Federal Indian Law

Newsletter of the Federal Bar Association Indian Law Section

Spring 2012

Inside This Issue

Indian Law Cases, News, and Notes

Section Happenings

By Elizabeth Ann Kronk

Aaniin!

I hope this update finds you well. It continues to be a busy and productive time for the Federal Bar Association Indian Law Section. Below is a summary of some of our recent and upcoming events.

37th Annual Indian Law Conference; Santa Fe, New Mexico (April 19–20, 2012)

I am looking forward to our annual section conference on April 19 and 20. The conference is titled "Mapping Indian Law & Policy" and is again hosted by the Hilton Santa Fe at Buffalo Thunder, located on the Pueblo of Pojoaque. The conference co-chairs—Patrice Kunesh, deputy solicitor–Indian affairs, U.S. Department of the Interior; Matthew L.M. Fletcher, professor at Michigan State University College of Law and deputy chair of the Indian Law Section; Andrew Adams III, attorney at Jacobson Buffalo Magnuson Anderson & Hogen P.C. and treasurer of the Indian Law Section; and Venus McGhee Prince, attorney general for the Poarch Band of Creek Indians—have done a fantastic job of putting together a great conference. The conference will feature eight plenary sessions, covering topics as diverse as Indian identity, intergovernmental jurisdictional agreements, the 25th anniversary of the *Cabazon* decision, transportation issues, laches claims, and ethical challenges related to the practice of federal Indian law. Several breakout sessions are also planned and will address federal court nominations, jurisdiction under the Tribal Law and Order Act and Public Law 280, and Internet gaming. A Supreme Court update will also be provided. Finally, we will take a moment to honor the late Dean and Professor David Getches at the Friday luncheon. The National Native American Bar Association will hold its annual meeting at the Buffalo Thunder Hotel on Wednesday, April 18, and the National Native American Law Students Association will be holding its annual meeting during the conference. As usual, the conference promises to be an opportunity to learn about the latest legal developments in Indian Country, as well as an opportunity to see friends and colleagues. I look forward to seeing you all there. For more information on the FBA ILS annual conference, please see: fedbar.org/Education/Calendar-CLE-events/37th-Annual-Indian-Law-Conference.aspx.

13th Annual Washington, D.C. Indian Law Conference (Nov. 15, 2011)

On Nov. 15, 2011, the section hosted its annual midyear meeting in Washington, D.C. Because of the popularity and growing size of the midyear conference, we were able to expand into a larger space. The midyear conference was chaired by Allison Binney, partner at Akin Gump Strauss Hauer and Feld LLP, and Larry Roberts, general counsel of the National Indian Gaming Commission. In addition to a federal

Chair continued on page 2

Chair continued from page 1

court update, there were panels on the *Jicarilla* and *Tohono O'odham* cases from the Supreme Court's last term, the *Cobell* settlement, expanding jurisdiction to protect Native women, accessing capital for Indian Country, perspectives on Congress, and ethics (representing the federal government while fulfilling the trust responsibility). U.S. Associate Attorney General Thomas Perrelli gave the keynote presentation. By all accounts, the midyear conference was a huge success, and we look forward to continuing to grow into our new larger space when we host the 2012 midyear conference this fall.

Federal Bar Association 2012 Midyear Conference

Like the Indian Law Section, the national FBA hosts both a midyear and annual conference. The midyear conference is always in the Washington, D.C., area and is usually held in March. The annual conference is held in September at rotating locations. (This year's annual conference is in San Diego; it will be in Puerto Rico and Salt Lake City in coming years). This year's FBA midyear conference, which was held March 29-31 at the Westin Arlington Gateway in Arlington, Va., was a wonderful event. It also presented numerous opportunities to become more involved in the FBA. As members of the Indian Law Section, you are always invited to attend the meeting of the chairs of Sections and Divisions and the National Council Meeting. You may also want to consider becoming involved in one of the FBA's 19 other sections, including: alternative dispute resolution, antitrust & trade regulation, bankruptcy law, civil rights law, criminal law, environment, energy & natural resources law, federal litigation law, government contracts, health law, immigration law, intellectual property, international law, labor & employment law, securities law, social security law, state and local government law, taxation law, transportation & transportation security law, and veterans law. There are also five FBA divisions, which include corporate and association counsel, federal career services, judiciary, senior lawyers, and younger lawyers. Many of these FBA sections and divisions are related to areas of law of importance in Indian Country. If you are interested in joining another section or division, information is available at www.fedbar.org/Leadership/Sections-and-Divisions-Leadership.aspx. If you are interested in becoming more involved in the national FBA, please feel free to contact me at elizabeth.kronk@ttu.edu.

Indian Law Section Newsletter Committee

In addition to the efforts of the midyear and annual conference chairs and others highlighted above, I sincerely appreciate the efforts the section's Newsletter Committee to produce this newsletter. I want to thank especially Cameron Fraser for her years of service as a contributing editor for the Supreme Court update. Taking her place is April Day, whom we welcome on board and thank for her work on this edition. I also want to thank Christina Morrow for her service as the Southeast regional editor.

As you can see from the above, we continue to strive to ensure that the section provides value to its members. It is an honor and privilege to serve the section and larger FBA. If ever you have any questions or concerns, please do not hesitate to contact me, at elizabeth.kronk@ttu.edu, or any of the section officers. Chi Miigwetch! ◆

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

Inside the Beltway Update

By Timothy Q. Evans

Start of the Second Session of the 112th Congress

On Jan. 16, the House of Representatives returned from recess to begin the second session of the 112th Congress. During their first two weeks, the House Republican and Democratic caucuses held member-level retreats to discuss legislative strategy and set priorities for the second session. On Jan. 23, the Senate returned and both chambers met in a joint session of Congress to receive President Obama's third State of the Union address. In light of the controlling party split between the House and Senate and the election-shortened legislative year, few people believe that Congress will move any significant pieces of legislation this year.

Federal Budget, FY 2012 Appropriations Bills & FY 2013 President's Budget Request

After passing several continuing resolutions last year to keep the federal government funded at essentially Fiscal Year 2011 levels into the new Fiscal Year 2012, Congress passed a FY 2012 spending bill in December which provides funding for the government through Sept. 30, 2012, and includes nearly $7 billion in overall federal spending cuts compared to FY 2011. President Obama signed the bill on Dec. 23. The bill includes $2.535 billion for the Bureau of Indian Affairs (a decrease of $59 million from the FY 2011 level), consisting of the following line items: $2.3 billion for the operation of Indian programs; $123 million for construction of education, public safety and justice facilities; and $32 million for Indian land and water settlements and miscellaneous payments to Indians. The bill also includes $4.3 billion for Indian Health Service programs (an increase of $244 million over FY 2011): $3.8 billion for the health services account, $441 million for the health facilities account, and $472 million (over $74 million more than provided in FY 2011 and over $10 million more than the White House requested for FY 2012) for tribal contract support costs.

On Feb. 13, President Barack Obama and his administration submitted their $3.8 trillion Fiscal Year 2013 budget request to Congress. The request includes $2.634 billion for the Bureau of Indian Affairs, an increase of about $110 million from the FY 2012 enacted level. This amount includes $2.379 billion for the operation of Indian programs; $105.9 million for construction of education, public safety, and justice facilities; and $5 million for the Indian Guaranteed Loan Program, a decrease of $2.1 million from the FY 2012 enacted level. The request also includes $4.422 billion for the Indian Health Service, an increase of $115.9 million from the FY 2012 enacted level. Within that overall amount, $3.978 billion is recommended for the health services account and $443 million is recommended for the health facilities account. The Bureau of Indian Education construction account saw the largest decrease (almost $18 million) and is recommended to be funded at $52.8 million for FY 2013.

As backdrop to the FY 2012 appropriations and FY 2013 budgeting processes, the Joint Select Committee on Deficit Reduction, the so-called congressional "Super Committee" established by the Budget Control Act, failed to meet its Nov. 23 deadline last year for reporting to Congress recommendations to trim $1.2 trillion from the federal deficit. This failure triggered $1.2 trillion in automatic across-the-board spending cuts, which would take effect beginning in Fiscal Year 2013 through the "sequestration" process. Democrats generally maintained that any deficit reduction agreement would require some increase in revenues, while Republicans generally relied upon spending cuts. The panel's failure to reach a compromise on tax revenues and entitlement outlays now leaves both defense and non-defense federal spending subject to automatic sequestration each year beginning in January 2013 and lasting through Fiscal Year 2021. Congress has one year to amend the Budget Control Act before the automatic sequestration begins. Given the general nature of the measures included in the Budget Control Act and the possibility of Congressional amendment, it remains to be seen how such measures will affect Indian Country over the next decade.

Senate Committee on Indian Affairs and House Natural Resources Subcommittee on Indian and Alaska Native Affairs Hearings

The Senate Committee on Indian Affairs (SCIA), under the leadership of Chairman Daniel Akaka (D-Hawaii), held oversight hearings on a variety of issues affecting Indian Country this past fall and winter. The topics covered included tribal transportation and priorities for reauthorization of expiring surface transportation statutes (Sept. 15), implementation of the Tribal Law and Order Act (Sept. 22), regulatory reform in Indian country to assist in deficit reduction and job creation (Dec. 1), how state and federal tax policies impact Indian Country (Dec. 8), barriers and opportunities in the development of energy resources in Indian country (Feb. 16), the President's FY 2013 budget request for Native programs (March 8), and the negotiation and implementation of water settlements in Indian country (March 15). The SCIA also

Beltway continued on page 4

BELTWAY continued from page 3

held legislative hearings and business committee meetings to mark up pending tribal legislation.

The House Natural Resources Subcommittee on Indian and Alaska Native Affairs, chaired by Rep. Don Young (R-Alaska), has over the past several months held legislative hearings on pending tribal bills, including H.R. 2444, which would amend the Indian Self-Determination and Education Assistance Act to provide for further tribal self-governance (Sept. 22); H.R. 2938, which would prohibit Class II or Class III gaming on lands purchased under a settlement act for the Tohono O'odham Nation after its Gila Bend Indian Reservation was flooded by the construction of a federal dam (hearing held on Oct. 4, with bill approved and passed out of the full Natural Resources Committee at its legislative hearing on Nov. 17); H.R. 3532, the American Indian Empowerment Act of 2011, which would allow a tribe at its sole discretion to take its lands out of federal trust, while maintaining the restrictions against alienation and taxation, and adopt tribal laws governing such lands (Feb. 7); H.R. 3973, the Native American Energy Act, which is intended to promote and encourage increased energy production on tribal lands by reducing government barriers and regulations (Feb. 16); and H.R. 1272, the Minnesota Chippewa Tribe Judgment Fund Distribution Act, which would distribute into a trust fund federal monies appropriated in 1999 pursuant to a Court of Federal Claims judgment intended to compensate the tribe for the wrongful implementation of the Nelson Act of 1889 (March 1). On March 6, the subcommittee held an oversight hearing to examine the provisions for the Indian Health Service and the Office of Special Trustee for American Indians in the President's FY 2013 budget request to Congress.

Other congressional committees with jurisdiction over tribal-related matters also held hearings this past fall. The Senate Banking, Housing and Urban Affairs Committee, under Chairman Tim Johnson (D-S.D.), held a hearing on Nov. 10 to examine the opportunities and challenges for economic development in Indian country. And the Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade held hearings on Internet gaming, which are discussed in more detail below.

Carcieri "Fix" Legislation

Efforts continue to enact legislation overturning the effects of the U.S. Supreme Court's 2009 *Carcieri v. Salazar* decision, which held that the Secretary of the Interior could not exercise the authority granted by Section 5 of the Indian Reorganization Act (IRA) to take land into trust for a currently recognized Indian tribe that was not under federal jurisdiction in 1934, when the IRA was enacted. Three bills introduced last year and currently before the Congress (S. 676, H.R. 1291, and H.R. 1234) seek to "fix" the decision and affirm the secretary's authority to take land into trust for all federally recognized tribes, regardless of their status at the time of IRA enactment or the date of their federal recognition.

In October, tribal leaders met in Washington, D.C., as part of an Impact Week coordinated by the National Congress of American Indians and several other tribal organizations and tribes, to rally and call on Congress to protect tribal trust lands from *Carcieri*-based challenges, as well as to protect Native women by including of tribal-specific provisions in the upcoming reauthorization of the Violence Against Women Act (VAWA) and to honor its trust responsibility towards tribes and tribal members as it considers cuts in the federal budget. The week began with presentations by various congressional members and administration officials to tribal leaders. These presentations were followed by a rally on the U.S. Capitol grounds and tribal leader meetings with Congress members and their staffers, at which tribal leaders pushed for legislation intended to address the effects of the *Carcieri* decision. During that same week, the SCIA held an oversight hearing (on Oct. 13) to examine the ripple effects that the *Carcieri* decision has had on jobs, economic development, and public safety in Indian country. (The SCIA had earlier last year marked up and approved the Senate-introduced "fix" bill, S. 676.) Tribal leaders within United South and Eastern Tribes Inc. (USET) continued to push congressional members for a *Carcieri* fix during USET's own Impact Week held in Washington, D.C., on Feb. 13-16.

Internet Gaming Legislation

Issues around Internet gaming and its potential effects on tribal gaming operations are becoming more prominent on Capitol Hill. Two federal authorization bills are currently being considered. The first, H.R. 1174, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act, was introduced by Rep. John Campbell (R-Calif.) on March 17

of last year. The second, H.R. 2366, the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011, was introduced on June 24 by Rep. Joe Barton (R-Texas) and would authorize Internet poker only. Several hearings on the topic of Internet gaming were held throughout the fall. The House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade held two oversight hearings on Oct. 25 and Nov. 18. Ernie Stevens Jr., chairman of the National Indian Gaming Association, provided testimony at the October 25 hearing. On Nov. 17, the SCIA also held a hearing to examine the future of Internet gaming and its impact on tribal governmental gaming. The committee held a related hearing on Oct. 6 pertaining to Internet accessibility and electronic commerce in Native communities.

On Dec. 23, the U.S. Department of Justice (DOJ) made news when it released an opinion finding that the federal Wire Act would not prevent the states of New York and Illinois from selling lottery tickets online to instate residents. The Wire Act, enacted in 1961, prohibits the use of interstate communications equipment to transmit gambling information across state lines. The Wire Act was intended to combat organized crime's use of telephones to carry on illegal gambling operations, but its broad terms can be read to include other communications equipments, including the Internet. The main provision of the Wire Act prohibiting interstate gambling communications is unclear in its wording and there has been debate over the types of gambling it prohibits since the law's enactment. For decades the DOJ Criminal Division has taken the position that the Wire Act prohibits communications about all forms of gambling. In its Dec. 23 opinion, however, the DOJ Office of Legal Counsel concluded that the Wire Act only prohibits interstate communications concerning betting or wagering on sporting events or contests. The complete effect of that opinion as to online non-sports betting or wagering is still being interpreted, especially in relation to how tribal gaming operations may or may not be able to expand their operations in this area. On Feb. 9, the SCIA held an oversight hearing on the DOJ opinion specifically to examine its potential impacts on Indian tribes.

White House Tribal Nations Conference

On Dec. 2, President Barack Obama and members of his administration gathered with tribal leaders at the Department of Interior for the annual White House Tribal Nations Conference. This is the third conference hosted by the President in which representatives from all federally recognized tribes were invited to Washington, D.C., to engage the administration on issues unique to their tribal communities. The conference concluded a weeklong series of events hosted by the National Congress of American Indians and the White House. Those events included an NCAI-led preparatory meeting for tribal leaders on Nov. 29 and a series of regional listening sessions by federal department and agency representatives with tribal leaders on Nov. 30 and Dec. 1. During the week, the administration also released a progress report that highlighted its policy and administrative accomplishments for Indian Country. President Obama spoke of his administration's accomplishments during the past three years, which include permanent reauthorization of the Indian Health Care Improvement Act and passage of the Tribal Law and Order Act. The President noted in his remarks that he also continues to support legislation clarifying that the Secretary of the Interior may take land into trust for all federally recognized tribes, in response to the Supreme Court's 2009 decision in *Carcieri v. Salazar*. Of particular note, the President announced that his administration has launched an initiative on American Indian and Alaska Native education to prepare Native youth to compete in the marketplace, reduce the secondary education drop-out rate, and strengthen tribal colleges.

As a lead-up to the White House summit, the Department of the Interior announced on Nov. 30 that it had adopted a new tribal consultation policy that seeks to synchronize the department's consultation practices within its bureaus and offices. Developed in coordination with tribal leaders, the new policy sets out detailed requirements and guidelines for Interior officials and managers to follow to ensure the use of best practices to achieve meaningful consultation with tribes. Also on Nov. 30, Secretary of the Interior Ken Salazar announced the appointment of the five members to the Secretarial Commission on Indian Trust Administration and Reform: Fawn F. Sharp (chair of the commission), president of the Quinault Indian Nation; Peterson Zah, former chair of the Navajo Tribal Council and president of the Navajo Nation; Stacy Leeds, dean and professor of law at the University of Arkansas School of Law; Tex G. Hall, chair of the Three Affiliated Tribes of the Fort Berthold Reservation; and Bob Anderson, professor of law and director of the Native American Law Center at the University of Washington. The commission is expected to complete a comprehensive evaluation of the Interior Department's management and administration of Native American trust funds within 24 months and offer recommendations to the secretary for improvements.

National Tribal Organization Meetings

On Jan. 26, National Congress of American Indians (NCAI) President Jefferson Keel, Lt. Governor of the Chickasaw Nation, delivered the organization's tenth annual State of Indian Nations Address in Washington, D.C. In his remarks, Lt. Gov. Keel pressed for congressional action to help Indian tribes succeed by fixing the trust land acquisition problems created by the Supreme Court's *Carcieri v. Salazar* decision and

BELTWAY continued on page 8

Supreme Court Update

By Ann Tweedy and Cameron Fraser

Although the Supreme Court has not decided an Indian law case in the current Term, it has granted certiorari and scheduled oral arguments in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* and *Salazar v. Ramah Navajo Chapter*. The Court has denied over 20 petitions for certiorari in Indian law cases so far this Term, but several petitions of interest are pending before the Court. They include *Arctic Slope Native Association v. Sebelius*; *Sebelius v. Southern Ute Indian Tribe*; *Beaulieu v. Minnesota*; *Cherokee Nation v. Ketchum*; *Corboy v. Louie*; and *LaBuff v. United States*.

Salazar v. Ramah Navajo Chapter

On April 18, 2012, the Court will hear oral arguments in *Salazar v. Ramah Navajo Chapter*, one of three cases appealed to the Court involving funding for Indian Self-Determination and Education Assistance Act (ISDEA) contracts. Plaintiff Ramah Navajo School Board Inc. (RNSB), a nonprofit corporation located on the Ramah Navajo Reservation, entered into a contract with the United States under the ISDEA to operate public health programs and facilities. RNSB filed suit against the United States, alleging that the government failed to pay RNSB's indirect contract support costs shortfall for fiscal years 1993 through 2003. The United States declined to pay RNSB on the ground that it had already spent the funds appropriated for the contract on other tribal health providers. The Tenth Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of the United States and remanded for further proceedings. The United States now asks the Court to answer "[w]hether the government is required to pay all of the contract support costs incurred by a tribal contractor under the Indian SelfDetermination and Education Assistance Act, 25 U.S.C. § 450 et seq., where Congress has imposed an express statutory cap on the appropriations available to pay such costs and the Secretary cannot pay all such costs for all tribal contractors without exceeding the statutory cap."

In a parallel case to *Salazar v. Ramah Navajo Chapter*, the Court took no action on the petition in *Arctic Slope Native Association v. Sebelius* (which had been distributed for conference of Jan. 6), apparently accepting the U.S. solicitor general's recommendation to hold the *Arctic Slope* case pending the outcome in *Ramah Navajo Chapter*. (In its brief opposing cert, the United States conceded a circuit split between the Tenth Circuit in *Ramah Navajo Chapter* and the U.S. Court of Appeals for the D.C. Circuit in *Arctic Slope*.) Arctic Slope Native Association (ASNA), an Alaska Native Regional Corporation, filed suit against the Secretary of Health and Human Services for breach of contract, alleging that the U.S. government failed to pay ASNA's contract support costs shortfall for fiscal years 1999 and 2000. As in the *Ramah Navajo Chapter* case, the United States declined to pay ASNA on the ground that the government had already spent the funds appropriated for the contract on other tribal health providers. ASNA asks the Court to answer the question of "[w]hether the Federal Circuit erred in holding, in direct conflict with the Tenth Circuit, that a government contractor which has fully performed its end of the bargain has no remedy when a government agency overcommits itself to other projects and, as a result, does not have enough money left in its annual appropriation to pay the contractor."

The U.S. solicitor general has also asked the Court to hold the petition in for certiorari in *Sebelius v. Southern Ute Tribe*, another case from the Tenth Circuit involving "whether the Secretary of Health and Human Services must accept an Indian tribe's proposal for a new [Indian Self-Determination and Education Assistance Act] self-determination contract, notwithstanding that the Secretary lacks sufficient appropriations under the statutory cap to pay the tribe's proposed contract support costs[,]" pending the outcomes of *Ramah Navajo Chapter* and *Arctic Slope*. The petition was distributed for conference of March 16.

Salazar v. Patchak

The Court will hear oral arguments in the consolidated cases of *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* and *Salazar v. Patchak* on April 24, 2012. These cases involve the interpretation of the Quiet Title Act's Indian lands provision and issues regarding prudential standing. Patchak brought suit in federal court against the Interior Department for taking into trust 147 acres in Michigan for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, also known as the Gun Lake Tribe, which intervened in the lawsuit. After the U.S. District Court for the District of Columbia dismissed his suit, Patchak appealed to the U.S. Court of Appeals for the District of Columbia and asked the court to resolve two jurisdictional issues: "whether, as the district court held, he lacks standing; and whether, if he has standing, sovereign immunity bars his suit." The appeals court reversed, finding that he had standing, and that his lawsuit was not barred by the Quiet Title Act since it "falls within the general waiver of sovereign immunity set forth in § 702 of the APA."

In its petition for certiorari, the Gun Lake Tribe asked the Court to resolve the following questions: (1) "Whether the Quiet Title Act and its reservation of the United States' sovereign immunity in suits involving 'trust or restricted Indian lands' apply to all suits concerning land in which the United States 'claims an interest,' 28 U.S.C. § 2409a(a), as the Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether they apply only when the plaintiff claims title to the land, as the D.C. Circuit held"; and (2) "Whether prudential standing to sue under federal law can be based on either (i) the plaintiff's ability to 'police' an agency's compliance with the law, as held by the D.C. Circuit but rejected by the Fifth, Sixth, Seventh, and Eighth Circuits, or (ii) interests protected by a different federal statute than the one on which suit is based, as held by the D.C. Circuit but rejected by the Federal Circuit." In their petition, Secretary of the Interior Ken Salazar and Assistant Secretary–Indian Affairs Larry Echo Hawk asked the Court to resolve: (1) "Whether 5 U.S.C. 702 waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian Tribe[]"; and (2) "Whether a private individual who alleged injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act ... ."

Pending Petitions

On Feb. 13, 2012, the Court requested a response from Minnesota (which had initially filed a waiver of its right to respond) to the petition for writ of certiorari in *Beaulieu v. Minnesota*, seeking review of a decision of a Minnesota court of appeals for which the Minnesota Supreme Court denied a petition for discretionary review. The state filed its response on March 14. The case involves the state's commitment of a White Earth Band of Ojibwe tribal member as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP) under Minnesota law. The Minnesota appeals court reasoned that federal law did not preempt Minnesota's jurisdiction over the civil commitment of SDP or SPP individuals and that exceptional circumstances—including the state's interest in protecting the public from "dangerous and repeat sex offenders" and in "the care and treatment of sex offenders and the mentally disordered"—existed to justify the state's exercise of jurisdiction. The court also noted that the White Earth Band of Ojibwe did not have a civil commitment law or, according to the court, any structure in place to treat SDP or SPP individuals. Petitioner asks the Court to resolve two questions: (1) "Does Public Law 280, 18 U.S.C. § 1162 and 28 U.S.C. § 1360, give the State of [Minnesota] jurisdiction to involuntarily civilly commit a member of a federally recognized Indian tribe who is a legal resident of his tribal reservation under Minnesota's Commitment and Treatment Act (Minn. Stat. Ch. 253B?)"; and (2) "Was Minnesota's involuntary civil commitment of [petitioner] contrary to, and/or an unreasonable application of this Court's clearly established law limiting Public Law 280's grant of civil jurisdiction to private civil matters?"

On Dec. 12, 2011, the Court called for the view of the U.S. solicitor general in *Corboy v. Louie*, a case from the Supreme Court of Hawaii wherein the petitioners challenged Hawaiian state action with regard to the Hawaiian home lands—the approximately 200,000 acres set aside for long-term leasing by Native Hawaiians from the 1.8 million acres of Kingdom of Hawai'i lands that were "ceded" to the United States by the republic that overthrew the Hawai'ian monarchy. The homelands were set aside under the Hawaiian Homes Commission Act (HHCA), a 1921 federal law that later was adopted in the Hawaii state constitution as a condition of statehood. The petitioners raised an equal protection challenge to a homestead lease qualification in the HHCA that exempts Hawaiian home lands from real property taxes and requested property tax refunds reflecting the difference between the amounts they were assessed and the amounts they claimed they would have owed if they were homestead lessees. The Supreme Court of Hawaii, applying state law principles, determined that the petitioners lacked standing and thus did not reach their equal protection claims. Their cert petition presents the question "[w]hether the Hawaii courts erred in failing to recognize that petitioners have standing to seek a refund of their own taxes and that the Equal Protection Clause precludes a State or municipality from creating tax exemptions that are available only to members of a certain race."

On Dec. 2, 2011, the Cherokee Nation and Britney Jane Little Dove Nielson (the child's mother) filed a petition for certiorari in *Cherokee Nation v. Ketchum*. The Cherokee Nation and the child's mother are appealing the Tenth Circuit's decision (discussed in the Fall 2011 edition of *Federal Indian Law*) finding

Supreme Court continued on page 8

Supreme Court continued from page 7

that the temporary citizenship under the Cherokee Nation Citizenship Act, which extends Cherokee Nation citizenship to all newborn children who are direct descendants of an original enrollee for a 240-day period, did not constitute "membership" for purposes of the Indian Child Welfare Act (ICWA). Noting that ICWA defines an "Indian child" in relevant part to mean an unmarried person under the age of eighteen who is "a member of an Indian tribe," the petition presents the question "[w]hether a federally recognized Indian tribe's membership criteria determine whether a child is an 'Indian child' for the purposes of ICWA."

Petition for certiorari in *LaBuff v. United States* was filed on Aug. 26, 2011. LaBuff was convicted of robbery under the Major Crimes Act, which provides federal criminal jurisdiction over Indians that commit specific crimes in Indian country. LaBuff appealed his conviction to the Ninth Circuit Court of Appeals, arguing that the government failed to prove beyond a reasonable doubt that he was Indian. In a decision discussed in more detail in this newsletter's Rocky Mountain update, the Ninth Circuit upheld his conviction using a two-part test to determine whether a person is "Indian" for purposes of establishing jurisdiction under the Major Crimes Act: he must have a sufficient "degree of Indian blood" and "tribal or federal government recognition as an Indian." In his petition for certiorari, LaBuff asks the Court to resolve the following questions: (1) "Has the Ninth Circuit, contrary to *United States v. Rogers*, erroneously minimized consideration of the undisputed facts that petitioner is not socially recognized as an Indian, does not participate in Indian social life, and does not hold himself out as an Indian and thereby created a conflict with the Eighth Circuit?"; and (2) "Did the government prove beyond a reasonable doubt that petitioner is an Indian person where he is not a member of a Tribe, is not socially recognized as an Indian, does not participate in Indian social life, and does not hold himself out as an Indian?"

Petitions Denied

Twenty-one petitions for certiorari in Indian law cases have been denied so far this term: *Begay v. United States*; *Breakthrough Management Group Inc. v. Chukchansi Gold Casino and Resort*; *Bryant v. United States*; *Cavanaugh v. United States*; *Evans v. Wapato Heritage*; *Gila River Indian Community v. Lyon*; *Gufstafon v. Poitra*; *K2 America Corp. v. Roland Oil & Gas, LLC*; *Lomas v. Hedgpeth*; *Malaterre v. Amerind Risk Management Corp.*; *Navajo Nation v. Equal Employment Opportunity Commission*; *Newell v. United States*; *Omaha Tribe of Nebraska v. StoreVisions Inc.*; *Oneida Indian Nation v. County of Oneida*; *Owen v. Weber*; *Reed v. Gutierrez*; *Seneca Telephone Company v. Miami Tribe of Oklahoma*; *Shavanaux v. United States*; *United States v. New York*; *Ute Mountain Ute Tribe v. Padilla*; and *Ysleta del Sur Pueblo v. Texas*. The Court also denied the San Carlos Apache Tribe's motion to file a writ of certiorari out of time in *San Carlos Apache Tribe v. United States*. ◆

Beltway continued from page 5

streamlining lease approvals by passing the HEARTH Act. He also called on Congress to pass public safety and education legislation for Indian Country, such as the Violence Against Women Act Reauthorization, the SAVE Native Women Act, the Native CLASS Act, and amendments to the Stafford Act that would remove burdens from states and tribes in times of critical emergencies. Keel stressed that the Budget Control Act passed last year posed great risks to Indian Country and called on Congress to hold tribal programs harmless. To accomplish these goals, Keel said he will work tirelessly in 2012 to turn out Native American voters and support candidates who are strong in Indian issues and priorities while also urging the presidential candidates to make sure Indian Country is at the table during the campaign and throughout any future Administration. NCAI held a tribal leaders summit on the days surrounding Lt. Gov. Keel's address, and held its Executive Council Winter Session on March 6-8.

On Feb. 7–8, tribal leaders met on Capitol Hill to participate in the National Indian Gaming Association Winter Legislative Summit. The summit included discussions on Internet gaming, labor issues, land-into-trust, and the National Indian Gaming Commission regulatory process. During the week, tribal leaders gathered in the SCIA hearing room to hear comments from various elected officials. Presenters during the summit included Rep. Betty McCollum (D-Minn.); Ayesha Khanna, counsel, Office of Sen. Harry Reid (D-Nev.); Loretta Tuell, SCIA majority staff director; Sen. Patty Murray (D-Wash.); Sen. Daniel Akaka (D-Hawaii); Sen. Mark Begich (D-Alaska); Rep. Ken Calvert (R-Calif.); Rep. Ron Kind (D-Wis.); Rep. Frank Pallone (D-N.J.); Rep. Xavier Becerra (D-Calif.); Rep. Jeff Denham (R-Calif.); Rep. Kristi Noem (R-S.D.); Rep. Martin Heinrich (D-N.M.); Rep. Joe Baca (D-Calif.); Traci Stevens, chair, NIGC; Rep. James Clyburn (D-S.C.); Rep. Dale Kildee (D-Mich.); Rep. Tom Cole (R-Okla.); Sen. John Hoeven (R-N.D.); Rep. Mary Bono Mack (R-Calif.); Richard Litsey, Senate Finance Committee; Rep. Tom McClintock (R-Calif.); David Mullon, SCIA minority staff director; and Aaron Klein, deputy assistant secretary for economic policy, Department of the Treasury. ◆

Northeast Region Update

By Nichole Friedrichs

In *Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408 (2d Cir. 2011), the U.S. Court of Appeals for the Second Circuit issued its most recent opinion in the long line of cases involving the Oneida Indian Nation's historic reservation in New York. In 2010, the Second Circuit held (337 F.3d 139) that the tribe's sovereign immunity barred Madison County's and Oneida County's foreclosure actions for failure to pay county taxes on land owned by the tribe. (The land was deemed subject to taxation under the Supreme Court's 2005 decision in *City of Sherrill v. Oneida Indian Nation*.) The counties appealed to the Supreme Court, which granted certiorari. While the case was pending before the Court (after the parties' briefing, but before oral arguments), the Oneida Indian Nation declared that it had waived its sovereign immunity, and the Supreme Court remanded the case. On remand, the Second Circuit reviewed the remaining two grounds supporting the district court's judgment in favor of the tribe: that the counties' redemption notice procedures failed to comport with due process, and that the tribe's properties were exempt as a matter of state law.

The Second Circuit rejected the tribe's argument that the notices provided under New York's redemption notice procedures were not given far enough in advance of the respective expiration dates to satisfy federal due process standards, noting that the tribe "failed to establish any genuine dispute as to the fact that it received notice sufficient to 'apprise [it] of the pendency of the action and afford [it] an opportunity to present [its] objections.'" Having dismissed the tribe's due process claim, the court found that there were no other federal claims supporting the district court's award of injunctive relief, and that a New York state court should decide the tribe's state law claims. The appeals court also affirmed the lower court's ruling that the tribe was not liable for penalties or interest, and it did not revisit the district court's ruling that the tribe's historic reservation was not disestablished by the 1838 Treaty of Buffalo Creek.

In *United States v. Newell*, 658 F.3d 1 (1st Cir. 2011), an appeal of criminal convictions of the former governor and former finance director of the Passamaquoddy Tribe at Indian Township for misappropriating federal and tribal funds, the U.S. Court of Appeals for the First Circuit upheld each of the conspiracy to defraud the United States and misuse of federal and tribal monies counts, save one. The defendants raised several issues on appeal, including the sufficiency of the evidence, jury instructions, sentencing and the restitution order. Of particular interest was their argument that the court lacked subject matter jurisdiction over some of the federal counts.

In their appeal, they argued that the district court did not have subject matter jurisdiction over four of the federal counts because the Passamaquoddy Tribe has exclusive jurisdiction over "internal tribal matters" pursuant to enacted legislation settling the tribe's lands claims in 1980. Specifically, they argued that 18 U.S.C. § 666(a)(1)(A), which the government sought to enforce against them, did not apply because the allocation of tribal money was an internal tribal matter. 18 U.S.C. § 666 outlines criminal penalties for "an agent of an organization, or of a State, local, or Indian tribal government … [who] embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies … benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan guarantee, insurance, or other form of Federal assistance." The appeals court rejected the internal tribal matters argument for several reasons. First, the court noted that the tribe's settlement legislation, specifically 25 U.S.C. § 1725(c), exempts the tribe from certain criminal statutes but not Section 666. Second, Congress explicitly included Indian tribes within the scope of the section 666(a). Third, the court explained that even though "it is not clear that any 'peculiarly federal interest' is in fact required for [the] statute to apply to the Tribe," the federal government does have "an interest in ensuring that this money is 'not frittered away in graft or on projects undermined when funds are siphoned off.'" Finally, the court analyzed the defendants' argument under the test for what is an "internal tribal matter" established in *Akins v. Penobscot Nation*, 130 F.3d 482

Northeast Region continued on page 10

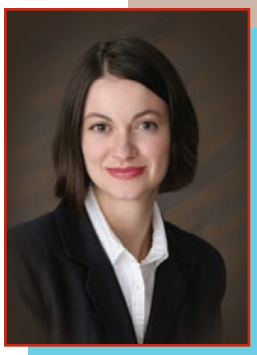
(1st Cir. 1997), and concluded that the mismanagement of federal grants and contracts does not constitute an internal tribal matter. The court noted that the interests of non-members, namely federal and state agencies, are implicated, and that "prior legal understandings support [a] finding that the challenged conduct does not constitute an internal tribal matter." The court ended its analysis by remarking that it would be a different case if the mismanagement of settlement fund income—and not federal funds—were at issue, although it did not express an opinion on that question.

In *Red Earth LLC v. United States*, 657 F.3d 138 (2d Cir. 2011), the court upheld a preliminary injunction granted to Red Earth LLC and the Seneca Free Trade Association staying enforcement of provisions of the Prevent All Cigarette Trafficking Act (PACT Act), which requires mail-order cigarette sellers to pay state excise taxes. The PACT Act, enacted in 2010, mandates that sellers of cigarettes ordered over the internet and delivered by mail to comply with state and local tobacco laws, including excise taxes and licensing and tax-stamping requirements, "as if the delivery sales occurred entirely within the specific State and place" where the tobacco is delivered. Red Earth is a cigarette retailer located on Cattaraugus Indian Reservation within the territory of the Seneca Nation of Indians. The Seneca Free Trade Association represents businesses licensed by the Seneca Nation, including many tobacco retailers. These retailers, including Red Earth, sell untaxed cigarettes to customers via phone, fax and the Internet. For out-of-state sales, excise taxes could be collected only "directly from the customers using sales reports that out-of-state sellers has to file with state tobacco tax administrators under the Jenkins Act of 1949." The plaintiffs brought suit in 2010, several days before the PACT Act was to go into effect. The U.S. District Court for the Western District of New York issued a preliminary injunction finding that they were likely to succeed on the merits, based on the court's finding that "due process requires an out-of-state seller to maintain minimum contacts with a state before the state can subject it to taxation." The Second Circuit affirmed the order on appeal, noting that the "equities tip in the plaintiffs' favor because of the adverse economic effects that will result from enforcement of the statute in violation of the due process rights they may have." The court also addressed the plaintiffs' cross appeals, in which they argued that the PACT Act violated the Equal Protection Clause of the Fifth Amendment by "intentionally target[ing] Native Americans, and ... exempt[ing] only residents of Alaska and Hawaii." The lower court rejected this argument, finding that there was no intentional discrimination on the part of Congress even though Native Americans make up about 80% of sellers, but rather that the intent was to "curtail what it believed to be improper assertions of Native American sovereignty… ." The Second Circuit agreed.

In another case involving tobacco commerce, *United States v. Native Wholesale Supply Co.*, No. 08-CV-850, 2011 U.S. Dist. LEXIS 114215 (W.D.N.Y. Oct. 4, 2011), the United States brought suit against Native Wholesale Supply Co. (NWS) for its failure to pay quarterly assessments under the Fair and Equitable Tobacco Reform Act of 2004 (FETRA). Pursuant to FETRA, the Secretary of Agriculture makes "annual payments to tobacco farmers and producers as consideration for the termination of government quotas and price supports. These payments are made from a Tobacco Trust Fund which is funded principally through quarterly assessment on all domestic manufacturers and importers of tobacco products … ." NWS, which is incorporated by the Sac and Fox Tribe of Oklahoma with its office on the Cattaraugus Indian Reservation, imports and sells tobacco products. NWS partially paid assessments under FETRA in 2005, but did not pay subsequent assessments. The United States sought a monetary judgment for approximately $18.5 million plus interest, and any other assessments and/or penalties accrued since the action was filed in 2008. Ruling on cross-motions for summary judgment, the U.S. district court granted the United States' motion. The court addressed several issues, including whether FETRA violates the Takings and Due Process Clauses of the Constitution, how the government calculated the assessments, and whether FETRA violates treaty rights. Relying on Article III of the Jay Treaty (which provides a duty exemption for Indians crossing the border between Canada and the United States) and the subsequent Treaty of Ghent (which requires Canada and the United States to restore to Indians "all the possessions, rights and privileges which they may have enjoyed or been entitled to" before the War of 1812), NWS argued that FETRA did not apply to it as an Indian-owned corporation. Applying earlier decisions interpreting the two treaties, the court concluded that "the duty exemption to the Jay Treaty was abrogated by the War of 1812 and the Tariff Act of 1897 and not revived by the Treaty of Ghent." The court also noted that, even if the treaty rights remained intact, the duty exemption does not apply to commercial goods. Thus the court concluded that FETRA did not violate NWS's treaty rights and that NWS is subject to the assessment obligations. ◆

Plains Region Update

By Shilee Mullin



In *South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986 (8th Cir. 2012), the court found that South Dakota lacked standing to pursue its challenge to the Bureau of Indian Affairs' (BIA) decision to take land into trust for the benefit of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation. The case arose out of the tibe's request that four parcels of land be taken into trust pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, and other legislation. The BIA's initial decision-maker was the Sisseton Agency Superintendent of the BIA, an enrolled member of the tribe who had previously served as the tribe's chairman. South Dakota alleged that the superintendent was biased due to his history and, arguing that the BIA's decision violated the state's due process rights, sought to prevent the Secretary of the Interior from accepting the land into trust. The Eight Circuit rule that the State lacked prudential standing under the Fifth Amendment's Due Process Clause because "[t]he State is not a 'person' within the meaning of the Fifth Amendment's Due Process Clause." Thus, the court held, the State's claim did not fall within the Due Process Clause's "zone of interests." The court did, however, recognize that the question of whether the state might have standing under the statutes authorizing the acquisition "is a more complex question," but the court determined that it need not resolve any other issues because the state did not raise any statutory claims on appeal.

In *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129 (10th Cir. 2011), the court determined that the Bureau of Indian Affairs (BIA) properly exercised its discretion in denying a tribal member's application to gift a portion of his property interest in a parcel of land held in restricted fee status to the tribe. The court also resolved "a novel jurisdictional question"—whether the BIA "abandoned its right to challenge the district court's remand order [to the BIA], even though the government substantially prevailed in the district court's final judgment." The case arose out of the tribe's U.S. district court action against the BIA challenging the agency's denial of the gift conveyance under the Administrative Procedures Act (APA), along with other statutory and constitutional claims. The district court bifurcated the APA and other claims and, in a 2005 order, determined that the BIA's denial of the gift conveyance was arbitrary and capricious. The court remanded the case to the BIA for proceedings consistent with its decision, and the BIA issued a revised decision approving the gift application. The tribe then challenged the BIA's revised decision in district court, arguing that the agency erred in denying the tribe's request to convey the land in trust, as opposed to restricted fee status. The district court affirmed the BIA's revised decision and dismissed the tribe's other claims. Although it was the prevailing party in this later order, the BIA appealed and sought review of district court's 2005 order. The Tenth Circuit found that it had jurisdiction over the BIA's appeal because the 2005 order constrained the agency's discretion on remand and, thus, the BIA retained a personal stake in the order. The appeals court also appeared to determine that the BIA could not have taken an interlocutory appeal of the 2005 order because "future appellate review likely was not foreclosed and the government's immediate appeal likely would not have fallen within the practical finality exception." The Tenth Circuit did not consider whether the BIA's intervening decision mooted the appeal.

In *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011), the court ruled that a defendant's uncounseled prior tribal court incarcerations that "involved no actual constitutional violation" could be used in federal court to enhance a federal charge "in the absence of any other allegations of irregularities or claims of actual innocence surrounding the prior convictions ... ." The court found that defendant's three misdemeanor domestic abuse convictions in Spirit Lake Tribal Court could be used to prove the elements of the offense of domestic assault by a habitual offender under 18 U.S.C. § 117.

At the federal district court level, the court in *Colombe v. Rosebud Sioux Tribe*, __ F. Supp. 2d __, No. 11-3002, 2011 WL 4458795 (D.S.D. Sept. 23, 2011), dismissed the plaintiff's complaint for failure to exhaust tribal court remedies. Although it found that plaintiff exhausted its tribal court remedies as

Plains Region continued on page 12

to whether there was an illegal modification of the contract at issue, the court ruled that plaintiff did not exhaust its tribal court remedies as to the issue of whether jurisdiction to determine the legality of the contract at issue rests with the National Indian Gaming Commission or the tribal court.

The court in *United States v. Youngbear*, No. 11-CR-151, 2012 WL 176247 (N.D. Iowa Jan. 20, 2012), held that a tribal court judge had the authority to issue a search warrant to search for evidence of a federal crime. The tribal court judge issued a search warrant for defendant's residence for a firearm and/or ammunition, and the searching officer located ammunition and a shotgun shell. Defendant was later indicted for a federal crime. Defendant moved to suppress the evidence, arguing that the tribal court judge lacked authority to issue a warrant to search for evidence of a federal crime and that the warrant only sought evidence relating to a federal crime. The court determined that if the tribal court judge lacked authority under tribal law to issue the warrant for evidence of a federal offense and the warrant sought evidence relating "solely to a federal offense," then the search would violate a defendant's Fourth Amendment rights. Nonetheless, the court stated that the good faith exception to the exclusionary rule, created in *United States v. Leon*, may apply in such a situation to render the evidence admissible. Alternatively, the court held that the evidence obtained as a result of the tribal court's search warrant was admissible because the search warrant was also issued to search for evidence of tribal offenses. The court denied defendant's motion to suppress.

In *Native American Council of Tribes v. Weber*, No. 09-4182, 2011 WL 4382271 (D.S.D. Sept. 20, 2011), the court denied the defendants' (the warden of the South Dakota state penitentiary and other state officials) motion for summary judgment on a group of inmates' claim that the defendants violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), finding that the defendants did not present a compelling government interest for removing commercial tobacco from Native American ceremonies. The use of tobacco was prohibited in the penitentiary by a state executive order in 1992, but use of tobacco by Native American inmates for religious ceremonies was exempted. Because some inmates sold such tobacco within the general penitentiary population, however, the defendants—apparently acting on the advice of some Lakota medicine men and without consulting the inmates—banned all commercial tobacco from religious ceremonies. The court found that the defendants did not present a compelling government interest in banning the use of commercial tobacco for religious ceremonies because they offered no basis for an actual threat of safety or security, and because other least restrictive means existed to outlawing tobacco. However, the court found that the defendants did not violate the American Indian Religious Freedom Act (AIRFA) or Article 73 of the United Nations Charter, as plaintiffs alleged. It held that the defendants did not violate the AIRFA because it is a statement of federal policy that does not create a cause of action, and that Article 73 (even assuming it applied to the action), did not create a private right of action as to the individual defendants.

In another case from the U.S. District Court for the District of South Dakota, *Flandreau Santee Sioux Tribe v. South Dakota*, No. 07-4040, 2011 WL 2551379 (D.S.D. June 27, 2011), the court denied the parties' dispositive cross-motions, finding that although the record suggested "[the State's] unwillingness to negotiate in good faith" for a tribal-state compact pursuant to the Indian Gaming Regulatory Act (IGRA), "it is not appropriate to attribute bad motives to the State at the summary judgment stage." Although the court found that the issues should be resolved at trial, it noted that even though the state did not violate an express provision of IGRA, its conduct still violates its duty to negotiate in good faith. The parties subsequently settled the litigation.

In *Attorney's Process and Investigation Services Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, No. 05-168, 2011 WL 3648551 (N.D. Iowa Aug. 19, 2011), the court held that the Sac & Fox Tribal Court could not exercise jurisdiction over the tribe's claim against plaintiff, a non-Indian entity, for conversion under the second *Montana* exception. Finding that conduct on the reservation is a "*sine qua non* to tribal jurisdiction over nonmembers, regardless of which *Montana* exception is invoked," the court determined that the tribe had not satisfied the second *Montana* exception because it did not establish that the plaintiff's conduct occurred on the tribe's reservation.

In *Gustafson v. In re Poitra*, 800 N.W.2d 842 (N.D. 2011), the North Dakota Supreme Court held that a state trial court lacked jurisdiction over a non-Indian lessee's claim against Indian lessors under a lease for Indian-owned fee land within an Indian reservation. The court found that state jurisdiction over a lease of Indian-owned fee land located within a reservation would infringe on the rights of Indians to govern themselves and, thus, that state court jurisdiction was prohibited. ◆

Rocky Mountain Region Update

By Amy Bowers

In *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011), the court reversed and remanded the district court's decision to dismiss an indictment against the defendant for domestic assault by a habitual offender. Shavanaux, a member of the Ute Indian Tribe who had two prior assaulting a domestic partner convictions in Ute tribal court—and did not have counsel in either Ute tribal court prosecution—was indicted for a third assault of a domestic partner under 18 U.S.C. § 117(a) as a habitual offender. He filed a motion to dismiss the indictment, asserting that the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the U.S. Constitution forbid reliance on his uncounseled tribal convictions to support a charge under 18 U.S.C. § 117(a). The court held that the use of tribal convictions in subsequent prosecutions cannot violate the Sixth Amendment because the Bill of Rights does not apply to Indian tribes, and that Shavanaux's prior tribal court convictions complied with the Indian Civil Rights Act's (ICRA) right to counsel provision, 25 U.S.C. § 1302(a)(6). The court also held that, because the two tribal court convictions complied with ICRA and the tribal court properly exercised jurisdiction over those cases, there was no Due Process Clause violation.

In another case from the Tenth Circuit, *United States v. LaBuff*, 658 F.3d 873 (10th Cir. 2011), the court upheld a conviction under the Major Crimes Act of a non-enrolled Indian who resided on the Blackfeet Indian Reservation, was designated a "descendant of a member" by the Blackfeet Tribe and had received government services available only to Indians. LaBuff appealed his conviction of robbery and aiding and abetting robbery in Indian Country in violation of the Major Crimes Act, 18 U.S.C. §§ 1153(a) and 2111, arguing that the federal government failed to provide sufficient evidence that he was an "Indian" for the purposes of prosecution under the Major Crimes Act, which does not define the term "Indian." In the absence of a statutory definition, the court applied a two-part test to determine if a person is an Indian for the purpose of establishing federal jurisdiction over crimes in Indian country: the government must establish (1) that the defendant has a sufficient "degree of Indian blood," and (2) that he has "tribal or federal government recognition as an Indian." Four evidence factors govern the second prong, "in declining order of importance: (1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life." Applying this test, the Tenth Circuit noted that LaBuff was 5/32 Blackfeet and 1/16 Cree Indian and found that this was a sufficient degree of Indian blood to satisfy the first prong. The court also found that the sum of the four evidence factors was sufficient for a rational fact finder to determine that he is an Indian for the purposes of 18 U.S.C. § 1153, since he had resided on the Blackfeet Indian reservation for most of his life and had received governmental services that were available only for Indians.

In *K2 America Corp. v. Roland Oil & Gas LLC*, 653 F.3d 1024 (9th Cir. 2011), the court held that Public Law 280, 28 U.S.C. § 1360(b), did not extend federal court jurisdiction to a lawsuit between two Montana corporations alleging tort, contract, and state statutory claims arising from a dispute over oil and gas leases on allotted lands held in trust by the United States for various Indian allottees. K2 argued that, even though its claims were based on state law, Public Law 280 provided the federal court with jurisdiction because the dispute occurred on trust land. The court disagreed and, relying on *Bryan v. Itasca County*, stated that Public Law 280 reaffirmed the Indian-federal relationship except for the "conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians." The Ninth Circuit confirmed the district court's conclusion that although section 1360(b) limits the exercise of state jurisdiction, it does not confer jurisdiction on federal courts but rather reserves federal and tribal jurisdiction not so granted. K2 also argued that even though its claims involved only state law, the district court had subject matter jurisdiction provided by the "complete preemption" doctrine under 28 U.S.C. § 1331—which applies where the force of federal law is so strong that it converts (otherwise) state law claims into claims arising under federal law—because the dispute involved trust lands. The Ninth

Rocky Mountains continued on page 14

ROCKY MOUNTAINS continued from page 13

Circuit found this argument unpersuasive, noting that the parties to the lawsuit were non-Indian, that ownership of the leases at issue did not involve a federal source of law, and that state law could resolve the case. The Ninth Circuit also noted that its holding did not preclude K2 from seeking remedies in tribal court.

In *In re Estate of Big Spring*, 255 P.3d 121 (Mont. 2011), the Montana Supreme Court held that the Blackfeet Tribal Court had exclusive jurisdiction over the estate property (trust land and fee land) of a Blackfeet tribal member that was located within the boundaries of the tribe's reservation. In 2004, two of his children initiated a probate proceeding in Montana state court. A third child intervened in this proceeding in 2006. After negotiations to resolve the probate failed, the two children who had filed the original proceeding in state court moved to dismiss it for lack of subject matter jurisdiction, arguing that the Blackfeet Tribal Court had exclusive jurisdiction over the matter. The state court denied their motion, finding that tribal courts do not have exclusive jurisdiction over fee property on Indian reservations and applying the three-prong test from *State ex rel. Iron Bear v. District Court*, 512 P.2d 1292 (Mont. 1973), to determine if it had subject matter jurisdiction over a dispute arising within the boundaries of an Indian Reservation. On appeal, the Montana Supreme Court overturned the *Iron Bear* test, concluding that it conferred greater subject matter jurisdiction upon Montana state courts than was permitted by federal law. The Montana Supreme Court replaced the *Iron Bear* test with a new test based on *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), which requires courts to consider whether the exercise of jurisdiction by a state court or regulatory body is preempted by federal law or, if not, whether it infringes on tribal self-government." The court stated that this new test is the "proper analysis in both regulatory and adjudicatory actions involving tribal members or land[,]" and it emphasized the need for state district courts (particularly those near Indian country) hearing probate cases to determine if the matter involves tribal members or land—and to determine if jurisdiction exists—before proceeding on the merits. The court also noted that the term "Indian" is not interchangeable with "tribal member," and that the relevant distinction in a determination of inherent tribal civil jurisdiction, with respect to the status of individuals, is between tribal member and nonmember.

In *People ex rel. J.C.R.*, 259 P.3d 1279 (Colo. App. 2011), parents appealed termination of their parental rights based on five claims, one of which was that the Indian Child Welfare Act's (ICWA) notice requirements were not met. Approximately three months after the judgment terminating parental rights was issued but before her appeal was filed, the mother told counsel that she might be a member of two Indian tribes. The court denied the appeal, holding that while a notice obligation arises under ICWA when a court has reason to know or believe that an Indian child is involved, there was no information or assertion concerning the children's possible Indian heritage during the termination hearing. The court distinguished and declined to follow *People in Interest of J.O.*, 170 P.3d 840 (Colo. App. 2007), which states that "the notice requirements of the ICWA ... may be raised for the first time on appeal." Noting that in *J.O.* the children's Indian heritage had been raised in the termination proceedings and that the issue on appeal there was the timeliness and sufficiency of the ICWA notice, whereas in *J.C.R.* ICWA notice was not provided because the trial court had no information indicating the children were potentially of Indian heritage, the court found that *J.O.* did not require a remand proceedings to comply with ICWA. ◆

Southwest Update

By Patty Ferguson-Bohnee

In *Save the Peaks Coalition v. U.S .Forest Service*, 669 F.3d 1025, No. 10-17896, 2012 WL 400442 (9th Cir. Feb. 9, 2012), the Ninth Circuit upheld the district court's grant of summary judgment in favor of the U.S. Forest Service (USFS) and the Arizona Snowbowl Resort (ASR). Save the Peaks Coalition brought an action in U.S. district court after different plaintiffs were unsuccessful in challenging the use of reclaimed water to make artificial snow on the sacred San Francisco Peaks—an area sacred to the Navajo and Hopi peoples—under the National Environmental Policy Act (NEPA) and the Religious Freedom Restoration Act in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008). The district court found that the coalition's claims were barred by laches and that neither NEPA nor the Administrative Procedure Act (APA) was violated. The Ninth Circuit reversed the district court's finding on laches since neither the USFS nor ASR could demonstrate that they suffered prejudice. The Ninth Circuit affirmed the district court's grant of summary judgment on the NEPA and APA claims, finding that the USFS took the requisite "hard look" at the possibility and the risks of persons ingesting snow made from reclaimed water, and that the USFS did not fail to ensure the scientific integrity of its analysis.

The court in *Rolling Frito-Lay Sales LP v. Stover*, No. 11–1361, 2012 WL 252938 (D. Ariz. Jan. 26, 2012), held that the Salt River Pima-Maricopa Indian Community court lacked jurisdiction over a tort claim brought by a non-Indian against a non-Indian partnership arising out of an incident at a store owned by a tribal member and located on trust land. Stover, a non-Indian, fell over one of Rolling Frito-Lay's boxes while she was in the store. She initially sued Rolling Frito-Lay in state court, then dismissed that lawsuit without prejudice and sued Rolling Frito-Lay in tribal court. Rolling Frito-Lay sought an injunction in U.S. district court to prevent Stover from proceeding with her tribal court action. In granting the injunction, the court stated that "Stover's tort claim is unrelated to plaintiff's consensual relationship with a tribe member to deliver items for sale to a tribal store. There is no reason why a non-Indian company should reasonably have expected its delivery of food to an Indian store would subject it to a negligence suit by a non-Indian plaintiff governed not by United States law, but by tribal laws and procedures."

In *In re S.M.M.D. and T.A.D.*, __ P.3d __, No. 55541, 2012 WL 247964, (Nev. Jan. 26, 2012), the Nevada Supreme Court held that a tribal-state agreement enacted pursuant to Section 1919 of the Indian Child Welfare Act (ICWA) respecting child custody proceedings could vest a Nevada district court with concurrent subject matter jurisdiction to determine a relinquishment of parental rights under circumstances where a tribe would otherwise have exclusive jurisdiction under Section 1911 of ICWA. The court concluded that ICWA, in keeping with fundamental principles of tribal autonomy, allows for tribal-state agreements for concurrent jurisdiction even when the tribe would have exclusive jurisdiction absent an agreement. ◆

California/Hawai'i Update

By Cheryl Williams

In *Blue Lake Rancheria v. United States*, 653 F. 3d 1112 (9th Cir. 2011), the tribe brought suit seeking a refund of more than $2 million from the Unites States for payments made under the Federal Unemployment Tax Act (FUTA) by a wholly tribally-owned employee leasing company, arguing that the FUTA's exception in 25 U.S.C. § 3306(c)(7) from the payment of employment taxes for "services performed in the employ of an Indian tribe or an instrumentality" thereof applied to the employee leasing company. The district court granted the United States' motion for summary judgment, and the tribe appealed. The Ninth Circuit held that the exception applies only where a tribe acts as a common-law employer as determined by the general common law of agency, and thus that it does not apply where an entity merely acts as a statutory employer or "paymaster" that is solely responsible for paying wages for employee services performed for another. But the court also found that a common law employment relationship existed between the employee leasing company, which provided temporary staffing for small and medium-sized businesses, and its employees because the company retained control over hiring and termination decisions, paid salaries, set compensation, provided employment benefits, handled unemployment claims, and withheld and remitted income and Federal Insurance Contribution Act taxes for its employees. Based on its finding that a common law employment relationship existed, the Ninth Circuit reversed the district court's ruling and ordered a refund of the FUTA taxes.

Acting in his capacity as a court-appointed mediator, Hon. Eugene F. Lynch (ret.) issued his Order Regarding Mediator's Selection of Appropriate Compact on Sept. 22, 2011, in favor of the Big Lagoon Rancheria in *Big Lagoon Rancheria v. State of California*, Case No. 09-1471 CW (N.D. Cal.). The tribe sued the state of California under section 2710 of the Indian Gaming Regulatory Act (IGRA), alleging the state failed to negotiate in good faith with the tribe for a gaming compact. The U.S. District Court for the Northern District of California granted the tribe's motion for summary judgment on Nov. 22, 2010, *see Big Lagoon Rancheria v. California*, 759 F. Supp. 2d 1149 (N.D. Cal. 2010), concluding that the state's non-negotiable demand requiring the tribe to pay 15 percent of its gaming net win into the state's general fund constituted a direct tax in violation of IGRA and evidenced bad faith, as did the state's demand for environmental mitigation measures unsupported by meaningful concessions in exchange. As the next step in the IGRA-mandated process, the parties had 60 days to negotiate a compact, but they failed to reach an agreement. The court then appointed Judge Lynch pursuant to IGRA section 2710(d)(7)(b)(iv), which requires that a court-appointed mediator examine the last, best final offers from the parties following a failed compact negotiation and, guided by IGRA's provisions, select the best one.

The state's last, best offer did not impose any revenue sharing requirement on the tribe, which it argued was a fair concession in exchange for the imposition of broad environmental mitigation and design measures. Among the state's demands was a requirement that the tribe enter into separate enforceable agreements with state agencies regarding mitigation of off-reservation impacts including aesthetics, air quality, biological resources, traffic impacts, and agricultural resources, with any dispute under such agreements resolved by arbitration. Another provision of the state's proposal required full compliance with the Federal Coastal Zone Management Act. The state's proposal also called for on-reservation regulations extending not only to the gaming facility but also to a hotel, access roads, parking lots, utility or waste disposal systems, and water supply. In addition, the state's proposed compact contained extensive design measures spanning over six pages in length and covering such topics as noise abatement, limitations on the use of materials and colors, height and signage limitations, storm water pollution prevention, and grading and soil compaction standards, and including a requirement that the majority of the casino and infrastructure be screened from public view. The state's proffered compact also required a fully published environmental impact report with opportunity for public comment. The tribe's proposed compact, by comparison, required the preparation of a non-binding environmental impact report with the opportunity for public comment and good faith negotiations with public agencies to enter into agreements regarding mitigation of significant off-reservation impacts. The tribe also agreed to make revenue sharing fund payments into the state-run Revenue Sharing Trust Fund (RSTF) and Special Distribution Fund (SDF), which benefit, respectively, federally recognized tribes in California that operate fewer than 350 slot machines and local communities.

Upon analyzing the parties' proposals, Judge Lynch selected the tribe's plan as the compact best comporting with the terms of IGRA, other applicable federal law, and the findings of the district court. He found that the state's attempt to use the compacting process as a means of imposing most of the state's environmental and land use laws on the tribe violated both the district court's order on summary judgment, which denounced similar provisions previously demanded by the state, and IGRA's purpose of promoting the economic prosperity of tribes. Judge Lynch explained

that the financial impact of the state's environmental regulations could far outweigh any payment obligation to the RSTF and SDF:

[T]he Mediator has handled these types of cases and lived in California his entire life, and it is common knowledge that if you get in an environmental fight regarding building a project, two things happen – the cost of the project escalates dramatically and it takes years to get built, which delay also would result in a loss to the tribe through gaming profits. In the Mediator's opinion, you cannot compare the savings to the Tribe versus the large financial risks of an environmental dispute, plus the delay in launching its gaming facility. It would appear clear that the financial risks of adopting the State's plan fall more dramatically on the side of the tribe.

In rejecting the state's argument that its willingness to forego any revenue sharing obligation was a meaningful concession in exchange for imposing the broad environmental and land use requirements, Judge Lynch explained that while an analysis of meaningful concessions is appropriate in the compact negotiation phase, his role as mediator solely involved selecting the best compact in accordance with the terms of IGRA.

After Judge Lynch issued his decision, the state had 60 days, or until Nov. 22, 2011, to consent to the proposed compact selected by the mediator under 25 U.S.C. § 2710(d)(7)(B)(vi). IGRA Section 2710(d)(7)(B)(viii) requires that, at the conclusion of the 60-day period, the mediator notify the Secretary of Interior of a state's failure to consent to the selected compact, at which point the secretary is to proscribe, in consultation with the tribe, procedures under which a tribe may conduct Class III gaming. As set forth in a Nov. 8, 2011 joint case management statement filed by the parties, however, the state notified the court that it would not consent to the mediator's selected compact. On Nov. 23, 2011, the state filed motions to vacate the mediator's order and to stay the action pending its appeal of the court's Nov. 22, 2010 order granting Big Lagoon's motion for summary judgment. In its motion to vacate, the state argues that the court should review the propriety of the mediator's decision, a review not contemplated by IGRA's mandated procedures and arguably outside the court's jurisdiction. The state's motion to stay challenges the Big Lagoon Rancheria's status under *Carcieri v.Salazar*, 555 U.S. __, 129 S. Ct. 1058 (2009), arguing that the tribe was not a recognized tribe under federal jurisdiction when Congress passed the Indian Reorganization Act in 1934.

On Feb. 1, 2012, the district court denied the state's motion to vacate but granted its motion to stay the matter pending resolution of the state's appeal, finding that the state raised "serious questions going to the merits of the case" and that the state faced irreparable harm should the secretary promulgate gaming procedures for the tribe prior to the resolution of the appeal without considering the state's demands for certain environmental regulations. On Feb. 10, the state filed its opening brief with the Ninth Circuit, reiterating its *Carcieri*-based argument. On Feb. 22, the tribe filed a motion with the Ninth Circuit to vacate the district court's stay order, arguing that the state failed to make the requisite showing of irreparable harm without a stay and that the district court's order merely citing to "serious questions" without further analysis improperly applied the Ninth Circuit's precedent in *Alliance for the Wild Rockies v. Cottrell*, 613 F.3d 960 (9th Cir. 2010), which permits the issuance of a stay where the moving party can demonstrate "serious questions going to the merits and a hardship balance that tips sharply towards the plaintiff."

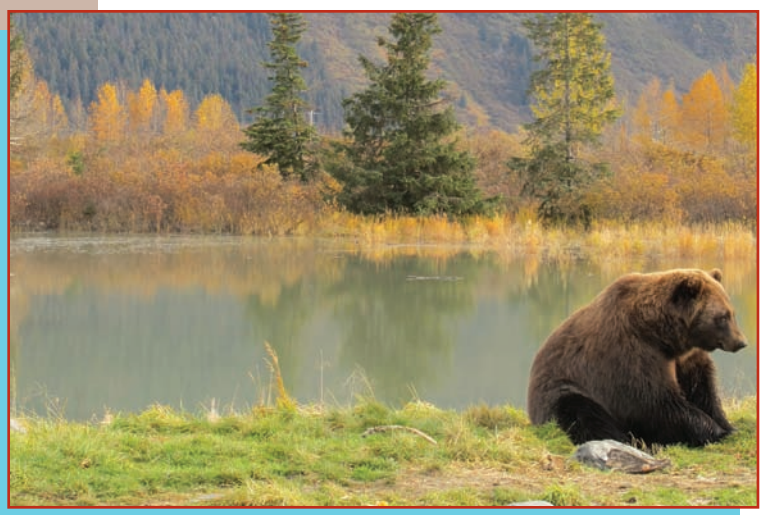
In case news from Hawai'i, the plaintiffs in *Corboy v. Louie*, __ P.3d __, No. 30049, 2011 WL 1687364 (Hawai'i Apr. 27, 2011), wherein the Supreme Court of Hawaii denied on standing grounds their equal protection challenge to a provision of the Hawaiian Homes Commission Act exempting homestead leases of Hawaiian homelands from real property taxes, filed a petition for certiorari to the U.S. Supreme Court on Sept. 15, 2011. On Dec. 12, the Court requested the U.S. solicitor general's view on the case. (The case is also discussed in this newsletter's Supreme Court update.) ◆

Alaska Update

By Natalie Landreth

On Oct. 25, 2011, the Superior Court for the State of Alaska, First Judicial District at Juneau, issued a decision with significant implications for tribal courts throughout Alaska in *Central Council of Tlingit and Haida Indian Tribes of Alaska v. State*, Case No. 1JU-10-376. Plaintiff Central Council of Tlingit and Haida Indian Tribes of Alaska, a federally recognized tribe, sued the Alaska Department of Revenue and Child Support Services Division for declaratory and injunctive relief, seeking an order that the tribe's court has subject matter jurisdiction over child support cases concerning its member children. The Alaska superior court first reviewed the history of child support and noted that the Uniform Interstate Family Support Act (UIFSA) specifically requires states to recognize child support orders from other states (which the UIFSA defines to include tribes) as a condition for receiving federal Title IV-D funding. The Alaska legislature adopted the UIFSA in 1997 but omitted tribes from the definition of "state." Alaska requested exemptions from this requirement several times, most recently in 2008, but the U.S. Department of Health and Human Services rejected each request before finally issuing a warning to Alaska that unless it amended its version of UIFSA to include tribes, it risked losing more than $60 million in Title IV-D funds. Alaska amended the definition of "state" but added language stating that the provision was not meant to expand tribal jurisdiction but rather only to allow for child support *if* a court determined that tribes have such jurisdiction.

The court then examined the Alaska Supreme Court's decision in *John v. Baker*, 982 P.2d 738 (Alaska 1999), noting that tribal power does "not depend upon the existence of Indian country, but rather stems from the tribe's interest in 'preserving and protecting the Indian family as the wellspring of its own future.'" (Because the *John* court declined to rule on child support, however, the *Central Council of Tlingit and Haida Indian Tribes* case presented a question of first impression for Alaska courts.) The superior court next analyzed the relationship between child custody and child support under well-established principles of state law. Relying on a case involving two former Texas residents who had moved to different states (one to Alaska, one to Oregon) in which the Alaska Supreme Court held Alaska state courts had jurisdiction to modify a child support decree entered by a Texas court since "decid[ing] custody and visitation issues without being able to make the logically concomitant support modification could result in an imbalance between visitation allowed and support owed[,]" the superior court concluded that the same rationale applied to tribal courts: "[T]he determination of child support is an integral part of a custody determination. To the extent that the Supreme Court found in *John v. Baker* that tribes have jurisdiction over custody determinations, I conclude that this jurisdiction, to be meaningful, must extend to adjudication of child support." The superior court not only determined that child custody and child support adjudications were logically related, but also found there were compelling policy reasons for its rule, as the alternative could deter parents from using tribal courts since they could not adjudicate support and could even attract litigants who specifically wanted to avoid being ordered to provide child support. The parties are currently engaged in supplemental briefing but expect the case to be appealed to the Alaska Supreme Court. ◆



SAN DIEGO

Federal Bar Association
2012 Annual Meeting and Convention

September 20–22 • Manchester Grand Hyatt

Enjoy a tour and a reception at the USS Midway Museum!
www.midway.org

Featuring CLE sessions on current trends in civil, criminal, and bankruptcy law with prominent speakers including Ninth Circuit Judges J. Clifford Wallace and Mary M. Schroeder, Dean Erwin Chemerinsky, and Judy Clarke

Join us for an "Open Air Fiesta" by the San Diego Bay!

www.fedbar.org/sandiegoconvention

Federal Indian Law

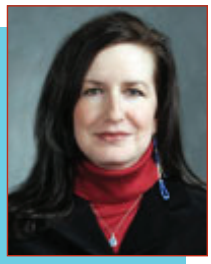
Newsletter of the Federal Bar Association Indian Law Section

Spring 2012

A Publication of the Federal Bar Association Indian Law Section

1220 N. Fillmore St., Suite 444
Arlington, VA 22201

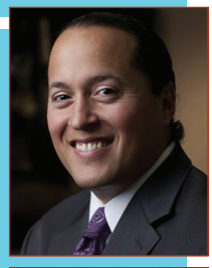
FBA Indian Law Section Executive Board



Jennifer Harvey Weddle
Greenberg Traurig LLP
Chair

Matthew L.M. Fletcher
Michigan State University College of Law
Deputy Chair

Kristen Carpenter
University of Colorado Law School
Secretary



Andrew Adams III
Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C.
Treasurer

Hon. Elizabeth Ann Kronk
Texas Tech University School of Law
Immediate Past Chair

Lawrence R. Baca
Chair Emeritus