* involves the question of whether land transfers between the state of South Dakota and the federal government violated the Water Resources Development Act of 1999, a question that hinges on whether the transferred lands were within the boundaries of the tribe’s reservation.

On Feb. 7, 2011, the Winnemucca Colony Council sought certiorari review of the U.S. Court of Appeals for the Ninth Circuit’s decision in *Winnemucca Colony Council v. Wasson* affirming a determination, originally

entered by a panel of mediators termed the “Minnesota Panel,” that another entity, called the Winnemucca Indian Colony Council, constituted the legitimate governing body of the Winnemucca Indian Colony and therefore was entitled to withdraw money from an account entered into in the colony’s name. The Winnemucca Colony Council sought to challenge the panel’s decision in tribal court, but, after various orders, the Inter-Tribal Court of Appeals eventually dismissed the case on the basis of lack of jurisdiction. The federal district court thereafter granted summary judgment in favor the Winnemucca Indian Colony Council. The Winnemucca Colony Council appealed to the Ninth Circuit and lost. In its petition for certiorari, the Winnemucca Colony Council asks the Supreme Court to address whether the federal district court exceeded its powers and violated the Indian Self-Determination Act by determining which tribal faction had control over tribal treasury resources and whether the Ninth Circuit violated the Indian Self-Determination Act by affirming the district court, given that the Winnemucca Indian Colony Council was not recognized as the legitimate governing body of the Colony by the Bureau of Indian Affairs.

On March 7, 2011, the appellants filed a petition for certiorari in *Rosales v. United States*, wherein the U.S. Court of Appeals for the D.C. Circuit found that whether a tribe was “under Federal jurisdiction” in 1934 was irrelevant in determining whether the Jamul Indian Tribe became the beneficial owner of Indian trust land. The petition presents the questions of whether a court must decide if a tribe was “under Federal jurisdiction” in 1934: (1) whenever a tribe claims an interest in Indian trust land adverse to a state or individual’s interest in that property; (2) when determining the timeliness of the petitioners’ Tucker Act claims that the tribe never became a beneficial owner of Indian trust land; or (3) in determining whether the tribe was a required, but absent party, claiming an interest in petitioners’ beneficial interest in trust property.

Eighteen petitions for certiorari have been denied so far in the 2010–2011 term: *Attorney’s Process and Investigation Services Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*; *Board of Directors of the Truckee-Carson Irrigation District v. United States*; *Cottier v. City of Martin*; *Eagle v. Yerington Paiute Tribe*; *Fort Peck Housing Authority v. Department of Housing and Urban Development*; *Glacier Electric Cooperative v. Sherburne*; *Gould v. Cayuga Indian Nation of New York*; *Hoffman v. Sandia Resort and Casino*; *Hogan v. Kaltag Tribal Council*; *Maybee v. Idaho*; *Metlakatla Indian Community v. Sebelius*; *Miccousukee Tribe of Indians of Florida v. South Florida Water Management District*; *Morris v. Nuclear Regulatory Commission*; *Schaghticoke Tribal Nation v. Kempthorne*; *Suquamish Indian Tribe v. Upper Skagit Indian Tribe*; *Thunderhorse v. Pierce*; and *Yellowbear v. Wyoming, Day v. Apoliona*. ♦



# NORTHEAST REGION UPDATE

By Nicole Friederichs

Several tribes have brought suit against the state of New York challenging its new cigarette tax laws and regulations, which seek to impose and require tribal retailers to collect taxes on on-reservation cigarette sales to non-tribal members. The new laws and regulations end New York's policy of not enforcing taxes on such sales. Three of these cases are being heard in the U.S. District Court for the Western District of New York: *Unkechaugue Indian Nation v. Paterson*, No. 10-CV-711A (W.D.N.Y.); *St. Regis Mohawk Tribe v. Paterson*, No. 10-CV-811A (W.D.N.Y.); and *Seneca Nation of Indians v. Paterson*, No. 10-CV-687A (W.D.N.Y.). One is before the U.S. District Court for the Northern District of New York: *Oneida Nation of New York v. Paterson*, No. 6:10-CV-1071 (N.D.N.Y. Oct. 14, 2010). The St. Regis Mohawk Tribe's case was transferred from the Northern District and consolidated with the Unkechaugue Indian Nation's lawsuit. Additionally, the Cayuga Indian Nation successfully intervened in the Seneca Nation's case. In two of these cases, *Seneca Nation of Indians* and *Unkechaugue Indian Nation*, the district court denied the plaintiffs' motion for a preliminary injunction but stayed the decision pending appeal. The court in *Oneida Nation*, on the other hand, granted the nation's motion for a preliminary injunction.

New York's new cigarette tax laws and regulations require wholesalers to tax stamp all cigarettes and make it illegal for wholesalers to sell any unstamped cigarettes, even if they are bound for an Indian reservation. To allow for tax-exempt cigarette purchases by tribal members, the new law provides for a coupon system whereby the state distributes a quantity of tax-exemption coupons to participating Indian tribes. A tribe may then use the coupons to purchase cigarettes from wholesalers without paying the tax stamp. Or, the tribe may distribute the coupons to its own retailers, who may redeem them from the wholesalers directly. Any tribe opting out of the coupon system would fall under the prior approval system whereby a wholesaler would seek approval from the state before selling any tax-exempt cigarettes. In either the coupon system or the prior approval system, the state establishes the "probable demand" of cigarette consumption by members of each tribe.

In *Seneca Nation of Indians v. Paterson*, No. 10-CV-687A, 2010 WL 4027795 (Oct. 14, 2010), the U.S. District Court for the Western District of New York concluded that the Seneca Nation and Cayuga Indian Nation failed to establish a likelihood of success and therefore denied their motions for a preliminary injunction. Specifically, the court rejected the nations' arguments that the tax law

amendments were facially invalid, that requiring prepayment of the tax for sales to non-Indians was burdensome, that the laws impermissibly taxed out-of-state sales, and that the allocation of tax-exempt cigarettes was too burdensome. The court rejected these arguments, relying primarily on Supreme Court precedent, namely *Department of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), and *Moe v. Consolidated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Relying in part on the decision in *Seneca Nation*, the U.S. District Court for the Western District of New York similarly denied the plaintiffs' motion for a preliminary injunction in *Unkechaugue Indian Nation*, \_\_\_ F. Supp. 2d \_\_\_, No. 10-CV-711A, 2010 WL 4486565 (W.D.N.Y. Nov. 9, 2010).

The U.S. District Court for the Northern District of New York, on the other hand, granted the tribe's motion for a preliminary injunction in *Oneida Nation v. Paterson*, No. 6:10-CV-1071, 2010 WL 4053080 (Oct. 14, 2010). The court found that the Oneida Nation would be irreparably harmed by the new law since it would require the tribe to pay the tax before sales and "be out-of-pocket" approximately \$3.5 million until the sales are made. The court concluded that "[r]equiring the Oneida Nation to pay out such a large amount of money impinges upon its ability to operate its business, a fundamental part of sovereignty and self-governance." The \$3.5 million outlay was part of the reason why the court found that the nation had shown a likelihood of success on the merits, since it constituted more than a minimal burden to the nation. The court also found fault with the prior approval system because it "does not assure adequate availability of untaxed cigarettes for consumption by members and the Oneida Nation." Finally, the court concluded that the balance of equities and public interest favored the Oneida Nation, focusing on the nation's "interest in retaining its sovereignty and rights of self-government." In addition to preliminarily enjoining the state from attempting to impose the taxes, the court ordered mediation between the parties. ♦



## OKLAHOMA UPDATE

By Yonne Tiger

In *Muhammad v. Comanche Nation Casino*, No. 09-968 (W.D. Okla.), a casino patron sought damages in state court for a slip-and-fall accident that occurred when she slipped and fell on the casino's premises. The plaintiff relied on *Cossey v. Cherokee Nation Enterprises*, 212 P.3d 447 (Okla. 2009), wherein the Oklahoma supreme court found that an Oklahoma state court was a court of competent jurisdiction to hear state law tort claims pursuant to the Oklahoma tribal-state gaming compact. The Comanche Nation removed the case to the U.S. District Court for the Western District of Oklahoma, which denied the plaintiff's motion to remand. The plaintiff argued that the Indian Gaming Regulatory Act (IGRA) "authorizes states to acquire civil jurisdiction pursuant to a valid state-tribal gaming compact and that the Compact at issue has this effect." Addressing Oklahoma Supreme Court rulings on this matter, the court stated: "recent opinions issued by the Oklahoma Supreme Court that purport to resolve the issue presume the authority of state courts to apply federal laws and to interpret gaming compacts in effect between the State of Oklahoma and various Indian Tribes." The U.S. district court held that the compact is a creation of federal law, IGRA, and "the interpretation of IGRA presents a federal question suitable for determination of a federal court." The Comanche Nation filed a motion to dismiss, arguing that its tribal court had exclusive jurisdiction over the case because the alleged injury occurred on tribal property. The U.S. district court found that IGRA and tribal-state gaming compact questions are matters of federal law, and that tribal courts therefore lack jurisdiction.

Addressing its own jurisdiction, the court provided a two-part review of IGRA and the Comanche Nation compact. The court determined that whether Oklahoma can validly adjudicate a tort claim against a tribe for conduct occurring on Indian lands depends, in part, on whether IGRA authorizes states to acquire such jurisdiction as part of a tribal-state gaming compact. The court concluded that the "IGRA does not prohibit a state and a tribe from negotiating an allocation of civil-adjudicatory authority over tort claims related to gaming operations." Holding that the compact did not waive the tribe's sovereign immunity from suit in state court or otherwise permit a state court action against the tribal enterprise to adjudicate plaintiff's tort claim, the court granted the tribe's motion to dismiss and suggested that the waiver of tribal sovereign immunity in the compact was limited solely to an administrative remedy or a civil action in tribal court. During the pendency of *Muhammad*, an opinion was rendered in *Choctaw Nation of Oklahoma v. Oklahoma*. The court's decisions in *Muhammad*, issued on Sept. 28, 2010, (addressing removal and federal ques-

tion jurisdiction) and Oct. 27, 2010, (addressing subject matter jurisdiction) are available, respectively, at 2010 WL 3824171, and 2010 WL 4365568.

In *Choctaw Nation of Oklahoma v. Oklahoma*, 724 F. Supp. 2d 1182 (2010), the Choctaw Nation and the Chickasaw Nation filed suit against the state of Oklahoma seeking certification and enforcement of an arbitration award finding that tribal courts provided a proper forum for resolving Indian country tort lawsuits against nations arising from gaming compacts. The court held that the dispute resolution clauses in the nations' gaming compacts were valid, and it ordered the state to comply with the terms of the arbitration award. (The Choctaw Nation and the Chickasaw Nation had separately filed notices of dispute with the state, which triggered the dispute resolution proceedings outlined in both the Choctaw and Chickasaw gaming compacts with the state that resulted in the arbitration award.)

In *Morgan Building & Spas Inc. v. Iowa Tribe of Oklahoma*, No. CIV-09-730, 2011 WL 308889 (W.D. Okla. Jan. 26, 2011), the court granted the Iowa Tribe's motion to dismiss a lawsuit brought against a tribal economic entity for lack of subject matter and personal jurisdiction and failure to state a claim. The case arose out of a dispute between the plaintiff and BKJ, an economic entity formed by the tribe's business committee under the tribe's corporation act and constitution. Morgan sued for an alleged breach of contract and asserted that BKJ was an alter ego of the tribe and had waived the tribe's sovereign immunity through the contract BKJ signed with Morgan. The court first had to determine whether to apply an alter ego analysis or a subordinate economic entity analysis to the tribe's economic entity. The court found that the factors used to determine whether one corporation is an alter ego of another corporation and the factors used to determine whether a tribe's economic entity qualifies as a subordinate economic entity are similar and overlap in many respects. It also noted that an economic entity could conceivably satisfy the factors for both an alter ego and a subordinate economic entity.

Though it did not find any case applying the alter ego analysis to an Indian tribe's economic entity, the court noted that the subordinate economic entity analysis seems to have developed specifically for tribal economic entities, and particularly to extend tribal sovereign immunity to those entities. Citing the Tenth Circuit's opinion in *Breakthrough Management Group Inc. v. Chukchansi Gold Casino and Resort*, 629 F.2d 1173 (10th Cir. 2010) (a case discussed in this newsletter's Southwest Region Update), the court stated that under this analysis, the following factors "are helpful in determining whether a tribe's economic entity qualifies

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# CALIFORNIA/HAWAI'I UPDATE

By Cheryl Williams



On Dec. 13, 2010, the Supreme Court invited the acting solicitor general to file a brief expressing the views of the United States on the issues presented in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010). The U.S. Court of Appeals for the Ninth Circuit found that California negotiated in bad faith for a tribal-state compact, and violated the Indian Gaming Regulatory Act (IGRA), by demanding that the Rincon Band pay monies into the state's general fund because (1) the funds would not be used for purposes directly related to the operation of gaming activities and (2) the state's demand for revenues was not counterbalanced by bargained-for meaningful concessions for the tribe. The Supreme Court's decision on whether to grant certiorari may ultimately depend on the views expressed by the federal government in its brief.

While California's cert petition has been pending before the Court, the Department of the Interior has rejected two tribal-state gaming compacts negotiated between the state of California and tribes and submitted to the department for approval. In an Aug. 17, 2010, letter from Assistant Secretary–Indian Affairs Echo Hawk to Chair Treppa of the Habematolel Pomo of Upper Lake (Upper Lake), the department denied the tribe's compact for violating IGRA § 2710(d)(4). According to the letter, Upper Lake and the state of California executed a new compact in 2009 which permitted the tribe to commence operating up to 750 slot machines in exchange for a general fund revenue sharing payment of fifteen percent of the net win generated from those machines. In AS–IA Echo Hawk's opinion, the bundle of concessions the tribe was set to receive under the new compact—including the right to conduct Class III gaming, exclusivity from non-Indian competition under Proposition 1A (the state-wide ballot initiative that amended California's constitution to allow casino-style gaming only on Indian reservations), “enhanced” exclusivity, and the continued ability to receive an annual \$1.1 million payment from the Revenue Sharing Trust Fund (established under the 1999 California tribal-state compacts to provide monies for federally recognized tribes in California that operate fewer than 350 slot machines or do not conduct gaming at all) under certain conditions—was not sufficient to warrant a general fund revenue sharing obligation of fifteen percent of net win.

In a Feb. 25, 2011, letter from AS-IA Echo Hawk to Chair Williams of the Pinoleville Pomo Nation, the department similarly disapproved the tribe's pending Class III gaming compact for violating IGRA § 2710(d)(4) in light of *Rincon*, noting that the proposed compact contained provisions nearly identical to those

disapproved in the Upper Lake compact, including a general revenue fund sharing fee of fifteen percent of net win. AS-IA Echo Hawk opined that the promise of exclusivity from non-Indian gaming competition (under Proposition 1A) in a core geographic area saturated with an abundance of existing tribal competition, and the “ordinary and routine subjects of compact negotiations” (such as the number of permitted devices or the term length of the agreement), did not justify a general fund revenue sharing obligation of fifteen percent of net win.

Also relying on *Rincon*, the U.S. District Court for the Northern District of California issued an order in *Big Lagoon Rancheria v. California*, \_\_\_ F. Supp. 2d \_\_\_, No. Civ. 09-01471 CW, 2010 U.S. Dist. LEXIS 123722 (N.D. Cal. Nov. 22, 2010), granting the tribe's motion for summary judgment on its claim alleging the state negotiated its proposed compact in bad faith under IGRA § 2710(d)(7). The court concluded that the state's nonnegotiable demand that the tribe pay 15 percent of its net win into the state's general fund constituted a direct tax in violation of IGRA and evidenced bad faith. The court was not persuaded by the state's oft-repeated mantra that general revenue fund sharing is permissible in exchange for a tribe's right to conduct gaming free from competition under Proposition 1A, as this is a right to which the tribe is already entitled and thus not a meaningful concession justifying the revenue sharing demand. The tribe also argued that *Rincon* prohibits environmental mitigation measures as beyond the scope of permissible compact negotiation topics. While the court declined to read IGRA in such a manner, it did find the state's demands for environmental mitigation measures to be in bad faith because they too were unsupported by any meaningful concession:

In sum, the State may request environmental mitigation measures so long as they (1) directly relate to gaming operations or can be considered standards for the operation and maintenance of the Tribe's gaming facility, (2) are consistent with the purposes of IGRA and (3) are bargained for in exchange for a meaningful concession. Because it does not appear that the State offered a meaningful concession in connection with its requests for environmental mitigation measures, it thus far has failed to negotiate in good faith.

The state filed a notice of appeal with the Ninth Circuit on Dec. 9, 2010.

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## SOUTHWEST REGION UPDATE

By Patty Ferguson-Bohnee

In *Breakthrough Management Group Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010), the Tenth Circuit reversed the U.S. District Court for the District of Colorado's finding that the Picayune Rancheria of the Chukchansi Indians' casino and economic development authority were not entitled to share the tribe's sovereign immunity. The Breakthrough Management Group (BMG), which provides online business management training and consulting services, claimed that casino employees copied and distributed materials from one of BMG's training programs, in violation of the casino's license from BMG. BMG sued the tribe, the tribe's economic development authority, the tribe's casino, and casino officers and employees, alleging federal and state law violations. The defendants moved to dismiss the case on the basis of tribal sovereign immunity. The district court granted the tribe's motion, finding that it did not waive its immunity by entering into licensing agreements with BMG containing a forum selection clause. The court denied the remaining motions to dismiss, however, finding that neither the authority nor the casino was entitled to share the tribe's sovereign immunity because "any judgment imposed against them would not imperil the tribe's monetary assets." Although the court found that the authority owns and operates the casino, and the casino revenues pass through the authority to the tribe, it concluded that the casino and authority were non-Indian entities and, as such, were not entitled to the tribe's sovereign immunity.

The Tenth Circuit reversed, finding that the district court used the wrong legal standard for determining whether a tribal entity enjoys a tribe's sovereign immunity. Specifically, the appeals court found that the lower court erroneously inquired, as a threshold matter, about the financial impact on a tribe of a judgment against its economic entities. Rather, the Tenth Circuit held, a court determining whether an entity qualifies as a subordinate economic entity and thus possesses tribal sovereign immunity should look at a variety of factors, including but not limited to: (1) how the entity was created; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has over the entity; (4) whether the tribe intended the entity to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity would be served by granting immunity to the entity. Applying these factors, the court held that the authority and the casino share the tribe's sovereign immunity, and it remanded the case for a determination of whether the authority and casino waived this immunity by entering into licensing agreements with BMG.

In *Gila River Indian Community et al v. U.S.*, Nos. CV-10-1993, CV-10-2017, CV-10-2138, 2011 WL

826282 (D. Ariz. Mar. 3, 2011), plaintiffs including the Gila River Indian Community, the City of Glendale, and Arizona state legislators challenged the Department of Interior's decision to accept a parcel of land into trust for the Tohono O'odham Nation. Under the 1986 Gila Bend Indian Reservation Lands Replacement Act, Congress sought to compensate the Tohono O'odham Nation for reservation land affected by the creation of the Painted Rock Dam. The act provided for the U.S. to purchase replacement land and take up to 9,880 acres of land into trust for the nation. The Tohono O'odham Nation purchased 135 acres of unincorporated land surrounded by the City of Glendale in 2003, and in 2009 announced plans to use the land for gaming and submitted an application to have the land taken into trust. The nation asserted that because the land was part of a land claims settlement, it was not subject to the Indian Gaming Regulatory Act's (IGRA) general prohibition against gaming on reservation lands placed into trust after Oct. 17, 1988, and the nation requested an Indian lands opinion from the Interior Department regarding the land's eligibility for gaming. The nation later withdrew its request for the opinion and asked the department to accept into trust only a 54-acre unincorporated parcel. In June 2010, the department issued its decision to take the land into trust, concluding that the legal requirements under the Gila Bend Act had been satisfied. The department did not issue an Indian lands opinion.

The plaintiffs raised several challenges. The Gila River Indian Community argued that the Tohono O'odham Nation had exceeded its replacement land acreage under the Gila Bend Act prior to the purchase of the 54-acre property, but the court deemed this argument waived because no party raised it during the administrative process. The Tohono O'odham had taken the position before the department that only trust land counted against the 9,880-acre cap in the act, the department agreed, and no parties objected. The court also rejected the Gila River Indian Community's argument that the department's decision to take the land into trust was arbitrary and capricious because the agency's decision "[d]id not address or determine the [Tohono O'odham] Nation's eligibility to game on the parcel under IGRA." The court deferred to the department's interpretation of the Gila Bend Act as requiring the acquisition of the land for the nation. The court also found that the act did not require the secretary of the Interior to establish a water management plan before taking the land into trust.

The City of Glendale argued that because the 54-acre parcel is surrounded by the city, the land could not be taken into trust under the Gila Bend Act, which prohibits taking into trust land "within the corporate limits of any city or town." The court found that the statutory phrase "within the corporate limits" was ambiguous, but

it deferred to the department's interpretation under the *Chevron* doctrine and also noted the canon of construction requiring that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." And the court rejected the city's arguments that the trust acquisition decision encroached on state sovereignty in violation of the Tenth Amendment and exceeded Congress's power under the Indian Commerce Clause.

In *Brenda O. v. Ariz. Dep't of Economic Security*, 244 P.3d 574 (Ariz. Ct. App. 2010), a Navajo mother appealed the termination of her parental rights under the Indian Child Welfare Act (ICWA). ICWA § 1912(f) provides that a tribal member's parental rights cannot be terminated without evidence beyond a reasonable doubt, including testimony of a qualified expert witness, showing that continued custody is likely to result in serious emotional or physical damage to the child. Evidence, including the testimony of a non-Indian psychologist, indicated that Brenda O. had an alcohol problem. Brenda O. argued that the trial court erred in terminating her rights because this psychologist did not qualify as an expert witness within the meaning of § 1912(f). Citing and quoting its own precedent and cases from other states, the appeals court found that "'distinctive knowledge of Indian culture is necessary only when cultural mores are involved' in the termination determination. When 'matters not implicating cultural bias' are at issue, a witness with 'substantial education and experience' need not have 'special knowledge of Indian life.'" Thus, it concluded, when "cultural bias is clearly not implicated, the necessary proof may be provided by expert witnesses who

do not possess special knowledge of Indian life."

Three U.S. district court cases regarding environmental law are also noteworthy. In *Save the Peaks Coalition v. U.S. Forest Service*, No. CV 09-8163, 2010 WL 4961417 (D. Ariz. Dec. 1, 2010), a case that is part of a continuing effort to stop snowmaking using reclaimed sewer water on the San Francisco Peaks where there are numerous sacred sites, the court found that the plaintiffs' claims were barred by the doctrine of laches. The plaintiffs have filed an appeal to the Ninth Circuit. In *Quechan Tribe v. U.S. Dep't of the Interior*, \_\_\_ F. Supp. 2d \_\_\_, No. 10cv2241, 2010 WL 5113197 (S.D. Cal. Dec. 15, 2010), the court granted a preliminary injunction when the federal government failed to provide adequate consultation under § 106 of the National Historic Preservation Act regarding cultural properties. The court also found that the tribe's procedural National Environmental Policy Act claim and substantive claim under the Federal Land Policy and Management Act of 1976 "raise serious questions." (The *Quechan* case is also discussed in the California/Hawai'i Regional Update.) And in *U.S. v. Questar Gas Management Co.*, No. 2:08CV167DAK, 2010 WL 5279832 (D. Utah Dec. 14, 2010), the court allowed the Ute Indian Tribe of the Uintah and Ouray Reservation to intervene in an action by the U.S. against Questar to protect the tribe's interests with respect to jurisdictional issues raised by Questar, and to bring a nuisance claim to the extent that it shared common questions of law and fact with the federal government's existing Clean Air Act claims. On a motion by Questar, the court dismissed the tribe's federal common law nuisance claim. ♦

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as a subordinate economic entity":

(1) the method of creation of the economic entit[y]; (2) [its] purpose; (3) [its] structure, ownership, and management, including the amount of control the tribe has over the entit[y]; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entit[y] ... . Furthermore, our analysis also is guided by sixth factor: the policies underlying tribal sovereign immunity and its connection to tribla economic development, and whether those policies are served by granting immunity to the economic entities ... . Those policies include protection of the tribe's monies, ... as well as preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealing between Indians and non-Indians.

Applying those factors, the court found that BKJ was a subordinate economic entity of the tribe. The court then found that BKJ's waiver of its immunity did not constitute a waiver of the tribe's immunity, citing *Santa Clara Pueblo v. Martinez* and emphasizing that a waiver of sovereign immunity cannot be implied but

must be unequivocally expressed.

In other federal Indian law news from Oklahoma, the White House issued a press release on Feb. 2, 2011, announcing the nomination of Arvo Mikkanen, a member of the Kiowa Tribe, for the U.S. District Court for the Northern District of Oklahoma. President Obama stated in his press release: "I am proud to nominate these two outstanding candidates to serve on the United States District Court. I am confident they will serve the American people with integrity and distinction." Mikkanen has served as an assistant U.S. attorney for the Western District of Oklahoma since 1994. From 1988 to 1994, he was an associate at Andrews Davis Legg Bixler Milsten & Price in Oklahoma City. He has also served as a trial and appellate judge for the Court of Indian Offenses and the Court of Indian Appeals for the Kiowa, Comanche, Apache, Wichita, Caddo, Delaware, Fort Sill Apache, Ponca, Pawnee, Kaw, Otoe-Missouria, and Tonkawa Tribes. From 1991 to 1994, he served as the chief justice of the Cheyenne-Arapaho Supreme Court. Before he practiced law, Mikkanen served as a law clerk to Hon. Robert M. Parker of the U.S. District Court for the Eastern District of Texas and as a law clerk to Hon. Lawrence S. Margolis of the U.S. Court of Claims. He received a J.D. in 1986 from Yale Law School and a B.A. in 1983 from Dartmouth College. ♦



## PLAINS REGION UPDATE

By Shilee Mullin

In *Nanomantube v. Kickapoo Tribe of Kansas*, 631 F.3d 1150 (10th Cir. 2011), the U.S. Court of Appeals for the Tenth Circuit found that a tribe's statement (in a sentence in a handbook) that it would comply with Title VII of the Civil Rights Act did not effect a waiver of tribal sovereign immunity from suit. A former employee of the Kickapoo Tribe brought action for employment discrimination, and the U.S. District Court for the District of Kansas dismissed the case based on tribal sovereign immunity. The plaintiff argued that the tribe was subject to suit because his claims did not "implicate tribal self-government concerns that inform the question of a tribe's regulatory or adjudicative authority over nonmembers of the tribe." The court disagreed, finding that the plaintiff was "conflating two different aspects of tribal sovereignty," and that "the relevant inquiry remains the 'Supreme Court's straightforward test to uphold Indian tribes' immunity from suit'—whether the tribe's immunity has either been abrogated by Congress or waived by the tribe." The court found that congress did not waive the tribe's immunity in Title VII, and that the tribe did not unequivocally waive its immunity by stating that it would comply with Title VII.

In *Amerind Risk Management Corp. v. Malaterre*, \_\_\_ F.3d \_\_\_, No. 08-3949, 2011 WL 500216 (10th Cir. Feb. 15, 2011), the Tenth Circuit found that plaintiff Amerind, as a corporation chartered under § 17 of the Indian Reorganization Act, 25 U.S.C. § 477 (a "Section 17 corporation"), was entitled to sovereign immunity. Amerind assumed the rights and obligations of ARMC, a corporation incorporated under the laws of the Red Lake Band of Chippewa Indians as a self-insurance risk pool. After the Turtle Mountain Housing Authority (TMHA) joined the risk pool (per an agreement between ARMC and TMHA), a fire destroyed a house on the Turtle Mountain Reservation that was being leased from TMHA. The lessees brought an action against TMHA in Turtle Mountain Tribal Court and later added ARMC as a defendant (*Amerind I*). Thereafter, the U.S. Department of Interior issued a federal corporate charter incorporating Amerind and giving Amerind the right to acquire ARMC. Three tribes ratified the charter. The lessees subsequently brought action in U.S. district court, seeking a declaratory judgment that the ARMC policy covered their claims (*Amerind II*). Amerind moved to dismiss, asserting that the lessees failed to exhaust their tribal court remedies (the case in the tribal court was still pending), and that it was entitled to tribal sovereign immunity. The court dismissed on tribal exhaustion grounds. Back in tribal court, the lessees moved to dismiss TMHA, and the tribal court and tribal court of appeals found, inter

alia, that Amerind was not entitled to tribal sovereign immunity. Thereafter, Amerind brought a declaratory judgment action in U.S. district court, "seeking a determination that the tribal court exceeded its jurisdiction by exercising authority over Amerind, a nonmember of the tribe, under *Montana v. United States*," but did not at that time raise the issue of tribal immunity from suit. The district court held that the Turtle Mountain Tribal Court had jurisdiction because ARMC entered into a consensual relationship with TMHA.

Amerind appealed but did not raise the tribal sovereign immunity issue in its appellate brief. Nonetheless, the court raised the issue sua sponte and found that Amerind was entitled to tribal sovereign immunity as a tribal agency, and that Section 17 corporations are entitled to sovereign immunity. The court next discussed waivers of sovereign immunity and found that Amerind did not waive immunity by failing to raise the issue in *Amerind II* because sovereign immunity is not waivable, noting that the issue was raised in *Amerind I*. The court then addressed the lessees' argument that Amerind waived its immunity by agreeing to assume the obligations and liabilities of ARMC, which had signed an agreement with TMHA. The court held that Amerind's general assumptions of ARMC's obligations and liabilities did not constitute a waiver of sovereign immunity because it was, at most, "an implied waiver of sovereign immunity," which cannot constitute a waiver. The Tenth Circuit reversed the lower court and remanded the case with instructions to enjoin the tribal court proceeding. Judge Beam, specially concurring in the decision, stated that he "would find that the tribal court does not have jurisdiction over the plaintiffs' direct suit against Amerind under *Montana*." He also stated that the claims in this case were, in reality, negligence and wrongful death claims against TMHA and that although ARMC had a contractual relationship with TMHA, "it was TMHA's alleged negligence, not ARMC's contractual relationship with TMHA, that gave rise to plaintiffs' personal injury/wrongful death suit." In his dissent, Judge Bye argued that Amerind waived its immunity, and that the lessees should at least be allowed discovery to determine whether Amerind did so.

In *South Dakota v. U.S. Dep't of Interior*, No. 10-3007, 2011 WL 382744 (D.S.D. Feb. 3, 2011), the court found that the Department of Interior lawfully accepted four parcels of land into trust for the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation under § 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465. The state argued that the trust acquisitions were unlawful because § 5 is an unlawful delegation of legislative power and deprived the state of a republican form of government. The state also

argued that the Bureau of Indian Affairs (BIA) Sisseton Agency's superintendent, who initially considered the trust acquisition, was biased because he was a member of the Sisseton Tribe and that the decision to accept the parcels of land into trust was arbitrary and capricious under the Administrative Procedure Act. The court rejected the state's claims, reiterating that many other courts have considered a nondelegation challenge to § 5 of the IRA and concluded that § 5 is not an unconstitutional delegation of legislative authority. The court found that acceptance of the parcels into trust, at most, would reduce the area over which the state could exercise jurisdiction but had no impact on the existing form of republican government. The court also rebuked any claim that BIA officials had actual bias or an unconstitutional probability of bias. Finally, the court found that the BIA's decisions were not arbitrary and capricious because the agency adequately analyzed the factors set forth in the regulations for implementing § 5. The court dismissed the state's action.

In an unreported decision in a case pending in the U.S. District Court for the District of South Dakota, *Alltel Communications LLC v. DeJordy*, No. 10-MC-00024, 2011 WL 6734766 (D.S.D. Feb. 26, 2011), the court found that the Oglala Sioux Tribe and defendant DeJordy could not assert tribal sovereign immunity in response to a subpoena duces tecum served on them by plaintiff Alltel. Alltel issued a non-party subpoena to the tribe and DeJordy (a licensed attorney who acted as a consultant to the tribe), along with his law firm, pursuant to Fed. R. Civ. P. 45(c)(3)(A), seeking to obtain various documents in support of its breach of contract claim against DeJordy. The tribe moved to quash the subpoena, asserting tribal sovereign immunity and that the documents were protected by the attorney-client privilege. The tribe also asserted that DeJordy was a nontestifying expert in other litigation between Alltel and the tribe. The court first addressed Rule 45's requirement that a non-party challenging a subpoena submit a privilege log describing the nature of the documents withheld, among other things (the tribe had not submitted a log). Discussing Rule 45's requirement and the split of authority over the implication of

the failure to file such a log, the court found that "the burden imposed on the Tribe in producing a privilege log in order to avoid a waiver claim may be unduly time consuming and burdensome." The court also found that the tribe "in good faith and in a timely manner, asserted its claim of sovereign immunity." Thus, the court found that the tribe had not waived its privileges by failing to file a privilege log. However, the court found that "tribal sovereign immunity constitutes no shield for the Tribe, as a non-party, to justify noncompliance with a federal civil subpoena duces tecum." Discussing various cases, the court reasoned that the tribe should be required to comply with the subpoena because federal employees are routinely required to produce records and testify, and it "would be strange indeed if a federal subpoena were operative against the [federal government] and its officers but not [a tribe]." Finally, the court determined that the tribe had not established attorney-client or work product privilege, but it granted the tribe an opportunity to present a privilege log to substantiate its assertion.

In another case pending in the U.S. District Court for the District of South Dakota, *Flandreau Santee Sioux Tribe v. South Dakota*, No. 07-4040, 2011 WL 294450 (D.S.D. Jan. 26, 2011), the court granted the state's motion to quash the tribe's notice of deposition issued to the former South Dakota governor Mike Rounds in a case brought pursuant to the Indian Gaming Regulatory Act (IGRA) alleging the state failed to negotiate a tribal-state gaming compact with the tribe in good faith. The tribe sought to depose the former governor as the ultimate decisionmaker for the state concerning its execution of a gaming compact. The state objected, arguing that Rounds was a high-ranking governmental official, and that any communications were protected by the deliberative process privilege. The court granted the state's motion to quash without prejudice, determining that subjective motives, beliefs and intent are not discoverable—only objective facts are. The court also determined that it need not address the state's deliberative process privilege claim, notwithstanding that this privilege applies only to documents, because the five-part test pertinent to the depositions of high ranking officials weighed in the state's favor. ♦

### CALIFORNIA/HAWAII continued from page 13

Finally, in *Quechan Tribe of the Fort Yuma Reservation v. Department of the Interior*, \_\_\_ F. Supp. 2d \_\_\_, No. 10-cv-2241-LAB CAB, 2010 U.S. Dist. LEXIS 132482 (S.D. Cal. Dec. 15, 2010), the U.S. District Court for Southern District of California issued an injunction preventing the development of a 6,500 acre solar energy project on federally-owned land comprising a desert conservation area. The tribe asserted that the project would destroy culturally important areas, including burial sites with artifacts, and would endanger the habitat of the flat horned lizard, a reptile that is of significant importance to the tribe and is under consideration for federal protection under the Endangered

Species Act. The court held that the BLM violated the National Historic Preservation Act (NHPA) for failing to consult with the tribe as a "consulting party" under the NHPA on at least seven different issues, and that the tribe satisfied the "likelihood of success on the merits" required for the issuance of an injunction. The court found that the tribe also satisfied the irreparable harm standard required for injunctive relief because the massive scope of the proposed solar project would virtually ensure some damage to historic sites of cultural and religious significance to the tribe. Accordingly, the court enjoined the project pending the outcome of the litigation. ♦

# NORTHWEST REGION UPDATE

By Trent Crable

In *Ventura v. Snoqualmie Indian Tribe*, No. C11-45RAJ, 2011 WL 219678 (W.D. Wash. Jan. 24, 2011), the U.S. District Court for the Western District of Washington held that it did not have jurisdiction over writ of habeas corpus actions brought under the Indian Civil Rights Act, 25 U.S.C. § 1303, by two suspended Snoqualmie Tribal Council members. Arlene and Kanium Ventura have been charged by the tribal prosecutor with committing various crimes. They were both suspended from performing their duties as members of the Tribal Council and barred from entering the tribal center until their criminal cases are concluded. Political turmoil has prevented the tribal court from acting on the cases, and their cases have been stuck in limbo. The Venturas filed separate writs of habeas corpus in the local U.S. district court, arguing that their liberty has been unlawfully restrained and that the tribe has violated their rights under the Indian Civil Rights Act. The court found that it could not act on the habeas petitions because the Venturas were not in tribal detention—that the legal limbo was not “custody” and the court had no power to order them out of limbo—and that whatever loss of liberty they may be suffering was not the result of a criminal proceeding, as required under 25 U.S.C. § 1303, but was rather due to the suspension issued by the tribe’s general membership.

In *Confederated Tribes of the Colville Reservation v. Anderson*, No. CV-0900342-EFS, 2011 WL 43578 (E.D. Wash. Jan. 3, 2011), the U.S. District Court for the Eastern District of Washington held that the confederated tribes could not bring an action under 42 U.S.C. § 1983 on behalf of tribal members, but that the individual aggrieved member could bring a § 1983 action on his own behalf under the facts of the case. The court further held that the state could enact and enforce hunting safety laws against a tribal member’s treaty hunting activities performed off-reservation where tribes have “in common” hunting rights if: (1) the law reasonably prevents a public-safety threat; (2) the law is necessary to prevent the identified public-safety threat; (3) the law does not discriminate against Indians; and (4) applying the law against the tribe is determined to be necessary in the interest of public safety.

In *Knox v. U.S. Dep’t of Interior*, No. 4:CV 09-162-BLW, 2010 WL 5420385 (D. Idaho Dec. 27, 2010), the U.S. District Court for the District of Idaho held that two gambling “addicts,” Wendy Knox and Richard Dotson, could sue the United States under the Administrative Procedure Act for approving the use of video gaming machines in facilities operated by Idaho’s four tribes. Knox and Dotson claim that they are addicted to gambling, that they almost exclusively gamble at the Fort Hall Casino operated by the Shoshone-Bannock Tribes, and that they almost exclusively play video machines.

They sued the Idaho governor, the U.S. Department of Interior, and the secretary of the Interior. The court dismissed the case against the governor of Idaho, finding that it lacked subject matter jurisdiction over the state. But the court refused to dismiss the claims against the United States parties finding, inter alia, that: (1) the plaintiffs have standing, including that their injuries could be traced to the actions of the secretary and that a remedy exists (i.e., that removing video gaming machines from the tribal casinos could be adequate to protect these plaintiffs from future harm); (2) that the tribes are not “indispensable parties” under Federal Rule of Civil Procedure 19 because their interests are sufficiently protected by the Interior secretary; (3) that the state is not an indispensable party, because, among other things, complete relief can be granted in the state’s absence; (4) the statute of limitations has not run, despite the fact that the compact at issue was entered into in 2000, because the compact didn’t authorize video gaming; and (5) the fact that the secretary has never directly authorized video gaming in the compact does not mean that there has been no “final agency action” as required by the Administrative Procedure Act.

In *State v. Eriksen*, 241 P.3d 399 (Wash. 2010), the Supreme Court of Washington held that tribal officers have the authority to continue fresh pursuit of motorists who break traffic laws on reservation and subsequently drive beyond reservation boundaries, and to detain such individuals until authorities with jurisdiction arrive. A Lummi Nation police officer noticed a car driving on the reservation that crossed the centerline while using its “brights.” The officer pursued the car off-reservation, where it turned into a gas station. The driver, Eriksen, a non-Indian, was suspected of driving under the influence of alcohol. The Lummi officer cuffed and detained Eriksen until state authorities arrived and took control of her. Eriksen was then prosecuted in state court and appealed on the ground that the stop was unlawful because it was made by a tribal officer off the reservation.

In *State v. Abrahamson*, 238 P.3d 533 (Wash. Ct. App. 2010), the Court of Appeals of Washington held that “under the plain and unambiguous language of [the Revised Code of Washington section] 37.12.010 the state assumed jurisdiction over all criminal offenses committed by Indians while operating a motor vehicle on public roads on an Indian reservation.” Under the Washington law enacted under Public Law 280, the state of Washington assumed criminal and civil jurisdiction over Indians on Indian lands for eight specific areas of law, including the “[o]peration of motor vehicles upon the public streets, alleys, roads and highways.”

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# MIDWEST REGION UPDATE

By Andrew Adams III

In *Patchak v. Salazar*, \_\_\_ F.3d \_\_\_, No. 09-5324, 2011 WL 192495, (D.C. Cir. Jan. 21, 2011), a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled that David Patchak has standing to bring a lawsuit against the Interior Department for taking into trust 147 acres on behalf of the Match-e-be-nash-e-wish Band of Pottawatomis Indians, also known as the Gun Lake Tribe. The ruling reversed a decision by the U.S. District Court for the District of Columbia that Patchak did not have standing and was barred from filing the complaint by the Quiet Title Act, which provides that the U.S. government cannot be divested of title to Indian trust lands. The appeals court's decision enlarges the previous criteria concerning who has standing to bring suit challenging the federal government's authority to take land into trust for tribes under the Indian Reorganization Act (IRA), and it brings into question the extent of Quiet Title Act's protection of Indian trust land. The core issue presented in the lawsuit is Patchak's challenge that the Interior secretary was not authorized to take land into trust for the Gun Lake Tribe because the tribe was not "under Federal jurisdiction" in 1934 when the IRA was passed, an argument that relies on the U.S. Supreme Court's 2009 ruling in *Carciere v. Salazar*.

In *Anderson v. Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court*, No. 1:10-CV-676, 2010 WL 5625054 (W.D. Mich. Dec. 21, 2010), petitioner Anderson was convicted of domestic violence in the Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court and sentenced to serve 365 days in jail. Anderson asserted that his sentence is unlawful because he was not given sufficient credit for time served before his sentence was imposed. He also asserted numerous other challenges to his conviction, including that his rights to a speedy trial and to a jury trial were violated. The respondent tribal court moved to dismiss the petition on the ground that Anderson had appealed his conviction and that the appeal was pending before the tribal court. The U.S. district court dismissed the petition, finding that Anderson had failed to exhaust his remedies in the tribal court system.

After accepting and considering public comment, the court in *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, No. No. 05-10296-BC, 2010 WL 5185114 (E.D. Mich. Dec. 17, 2010) approved a negotiated settlement proposed by the Saginaw Chippewa Indian Tribe of Michigan, the United States, the state of Michigan, the governor of Michigan, the state treasurer, the city of Mount Pleasant, and the county of Isabella, and entered a judgment recognizing that treaties of 1855 and

1864 established the six-township Isabella Reservation. The judgment also adopted twelve separate intergovernmental agreements negotiated between and among the settling parties that covered topics including cross-deputization, implementation of the Indian Child Welfare Act, and revenue sharing. Under the judgment, the court maintains continuing jurisdiction over the declaration of the reservation boundaries, but maintains jurisdiction over implementation of the agreements only to the extent described in them. The court entered the settlement over the objection of then-Michigan Attorney General Michael Cox, rejecting his arguments that the settlement could upset earlier state criminal convictions, ceded state criminal jurisdiction, and should have allowed for additional public comment. No party timely appealed entry of the order, but Michigan attorney general Bill Schuette (Michael Cox's successor) moved the court to modify one provision of the law enforcement agreement between the state and the tribe restricting state officers' non-emergency entry into a tribal "enclave" surrounding the tribe's trust lands. The tribe and United States have opposed the motion, on which the court will hear argument in May.

In *Swenson v. Nickaboine*, 793 N.W.2d 738 (Minn. 2011), a divided Minnesota Supreme Court held that the state's workers' compensation statute applied to an on-reservation, Indian-owned business where the worker in question was a non-Indian. The court distinguished its decision in *Tibbetts v. Leech Lake Reservation Bus. Cmte.*, 397 N.W.2d 883 (Minn. 1986), which held that Congress did not subject tribes to Minnesota state court jurisdiction in 40 U.S.C. § 3172, on the basis that *Tibbetts* involved a workers' compensation claim brought by a tribal member against a tribe, whereas *Swenson v. Nickaboine* involved an injured worker who is not a tribal member and an employer that is owned by a tribal member (and not a tribe or a tribal corporation). ♦





## ALASKA UPDATE

By Natalie Landreth

On March 4, 2011, the Alaska Supreme Court issued a landmark decision in favor of the plaintiff tribes in *State v. Native Village of Tanana*, \_\_ P.3d \_\_, No. S-1332, 2011 WL 745848 (Alaska Mar. 4, 2011). The Tribes of Tanana, Nulato, Akiak, Kalskag, Lower Kalskag, and Kenaitze, along with adoptive parents the Schweiterts, sued several Alaska state officials over an Oct. 1, 2004, opinion letter by the state's attorney general that purported to adopt a policy of refusing to grant full faith and credit to tribal adoption decrees and orders issued in tribally initiated child protection cases. After the state issued this new policy—which was a complete reversal of the state's previous position—it refused to recognize tribal adoption decrees unless the adoption case had been transferred to a tribal court from a state court. The tribes argued that this policy violated § 1911 of the Indian Child Welfare Act (ICWA). The state argued that tribes “do not possess the inherent authority to initiate child protection cases.” The crux of the state's argument was that tribal jurisdiction is derivative of state authority, rather than based on an independent, sovereign authority.

In a carefully written opinion, the court first addressed the state's claim that the tribes' case was not ripe for review. The state argued that the plaintiffs were merely challenging a policy, rather than actual harm based on specific facts, but the court rejected this contention:

Indian children may be at risk of harm because of the State's refusal to coordinate and cooperate with tribes regarding reports of harm; Indian children, as well as their natural and putative adoptive parents, may be held in legal limbo by the State's refusal to give full faith and credit to tribal adoption decrees; and both the State and tribal courts need to understand the extent to which tribal courts in “child custody proceedings,” as that term is defined in ICWA, are entitled to full faith and credit... . [T]he Tribes have readily established the injury and threat of injury necessary to support this suit... . There are enough facts before us to resolve the parties' fundamental jurisdictional dispute in limited fashion: ... whether—absent formal reassumption of jurisdiction under ICWA § 1918—Alaska Native tribes have inherent sovereign jurisdiction, concurrent with the State, to initiate ICWA-defined child custody proceedings.

The court methodically reviewed its own precedents on tribal jurisdiction, and ultimately concluded that four fundamental principles enunciated in its prior decision *John v. Baker*, 982 P.2d 738 (Alaska 1999), controlled in *Tanana*:

First, unless and until its powers are divested by Congress, a federally recognized sovereign Indian tribe has powers of self-government that include the inherent authority to regulate internal domestic relations among its members.

Second, ANCSA's elimination of nearly all Indian country in Alaska did not divest federally recognized sovereign Alaska Native tribes of their authority to regulate internal domestic relations among their members.

Third, we must resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans and we will not lightly find that Congress intended to eliminate the sovereign powers of Alaska tribes.

Fourth, Congress's purpose in enacting ICWA reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes and ICWA's very purpose and structure presumes both that the tribes ... are capable of adjudicating child custody matters ... and that tribal justice systems are appropriate forums for resolution of child custody disputes.

Building upon these four fundamental principles, the court further agreed with the tribes that: “ICWA creates limitations on state' jurisdiction over ICWA-defined child custody proceedings, not limitations of tribes' jurisdiction over those proceedings.”

The state also argued that *Native Village of Nenana v. State Department of Health & Social Services*, 722 P.2d 219 (Alaska 1986), which held that Public Law 280 divested Alaska Native Tribes of any jurisdiction under ICWA §§ 1911(a) and (b), should control. But the court agreed with the tribes that *Nenana* was no longer good law, holding:

[W]e acknowledge that in the nearly 25 years since our *Nenana* decision, our view of P.L. 280's impact on tribal jurisdiction has become the minority view – other courts and commentators have instead concluded that P.L. 280 merely gives states concurrent jurisdiction with tribes in Indian country. What remains of *Nenana* must now be overruled. We adopt the view that P.L. 280 did not divest tribes of all jurisdiction under § 1911(a), but rather created concurrent jurisdiction with the State.

After overturning *Nenana*, the court stated in unequivocal terms:

[W]e hold that federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction under § 1918(a) still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country. Necessarily, federally recognized Alaska Native tribes are entitled to all of the rights and privileges of Indian tribes under ICWA, including procedural safeguards imposed on states and § 1911(d) full faith and credit with respect to ICWA-defined child custody orders to the same extent as other states' and foreign orders.

The decision in *Native Village of Tanana* clarifies the law and leaves little question that Alaska tribes possess inherent jurisdiction to initiate ICWA and Child-In-Need-of-Aid proceedings involving their member children, and that the state of Alaska must give full faith and credit to tribal court decrees. The four broad principles enunciated above seem to put to bed the notion that somehow Alaska tribes are "different" and have less jurisdiction because of changes wrought by the Alaska Native Claims Settlement Act. The decision also clarifies that

the bedrock principles of Indian law apply with equal force in Alaska. As a practical matter, it means the state can no longer rely on the Oct. 1, 2004 policy of refusing to recognize tribal court decrees. The trial court had issued an injunction preventing the state from enforcing its Oct. 1, 2004 policy, and the Alaska Supreme Court did vacate that portion of the opinion "out of respect for the Executive Branch." However, the court was careful to note that it was "confident the State's agencies will follow our clarifying ruling."

Throughout the case, the state raised numerous hypothetical factual scenarios about tribal jurisdiction over nonmembers and nonmember parents of Indian children. The court explicitly left those questions to be decided in another case that might present those specific factual scenarios. The state attorney general has 90 days in which to file a petition for review to the U.S. Supreme Court. The state's failure to get certiorari review last fall of *State of Alaska v. Kaltag*, a case which raised similar issues in federal court, suggests that the Court views the issue of inherent sovereign tribal jurisdiction (concurrent with the state) to initiate ICWA-defined child custody proceedings, a matter of settled law. ♦

#### **BELTWAY continued from page 5**

Gillette, who recently left the White House to become deputy assistant secretary for policy-Indian affairs at the Department of the Interior. On Feb. 16, Sen. Akaka announced the appointment of Loretta Tuell, a member of the Nez Perce Tribe, as the staff director/chief counsel of the Senate Committee of Indian Affairs. She replaced outgoing staff director Allison Binney, a member of the Sherwood Valley Band of Pomo Indians.

In mid-February, Patrice Kunesh, of Standing Rock Sioux Hunkpapa Lakota descent, assumed the role of deputy solicitor for Indian affairs within the Department of the Interior. She previously served on faculty at the University of South Dakota School of Law, as an attorney for the Native American Rights Fund, and as in-house counsel to the Mashantucket Pequot Tribe. She fills the vacancy left by Pilar Thomas, who took a position within the Department of Energy.

And on Dec. 6, 2010, Department of Health and Human Services Secretary Kathleen Sebelius announced the individuals who will serve on the secretary's Tribal Advisory Committee (STAC), the first tribal advisory committee established to advise the secretary in

the department's history. More information on STAC is available at [www.hhs.gov/intergovernmental/tribal](http://www.hhs.gov/intergovernmental/tribal).

#### NCAI STATE OF INDIAN NATIONS ADDRESS

On Jan. 27, National Congress of American Indians President Jefferson Keel, lieutenant governor of the Chickasaw Nation, delivered the organization's ninth annual State of Indian Nations Address in Washington, D.C. In his remarks, President Keel outlined the successes achieved in 2010, including the passage of the Tribal Law and Order Act and the Indian Health Care Improvement Act, but stressed that Indian nations face great challenges in 2011 as Congressional leaders begin making difficult budget choices. Keel called on federal partners to clear the way for tribes to expand economic opportunity and energy development and concluded that the unique nation-to-nation relationship between the United States and tribes is the gateway to a new era of self-reliance. Many of President Keel's sentiments were echoed in the Congressional response delivered by Sen. Lisa Murkowski (R-Alaska). ♦

#### **NORTHWEST continued from page 16**

Abrahamson, a member of the Spokane Tribe, was convicted by the state of driving under the influence of alcohol, attempting to elude, and driving with a revoked license, all committed on the Tulalip reservation.

In *In re the Parenting and Support of Samantha Beach*, No. 28728-9-III, 2011 WL 446863 (Wash. Ct. App. Jan. 27, 2011), the Court of Appeals of Washington held that the Indian Child Welfare Act (ICWA) applied to a custody dispute between the child's mother and the mother's ex-boyfriend, and that a "de facto" parent has

no standing to claim custody under ICWA.

In *In re M.R.L., E.Y.L., Y.I.L., A.J.L., M.L.L., and S.E.L. v. N.L. and B.Z.L.*, 239 P.3d 255 (Or. Ct. App.), the Court of Appeals of Oregon held, among a great many other things, that the father's lawyer's mistaken assertion that the ICWA did not apply warranted reversal because it constituted inadequate performance of counsel and caused the state to fail to perform the requirements of ICWA and similar state law. ♦

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