Federal Indian Law

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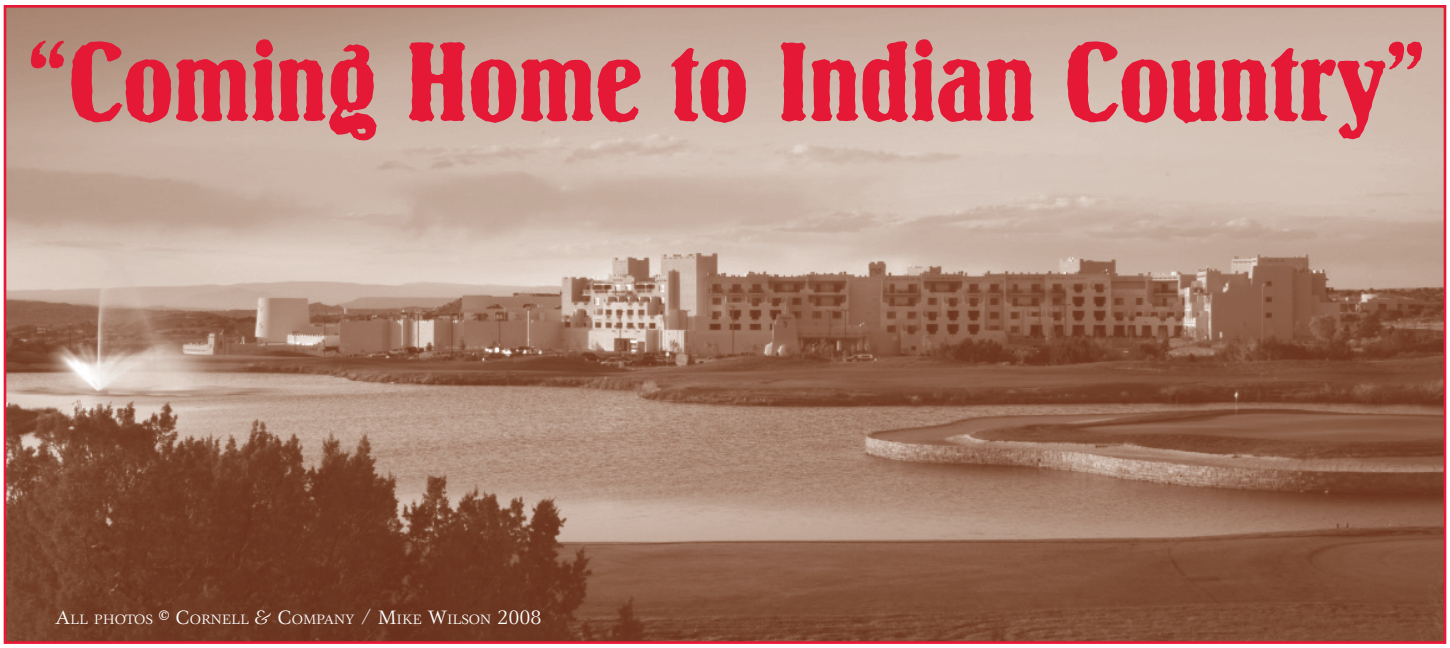

34th Annual Federal Bar Association Indian Law Conference

For the first time in its history, the annual Federal Bar Association Indian Law Conference will take place in a tribal community just outside of Santa Fe, New Mexico, at the Hilton Santa Fe at Buffalo Thunder, located on the Pueblo of Pojoaque. We celebrate this historic move as an opportunity for reflection on the relationship between federal Indian law and Indian communities, particularly in an era of political change and promise.

Federal Indian law, with its assimilationist legacy, has not always promoted the best interests of Indian tribes. Today, however, grassroots movements in Indian Country inspire tribal advocacy before all three branches of federal government. Tribes are positioned like never before to shape the law that affects tribal people, resources, and values.

The 2009 conference will examine these issues through discussions on reservation-based economies, renewable energy, religious freedoms, environmental regulation, legal ethics, Supreme Court litigation, and gaming. Other panels will address opportunities for tribes to use the law as a tool in revitalizing Indian communities, particularly in light of the new Presidential administration.

Inside This Issue

A Word From the Chair

By Allie Greenleaf Maldonado

Two thousand nine marks the 11th year that I have been honored to serve my community as a volunteer for the Indian Law Section of the Federal Bar Association. This year, I am particularly honored to have been elected by my peers as the section's chair. Filling D. Michael McBride's and Lawrence Baca's shoes will not be easy, but with the section's amazing Executive Board at my side, I am anticipating an outstanding year.

Mike McBride's two years as chair of the section were distinguished by the incredible work of our members and the vibrancy of the section. Our section has become the largest Indian law organization in the country and we have a lot to be proud of—our members are leaders in the field as lawyers, judges, and policy makers. We thank Mike warmly for his service.

Last year's conference again set the attendance record, as we gathered to reflect on the anniversaries of the Winters Doctrine, the Indian Country statute, the Indian Civil Rights Act, the Indian Child Welfare Act, and the Indian Gaming Regulatory Act. We thank Professor John P. LaValle and the American Indian Law Center in the University of New Mexico School of Law (UNM) for arranging for the printing and binding of the conference materials. Our section enjoys a long and fruitful relationship with UNM, and will again donate $5,000 this year to the Pre-Law Summer Institute.

At our last conference, we honored Jack Lockridge with the section's Distinguished Service Award. We were also pleased to honor Lawrence Baca with the inaugural Lawrence R. Baca Lifetime Achievement Award. We recalled his lifetime of commitment to federal Indian law, civil rights, and the rule of law, as well as his leadership and commitment to this section and the Federal Bar Association. At its annual meeting in Oklahoma City on Sept. 10–12, 2009, the Federal Bar Association will swear in Lawrence Baca as its president. He will become the first Native American president of a major U.S. bar association. I hope you can attend; in addition to the swearing-in, the host committee has planned many native-themed events in the heart of Oklahoma Indian country.

Also in 2008, the Federal Bar Association supported the Tribal Justice Improvement Act of 2008, which would extend tribal court criminal jurisdiction to non-Indians who commit domestic violence crimes within Indian Country.

While in no way minimizing the successes of our conferences, I have continually heard the membership express a strong desire for the annual FBA Indian law conference to be held in Indian country. The Indian Law Section leadership worked for many years to meet this goal. We took into consideration cost, location, airport access and the ability of facilities to meet our conference's needs. I am incredibly proud that after years of evaluating a variety of options we were able to secure a two-year contract with the Hilton Santa Fe at Buffalo Thunder on the Pueblo of Pojoaque. We are looking at this facility as our new home and hope that this is the beginning of a long-term relationship between the FBA Indian Law Section and the Hilton Santa Fe at Buffalo Thunder. The move does come with an increase in cost. However, we feel confident that the minor increase is more than outweighed by the benefits and amenities of our new location.

I am particularly mindful of keeping costs down for students. As a student at the University of Michigan Law School, the FBA Indian Law Conference was my only lifeline into Indian Country's legal community. Without the conference, I might not have had the chance to develop a rewarding career doing work in Indian Country that is personal and close to my heart. I am excited to get up and go to work every day. My connection to the FBA Indian Law Conference has given my career purpose beyond the paycheck and I will continue to show my gratitude by doing my part to preserve the conference for the next generation of Indian law practitioners. ◆

U.S. Supreme Court Update

This past summer, the Court decided *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, holding that tribal courts do not have subject-matter jurisdiction to adjudicate civil tort claims as "other means" of regulating the conduct of a non-member bank owning fee-land on a reservation that entered into a private commercial agreement with a member-owned corporation, the majority of which is owned by tribal members, under the exceptions to the rule stated in *Montana v. United States*. The Eighth Circuit had upheld the lower court's determination that the Cheyenne River Sioux Tribal Court had jurisdiction over a discrimination claim brought by tribal members against a non-member bank. While this case will undoubtedly provoke much scholarly attention, the Court's holding appeared premised on the notion that the conduct in question did not involve tribal members, but instead was an action by tribal members to undo a transaction between a state-chartered bank and non-Indian purchasers of land.

On Feb. 25, 2008, the Supreme Court granted cert in *Carcieri v. Kempthorne*. The First Circuit sitting *en banc* affirmed the lower court's determination that the Secretary of the Interior could take land into trust for the benefit of the Narragansett Indian Tribe of Rhode Island. The Court reviewed, at the State of Rhode Island's request: 1) whether the 1934 Indian Reorganization Act (IRA) empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934; and, 2) whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there. The Supreme Court reversed. Without addressing the second question, the Court concluded that the IRA only authorizes the Secretary of the Interior to place land into trust for tribes that were under federal jurisdiction when the statute was enacted in 1934. This interpretation of "Indian tribe" rested upon the use of the word "now" in the definition of "Indian" contained in the IRA.

Two additional petitions for certiorari have been granted. Petition for certiorari in *United States v. Navajo Nation* was filed on May 13, 2008 from the U.S. Court of Appeals for the Federal Circuit. Cert was granted on Oct. 1, 2008. The questions presented by the United States are whether: 1) the Court of Appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by United States v. Navajo Nation, 537 U.S. 488 (2003); and, 2) if *Navajo* did not foreclose the question, whether the Court of Appeals properly held that the United States is liable as a matter of law to the Navajo Nation for up to $600 million for the Secretary's actions in connection with his approval of amendments to an Indian mineral lease. The alleged fiduciary duties are based on several statutes that do not address royalty rates in tribal leases and common-law principles not embodied in a governing statute or regulation. Oral argument was held on Feb. 23, 2009.

On April 29, 2008, petition for certiorari was filed from a decision of the *Supreme Court of Hawaii in Hawaii v. Office of Hawaiian Affairs*. Cert was granted on Oct. 1, 2008. Oral argument was held Feb. 25, 2009. In the Joint Resolution to Acknowledge the 100th Anniversary of the Jan. 17, 1893, Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land - 29 percent of the total land area of the State and almost all the land owned by the state - unless and until it reaches a political settlement with native Hawaiians about the status of that land.

On Feb. 11, 2009, petition for certiorari was filed in *Schwarzenegger v. Rincon Band of Luiseno Mission Indians* from the Ninth Circuit. The Rincon Band brought this action against the governor of California ("the state") seeking, inter alia, reliance damages and a declaratory judgment regarding the aggregate maximum number of slot machine licenses available to Indian tribes

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in California who were parties to approximately 60 essentially identical Indian Gaming Compacts between those tribes and the state. The Court of Appeals held: 1) other tribes were not necessary parties to the claim for declaratory relief, and 2) the Eleventh Amendment barred a claim against the State of California for reliance damages.

Petition for certiorari in *Losh v. Minnesota* was filed on Feb. 2, 2009, and is an appeal from the Supreme Court of Minnesota. The Court below held that a court may consider the underlying basis for the revocation of the driver's license to determine whether the driving after revocation offense raises substantially different or heightened public policy concerns for the purposes of determining whether the state has subject-matter jurisdiction, pursuant to Public Law 280, to prosecute a tribal member who commits the offense of driving after revocation of a driver's license on tribal land. The Court further held that driving after revocation when the underlying basis for the revocation was driving while impaired or a failure of a test administered under the Minnesota implied-consent law is criminal/prohibitory for purposes of determining jurisdiction under Public Law 280.

On Jan. 30, 2009, petition for certiorari was filed in *Coushatta Tribe of Louisiana v. Meyer and Associates* from the Supreme Court of Louisiana. The Coushatta Tribe asks the Court to resolve the following two questions: 1) Are state courts required to apply and follow the tribal exhaustion doctrine, and, in this case, should the Louisiana Supreme Court have given the Coushatta Tribal Court the first opportunity to interpret Coushatta law?; and, 2) Can a tribe be forced to litigate claims in a state court when an ostensible waiver of sovereign immunity is not valid under that tribe's law?

Petition for certiorari in *Cook v. Avi Casino Enterprises* was filed on Jan. 22, 2009, and is an appeal from the Ninth Circuit. The Ninth Circuit held that the federal courts had jurisdiction over Avi Casino Enterprises because there was a diversity of citizenship. However, it affirmed the district court's dismissal because of tribal sovereign immunity and affirmed the dismissal of the individual defendants. The questions presented by the Cooks are: 1) Does the tribal sovereign-immunity doctrine bar a dram-shop lawsuit against the tribal corporation and its employee?; 2) Did Arizona courts erroneously hold that there was no general personal jurisdiction?; and, 3) Did Arizona courts erroneously hold that there was no specific personal jurisdiction?

Petition for certiorari was filed in *Catskill Development v. Harrah's Operating Company* on Jan. 16, 2009 from the Second Circuit, which affirmed the district court's dismissal of the Catskill Group's tortious interference with a contract claim on the ground that its contracts with the Tribe were void and otherwise unenforceable at the time of Park Place's alleged interference. The court also affirmed the district court's grant of summary judgment to Park Place on the Catskill Group's tortious interference with business relations claim on the ground that the Catskill Group failed to establish a triable issue of fact that Park Place used wrongful means to interfere.

On Jan. 22, 2009, petition for certiorari was filed in *California v. Cachil Dehe Band of Wintun Indians of the Colusa Indian Community* from the Ninth Circuit. The Tribe brought an action against the State, its Governor, and the California Gambling Control Commission for declaratory and injunctive relief challenging the California Gambling Control Commission's interpretation of the compact and the Commission's assumption of authority to administer unilaterally the licensing of electronic gaming devices. The district court dismissed the case because it concluded that the other tribes that had signed identical gaming compacts, as well as non-gaming tribes, were required parties to the action and, because of tribal sovereign immunity, they could not be joined. The Ninth Circuit reversed and remanded upon finding that the other tribes were not necessary parties.

Petition for certiorari in *Stratman v. Salazar* was filed on Jan. 5, 2009, and is an appeal from the Ninth Circuit. *Stratman* asks the Court to resolve whether the Ninth Circuit impermissibly invalidated a prior congressional enactment by failing to apply the

canons of statutory construction relating to repeals by implication, and by construing the 'plain language' of ANILCA Section 1427 as exempting Leisnoi from ANCSA's village eligibility provisions, and mooting the Petitioner's action, without regard to Section 1427's legislative history, and contrary to Congress' actual intent.

On Jan. 14, 2009, petition for certiorari was filed from the Ninth Circuit in *Marceau v. Blackfeet Housing Authority*. Purchasers and residents of Indian housing built and paid for by the Blackfeet Housing Authority ask the Court whether the statutes, regulations and HUD requirements were so pervasive that federal control over Indian housing construction created a trust responsibility towards Indians that the Complaint alleges was violated.

Petition for certiorari in *Navajo Nation v. United States Forest Service* was filed on Jan. 5, 2009, from the Ninth Circuit. Navajo Nation asks the Court to resolve a widespread disagreement among the circuits as to whether a governmental action cannot constitute a 'substantial burden' under RFRA unless it forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or coerces them by threatening civil or criminal sanctions to act contrary to their religious beliefs.

Fourteen petitions for certiorari have been denied so far this term: *Seminole Tribe of Florida v. Florida House of Representatives*, *Friday v. United States*, *Rodriguez-Martinez v. United States*, *Harrah's Operating Co. v. NGV Gaming, Ltd.*, *Michigan Gambling Opposition v. Kempthorne*, *Roberts v. Hagener*, *South Fork v. United States*, *Pocatello*, *Idaho v. Idaho*, *Bodkin v. Cook Inlet Region Inc.*, *South Fork Band v. United States*, *Matheson v. Gregoire*, *Klamath Tribes of Oregon v. PacificCorp*, *Kemp v. Osage Nation*, *Kickapoo Traditional Tribe of Texas v. Texas*, *Lawrence v. Department of Interior*, and *Ho-Chunk v. Wisconsin*.

Inside the Beltway—Washington, D.C., Update

The inauguration of Barack Obama as the 44th President of the United States has brought a lot of changes. Obama nominated Senator Ken Salazar (D-CO) to be Secretary of Interior, and Salazar was confirmed on Jan. 20, 2009. Supporting and serving Indian tribes and restoring the "integrity of the nation-to-nation relationship with Indian tribes"[1] are top priorities for Secretary Salazar. Secretary Salazar believes that the Department of Interior should be a partner with Indian tribes to create and advance sustainable economic development.[2] While a Senator, Secretary Salazar served on the Energy and Natural Resources Committee, and continues to be a proponent of President Obama's energy initiative. Salazar aims to "expand the use of renewable energy like solar and win on public lands, and help tribes develop renewable energy resources on their lands."[3]

On Feb. 6, 2009, President Obama appointed Jodi Archambault Gillette, a member of the Standing Rock Sioux Tribe, as Deputy Associate Director the White House Office of Intergovernmental Affairs. Gillette will facilitate communications between the administration and state, tribal and local governments. Gillette served as the North Dakota First American Vote Director for the Obama Campaign for Change. Prior to her work with the campaign, Gillette was the Director of the Native American Training Institute, a tribally-operated non-profit organization.

President Obama recently signed the American Recovery and Reinvestment Act of 2009, which provides $787.2 billion dollars in funding, including approximately $2.5 billion to create jobs and economic opportunities in Indian Country. Senate Indian Affairs Committee Chairman Byron Dorgan (D-ND) noted that the legislation is "a long over-due and urgently needed investment in Indian Country."[4] The act provides $2 billion in bonding authority for tribal economic development of tax-exempt bonds and $400 million in bonding authority for qualified Indian school construction bonds. The act also provides grants and competitive funding for, among other things, Indian

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Health Care facilities, Indian energy and water projects, BIA programs, Indian public safety and justice programs, Indian housing, Indian education and tribal roads and bridges.

Tribes should also note that Congress is working to reauthorize the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, which expires on Sept. 30, 2009. As a result of significant coordination by tribes, SAFETEA-LU includes several provisions that are beneficial to tribes, including an increase of funding in the Indian Reservation Roads program. The reauthorization of SAFETEA-LU is a top legislative priority for many tribes and for National Congress of American Indians (NCAI). NCAI has developed a Joint Task Force that is working with tribal leaders and tribal transportation experts to develop a comprehensive list of tribal priorities.

Of particular interest in the courts is Secretary Salazar's recent appeal of the District of Columbia District Court's decision in *Indian Educators Federation Local 4524 of the American Federation of Teachers, AFL-CIO v. Kempthorne*. The Indian Educators Federation brought suit against the Secretary of Interior asserting that Section 12 of the IRA mandates employment preferences for American Indians employed in any position at Interior that directly and primarily relates to the provision of services to American Indians, based on Section 12 of the IRA, which directs the Secretary to give preference to qualified Indians to "various positions maintained by the Indian Office, in the administration of functions or services affecting Indian tribes." The secretary took the position that the term "Indian Office" was limited to mean only jobs within the Bureau of Indian Affairs. However, the D.C. District Court emphasized the importance of the "long-standing canon that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." No briefs have been filed in the appeal to date.

Endnotes

[1]Testimony of Ken Salazar before U.S. Senate at 4 (Jan. 15, 2009).

[2]*Id*. at 4.

[3]*Id*. at 3

[4]*See* indian.senate.gov.

California Update

This update focuses mostly on cases decided in 2008 by federal and state courts in California. The majority of the cases discussed deal with gaming, particularly tribal-state compact issues, and sovereign immunity.

In a case involving individual aboriginal title, and who bears the burden of demonstrating it exists when it is asserted as an affirmative defense in a criminal action, the Ninth Circuit Court of Appeals in *United States v. Lowry*, 512 F.3d 1194 (9th Cir. 2008), upheld the district court's conviction of a Karuk woman who was living on her family's ancestral land within what is now the Klamath National Forest. Whereas the district court found that the government had to prove that aboriginal title did not exist in order to convict a defendant for unauthorized occupation of National Forest land, the Ninth Circuit held that an occupant claiming individual aboriginal title bears the burden of demonstrating this title as an affirmative defense.

Another case involving Indian property rights and the federal government is *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072 (S.D. Cal. 2008), a tort action brought by the Quechan Indian Tribe against federal government agencies that caused damages to tribal cultural sites on reservation lands owned in fee by the United States as a right-of-way for an electric transmission line. The court held that, because the United States owned the lands in fee, Quechan tribal law gave the Tribe no proprietary interest in the lands, and that Tribal law did not explicitly provide the Tribe a proprietary interest in cultural resources located on non-Tribal fee land within the exterior reservation boundaries. But the court also held that the United States' fee ownership of the land was not fatal to the Tribe's negligence claims – since negligence claims do not depend on land ownership – and it allowed the Tribe's claims to go forward, finding that the Western Area Power Administration breached a duty to the Tribe under California not to damage cultural sites, and that the agency's actions caused severe and irreparable harm

to a cultural site as required in a claim of negligence per se in California law. The court further found that the agency's activities negatively impacted sites outside of the federal government's right-of-way, and it allowed the Tribe's California law claim for trespass to go forward as to sites on these non-right-of-way lands.

In a dispute between two casino developers that was consolidated with a tribe's suit against one of them, the Ninth Circuit in *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767 (9th Cir. 2008), held that 25 U.S.C. § 81 requires secretarial approval only for contracts that encumber lands already held in trust; thus, the contract at issue remained valid without secretarial approval because it implicated lands that were not yet in trust. NGV Gaming had sued Harrah's Entertainment Inc., alleging that Harrah's interfered with NGV's contract with the Tribe, and Harrah's and the Tribe argued that there was no interference because there was no valid contract between NGV and the Tribe. After the Ninth Circuit allowed NGV's suit to go forward on the basis that there was a valid contract and remanded the case, the district court, citing a possible circuit split following the Second Circuit's decision in *Catskill Development, LLC v. Park Place Entertainment Corp.*, 547 F.3d 115 (2d Cir. 2008), stayed the proceedings while Harrah's petition to certiorari was pending. The Supreme Court denied the petition for certiorari on January 26, 2009.

Several federal court cases involved disputes between tribes and the State of California under 1999 Tribal-State Gaming Compacts. In *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962 (9th Cir. 2008), the Ninth Circuit affirmed the district court's dismissal of the Tribe's claims against California for failure to negotiate in good faith (a requirement adopted into California law by voter initiative, thus avoiding Eleventh Amendment sovereign immunity issues), holding that freedom from competition is not a legally-protected interest for purposes of determining whether other tribes that signed the 1999 Compact were required parties under Federal Rule of Procedure 19(a). But the Ninth Circuit reversed the district court's dismissal of the Tribe's other claims, holding that other signatory tribes to the 1999 Compact were not required parties for the Tribe's breach of compact claims regarding California's limit on the number of slot machine licenses, the Tribe's placement in the draw for licenses and the State's formula and procedure for allocating licenses, and the California Gambling Control Commission's unilateral administration of licensing. These claims were remanded to the district court. On Jan. 22, 2009, the State of California filed a petition for a writ of certiorari to the Supreme Court. In a related action, the court in *Cachil Dehe Band v. California*, 2008 WL 205604 (E.D. Cal. 2008), found that because California law delegated the authority to negotiate gaming compacts with tribes to the Governor, a tribe seeking a declaration that the state was not negotiating in good faith over compact amendments must include the Governor as a named defendant (and the court granted the Tribe leave to amend its complaint to so include the Governor).

Based on its decision in the *Cachil Dehe Band* case, the Ninth Circuit in *San Pasqual Band of Mission Indians v. California*, 295 Fed.Appx. 880, 2008 WL 4472608 (9th Cir. 2008), reversed the district court's dismissal of an action brought by San Pasqual seeking a judicial determination of the correct number of slot machine licenses authorized by the formula found in its gaming compact, which was materially identical to the 1999 Compact signed by over 60 other tribes. The district court had dismissed the Tribe's complaint on grounds that San Pasqual failed to join these other tribes, whom the court said were required parties because San Pasqual challenged the interpretation and application of a formula common to all their compacts.

In another case involving negotiations over compact amendments, Ninth Circuit upheld the district court's finding that other tribes were not necessary parties to the Rincon Band's claim for declaratory relief regarding California's negotiating position in compact talks with the Tribe. *Rincon Band v. Schwarzenegger*, 290 Fed.Appx. 60, 2008 WL 3822538 (9th Cir. 2008). Although the Ninth Circuit held that the Eleventh Amendment barred the

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Tribe's claim against the state for reliance damages, it upheld the district court's finding that California had negotiated in bad faith on the issue of revenue sharing. The district court found that California had not offered meaningful concessions to Rincon in exchange for the fees that the State was asking from the Tribe, and it concluded that the fees demanded by California, both in amount and type, constituted an attempt to impose a tax in violation of IGRA section 2710(d)(4). The State of California filed a petition for a writ of certiorari to the Supreme Court on Feb. 11, 2009.

Two cases involved the issue of federal question jurisdiction under the Indian Gaming Regulatory Act. In *Rumsey Indian Rancheria of Wintun Indians v. Dickstein*, 2008 WL 648451 (E.D. Cal. Mar. 5, 2008), the court rejected the defendants' arguments that the plaintiff's state law claims were completely preempted by IGRA and raised substantial questions of federal law, and it remanded to state court a case brought by the Rumsey Band of Wintun Indians against its former lawyer and former financial advisor asserting fourteen state law claims including breach of contract, breach of fiduciary duty, unjust enrichment and violation of the California Business and Professions Code. The court held that although claims that would interfere with a tribe's ability to govern gaming fall within the scope of IGRA's preemption of state law, the plaintiffs' claims were not of this type. It also held that since the plaintiffs' claims could be supported by alternative and independent state law theories, they did not raise substantial questions of federal law sufficient to establish federal question removal jurisdiction. A similar result was reached in *Runyan v. River Rock Entertainment Authority*, 2008 WL 338783 (N.D. Cal. Aug. 8, 2008), where the court remanded to state court the plaintiff's state law contract and tort claims against a tribal government instrumentality and agency that operates a tribal casino and of which he was a former employee. The case was eventually dismissed on sovereign immunity grounds.

At the end of 2008, the Ninth Circuit issued its opinion in a potentially significant case involving tribal sovereign immunity, *Cook v. Avi Casino Enterprises*, 548 F.3d 718 (9th Cir. 2008). A patron of Avi Casino, operated by the Fort Mojave Indian Tribe in Nevada, brought a dramshop and negligence action against Avi Casino Enterprises, Inc. ("ACE"), the tribally-owned corporation that operates the casino, and its employees. The Ninth Circuit upheld the district court's finding of diversity jurisdiction on the basis that the plaintiff was a California resident and ACE was a Nevada citizen because its principal place of business, the casino, was there (the court rejected the district court's finding that ACE was also a California citizen because it was incorporated under tribal law and the Tribe's seat of government is in California). But the court dismissed the case for lack of subject matter jurisdiction, holding that ACE enjoyed the Tribe's immunity from suit because it, like the casino, functions as an arm of the Tribe. Moreover, the individual ACE employees shared in this immunity because they were sued in their official capacity, and the court, citing Ninth Circuit law extending federal sovereign immunity to federal employees, held that tribal employees acting in their official capacity enjoy tribal sovereign immunity. The plaintiff filed a petition for certiorari on Jan. 22, 2009.

Tribal sovereign immunity was also at issue in two federal district court cases decided in 2007. In *Unkeowannulack v. Table Mountain Casino*, 2007 WL 4210775 (E.D. Cal. Nov. 28, 2007), the court dismissed a suit brought against the Table Mountain Rancheria's casino, its gaming commission, and the casino's president (who was named as a defendant in the complaint but not listed in the caption). The plaintiff asserted a claim under 42 U.S.C. § 1983 for violations of his Fifth and Fourteenth Amendment due process rights alleged to have occurred as a result of the defendants' procedural handling of a slot machine malfunction. After citing case law discussing sovereign immunity and holding that IGRA provides for no general right of private action, the court held that the casino, as an arm of the Tribe, was immune from suit; that the gaming commission was also an arm of the Tribe and

immune from suit; and that the casino's president was immune from suit as a tribal official since the complaint alleged claims against him acting in his official capacity based on conduct within the scope of his authority. The court in *Hill v. Rincon Band of Luiseno Indians*, 2007 WL 2429327 (S.D. Cal. Aug. 22, 2007), dismissed on tribal sovereign immunity grounds a complaint brought against the Tribe by a former employee, noting that "it is well established precedent that claims by former tribal employees against the Tribe are barred by tribal sovereign immunity" and citing Ninth Circuit case law to this effect.

Sovereign immunity was also at issue in California state law cases. In *Ameriloan v. Superior Court*, 169 Cal.App.4th 81 (2d Dist. 2009), a case involving the California Department of Corporations' action to enforce various provisions of California's Deferred Deposit Transaction Law against payday loan operations owned by the Miami Tribe of Oklahoma. The three companies were trade names used by Miami Nation Enterprise, an economic subdivision of the Tribe, in the cash advance business in California; they offered short-term loans to California residents over the internet. The appeals court held that the trial court erred in concluding that tribal sovereign immunity did not apply to off-reservation activity, and in ruling that to uphold tribal sovereign immunity would intrude on California's exercise of its reserved powers under the Tenth Amendment. The appeals court also rejected the State agency's arguments that a waiver existed by virtue of the "sue or be sued" clause in the tribal resolution establishing Miami Nation Enterprise, or by virtue of the arbitration provision contained in each of the payday loan companies' loan agreements with consumers. The court found that a factual issue existed as to whether the companies were acting on behalf of the Miami Tribe, and the case was remanded for a determination of whether the companies operate as "arms of the tribe" for purposes tribal sovereign immunity.

In *Santa Ynez Band of Mission Indians v. Torres*, 2008 WL 174338 (2d Dist. 2008), a state appeals court held that where an Indian tribe files a proof of claim in an adversarial bankruptcy proceeding, the tribe waives its sovereign immunity as to counterclaims or cross-complaints that are transactionally related to the proof of claim. The Tribe contracted with the defendant, a contractor, for construction and other work at the Tribe's casino and then sued him in state court for damages, claiming the work was substandard. The contractor then filed a cross-complaint for services provided, and the Tribe filed a motion to quash service of the cross-complaint. The court denied the motion, finding that the doctrine of tribal sovereign immunity did not bar a cross-complaint that was treated as an action for setoff or equitable recoupment. After the Tribe answered the cross-complaint, the contractor filed a Chapter 11 bankruptcy petition that stayed the state court action; the Tribe filed a proof of claim in the bankruptcy proceeding; and the bankruptcy court lifted the stay and directed the Tribe and the contractor to prosecute their claims in state court. When it got the case back, the trial court found that the Tribe's sovereign immunity had been waived and abrogated as to all matters arising out of its proof of claim filed in the bankruptcy proceeding. The appeals court upheld this finding, relying on the Ninth Circuit's decision in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004).

Hawai'i Update

The two Hawai'i cases discussed involve the Office of Hawaiian Affairs (OHA), one where the OHA was the defendant and one where it was the plaintiff. In *Day v. Apoliona*, 496 F.3d 1027 (9th Cir. 2007), the Ninth Circuit overturned the district court's dismissal of a complaint filed by Native Hawaiian individuals against trustees of the OHA, alleging that the trustees misspent trust funds used to lobby in favor of the Akaka Bill and support social service programs whose funds were not subject to the

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limitation that they be expended to better the conditions of Native Hawaiians. The Ninth Circuit reversed the district court's holding that the Hawaii Admission Act creates a right enforceable via 42 U.S.C. § 1983 and held that individual Native Hawaiians, as beneficiaries of the public trust created the Admission Act, have an individual right to have the trust terms complied with, and therefore can sue under Section 1983 for violation of that right. The court further held that violations of this right may include expenditure of funds for purposes not enumerated in the Hawaii Admission Act. After the Ninth Circuit issued its decision, the State of Hawaii, which had been participating in the case as an amicus curiae, was allowed to intervene pursuant to Federal Rule of Civil Procedure 24 in order to petition for panel rehearing and petition for panel rehearing en banc. *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007).

The other case from Hawai'i is now before the United States Supreme Court. The issue in *Hawaii v. Office of Hawaiian Affairs* is whether the 1993 congressional resolution apologizing for the overthrow of the Kingdom of Hawai'i requires the State of Hawaii to reach a political settlement with Native Hawaiians before transferring some 1.2 million acres of land to private ownership. In *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i*, 177 P.3d 884 (Hawai'i 2008), the Supreme Court of Hawai'i held that the 1993 Apology Resolution and related state legislation give rise to the State's fiduciary duty to preserve the lands at issue until the unrelinquished claims of Native Hawaiians to those lands have been resolved, noting that the Apology Resolution clearly recognized their unrelinquished claims to these lands. The State filed a petition for certiorari with the United States Supreme Court, which was granted on Oct. 1, 2008. *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 30 (2008).

Northwest Regional Update

It appears that the litigation over the certification of Woody Island as a native village under the Alaska Native Claims Settlement Act has finally been brought to an end. In 1976, Omar Stratman, and others, challenged the Secretary of Interior's certification of the island as a native village, arguing that the village did not meet the requirements of the Settlement Act. The litigation had been mooted, temporarily settled, and otherwise put on hold several times. In 2002, the Interior Board of Land Appeals found that the village did not meet several of the requirements of the Settlement Act. In 2006, the Office of the Department of Interior Solicitor concluded that Section 1427 of the Alaska National Interest Lands Conservation Act (1980) "ratified" the Secretary's certification of the village and thus made moot the litigation over whether the village met the requirements of the Alaska Native Claims Settlement Act. In *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161 (9th Cir. 2008), the court agreed with the Solicitor's opinion and dismissed Stratman's appeal as moot.

In *United States v. FMC Corp.*, 531 F.3d 813 (9th Cir. 2008), the court held that the Shoshone-Bannock Tribe could not enforce a consent decree between the United States and FMC Corporation. In the 1990s, the Tribe and the United States approached FMC Corporation, a mining enterprise, about potential violations of federal and tribal environmental laws. FMC Corporation agreed to pay the Tribe $1.5 million a year in lieu of applying for tribal permits. FMC Corporation also entered into a detailed consent decree with the United States. When FMC Corporation stopped making payments to the Tribe, the Tribe asked the district court to enforce the consent decree. The district court held that the Tribe could enforce the consent decree. FMC Corporation appealed. The Ninth Circuit held that while the Tribe was mentioned in the decree several times and granted certain "rights" by the decree, it was neither a party nor an intended third-party beneficiary to the consent decree and thus could not enforce it.

In *State ex rel Dewberry v. Kulongoski*, 187 P.3d 220 (Or. App. 2008), the Oregon Court of Appeals held that the trial court erred when in dismissed the realtors writ of mandamus that sought to bar state officials from carrying out a gaming compact with

the Confederated Tribes of Coos, Lower Umpqua, and Suislaw Indians. Oregon's procedural rules permit writs of mandamus only when there is no "plain, speedy and adequate remedy in the ordinary course of the law." The trial court had dismissed the action after finding that the realtors had a plain, speedy, and adequate remedy in the form of a declaratory judgment action. The two most interesting issues on appeal were: (1) whether the Oregon procedural rules concerning joinder of necessary parties applied in mandamus proceedings; and, (2) if a declaratory judgment action was, given the circumstances, truly an adequate alternative.

The court held that the standard joinder rules do not apply in mandamus proceedings—the only necessary parties are the "realtor" (the person or persons seeking the writ) and the "defendant." This ruling is significant because it allows the realtors to bring the action against the state officials without joining the Tribe, thus preventing a dismissal for failure to join a necessary party.

The court also held that a declaratory judgment action was not an adequate alternative in this case because the Tribe could prevent the action from going forward by asserting its immunity from suit. The court noted that the Tribe would clearly be a necessary party to a declaratory judgment action seeking to invalidate the compact. Because the Tribe had complete control over whether a declaratory judgment action could go forward, it was held to not constitute an adequate alternative to the writ.

In *Chao v. Spokane Tribe of Indians*, No. 07-0354 (E.D. Wash. Sept. 24, 2008), the court denied the Tribe's request to quash an administrative subpoena seeking certain tribal employment records, holding that the Fair Labor Standard Act applies to the tribal casino and that the Tribe was not immune from enforcement of the subpoena.

In *State v. Cayenne*, 195 P.3d 521 (Wash. 2008), the Supreme Court of Washington, sitting en banc, held that a state court could impose a crime-related sentencing condition on a tribal member that affects his on-reservation fishing rights. Gerald Cayenne, a member of the Chehalis Indian Tribe, was convicted of illegal off-reservation use of a gillnet. The Chehalis Tribe is a not a treaty tribe, and, therefore, according to the Court, its members are subject to all state laws when fishing off-reservation. The trial court prohibited Cayenne from owning gillnets, both on and off the reservation, during his eight month sentence. The Court of Appeals reversed, holding that the prohibition could not extend to actions on tribal land. The state Supreme Court reversed the Court of Appeals, holding that the prohibition was permissible because the defendant was convicted of a crime committed off-reservation and the state courts had personal jurisdiction over him. The Court distinguished the sentencing condition, which applied to only the individual felon, from a general regulation over on-reservation activity.

In *State v. Pink*, 185 P.3d 634 (Wash. App. 2008), the court held that the State does not have jurisdiction to prosecute a tribal member for unlawfully possessing a firearm on a state road located on tribal land. William Pink, a member of the Quinault Tribe, was a passenger in a vehicle that was pulled over by state officers on a state road located within the Quinault Reservation. The Tribe had granted a right-of-way to the state for the road. During the traffic stop, the officer learned that there was an outstanding warrant for Pink's arrest. The officers arrested Pink and discovered a rifle in the car. Pink admitted that the rifle was his. Because Pink was a convicted felon, it was unlawful for him to possess a firearm. The officers charged Pink with unlawful possession of a firearm. Pink moved to have the case dismissed, arguing that the State did not have criminal jurisdiction over a tribal member on tribal land. The State argued that it had jurisdiction because the offense occurred on a state road. The court held that the road easement granted to the state by the tribe did not provide the state criminal jurisdiction over criminal offenses that were not related to the operation of a motor vehicle.

Rocky Mountain Regional Update

In *United States v. Cruz*, 2009 WL 310906 (9th Cir. 2009), the Ninth Circuit reversed the U.S. District Court of Montana because the government failed to satisfy the test for Indian status under the Major Crimes Act set forth

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in *U.S. v. Bruce*, 394 F.3d 1215 (9th Cir. 2005). The defendant was convicted of assault resulting in serious bodily injury committed by an Indian on the Blackfeet Indian Reservation. The court considered several facts relevant to the determination of whether the defendant has Indian status. The defendant was 22 percent Blackfeet, but: he never became an enrolled member of the Tribe; moved off the reservation when he was a few years old; was eligible for tribal benefits, but never took advantage of them; and, went to school and had jobs that were open to Indians and non-Indians. He was renting a motel room on the Blackfeet Indian Reservation when the aggravated assault took place.

The *Bruce* test requires the defendant to have sufficient "degree of Indian blood," and to have "tribal or federal government recognition as an Indian." The first prong of the test was conceded by the defendant. The court held that none of the four factors of the second element were met. The defendant never voted as a member of the Tribe, never availed himself of tribal benefits, and, although he had been prosecuted by the tribal courts, he never seemed to identify as a member of the Tribe.

Petitions for cert to the U.S. Supreme Court were submitted and denied in two regional cases. *Roberts v. Hagener*, 287 Fed.Appx. 586 (9th Cir. 2008), an unpublished decision, was appealed to the U.S. Supreme Court. In *Roberts*, a Montana regulation permitting only "tribal members" to hunt big game on Indian reservations in Montana was found to be rationally-related to legitimate government purposes of promoting the conservation of wildlife within Indian Reservations and avoiding the logistical difficulties of regulating hunting differently for tribal members and non-members within reservations.

Second, in *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), a member of the Northern Arapaho Tribe of Wyoming was charged with violating the Bald and Golden Eagle Protection Act after he shot a bald eagle, without a permit, for use in a Sun Dance. The defendant argued that the prosecution was precluded by the Religious Freedom Restoration Act (RFRA) and the United States District Court of Wyoming agreed. The Tenth Circuit reversed the lower court noting that the defendant did not apply for a permit under the Bald and Golden Eagle Protection Act, the process which he claimed violated his rights under RFRA.

In non-court related developments, the most recent deadline for the determination of federal recognition of the Little Shell Tribe of Chippewa Indians of Montana has been extended again. In February 1997, the Branch of Acknowledgment and Research placed the Tribe's federal recognition petition on active review status. After many delays, the Assistant Secretary, in July of 2000, published a preliminary finding in favor of recognition. On Oct. 18-19, 2000, a technical assistance meeting was held with the Office of Federal Acknowledgment (OFA) to outline a program of action to strengthen the petition prior to the final determination. Substantial work was done to strengthen the Tribe's petition and the final submissions were made in February 2005.

There was a hearing in October before the Senate Committee on Indian Affairs on a bill to recognize the Little Shell Tribe sponsored by Senators Tester and Baucus of Montana. The Committee indicated it would take action on the bill in the first quarter of 2009. OFA began active consideration of the Tribe's new material on August 1, 2007, and conducted a three week site visit on Oct. 1, 2007. OFA had previously indicated it would reach a final determination on the Tribe's petition by the end of calendar 2007. This deadline was not met; the date was moved to the end of July 2008. Before that date arrived, the Assistant Secretary granted a new deadline of Jan. 28, 2009, but on Jan. 15, 2009, another extension was granted to July 27, 2009. ◆

Update: Tribal Justice Committee of the Indian Law Section Co-sponsors a "Criminal Jurisdiction in Indian Country" Panel at Michigan State University College of Law

Last February, as part of the Indigenous Law and Policy Center's Spring Panel Series, the Tribal Justice Committee co-sponsored a well-attended panel on criminal jurisdiction, with students, judges and attorneys representing many of Michigan tribes. Speakers included Eileen Luna-Firebaugh, author of the book *Tribal Policing*, Leslie Hagan of the U.S. Attorney's Western District office, and Bill Gregory, tribal prosecutor for Little Traverse Bay Bands of Odawa Indians.

Luna-Firebaugh spoke from her western perspective on tribal policing, cross-deputization agreements and Public Law 280. Her comments on de jure versus de facto jurisdiction spurred a thoughtful debate about law enforcement on reservations.

Hagan discussed the act which has been a part of her life for the past few years, as many in Indian Country know, the Adam Walsh Act. She was able to report on her success alerting tribes to the provisions in the act that will affect them, specifically the opt-out provision. The Adam Walsh Act would give states jurisdiction in Indian Country as it relates to sex offenders, unless the tribes opted out. A vast majority of the non-Public Law 280 tribes that had the right to opt-out of state jurisdiction over sexual offenders on tribal land did so. Of the very few who did not respond with either an opt-in or opt-out resolution, at least one tribe was landless, and one did not have a functioning government. Tribes who opted-out now need to find the resources to comply with the Walsh Act, which has a number of requirements, including a comprehensive registry of sexual offenders.

Bill Gregory spoke on a number of issues, but was able to give more context to Hagan's talk from the tribal perspective. In regards to the Walsh Act, Gregory gave some indication of the costs of compliance to a tribe. Specifically, the technology needed for digital fingerprinting alone costs thousands of dollars. Because of these costs and personnel required, some tribes are hoping to work on partnerships for regional offender lists. Gregory also spoke about his experience with Michigan tribes and gaming and his perspective on Michigan tribes' fight for reaffirmation over the past thirty years. ◆

Book Reviews

Destroying Dogma: Vine Deloria, Jr. and His Influence on American Society

Edited by Steve Pavlik & Daniel R. Wildcat

Fulcrum Publishing, 2006

Reviewed by Matthew L.M. Fletcher
Professor, Michigan State University College of Law

It can safely be said that Vine Deloria, Jr.'s work made an indelible imprint upon several academic areas – and could be said to have been a driving force in the current status in the academy of American Indian studies, American Indian law and policy, and even ethnohistory and other sciences. But Deloria's impact went far beyond academia and was a major force in the way national policymakers think about Indian tribes and Indian people – and the way Indian leaders think about themselves. Studies of American Indian law and policy in the post-Deloria era have begun and are flourishing, but this excellent collection of essays reminds scholars and other students of Indian studies to look to the past as well.

Essays in this collection recommended for lawyers include Steve Pavlik's "Darwin, Deloria, and the Origin of Life" and Richard M. Wheelock's "'The American Story': The Impact of Myth of American Indian Policy," but special kudos must go to David E. Wilkins' study, "Forging a Political, Educational, and Cultural Agenda for Indian Country: Common Sense Recommendation's Gleaned from Deloria's Prose." Wilkins reminds readers that Deloria was much more than an Indigenous philosopher or radical commentator on what's wrong with Indian law and policy. He had concrete ideas for changing things. Wilkins' chart listing Deloria's many recommendations for tribal and federal policymaking comes complete with a description of whether that recommendation made an impact. Most academics and policymakers are lucky enough to have two or three major ideas in their careers that go anywhere, but Deloria's career in ideas included what would become advances in tribal law and tribal courts, tribal colleges, reform in the Bureau of Indian Affairs, and perhaps most important, ideas that became the Indian Self-Determination and Educational Assistance Act and the Tribal Self-Governance Act.

Deloria was human, though. One area that remains in a very rough state even after his important commentary is American Indian religious freedom. Thomas J. Huffman's survey "In the Shadow of the Golden Calf: Pitfalls and Promises for the Free Exercise Clause," documents how federal constitutional law doesn't acknowledge Indian rights in this area. Deloria's influence likely contributed to the enactment of the American Indian Religious Freedom Act, but that statute and those that followed, such as the Religious Freedom Restoration Act, were not products of Deloria's metaphysics or commentary on Indian religions. Scholars such as Kristen Carpenter are stepping into Deloria's shoes in the 21st century to tackle these ongoing issues.

Perhaps the most important part of this collection is Deloria's contribution. The collection begins with a late speech from Deloria entitled, "Where is the Academy Going?" Other than his amazing humor, two things stood out in this talk. First, Deloria decries the reliance of students on the Internet as unquestioned authority, without reading into the words on the page. He provided an anecdote about assigning students in one of his classes to act as major players in the New Deal era (President Roosevelt, Secretary of Interior Ickes, Senator Walsh, etc.). When he asked the student playing Walter Reuther to talk about himself, the student answered, "I was born in 1918," a recitation of amusing but utterly useless information the student found on the Internet. Second, Deloria extended his critique to lawyers in the context of *South Dakota v. Yankton Sioux Tribe* (1998), a reservation disestablishment case and a terrible defeat before the Rehnquist Court. Attorneys for the Tribe and the state had compiled a legislative history of the Tribe as part of the Supreme Court record, but Deloria found a dozen documents in Kappler that weren't part of the record. When he confronted the Tribe's attorneys, he wrote, "the blood drained out

their heads, leaving a total vacuum, thus returning their heads to their original state." Humorous, yes, but Deloria's point was that their reliance on computers to find these documents may have prejudiced the Tribe's chances before the Court. The undercurrent to these critiques, of course, is that blind reliance upon the written word, absent a healthy dose of critical analysis and common sense, undercuts what tribal advocates do, just as it did the anthropologists and termination-era policymakers of the past. Vine Deloria, Jr. demanded better. ◆

On the Drafting of Tribal Constitutions

By Felix S. Cohen, Edited by David E. Wilkins, Foreword by Lindsay G. Robertson

University of Oklahoma Press, 2006

Reviewed by Alicia Ivory
Associate, Little Traverse Bay of Odama Indians

On the Drafting of Tribal Constitutions is the first volume in the American Indian Law and Policy Series, and focuses on Felix Cohen's "Basic Memorandum on the Drafting of Tribal Constitutions," drafted not long after the passage of the Indian Reorganization Act. David E. Wilkins' introductory essay provides a brief but insightful glimpse into the life and work of Felix Cohen leading up to his work on the IRA, describes the memo's historical context, and discusses some of the memo's actual impact on tribal governance.

Wilkins notes that, contrary to the assertion that Cohen's constitution became a boilerplate model adopted by IRA tribes, evidence suggests that many tribes were not mandated to adopt Cohen's constitution, or did not receive a copy of the constitution at all, but rather an outline. Cohen himself encouraged tribes to incorporate their own traditions and customs within the body of any tribal constitution, and Wilkins notes that many tribes had pre-existing constitutions, or extant governmental structures that did not conform to the framework suggested in Cohen's memo.

Several of the suggested constitutional provisions reflect Cohen's understanding of some of the structural differences between tribal and non-Indian governments, such as "Places of Chiefs in Tribal Government," or "Powers of Tribal Self-Government." However, as also noted by Wilkins, the memorandum reveals Cohen's own background and experience with non-Indian governments: most of the suggested sections clearly reflect a bias in favor of municipal governmental structure, such as sections titled "Statement of Purpose," "District Organization," "Offices and Titles," "Oaths of Office," and "Popular Initiative and Referendum."

The majority of the text consists of Cohen's edited memorandum, which, in addition to the sections noted above, includes sections discussing territory and membership, form of the governing body, relation of the Indian service to tribal government, conduct of elections, tenure of office, and individual rights. The memorandum also includes several sections covering bylaws, such as duties of officers, qualifications for office, salaries of officials, procedure of governing body, judicial code, code of misdemeanors, law of domestic relations, property, taxation and public welfare.

Whether or not Cohen intended the memorandum to become a model tribal constitution or merely a set of guidelines for tribes to keep in mind when drafting a constitution, it was nonetheless highly influential and widely adopted by many tribes. As such, *On the Drafting of Tribal Constitutions* provides a keen reference work for law students and academics interested in the non-Indian legal influence on the formation of tribal constitutions. ◆

Making Indian Country Safer: Opportunities for the Obama Administration

By Troy A. Eid

"The most fundamental function of all governments is to ensure the safety of their citizens and maintain law and order," then-Senator Barack Obama declared last fall. "The federal government has a legal trust responsibility to aid tribal nations in furthering self-government in recognition of tribes' inherent sovereignty. Unfortunately, the government has failed to live up to its obligation to help tribes maintain order."[1]

President Obama has a unique and perhaps historic opportunity to honor his campaign promise to strengthen criminal justice in Indian Country. His political party controls both houses of Congress. His cabinet is finally in place, and other presidential appointments are coming. This includes many new U.S. attorneys, the chief federal criminal prosecutors who since 1885 have functioned as local but non-elected district attorneys for serious offenses involving Native Americans on Indian lands. It also means new federal judges to decide cases arising in Indian Country.

At the Department of Interior, Secretary Ken Salazar echoed the President's campaign pledge during his first appearance before the Senate Committee on Indian Affairs. "There is no reason why we cannot do more," Salazar told his former Senate colleagues, "and I will be working closely to develop a program that focuses in on the law enforcement issues."[2]

For a new President who has vowed to respect tribal sovereignty, there can be no more urgent priority than strengthening criminal justice for people living and working on Indian lands. A great deal has been accomplished to make Indian Country safer—under successive Republican and Democratic administration—since President Nixon embraced Tribal Self-Determination as national policy. Yet far too much of the federal criminal justice system that is supposed to serve Indian Country—designed as it was to keep Native people isolated on reservations, with the real political power elsewhere—remains stubbornly frozen in the Termination Era.

There are plenty of statistics to tell this story, but it is perhaps more meaningful to relate it in human terms. We're talking, after all, about a federal criminal justice system in which the most basic legal question of all—jurisdiction—depends on determining the *ethnicity* of the perpetrator as well as the victim, along with the intricacies of land status. This breathtaking inconsistency – using the ethnicity of an *American citizen* to decide which laws apply and who investigates and prosecutes a crime—was brought home during my own service as a U.S. attorney on many occasions.

For starters, it may be impossible to tell at the crime scene whether the victim of an apparent homicide was an "Indian" or a "non-Indian" for purposes of federal law. This can lead to all sorts of jurisdictional confusion. If non-Indians are involved, it is a matter of exclusive state jurisdiction. Our office handled a reservation case where one victim of a vehicular homicide—an eight-year-old who tragically burned to death in her car seat—was a passenger along with her grandmother, an enrolled member of the tribe. The victim was not an enrolled tribal member, but had a sufficient degree of Indian blood to be considered an "Indian" for federal jurisdictional purposes.

Defense counsel countered that the victim was still not considered to be an Indian within the particular reservation community where the crime occurred, another required legal element for establishing federal jurisdiction. For instance, the girl had received Indian Health Service benefits on the reservation and was visiting her grandparents there at the time, but lived with her mother in Denver. Resolving this question required action by the Tribal Council, which met twice to consider the issue. After several weeks and repeated delays, what started as a federal prosecution became a matter for state prosecutors.

Cases involving dead bodies are another example. In one apparent homicide on an Indian reservation in Colorado, there were just two Bureau of Indian Affairs law enforcement officers on duty that night for a reservation bigger than Rhode Island and far more remote. An angry crowd converged at the crime scene. The lone BIA patrol officer at the scene could not establish a perimeter. The mob broke into the apparent victim's home, some people literally climbing through the windows. Meanwhile, the resident Federal Bureau of Investigation agent in Durango was 400 miles away in Denver – testifying before the nearest federal grand jury. This case remains an "unexplained death," and it is doubtful that sufficient legally admissible evidence will ever be collected to solve the crime.

Reforming the federal criminal justice system in Indian Country presents formidable challenges for our new President and his team. Other pressing issues – the economy above all—will demand more of everyone's time. So what can the Obama Administration do now to make Indian Country safer? Here are a few ideas.

Require U.S. Attorney's Offices and the BIA to Provide Mandatory On-Site Federal Deputation Training. Between February 2007 and December 2008, the U.S. attorney's Office in Colorado partnered

Last fall, Janelle Doughty, the Southern Ute Tribe's Justice Department Director—the first tribal member ever to hold that position—told the Senate Indian Affairs Committee how the program is succeeding. She described how the tribe's criminal investigator, Chris Naranjo, responded to a domestic violence crime scene on the Reservation last May. Naranjo had received on-site training on the reservation to renew his SLEC card, which otherwise would have expired long before he could have left his job for a week for refresher training a full days' drive away in Artesia. "Because he was federally deputized," she explained, "Chris could arrest the non-Indian suspect who had allegedly victimized one of our Tribal members in that case, which is now being prosecuted by the U.S. Attorney's Office."

with the Southern Ute Indian Tribe's Justice Department and the BIA to train tribal, state and local law enforcement officers on-site in Southwestern Colorado and deputize them to enforce federal laws in Indian Country. This nationally recognized "Criminal Justice in Indian Country" pilot training program resulted increased federal criminal prosecutions, including domestic violence cases.[3]

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The purpose of such on-site training is for qualified officers to obtain or renew their Special Law Enforcement Commission ("SLEC") cards without traveling for a week to the BIA Indian Police Academy in Artesia, New Mexico—a virtual impossibility for many tribal, state and local government employees. Other U.S. Attorney's Offices, including Arizona, New Mexico and South Dakota, similarly conduct their own on-site SLEC training. There is minimal additional cost to requiring all U.S. Attorney's Offices to offer such training in partnership with BIA, so that law enforcement officers on and near reservations have the tools they need to deal effectively with the jurisdictional maze. This can be done by executive order or joint Interior-Justice Department policy.

Support Expanded Federal Judicial Access On and Near Indian Reservations. On Dec. 13, 2005, a federal criminal trial was held on the Navajo Nation.[5] This little-noticed trial, convened in Shiprock, New Mexico and involving tribal members, marked the first time in history that a U.S. District Court had heard a case on the country's largest Indian reservation. The Navajo Nation covers an area nearly the size of West Virginia—a state, incidentally, with nine separate federal courthouses.

The lack of federal judicial access for Native people living on Indian lands is one of the great civil rights issues of our time. American citizens rightly value *localism*—having government officials who are accountable and accessible to

them, and who live and work in their communities. It would be unthinkable off-reservation for a crime victim to travel hundreds of miles just to participate in a criminal case. Yet this is commonplace in Indian Country, as is the lack of jury pools with meaningful Native American representation. As Janelle Doughty of the Southern Ute Tribe testified to the Senate last fall:

> It is totally unacceptable that the nearest U.S. District Court Judge in Colorado is 350 miles away from the Southern Ute Indian Reservation, and even farther from our sister tribe to the west, the Ute Mountain Ute Reservation. We have been pushing for a federal courthouse and judgeship in our area. Trying cases that meet the elements of the Major Crimes Act 350 miles from the jurisdiction in which they occur stands as a road block to justice and must be resolved. Federal juries in Colorado rarely include a single American Indian, yet they decide purely local crimes. And we have never had a federal grand jury in Western Colorado in my lifetime.[6]

The federal judiciary is a separate branch of government responsible for administering its own affairs. Yet Presidents and the Congress influence judicial policy through authorizing legislation and appropriations for judges and judicial resources. President Obama would do well to start reversing this injustice.

Keep Closing the Gap in Law Enforcement Resources Serving Indian Nations. On the average, Indian Country has roughly half as many police officers per capita as similarly situated rural communities.[7] This was the case in 1997, according to a report that year by the Clinton Justice Department, and in 2006, when the BIA commissioned its own analysis by a private consultant.[8] While times are tight, it is essential that the new administration work to close this gap in a systematic and sustained way. In the short term, this means resources for police departments, corrections and tribal courts, such as the Community Oriented Policing Services (COPS) grant program that received additional funding in the recently passed economic stimulus legislation. Looking forward, the Obama Administration should develop its own internal process to estimate what it would actually take for Congress to erase the resource gap entirely, in all major categories, by a reasonable date certain.

Partisan politics aside, the President's goal of making Indian Country safer is worthy of support, and we should waste no time in helping make it a reality. ◆

Troy A. Eid, eidt@gtlaw.com, chairs the American Indian Law Practice Group with Greenberg Traurig LLP in Denver and served as United States Attorney for the District of Colorado from 2006 until last January. He is an adjunct professor in American Indian Law at the University of Colorado School of Law.

Endnotes

[1]*First Americans for Obama, Barack on the Issues, Law Enforcement & Justice*, in Barack Obama And Joe Biden: The Change We Need, http://my.barackobama/page/content/firstamslaw (viewed March 21, 2009).

[2]"Secretary Salazar on the need to bolster law enforcement in Indian Country," testimony to the Select Committee on Indian Affairs, United States Senate, Feb. 12, 2009, www.usdoi.gov/audio/recordings/090212c/html (viewed March 21, 2009).

[3]Testimony of Janelle F. Doughty, Director, Department of Justice & Regulatory, Southern Ute Indian Tribe, before the Select Committee on Indian Affairs, United States Senate, Sept. 18, 2008, www.indian.senate.gov/public/_files/JanelleDoughtyREVISEDtestimony.pdf (viewed March 21, 2009)

[4]*Id.*

[5]"Historic Trial Begins in Shiprock," *Farmington Daily Times*, Dec. 14, 2005, p. A1.

[6]Doughty testimony, *id.*

[7]*See* testimony of Tracy Toulou, Director, Office of Tribal Justice, *U.S. Department of Justice, Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the U.S. Supreme Court*, 107th Cong., 2d Sess., S. Hrg. 107-605, Senate Committee on Indian Affairs, p. 13 (July 11, 2002).

[8]*See* Gap Analysis, Technology & Management Services, Inc., *Report to the U.S. Department of the Interior, Bureau of Indian Affairs, Office of Law Enforcement Services* (April 18, 2006) (unpublished); quoted in Troy A. Eid, *Beyond* Oliphant*: Strengthening Criminal Justice in Indian Country*, 54 The Federal Lawyer 40, 42 (March/April 2007).

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