

# FEDERAL INDIAN LAW



Newsletter of the Federal Bar Association  
Indian Law Section



Summer 2009 Issue

## A WORD FROM THE CHAIR

By Allie Greenleaf Maldonado

This is the eleventh year that I have been honored to serve my community as a volunteer for the Federal Bar Association Indian Law Section. In the summer of 2008, I was particularly honored to have been elected by my peers as the section's chair. Filling Michael McBride's and Lawrence Baca's shoes has not been easy, but with the section's amazing Executive Board at my side, we have had an outstanding year.

We held our midyear Washington, D.C., Indian Law Conference at the National Museum of the American Indian. The location proved convenient, beautiful, and abundant with great food! The D.C. program, now in its tenth year, was put together this year with the hard work of Ed Gehres and Vanessa Ray-Hodge. The FBA offered the conference free of charge, thanks to the generosity of the following sponsors: Holland & Knight LLP; Akin Gump Strauss Hauer & Feld LLP; Patton Boggs LLP; Sonosky Chambers Sachse Endreson & Perry LLP; Hobbs Straus Dean & Walker LLP; Crowe & Dunlevy, P.C.; Pillsbury Winthrop Shaw Pittman LLP; Homer Law; and Pipestem Law. Free admission allowed newcomers to Indian law easy access to current and significant Indian law information. Reviews of the conference complemented the timeliness and high quality of the presentations; the conference was a huge success!

I am incredibly proud that this year, we held our 34th Annual Indian Law Conference in Indian country. Over the last decade, I heard the membership express a strong desire for the annual conference to be held in Indian country, and the FBA Indian Law Section leadership worked diligently 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. Our efforts brought us to the Hilton Santa Fe at Buffalo Thunder on the Pojoaque Pueblo. The new location received wonderful reviews from our members! Despite the fact that we were Buffalo Thunder's first big conference, the resort did a great job of meeting the challenges we offered, and we only expect this location to get better. We consider this facility 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 highlight of this year's conference was the presentation of the Lawrence Baca Lifetime Achievement Award to Professor Philip Frickey. Frickey obtained a B.A. from the University of

Kansas in 1975 and a J.D. from the University of Michigan in 1978. After law school, he clerked for Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit and for Justice Thurgood Marshall of the U.S. Supreme Court. Frickey then practiced law for three years in Washington, D.C., before joining the faculty of the University of Minnesota Law School, where he taught for 17 years. In 1996, he was a visiting professor of law at Harvard Law School. Frickey joined the University of California-Berkeley Boalt Hall School of Law faculty in 2000, where he was appointed the Alexander F. and May T. Morrison Chair in 2006. His nominators for the Baca Lifetime Achievement Award described his achievements as follows:

Phil is legendary as a lawyer, scholar, teacher, and mentor in the field of federal Indian law. Perhaps like no other individual, he has substantially influenced theoretical de-

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velopments in the field, through a prolific body of articles and books in the nation's most prestigious publications. At the same time, Phil has bridged the gap between academia and Indian Country, urging his students and colleagues to engage in research that is grounded in the real experiences of Tribes.

Professor Frickey's response to receiving the award was predictably humble: "This stuns me. It is an award of the highest honor, in a field in which honor means more than about anything else. I don't feel worthy of it, but am so deeply touched. Thank you." We hope that by honoring Phil Frickey for our lifetime achievement award, we encourage others to appreciate his contributions to Indian country and follow in his footsteps.

At the 2009 FBA Annual Meeting and Convention in Oklahoma City on September 10-12, the FBA will be swearing in its first Native American president, Lawrence Baca. Appropriately, the conference will be offering several CLE sessions featuring Indian law issues. If you have never been to the annual meeting, but always wanted to network on a national level, this is the year to attend! More information including the schedule can be found at [www.fedbar.org/OK09\\_home.html](http://www.fedbar.org/OK09_home.html).

Serving FBA this year—and the 10 before it—provided me with a deeply enriching public service experience. However, my husband and I adopted a child last July and will be welcoming our first biological child in August, and I therefore will be taking a break from FBA service when my current term expires. The FBA Indian Law Section is an amazing asset to all of Indian law country that runs primarily through the dedication of volunteers. We are fortunate to have an incredible Executive Board, and we have never been short of volunteers for the conferences. Nevertheless, I call upon all of you who value the FBA Indian Law Section to step up and see what you can do to make the section stronger. We have all benefited from the section throughout the years, and it is our duty to make certain that what we created flourishes for the next seven generations. ♦

# INDIAN LAW CASES, NEWS, AND NOTES

## Supreme Court Update

Since the Spring 2009 newsletter, the Supreme Court has decided two cases: *Hawaii v. Office of Hawaiian Affairs* and *United States v. Navajo Nation*. In *Office of Hawaiian Affairs*, 129 S. Ct. 1436 (Mar. 31, 2009), the Supreme Court rejected the Office of Hawaiian Affairs' (OHA) argument that a 1993 congressional resolution of apology to the Native Hawaiian people precluded the State of Hawaii from alienating lands granted to it by the United States and to which Native Hawaiians have unrelinquished aboriginal title claims. The land at issue had been held in trust by the state, which planned to take it out of trust in order to develop it for affordable housing purposes. The OHA sought to enjoin the impending transfer of the land and of any other lands held in public trust until Native Hawaiian claims could be resolved. The Supreme Court of Hawaii granted the injunction on the basis of Congress's joint Apology Resolution, Pub. L. 103-150, 107 Stat. 1510, 1513-14.

The U.S. Supreme Court first rejected the argument that it lacked jurisdiction because only a state fiduciary duty was involved. On the merits, the Court held that the Apology Resolution's first substantive provision employed only terms that were not of the type used to create substantive rights and that the second substantive provision referred only to claims against the United States and thus could not be viewed to create claims against the state. The Court further noted that the 37 "whereas" clauses in the second substantive provision upon which the Supreme Court of Hawaii relied in reaching its decision (1) could not "bear the weight that the lower court placed on them," (2) "did not chang[e] the legal landscape and restructur[e] the rights and obligations of the State," and (3) "would raise grave constitutional concerns" if interpreted in accord with the Supreme Court of Hawaii's view of the clauses. 129 S. Ct. at 1444-45 (citations and internal quotation marks omitted). Accordingly, the Supreme Court reversed and remanded the case.

In *United States v. Navajo Nation*, 129 S. Ct. 1547 (Apr. 6, 2009), the Court rejected the Navajo Nation's claim that the Secretary of Interior breached the Department of the Interior's trust obligations to the nation by

engaging in ex parte communications with Peabody Coal Company and then delaying action on the company's administrative appeal of a new coal lease rate so as to render the Nation financially desperate and force it to accept a less favorable lease rate. This decision represented the second time the Court heard the case; on its first hearing of the case, in 2002, the Court also rejected the Nation's breach of trust claim, but in that case the breach of trust argument was based on the Indian Mineral Leasing Act of 1939. On remand from the Supreme Court's 2002 decision, the Nation lost at the trial court level but won in the Federal Circuit, which based its decision primarily on particular statutory provisions that it found—together with the federal government's comprehensive control over coal leases on tribal lands—created a trust duty to the Nation with respect to coal leases.

The Supreme Court held that none of the three statutory provisions created a trust responsibility for the coal lease at issue and that the federal government's comprehensive control of such leasing activities similarly could not, on its own, create such a duty to the Nation. Repeating its prior admonition that courts must base their findings of liability for breach of a federal trust responsibility on "specific rights-creating or duty-imposing statutory or regulatory prescriptions," 129 S. Ct. at 1554-55 (citation and internal quotation marks omitted), the Court held that the lease at issue was not issued under the authority of 25 U.S.C. § 635(a), the first provision on which the Federal Circuit court relied. Similarly, the Supreme Court held that the second provision at issue, 25 U.S.C. § 638, did not apply to a coal lease issued under the Indian Mineral Leasing Act. The Court rejected the third statutory provision, 30 U.S.C. § 1201 *et seq.*, on the basis that that statute was enacted 13 years after the original lease to Peabody Coal was issued. Finally, the Court rejected the Federal Circuit court's reliance on the federal government's control as a basis for finding trust liability, holding that such claims must, under the Indian Tucker Act, arise under "the Constitution, laws or treaties of the United States, or executive Orders of the President." 129 S. Ct. at 1558 (internal quotation marks and citation omitted).

Twenty-six petitions for certiorari relat-

ing to Indian law were denied this term by the Supreme Court: *Navajo Nation v. U.S. Forest Service*; *California v. San Pasqual Band of Mission Indians*; *Marceau v. Blackfeet Housing Authority*; *Seneca v. United South and Eastern Tribes*; *Losh v. Minnesota*; *Cook v. Avi Casino Enterprises* (Docket No. 08-929); *Cook v. Avi Casino Enterprises* (Docket No. 08-930); *California v. Cachil Dehe Band of Wintun Indians of the Colusa Indian Community*; *Schwarzenegger v. Rincon Band of Luiseño Mission Indians*; *Coushatta Tribe of Louisiana v. Meyer and Associates*; *Catskill Development v. Harrah's Operating Company*; *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*; and *Lawrence v. Dep't of Interior*. Additionally, one case, *Ho-Chunk v. Wisconsin*, was dismissed by agreement of the parties.

## Inside the Beltway: Washington, D.C. Update

In the past few months, federal agencies have been making efforts to distribute funds provided under the federal economic stimulus bill, officially known as the American Recovery and Reinvestment Act, P.L. 111-5, which President Obama signed into law on Feb. 17, 2009. The stimulus bill included \$2.5 billion in Indian Country-specific provisions and other monies for which tribal entities may be eligible. On February 18, the Office of Management and Budget released global guidance to federal agencies indicating how they are to post information about and administer the economic stimulus funding. On March 18, Vice President Joe Biden announced that the Department of Health and Human Services had released \$3 million, to be awarded to 246 Indian Tribes, for Native American nutrition programs. During the week of March 16, the Department of Justice announced the availability of competitive grants and funding assistance under six programs for which Tribes are eligible. On April 25, Secretary of the Interior Ken Salazar announced \$500 million in Indian Country economic recovery projects. And

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on June 23, the Department of Treasury issued a notice detailing the new \$2 billion tribal economic development bond program, including how tribal governments can apply for tax-exempt bonds and the types of projects that can be financed with them.

An additional \$18.04 million was allocated for guaranteed loans, workforce training programs, facilities improvement, and repair and maintenance projects directly administered by Bureau of Indian Affairs (BIA) Central Office personnel. On May 28, the Department of Housing and Urban Development announced the availability of \$252 million in Indian housing stimulus funds for the Native American Housing Block Grant and the Indian Community Development Block Grant programs.

On May 7, President Obama released his detailed FY2010 Budget Request for a total of \$3.55 trillion in federal spending. The President requested \$12.1 billion for the Department of the Interior for FY2010, including \$2.5 billion for the Bureau of Indian Affairs. He also requested \$4 billion for the Indian Health Service (IHS). The House Subcommittee on Interior, Environment, and Related Agencies held a markup of the FY2010 Interior appropriations bill on June 10, and on June 18, the House Appropriations Committee approved the bill as marked up by the Subcommittee. The bill contains \$6.8 billion for the BIA, the Office of the Special Trustee for American Indians, the IHS, and related Indian programs, \$654 million above the FY2009 level and \$39 million above the President's request. The IHS will receive \$4 billion, \$471 million above FY2009 and \$18 million above the request. The BIA will receive \$2.5 billion, \$183 million above FY2009 and \$22 million above the request.

The past few months have also seen the nomination and confirmation of several key appointees to administration positions influencing Indian affairs:

- The nomination hearing for David Hayes, deputy secretary of the the Interior, was held on March 12. The full Senate confirmed Hayes' appointment on May 21.
- On March 23, President Obama announced the nomination of Dr. Yvette Roubideaux, member of the Rosebud Sioux Tribe and assistant professor in the Department of Family and Medicine at the University of Arizona College of Medicine,

as director of the Indian Health Service. The Senate Committee on Indian Affairs held the nomination hearing for Roubideaux on April 23 and approved her nomination on April 30. The full Senate confirmed Roubideaux's appointment on May 6 and a swearing-in ceremony was held on June 30.

- On April 20, the Senate received the official nomination of Larry J. EchoHawk, former attorney general of Idaho, as assistant secretary of Indian affairs at the Department of the Interior. The Senate Committee on Indian Affairs convened its hearing on EchoHawk's nomination on May 7, and the full Senate confirmed his nomination on May 19. The Department of the Interior held a swearing-in ceremony for Assistant Secretary EchoHawk on June 26.

- On April 23, the Senate Committee on Energy & Natural Resources held a full-committee hearing to consider the pending nomination of Hilary Chandler Tompkins to be Solicitor of the Department of the Interior. After some delay, Tompkins, a member of the Navajo Nation and the first Native American to serve as solicitor of the department, was confirmed on June 17.

- On May 26, President Obama chose federal appellate Judge Sonia Sotomayor as his nominee to fill the Supreme Court position being vacated by Justice David Souter. If confirmed, Judge Sotomayor would be the first Latina and third woman to ever to sit on the nation's highest court. Judge Sotomayor began informal meetings with members of Congress during the week of June 1. Her confirmation hearings began on July 13 and concluded on July 16. More information on Judge Sotomayor and her nomination can be found on pages 9-11.

On May 8, President Obama signed into law P.L. 111-18, which repealed the statutory provisions that had created the "Bennett Freeze" on lands in dispute as part of the Navajo-Hopi Settlement Act of 1974. The new law enabled development to resume on those lands after nearly four decades. Also, on May 26, Attorney General Eric Holder granted a one-year extension for jurisdictions to implement the Sex Offender Registration and Notification Act, 42 U.S.C. § 16901, *et seq.* This extended the deadline for tribal and state governments to comply with the Adam Walsh

Child Protection and Safety Act, which requires Tribes to develop sex offender registry systems, until July 27, 2010.

On June 11, the Senate passed the Family Smoking Prevention and Tobacco Control Act. The Senate version, like the House bill, preserves tribal sovereignty with regard to state enforcement of federal tobacco laws. The Senate did not consider an amendment proposed by Sen. Tom Coburn (R-Okla.) that would have deleted the protection for tribal sovereignty. On June 12, the House voted to accept the Senate's version of the bill, and President Obama signed the bill on June 22.

The Supreme Court's *Carcieri v. Salazar* decision has also occupied Congress. On April 1, the House Natural Resources Committee held an oversight hearing on the ramifications of the decision on Tribes, and on May 21, the Senate Committee on Indian Affairs held a hearing to examine the executive branch's authority to acquire lands into trust for Indian Tribes, which focused almost exclusively on *Carcieri*. The Bureau of Indian Affairs held three consultation sessions with Tribes regarding the *Carcieri* decision: June 29 in Minneapolis, Minn.; July 1 in Sacramento, Calif.; and July 8 in Arlington, Va.

The Senate Committee on Indian Affairs held other recent hearings: a June 11 hearing on reforming the Indian health-care system, and a June 25 hearing on S. 797, the Tribal Law and Order Act of 2009. Also on June 25, the House Natural Resources Committee held a hearing on the reauthorization the reauthorization of the Indian Health Care Improvement Act (H.R. 2708).

In the local federal courts, a case involving the Washington Redskins football team mascot, *Pro Football Inc. v. Harjo*, No. 03-7162, 2009 WL 1350607 (D.C. Cir. May 15, 2009), was heard and decided by the Court of Appeals for the D.C. Circuit. The case involved a group of Native Americans who had petitioned to cancel the team's trademark registrations on the ground that such registrations disparaged Native peoples. The Trademark Trial and Appeal Board cancelled the registrations (50 U.S.P.Q. 2d (BNA) 1705 (Trademark Tr. & App. Bd. Apr. 2, 1999)), and the team sought judicial review. The D.C. District Court granted

the plaintiff team's motion for summary judgment and the Native defendants appealed. The Court of Appeals remanded the case (415 F.3d 44 (D.C. Cir. 2005)) and the district court again granted judgment for the team (567 F. Supp. 2d 46 (D.D.C. 2008)). The Native defendants then appealed again, but the D.C. Circuit this time affirmed the district court's ruling.

## Oklahoma Update

The Oklahoma Legislature, in its 2009 session, passed a joint resolution to put to a vote of the people a proposed constitutional amendment designating English as the official language of the State of Oklahoma. House Joint Resolution No. 1042 would amend the Oklahoma Constitution to include a new article identifying English as the "common and unifying language of the State of Oklahoma." The proposed amendment would mandate that all official actions of the State be conducted in the English language, except as otherwise required by federal law. The proposal contains language aimed at allaying fears of the 37 federally recognized Tribes and their citizens and members, providing that "[n]othing in this Article shall be construed to diminish or impair the use, study, development, or encouragement of any Native American language in any context or for any purpose." Despite this attempt at inclusion, many tribal leaders and American Indian citizens oppose the measure. The legislative referendum will be submitted to the voters of Oklahoma in 2010.

In *Citizen Potawatomi Nation v. Salazar*, No. 06-860, 2009 WL 1649196 (D.D.C. June 12, 2009), the U.S. District Court for the District of Columbia upheld the application of a static funding formula for distribution of federal funds to Tribes under the Bureau of Indian Affairs Shawnee Agency. The Citizen Potawatomi Nation appealed the application of the funding formula through the administrative procedures within the Department of the Interior before asking the district court to review the decision. The controversy arose when the Nation learned that the BIA was using data from 1988 to calculate distribution methods under Indian Self-Determination Contracts. The Interior Board of Indian Appeals (IBIA) upheld application of the formula, and the district court agreed, finding that the IBIA's decision was not arbitrary and capricious. The court dismissed for failure to join the other Tribes under the Shawnee

Agency as necessary parties, on the ground that the defendants enjoyed sovereign immunity.

In early 2009, the Supreme Court of Oklahoma issued its opinion in *Cossey v. Cherokee Nation Enterprises*, 2009 OK 6, No. 105300 (Jan. 20, 2009), a decision that sent waves of frustration and confusion throughout Oklahoma Indian Country. *Cossey* involved a personal injury tort action brought in Oklahoma state court by a nonIndian patron for injuries sustained at a gaming facility owned and operated by the Cherokee Nation on allotted Indian land. The case was filed in Rogers County District Court. An interlocutory appeal was filed, and the Supreme Court of Oklahoma gave guidance to the lower court for disposition of the case.

The *Cossey* court based both its findings that the Cherokee Nation had waived immunity from the suit and that it had subject matter jurisdiction over the claim on the Nation's gaming compact with the State of Oklahoma. The court examined the gaming compact and noted that it provided that "[the] Compact shall not alter tribal, federal, or state civil adjudicatory or criminal jurisdiction." The court found that the compact was derived from Oklahoma statutory law authorizing tribal gaming, and that Oklahoma's Governmental Tort Claims Act (GTCA) should be incorporated into the compact's provisions. Based on these findings, it held that the district court had subject matter jurisdiction over the claim, and that Oklahoma district courts have subject matter jurisdiction over any claim arising under the CTGA, including those arising on Indian land under a gaming compact. In support of its holding, the Oklahoma Supreme Court cited the U.S. Supreme Court's opinion in *Nevada v. Hicks*, 533 U.S. 353 (2001), which noted that while state and federal courts enjoy dual sovereignty and can adjudicate cases involving each other's statutes, there is no such reciprocal relationship between tribal courts and state courts.

Indian country jurisdiction in Oklahoma is a complex maze of checker-boarded lands within former and existing reservations, and Oklahoma has a unique land status resulting from the General Allotment Act and various statutes affecting the property holdings of the five Tribes. The lands at issue in *Cossey* fall under the definition of "Indian country" under 18 U.S.C. § 1151(c), which includes "all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the

same." Yet the *Cossey* court applied the U.S. Supreme Court's test from *Montana v. United States*, 450 U.S. 544 (1981), a case involving tribal jurisdiction over a nonIndian on fee land that was not owned by the Tribe. Applying *Montana*, the Court in *Cossey* found that the Cherokee Nation lacked jurisdiction to adjudicate the claim because the patron did not enter into a consensual relationship with the Cherokee Nation (even though he voluntarily went to go play at the casino operated by the Nation on the nation's lands), and because the patron's conduct did not threaten or have some direct effect on the nation's political integrity, economic security or health and welfare.

## Rocky Mountain Update

Since the Spring 2009 newsletter, the Rocky Mountain Region has had minimal activity. There were two cases involving the Indian Child Welfare Act (ICWA) and one case regarding equitable tolling of the statute of limitations when an action is first erroneously filed in tribal court.

In *In re M.B.*, 204 P.3d 1242 (2009), the Montana Supreme Court upheld a lower court's determination that good cause did not exist to deviate from the placement preferences in ICWA, and that the court's approval of the placement of children with prospective adoptive parents was not an abuse of discretion. It was the parents' wish that the children be adopted by their foster parents, who intervened in the case. The foster parents argued that, based on the "request of the biological parents" language in the BIA's guidelines, the parents' request that the children be placed with the foster parents should have been considered in determining good cause. The court determined that the foster parents' proposed interpretation did not fit within the plain language contained in the guidelines, and that while the purpose of the language in the guidelines is to protect the biological parents' confidentiality, the biological parents in this case were not seeking to protect their confidentiality. The court also determined that although the prospective adoptive parents otherwise did not qualify for preferential treatment under ICWA, the fact that they had previously adopted a sibling of the children at issue did qualify them for preferential placement under the act. The court noted that "it is reasonable and logi-

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cal to conclude that the adoptive parents of a Little Shell Indian child's full-blood birth sibling qualify as 'extended family members' within the meaning of the Act."

In *People ex rel. N.D.C.*, \_\_\_ P.3d \_\_\_, 2009 WL 1152176 (Colo. App. Apr. 30 2009), the mother appealed from the judgment terminating her parental rights to her daughter. She sought reversal on the grounds that the Denver Department of Human Services did not send notice to her Tribe in compliance with ICWA, and that the juvenile court did not comply with several substantive provisions of ICWA. In vacating the judgment of the lower court and remanding the action for proper notices, the Colorado Court of Appeals concluded that the department erred by not filing the notices or the return receipt cards with the court and that such errors were not harmless because there was no evidence in the record that the Tribe knew the mother was an enrolled tribal member or had lived on the reservation. The court also concluded that subsequent notices sent by the department likewise did not comply with the ICWA.

*Lozeau v. Geico Indemnity Co.*, 207 P.3d 316 (Mont. 2009), involved a negligence action arising out of a car accident on the Confederated Salish and Kootenai Tribes' Flathead Reservation. After filing a timely complaint in tribal court, Lozeau filed a complaint against the same defendants in state district court on Nov. 21, 2006—about six weeks after the statute of limitations had expired. The tribal court had dismissed the case there, concluding "without deciding the issue of subject matter jurisdiction[,] that it lacked personal jurisdiction over Lozeau. The state district court failed to take notice of the tribal court proceedings and concluded that "no facts exist" that would support application of the equitable tolling doctrine for the statute of limitations. It then dismissed the action. The Montana Supreme Court reversed the lower court, holding that the district should have considered the tribal court proceedings and that equitable tolling applied. It also acknowledged that "the issue of state and tribal jurisdiction can present a procedural quandary for litigants."

### Pacific Northwest Update

In *Hyde v. Fisher*, the Court of Appeals of the State of Idaho affirmed in part and reversed in part the trial court's denial of an inmate's petition for writ of habeas corpus.

The inmate, Hyde, argued that the prison's policies and practices violated his rights to practice his "Native American religion" provided by the state and federal constitutions, the Religious Exercises in Land Use and by Institutionalized Persons Act (RLUIPA), and the Free Exercise of Religion Protected Act (FERPA). "Specifically, Hyde allege[d] constitutional and statutory violations of his right to exercise the Native American religion by way of the sweat lodge, ceremonial pipe, smudging, and possession of kinnikinnik, sage, feathers, a choker, and a bandana, among others." *Hyde v. Fisher*, 152 P.3d 653, 654–55 (Idaho Ct. App. 2007). The court concluded that the prison's "complete ban on sweat lodge ceremonies and implementation of a personal property policy does not violate Hyde's constitutional rights or those conferred upon him by RLUIPA and FERPA[,] but it also held that the prison failed to demonstrate that a complete ban on smudging ceremonies was the least restrictive means of furthering the government's compelling interest of safety and security at the prison.

In *Phillip Morris v. King Mountain Tobacco*, 552 F.3d 1098 (9th Cir. 2009), the Ninth Circuit held that the Yakama Tribal Court "does not have colorable jurisdiction over nonmember Philip Morris's federal and state claims for trademark infringement on the Internet and beyond the reservation." King Mountain Tobacco is a tribal corporation founded and managed by Yakama tribal members. Phillip Morris believed that King Mountain's packaging was too similar to Phillip Morris's Marlboro brand and thus violated Phillip Morris's trademarks. It sued King Mountain in federal court, alleging various federal and state law claims and seeking, among other things, injunctive relief against King Mountain's continued sale of its products. King Mountain followed with an action for declaratory relief against Philip Morris in Yakama Tribal Court, which prompted Philip Morris to seek an injunction in federal court against the tribal proceedings. King Mountain asked the district court to stay its proceedings pending the tribal court's determination of its jurisdiction.

What's most interesting about the *King Mountain* case is not the ultimate holding—that the Yakama Tribal Court did not have jurisdiction under the *Montana* test—but rather the majority opinion's attempt, in the words of Judge William Fletcher, to "undermine

the longstanding presumption of *Williams v. Lee*, 358 U.S. 217 (1959)." Judge Fletcher concurred in the judgment, finding no tribal jurisdiction under *Montana*, but noting he did not join the majority opinion because it went on at length discussing what it saw as the near irrelevance of which side of the litigation the non-member was on, and found that the *Montana* test applied in the same way regardless of whether the non-member was the plaintiff suing a tribal member or a tribal member suing a non-member. Judge Fletcher viewed this as unnecessary dicta that was not only a jab at *Williams v. Lee* but also in clear conflict with the Ninth Circuit's recent en banc decision in *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (en banc).

In *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009), the Ninth Circuit held that the overtime provisions of the Fair Labor Standards Act (FLSA) apply to Baby Zack's Smoke Shop, a business owned by Puyallup tribal members and located on the Puyallup Reservation. The court found that neither the intramural affairs exception nor the treaty rights exception set forth in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115–16 (9th Cir. 1985) applied to the smoke shop, and that the Secretary of Labor had authority to enter the reservation to locate records and investigate possible violations of the FLSA.

In *Sweet v. Hinzman*, No. C08-844JLR, 2009 WL 1175647 (W.D. Wash. Apr. 30, 2009), the Western District of Washington granted a petition for writ of habeas corpus submitted by members of the Snoqualmie Tribe who had been banished by the Tribe while they served on the Tribal Council. The petitioners argued that they were denied due process, equal protection, and the right to confront and offer witnesses, in violation of the Indian Civil Rights Act. The court found that the petitioners had been denied due process because they were not provided sufficient notice and an opportunity to be heard.

### California Update

This update begins with case developments in several cases that were discussed in the Spring 2009 newsletter, including some interesting litigation involving the number of slot machine licenses authorized statewide under the 1999 tribal-state compacts.

On April 20, 2009, the Supreme Court denied the State of California's petition in

*California v. Cachil Dehe Band of Wintun Indians of Colusa Indian Community*, No. 08-931, 129 S. Ct. 1987. The state had appealed the Ninth Circuit's holding that other Tribes that signed the 1999 Tribal-State Gaming Compact were not required parties to a breach of contract action brought by Colusa against the state regarding the number, issuance, and allocation of slot machine licenses under the compact. After the petition for certiorari was denied, the U.S. District Court for the Eastern District of California held that the California Gambling Control Commission had the authority under the compact to unilaterally administer the draw of licenses, but that the state's calculation of the number of licenses allowed under the compact was wrong. See *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, No. S-04-2265, 2009 WL 1084830 (E.D. Cal. April 20, 2009). The district court sided with Colusa and the Picayune Rancheria of Chukchansi Indians (whom the court allowed to intervene, dismissing the state's challenge to Picayune's intervention on the ground that Picayune waited too long to intervene) and found that the compact authorizes a pool of 42,700 total licenses—over ten thousand more than the 32,151 figure put forth by California. The court also sided with Colusa regarding its priority in the license draw process, finding that a tribe should not be moved to a lower tier in the draw until it receives its full allotment of licenses allowed under the Compact (the state had moved Colusa to a lower tier after each draw in which Colusa received licenses, even though the Tribe did not receive its full allotment of licenses).

On May 26, the Supreme Court denied California's petition for certiorari in *California v. San Pasqual Band of Mission Indians*, 08-1208, \_\_\_ S. Ct. \_\_\_, 2009 WL 833151, another case involving the number of slot machine licenses allowed under the 1999 compact. The Ninth Circuit, overturning the district court, held that other signatory Tribes were not required parties to San Pasqual's lawsuit. *San Pasqual Band of Mission Indians v. California*, 295 Fed. Appx. 880 (9th Cir. 2008). Both San Pasqual and the Rincon Band of Luiseño Indians have lawsuits pending in U.S. District Court for the Southern District of California concerning the proper number of licenses under their 1999 compacts. The state had asked the court to stay Rincon's lawsuit until the *Colusa* litigation settled or alternatively to consolidate it with the *Colusa*

case, but the court rejected the request, finding that the state raised no concrete hardships or inequities it would suffer other than potentially inconsistent district court rulings. See *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, No. 04cv1151 (WMc), Order (S.D. Cal. Apr. 17, 2009).

On June 1, San Pasqual filed a claim against the state for \$550 million, the amount the Tribe claims as lost profits resulting from the state's refusal to issue the Tribe all of the licenses the Tribe claims it is entitled to under the compact. The claim is a prerequisite to filing a lawsuit against the state pursuant to the compact's terms.

In *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008), the Ninth Circuit upheld the imposition of California sales tax on construction work performed by a non-Indian subcontractor on Indian land. Specifically, the court held that a non-Indian subcontractor who purchased materials that were later delivered to a construction site for a tribal casino expansion—under a lump sum contract and as a “purchasing agent” for the Tribe—was liable for state sales taxes. The *Barona* court held that because the legal incidence of the tax fell on the non-Indian subcontractor, it did not violate the Supreme Court's prohibition against state taxation of Tribes in Indian country set forth in *United States v. Chickasaw Nation*, 515 U.S. 540 (1995), and it reversed the district court's holding that the California tax was preempted under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

A unanimous three-judge panel found that *Bracker* did not apply to invalidate the state tax “where the Tribe has invited commercial activity onto its territory for the purpose of marketing a sales tax exemption to non-Indian businesses who would otherwise be liable for the state tax under laws of general applicability.” The court found tribal interests to be minimally implicated by the tax (since the legal incidence fell on the subcontractor, downplaying the impact the cost of the tax had on the Tribe's expansion and stating that the Tribe's concern “carries minimal weight in the context of a \$75 million casino expansion, and where but for the contractual arrangement providing for indemnification by the Tribe, it would be [the contractor's] revenues—and not the Tribe's—that would be reduced.” The court similarly dismissed the federal government's interest, finding that its interest in tribal

economic development does not defeat a state's interest in raising revenue and “consistent application of its tax laws,” and that this federal interest “lessens in the specific context of a multi-million dollar casino expansion.” The court pointed to the state's interest in “preventing the manipulation of its tax laws to aid a casino in shopping tax exemptions to local businesses who otherwise would remit sorely needed revenue to the state.” The *Barona v. Yee* court also held that the tax was not preempted under the Indian Gaming Regulatory Act (IGRA), finding that IGRA's comprehensive regulation of Indian gaming did not occupy the field with respect to sales taxes imposed on third-parties purchases of equipment used to construct tribal gaming facilities.

## Hawai'i Update

On Mar. 31, 2009, the U.S. Supreme Court reversed the Hawaii Supreme Court's decision to issue an injunction prohibiting the State of Hawaii from selling or transferring certain lands held in trust for Native Hawaiians until title to the lands had been resolved. *State of Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009). In a unanimous decision, the Court held that the 1993 congressional resolution apologizing for the overthrow of the Kingdom of Hawai'i does not create any substantive claims or grant any legal rights against the state, and thus that the apology resolution did not prohibit the state from transferring the land without reaching a political settlement with Native Hawaiians. The case is discussed in more detail in the Supreme Court update on page 3.

On June 11, the House Natural Resource Committee held a hearing to examine H.R. 2314 (Abercrombie, D-Hawaii), the Native Hawaiian Government Reorganization Act of 2009. The first panel of witnesses consisted of just one witness: Rep. Mazie Hirono (D-Hawaii), who argued in favor of the bill. The second panel consisted of Hon. Micah Kane, chair, Department of Hawaiian Homelands, Kopele, Hawaii; Hon. Haunani Apoliona, chair, Office of Hawaiian Affairs, Honolulu; Gail Heriot, commissioner, U.S. Commission on Civil Rights, San Diego; Michael Yaki, commissioner, U.S. Commission on Civil Rights, San Diego; and Christopher Bartolomucci, partner, Hogan & Hartson, Washington, D.C. ♦



# DISCOVER Oklahoma City

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## Schedule at a Glance

### THURSDAY, SEPT. 10

6:30 a.m.–5:00 p.m. Registration Desk Open  
 8:00 a.m.–5:00 p.m. Exhibits Open  
**8:00–9:15 a.m. Welcoming Remarks by Oklahoma City Mayor Mick Cornett; Plenary Keynote by Professor Charles Ogletree: The Ethical Considerations of a Lawyer President**  
 9:30–10:30 a.m. Session 1A: Criminal Jurisdiction in Indian Country  
 Session 1B: Energy and the Environment  
 10:45–11:45 a.m. Session 2A: The Cherokee Freedmen  
 Session 2B: Sentencing After *Booker*  
 Noon–1:30 p.m. Foundation of the FBA Fellows Luncheon  
 1:45–2:45 p.m. Session 3A: Issues and Ethics for Lawyers Working with Corporate and Tribal General Counsel  
 Session 3B: Federal Court-Assisted Recovery Efforts: Innovations to Reduce Post-Conviction Substance Abuse and Recidivism  
 2:00–4:00 p.m. Foundation of the FBA Board Meeting  
 3:00–4:00 p.m. Session 4A: Issues and Ethics for Lawyers Working with Corporate and Tribal General Counsel (continued)  
 Session 4B: The Roberts Court on Criminal Law  
 4:15–5:15 p.m. Session 5A: Delivery of Veterans Services in Indian Country  
 Session 5B: How to Conduct a Jury Trial  
 6:00–9:00 p.m. Reception at the Oklahoma History Center

### FRIDAY, SEPT. 11

7:00 a.m.–5:00 p.m. Registration Desk Open

8:00 a.m.–4:00 p.m.  
8:00–8:30 a.m.

8:30–9:30 a.m.

9:45–10:45 a.m.

11:00 a.m.–Noon

12:15–2:00 p.m.

2:30–3:30 p.m.

4:00–4:30 p.m.

3:30–5:00 p.m.

2:00–4:00 p.m.

2:00–4:30 p.m.

2:00–4:30 p.m.

6:00–9:00 p.m.

### SATURDAY, SEPT. 12

7:00 a.m.–5:00 p.m.

8:30–9:45 a.m.

8:30–11:00 a.m.

10:00–11:30 a.m.

11:45 a.m.–1:45 p.m.

2:00–5:00 p.m.

7:00–10:30 p.m.

Exhibits Open  
 Tenth Circuit Swearing-In Ceremony  
**Welcoming Remarks by Oklahoma Governor Brad Henry; Plenary Keynote by Dean Erwin Chemerinsky: Enhancing Government: Federalism for the 21st Century**  
 Session 6A: The Roberts Court on Indian Law  
 Session 6B: Bankruptcy: Creditors' Rights and Fraud  
 Session 7A: Homeland Security and Civil Rights  
 Session 7B: Expert Discovery Issues in Civil Cases  
 Younger Federal Lawyer Awards Luncheon  
**The Oklahoma City Bombing Through the Eyes of Those Who Were Here**  
**Held at the Museum Institute for the Prevention of Terrorism.**  
**Remarks from the Architects of the Oklahoma City National Memorial Tours of the Memorial and Museum**  
 Circuit Vice Presidents Training  
 YLD Board Meeting  
 Health Law Section Board Meeting  
 Dinner and Reception at the National Cowboy and Western Heritage Museum

Registration Desk Open  
 Circuit Vice Presidents Meeting  
 Section and Division Chairs Meeting  
 Chapter Education Program  
 Presented by the Vice Presidents of the Circuits  
 FBA Awards Luncheon  
 National Council Meeting  
 Reception and Presidential Installation Banquet

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# The Nomination of Sonia Sotomayor to the Supreme Court of the United States: An Indian Law Perspective

By Richard Guest

On Tuesday, May 26, 2009, President Obama announced the nomination of Judge Sonia Sotomayor for associate justice of the U.S. Supreme Court. Confirmation hearings for Judge Sotomayor were held before the Senate Judiciary Committee from July 13 to July 16. If confirmed, Judge Sotomayor will replace Justice David H. Souter who, on Apr. 30, 2009, officially announced his retirement from the Court at the close of the 2008 term. It is expected that President Obama will push to complete the hearings and have the full Senate vote before the August recess.

## Brief Biography

Sonia Sotomayor was born in the South Bronx housing projects in 1954. Her parents had immigrated to New York from Puerto Rico during World War II. Her father, a factory worker with a third grade education, died when she was 9 years old. Shortly before her father's death, he had been diagnosed with juvenile diabetes. Her mother, a nurse, raised Sonia and her younger brother, Juan (now a doctor in Syracuse, N.Y.), instilled in them a belief in the power of education, and worked six days a week in order to send them to Catholic school, where Judge Sotomayor graduated as valedictorian of her class.

She attended Princeton University on a scholarship and graduated summa cum laude in 1976. Judge Sotomayor then attended Yale Law School, where she served as an editor to the *Yale Law Journal* and authored a student note entitled "Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights." Following her graduation from law school in 1979, she went to work as an assistant district attorney for the New York County District Attorney's Office, where she earned a reputation as "a fearless and effective prosecutor." In 1984, she entered private practice in a small civil litigation firm, representing corporations on matters related to international commercial law.

In 1991, Sotomayor was nominated by President George H.W. Bush for a federal judgeship in the U.S. District Court for the Southern District of New York. As a district court judge from 1992-98, she presided over roughly 450 cases, including the infamous 1995 injunction against Major League Baseball effectively ending the longest running baseball strike in history. In 1997, President Bill Clinton nominated her to serve as an appellate judge—the first Latina—on the U.S. Circuit Court of Appeals for the Second Circuit. Since her appointment in 1998, she has participated in over 3,000 panel decisions and authored roughly 400 opinions. Generally, Judge Sotomayor is considered a centrist and pragmatist, in the mold of a Justice Souter.

Throughout her career, she has remained involved in academia

and pro bono work, teaching classes at New York University and Columbia University and serving as a chair and member of public services associations, primarily for women and minorities. Before becoming a judge, she served for 12 years on the board of the Puerto Rican Legal Defense and Education Fund. She was appointed by Gov. Mario Cuomo to a seat on the board of the State of New York Mortgage Agency, which is tasked with helping low- and moderate-income families buy homes. As a judge, she was a member of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, and on the board of the Maternity Center Association.

## Federal Indian Law Experience

An extensive review of Sotomayor's record reveals that she has had very little exposure to—or experience in—federal Indian law. The Native American Rights Fund's research of her years as an assistant district attorney, attorney in private practice, or federal district court judge has not uncovered any cases dealing with issues pertaining to Indians or Indian tribes. During her tenure on the Second Circuit, Judge Sotomayor participated in only a handful of cases involving Indians, Indian tribes, or issues involving some aspect of federal Indian law.

Last year, in *Catskill Development v. Park Place Entertainment*, 547 F.3d 115 (2d Cir. 2008), Judge Sotomayor, writing for a unanimous panel, affirmed the district court's dismissal of the lawsuit brought by a casino development group against its competitor, which alleged tortious interference in connection with development and management of a casino in the Catskills with the St. Regis Mohawk Tribe. Judge Sotomayor found that the earlier contracts formed were void under the Indian Gaming Regulatory Act (IGRA) since they had not been approved by the National Indian Gaming Commission (NIGC), allowing the tribe to move forward with its later contract. Judge Sotomayor adopted a broad reading of IGRA ("designed to protect the best interests of Indian tribes"), rejecting arguments to narrowly define the term "Indian lands" or narrowly apply the term "management contract."

In 2006, Judge Sotomayor wrote an opinion for a unanimous panel in *Jones v. Parmley*, 465 F.3d 46 (2d Cir. 2006), a case which involved a Section 1983 lawsuit by several dozen members of the Onondaga Nation and their supporters against state and county law enforcement officers. The lawsuit was in relation to their mass arrest during a peaceful protest to express their disapproval of a tribal state agreement regarding state taxation of on reservation sales of cigarettes. Judge Sotomayor affirmed the district court's denial of the

PERSPECTIVE continued on page 10



law enforcement officers' motion for summary judgment on the basis of qualified immunity in relation to the plaintiffs' First Amendment (free speech and right to assemble) and Fourth Amendment (freedom from excessive force) claims. In recounting the facts in this case, Judge Sotomayor detailed the background leading up to the arrest of plaintiffs, including the formation of an "Indian Detail" by the New York State Patrol, which "consisted of seventy state troopers dressed in full riot gear and bearing riot batons" who removed their name tags in violation of the State Police Manual directive and who, without any prior warning or order to disperse, "charged into the demonstration and began arresting protesters allegedly indiscriminately, assaulting plaintiffs, beating them with their riot batons, dragging them by their hair and kicking them."

In 2004, in *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004), the Second Circuit dealt with various challenges to the Contraband Statutes, legislation enacted by New York in connection with the Master Settlement Agreement executed between the four major domestic manufacturers and most of the states. Companies who import cigarettes for resale from foreign manufacturers argued, in part, that New York selectively enforced the Contraband Statutes so as to "economically favor [wholesalers and importers] on Native American Reservations situated in the State of New York," thereby discriminating against plaintiffs in violation of the Equal Protection Clause (EPC). Judge Sotomayor joined a unanimous panel remanding this question back to the district court that had held that the appellants could not satisfy a requisite element to establish a violation of the EPC—an impermissible consideration of race, religion, etc. The district court relied on *Washington v. Yakima Indian Nation* (finding that a legislative classification singling out tribal Indians was not "suspect," because of the unique legal status of Indian tribes under federal law), and *New York Ass'n of Convenience Stores v. Urbach* (applying rational basis review to a New York State policy of not enforcing tax laws with respect to on-reservation cigarette sales). The panel concluded that it should remand, in part, based on its determination that district court's reliance upon *Yakima Nation* and *Urbach* was unclear since those decisions only dealt with the exercise and non-exercise, respectively, of state jurisdiction on reservation land.

In 2001, in *United States v. White*, 237 F.3d 170 (2d Cir. 2001), Judge Sotomayor wrote for a unanimous panel in a case involving members of the St. Regis Mohawk Tribe who operated wholesale warehouses where large quantities of cigarettes and liquor were sold on the St. Regis Mohawk Indian Reservation. The tribal member defendants had entered conditional guilty pleas in federal district court, reserving review by the U.S. Court of Appeals for the Second Circuit of their conviction for willfully violating Section 60501 of the Internal Revenue Code by failing to file Form 8300 reports of transactions in which they received payments in excess of \$10,000. Judge Sotomayor upheld their conviction, rejecting the defendants' argument that their cash transactions fell within the "foreign cash transaction" exception to Section 60501 because they took place entirely within the St. Regis Mohawk Indian Reservation. Judge Sotomayor, citing a long list of Indian law precedent, held that reservations have been incorporated into the territory of the United States and are not foreign territory, and thus that transactions on Indian reservations are not entitled to the "foreign cash exception." Judge Sotomayor "reinforced" this holding by reference to *Reich v.*

*Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), finding that Section 60501 is a federal statute of general applicability, which applies to Indians and their property interests.

In 2000, Judge Sotomayor joined a unanimous panel in *Bassett v. Mashantucket Pequot Tribes*, 204 F.3d 343 (2d Cir. 2000), that affirmed the doctrine of tribal sovereign immunity. This case focused primarily on a question of copyright law, involving a suit by a film producer against the Mashantucket Pequot Tribe, tribal museum, and tribal staff alleging copyright infringement under the Copyright Act, as well as state law claims of breach of contract and tortious interference with contract. The panel held that the claims against the tribe must be dismissed under the doctrine of tribal sovereign immunity. In particular, the panel rejected plaintiff's argument that the Copyright Act is a federal statute of general application and therefore "presumably applies to Indian Tribes" based on *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996). The panel found that "the fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it." However, the panel reversed the district court's dismissal of the claims against the tribal museum and tribal staff, finding that the tribe was not an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. The case was remanded to the district court for a determination whether the tribal museum (agency of the tribe) and the tribal staff (scope of authority) are entitled to the immunity of the tribe.

Judge Sotomayor has also participated in two cases relevant to Indian law in which unsigned summary orders were issued. First, in *Atlantic States Legal Foundation Inc. v. Whitman*, 14 Fed. Appx. 76 (2d Cir. 2001), the panel denied a challenge by the Atlantic States Legal Foundation (ASLF), which sought to enjoin the Environmental Protection Agency (EPA) from releasing federal funds for construction of a sewer treatment facility. On appeal, the Onondaga Nation, as an amicus party, raised the argument that the EPA also violated the National Historic Preservation Act by failing to consult with the tribe concerning the effects of the facility on potential historical and archaeological sites. The panel determined that, in general, an argument raised for the first time on appeal would not be considered; that the Onondaga Nation was not a plaintiff in this action; and that there was a likelihood that the tribe will be able to file an action against the EPA on these grounds at another appropriate stage of construction of the facility. Second, in *Stoddard v. United States*, 216 F.3d 1073 (2d Cir. 2000), the panel affirmed the district court's dismissal of a pro se plaintiff's complaint against the United States alleging that Liberty Island, located in New York Harbor and owned by the U.S. government, was never properly purchased from its Native American owners. On appeal, appellant contended that federal law conflicts with "constitutional Indian law" and that he should have "third party adjudication in relation to the jurisdictional conflict over Liberty Island." The panel held that the district court properly dismissed the action on the grounds, inter alia, of lack of subject matter jurisdiction, in light of the absence of evidence that the United States has waived its sovereign immunity from suit in this matter.

Judge Sotomayor's direct experience with Indian Law is too thin to form any solid theories regarding her potential approaches to Indian law cases that may come before the Court in the future. None

of the opinions she authored reveal her views regarding tribal sovereignty, tribal authority over non-Indians, state authority on Indian reservations, or the scope of the federal trust responsibility to Indian tribes. As we have learned directly from federal judges who are unfamiliar with Indian law, judges seek parallels with areas of law and modes of analysis with which they are most familiar. For Judge Sotomayor, her approach to issues of importance to Indians and Indian tribes may best be informed by her background as a corporate litigator when gaming, commercial, and tax issues are at issue; as an assistant district attorney when law enforcement and public safety issues arise on Indian reservations; and even perhaps as a Puerto Rican law student—writing a note arguing for territory’s right to exploit its offshore seabeds without violating the equal footing doctrine—when tribal sovereignty issues arise.<sup>1</sup>

### Should Indian Country Support or Oppose Sotomayor’s Nomination?

As a replacement for Justice Souter, who has been on the Court for nearly 20 years,<sup>2</sup> Judge Sotomayor offers a fresh opportunity for Indian Country to re-energize its efforts to slow—and eventually reverse—the erosion of tribal sovereignty by the Court. Although there is little possibility that Judge Sotomayor’s vote on the Court will, by itself, change the outcome in future Indian law cases, Indian country needs a champion on the Court—a justice who will look beyond just the last 30 years of Indian law. As Colordao Law School Dean David Getches noted in his 2001 article, “Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color Blind Justice, and Mainstream Values,” 84 Cal. L. Rev. 1573 (2001), Indian country needs an intellectual leader among the justices to emerge—one who “can assume the hard work of understanding Indian law, its historical roots, and its importance as a distinct field.” Failing an intellectual “rediscovery,” he warns, means Indian law will continue to unravel and Indian interests will suffer.

Most observers already see a clear path for Judge Sotomayor’s confirmation. Members of Indian country should carefully consider expressing their support for her confirmation, perhaps exploring early opportunities for her to accept a role as their intellectual leader. Once confirmed, Indian country can extend her an invitation to visit tribal courts, meet with tribal leaders and judges, and to observe firsthand the challenges confronting tribal governments. ♦

*Richard Guest is staff attorney at the Native American Rights Fund in Washington, D.C.*

### Endnotes

<sup>1</sup>Her article reveals exposure to and interest in the special status of U.S. territories struggling with sovereignty, identity, and a dearth of natural resources. Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 YALE L.J. 825 (1979).

<sup>2</sup>A summary of Souter’s Indian law jurisprudence is available at [turtletalk.wordpress.com/2009/05/03/justice-souters\\_federal\\_indian\\_law\\_legacy/](http://turtletalk.wordpress.com/2009/05/03/justice-souters_federal_indian_law_legacy/). In general, his record sides with tribal interests over questions of treaties and treaty interpretation and when the U.S. is a defendant, but regularly opposes tribal interests over questions of taxation and tribal jurisdiction over non-Indians.

## WILL A JUSTICE SOTOMAYOR TRANSFORM INDIAN LAW?

*Matthew L.M. Fletcher*

Federal Indian law is at a dead end in the Supreme Court, but a new justice—a transformative justice—could shake the Court out of its current rut. But it’s a stretch ...

Only time will tell whether President Obama’s nominee to replace Supreme Court Justice David Souter, Judge Sonia Sotomayor, will be sufficient to transform federal Indian law from its current status as a backwater of constitutional law. And there is no doubt that the Court’s view of federal Indian law and policy—and particularly Indian tribal governments—is stagnant and atavistic. The Court is in need of a visionary mind to help refocus its collective mindset about Indian law and policy.

Judge Sotomayor will be only the third racial minority and the third woman on the Supreme Court. Importantly, she will be the first minority justice with an inkling about the special property and political rights of certain minority people—in her case, the people of Puerto Rico. In some ways, American Indians and Puerto Ricans have much in common. In large measure, neither group wants complete integration into the American polity, preferring an existence on the fringes of the United States. This fact alone may help to shake up the mentality of the rest of the justices, who seem a bit surprised and annoyed that Indian people don’t want to give up their separate political and ethnic identities.

The addition of one Obama-appointed justice is not likely to make much of a difference, except in a case or two over the course of years. A Justice Sotomayor may be a simple replacement for Justice Souter’s vote in Indian law cases. Souter’s votes tended to favor tribal interests in treaty and trust cases, but went against tribal interests in taxation and jurisdiction cases. Flipping Justice Souter’s vote in a tax or jurisdiction case would not have made any difference in the outcome of any major case in the last ten years, so the impact of a new justice is muted.

However—and this is a huge if—a new justice could force the remainder of the justices to reconsider Indian law principles. Right now, the Court merely ignores inconvenient Indian affairs history, congressional intent, or its own precedents. A transformative justice could at least force the Court to address history, to address foundational principles. That might be enough to preserve the votes of Justices Ginsburg, Breyer, and Stevens. And it might be enough to pick up a vote from Justice Kennedy, or even Justice Alito, who is as close to a blank slate on Indian law as any of the justices. Who knows? ♦

*Matthew L.M. Fletcher is associate professor and director of the Indigenous Law and Policy Center at Michigan State University Law School. This article is reprinted (as adapted) with permission from Turtle Talk, [www.turtletalk.wordpress.com](http://www.turtletalk.wordpress.com), the blog of the Indigenous Law and Policy Center.*

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