Federal Indian Law

Newsletter of the Federal Bar Association
Indian Law Section

Winter 2010 Issue

A Word From the Chair

By Elizabeth Ann Kronk

Aaniin! The past few months have been very busy. There are a lot of new and exciting developments within our section.

D.C. Midyear Conference

On Friday, Nov. 13, 2009, the section, along with co-hosts the National Native American Bar Association and the Native American Bar Association of Washington, D.C., hosted the 11th Annual Washington, D.C. Indian Law Conference at the National Museum of the American Indian. Hopefully we have finally found a home for the D.C. midyear conference in the National Museum of the American Indian, and we look forward to hosting future conferences at the Museum. This conference was only possible because of the generosity of our tremendous sponsors, Akin Gump Strauss Hauer & Feld LLP, Greenburg Traurig, Holland & Knight LLP, Patton Boggs LLP, and Sonnenschein Nath & Rosenthal LLP.

Heather Dawn Thompson, section secretary and partner at Sonnenschein Nath & Rosenthal, and Katie Morgan, associate at Akin Gump Strauss Hauer & Feld LLP, served as co-chairs for the event and did an amazing job putting together a spectacular conference. The conference addressed many cutting-edge and important issues for Indian Country, including creative land ownership options for tribes, civil and regulatory jurisdictional fixes and tribal bankruptcy. A highlight of the conference was the keynote address from the solicitor of the Department of the Interior, Hilary Tompkins. Solicitor Tompkins endeared herself to the audience with her heartfelt pledge to work toward the best interests of Indian Country.

FBA Indian Law Section Committees

The section is seeking interested and motivated individuals to serve on section committees. Section committees include: Development of Federal Indian Law, Public Education, Legislation, Tribal Justice, Programming and Legal Education, Indian Law on Bar Exams, Nominations and Elections, Awards, and Membership. If you have an interest in serving on any of these committees or would like additional information on the responsibilities of the committees, please contact me at (406) 243-6781 or elizabeth.kronk@umontana.edu.

Nominations for Baca Lifetime Achievement and Outstanding Service Awards

Please consider nominating someone for either the Lawrence R. Baca Lifetime Achievement Award or the Indian Law Section Outstanding Service Award. Past recipients of the Baca Lifetime Achievement Award include Lawrence Baca and Professor Phil Frickey. Past recipients of the Indian Law Section Outstanding Service Award include Jack Lockridge and Hon. D. Michael McBride. The deadline for nominations is Friday, Feb. 12, 2010. Please submit nominations to the chair of the Awards Committee, Hon. D. Michael McBride, at mike.mcbride@crowedunlevy.com. Nominations should specifically address why the nominee meets the criteria for each award outlined below.

Qualifications for Lawrence Baca Lifetime Achievement Award:

1. Must have worked in the field of Indian law for at least twenty years as a practitioner, judge, legislator, leader, scholar or educator;
2. Be of good standing and held in high esteem in his or her professional arena; and
3. Have made significant contributions to the field of Indian law through litigation, development of legislation, scholarship or the development of Indian law students or through tribal leadership.

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Loretta Tuell Becomes First Native American Woman to Win American Bar Association Margaret Brent Award

by Mike Anderson, Anderson Tuell LLP

On Aug. 2, 2009, Loretta A. Tuell, a member of the Nez Perce Tribe, received the American Bar Association Margaret Brent Award at the Annual ABA Meeting in Chicago. Tuell was one of five distinguished attorneys to receive the award, and she is the first American Indian woman to receive the award in its almost 20-year history. The award is given to women lawyers who have made unique contributions to the legal profession; previous recipients include Justice Sandra Day O'Connor, Justice Ruth Bader Ginsburg, Janet Reno, and Hillary Clinton. Margaret Brent was the first female lawyer in America and was involved in 124 court cases over a span of eight years, winning every case. She formally demanded a "vote and voice" in the Maryland Assembly in 1648 (which the governor denied), and, over 250 years later, *Harper's* magazine called her "the first woman in America to make a stand for the rights of her sex."

Tuell received the award based on her mentorship of female Native American attorneys, public service at the U.S. Senate and the Department of the Interior, private law practice, and leadership with nonprofit entities. She grew up on the Nez Perce reservation and graduated from Washington State University and UCLA School of Law. Tuell is currently a partner at Anderson Tuell LLP, an Indian-owned law firm in Washington, D.C., that is among the first law firms in the country with a Native American woman as a founding partner. Before co-founding Anderson Tuell, she served as counsel to Sen. Daniel K. Inouye (D-Hawaii) on the Senate Committee on Indian Affairs, as counselor to the assistant secretary—Indian affairs, and as director of the Office of American Indian Trust. For the past eight years, she has served as legal counsel to Indian tribes throughout the country. In her acceptance speech, Tuell thanked the National Congress of American Indians, the Native American Rights Fund, and the National Indian Gaming Association, as well as the Nez Perce Tribe, the Soboba Band of Luiseño Indians, and the Table Mountain Rancheria, whose leaders attended the awards ceremony (and who sponsored tables at the ceremony). She also encouraged the

American Bar Association to continue to seek opportunities to advance female Indian attorneys and all Indian attorneys in arenas that have not traditionally been open to them, including judgeships. Let us all congratulate Loretta Tuell on her presentation with this distinguished award and this recognition of her work and accomplishments. ◆

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Qualifications for Indian Law Section Outstanding Service Award

Only FBA members and FBA staff can qualify for this Award, and only service rendered over the previous year is considered. Award recipients must demonstrate his or her commitment to the section through at least one of the following:

1. Significantly contributed to the strong continuance and development of the Indian Law Section.
2. Worked to improve the strength of the Indian Law Section by recruiting new members and working with other FBA sections.
3. Helped develop a positive outlook and rapport between the FBA and other Native American organizations.
4. Promotes the mission of the Indian Law Section or the FBA.
5. Develops significant outside relationships beneficial to the section.

We have many wonderful ideas for the New Year, and I look forward to developing the section in new and exciting ways. I hope that you and your loved ones had a happy holiday season, and I wish you a Happy New Year. I look forward to seeing you in 2010.

Please feel free to contact me at any time with questions or concerns, elizabeth.kronk@umontana.edu.

Chi Miigwetch! ◆

Indian Law Cases, News, and Notes

Supreme Court Update

As of the end of 2009, there were seven noteworthy petitions for writ of certiorari pending before the U.S. Supreme Court. The Court has not granted review of any petition in an Indian law case this term, but it has denied eight petitions.

Pending Petitions

A member of the Shinnecock Indian Nation filed a petition for a writ of certiorari in *In re Shinnecock Smokeshop* (No. 09-635), seeking reversal of the U.S. Patent and Trademark Office's decision not to grant him trademarks using his tribe's name: "Shinnecock Brand Full Flavor" and "Shinnecock Brand Lights." Initially, the examining attorney refused to issue the mark on the basis that the tribe was a "person." On appeal to the Trademark Trial and Appeal Board, the board refused to issue the mark on the basis that the tribe was an "institution." Smith argues that the office's decision is incorrect as a matter of statutory interpretation and that, since non-Indians have been granted marks with tribal and Indian names, it is illegal race discrimination and, specifically, a denial of his right to equal protection under the Fifth Amendment to deny his request, as a Native American, for trademarks that incorporate his tribe's name. On Dec. 9, 2009, the United States filed a waiver of its right to respond, and the petition was scheduled for conference on Jan. 15, 2010.

The same individual who filed the petition in *In re Shinnecock Smokeshop* also had filed a petition in *Smith v. Shulman* (No. 09-512), in which he argued that a rebate from a tobacco company to an Indian proprietor of an on-reservation smoke shop is not taxable income for federal income tax purposes (the petitioner also argued that the Court should overturn *Cherokee Nation v. Georgia*'s interpretation of the Indian Commerce Clause's language of "with" to mean "over" and finding that Indian tribes are "domestic dependent nations" rather than "foreign nations). The U.S. Court of Appeals for the Second Circuit dismissed his case on the grounds that the U.S. Tax Court had exclusive jurisdiction over his appeal of federal income taxes and penalties assessed against his on-reservation income. The *Smith v. Shuman* petition was denied on Dec. 7, 2009.

Two petitions were filed on Nov. 6, 2009, by individuals who are lineal descendants of Mdewakanton Sioux who were loyal to the United States during an uprising in 1862 (Loyal Mdewakantons). The petitioners argue that, as the originally intended trust beneficiaries of these lands, they have an equitable interest in the income, profits, and proceeds being derived from the lands, including casino revenue. Specifically, they argue that congressional appropriations acts in 1888, 1889, and 1890 created a trust interest and that this interest was not terminated by Congress's action in 1980 of transferring beneficial interest in the lands to the Prairie Island Indian Community, the Shakopee Mdewakanton Sioux Community, and the Lower Sioux Indian Community. The U.S. Court of Appeals for the Federal Circuit, however, found in *Wolfchild v. United States* that the petitioners did not hold a trust interest in the lands as descendents of the Loyal Mdewakantons.

The petition in *Wolfchild v. United States* (No. 09-579) raises the following questions: (1) whether, after *Carcieri v. Salazar*, federal subject matter jurisdiction exists over claims brought by Indian trust beneficiaries claiming that the federal government violated the Indian Reorganization Act by taking land into trust for Indian communities recognized after 1934 and composed of individuals who were precluded from forming tribes under congressional enactments; (2) whether the circuit court's holding that congressional appropriation acts created "statutory use restrictions" but not a trust relationship departs from applicable statutory interpretation and trust principles; and (3) whether the circuit court's holding that congress terminated the trust relationship in 1980 impermissibly violates the Indian Reorganization Act as well as the "clear and unambiguous" requirement for trust termination. The petitioners in *Zephier v. United States* (No. 09-580) argue a breach of federal trust responsibility based on the federal government's treating certain lands in Minnesota as being held in trust for the Prairie Island Indian Community, the Shakopee Mdewakanton Sioux Community, and the Lower Sioux Indian Community (in none of which the petitioners are enrolled), and the federal government's failure to distribute proceeds, income, and profits from the lands to the petitioners. In their petition for certiorari, the *Zephier* petitioners contend that the circuit court erred in failing to recognize a trust corpus in the real property at issue for the benefit of the Loyal Mdewakantons, and that the circuit court should have held the United States to be judicially estopped from arguing that a trust does not exist based on contrary arguments the federal government made before the U.S. Court of Appeals for the Eighth Circuit in *Cermak v. United States*.

A petition for a writ of certiorari was filed in *Harvest Institute Freedman Federation v. United States* (No. 09-585) by petitioners who are representatives of descendants of persons held in slavery by citizens of the Cherokee Nation, Chickasaw Nation, Choctaw Nation, Muscogee (Creek) Nation, and Seminole Nation. The petitioners seek reversal of a decision of the U.S. Court of Appeals for the Federal Circuit, which affirmed the U.S. Court of Federal Claims' dismissal of the plaintiffs' request for a declaratory judgment and monetary damages based on the federal government's alleged failure to ensure that the descendants of persons held in slavery by citizens of the Five Nations received the property rights due them pursuant to treaties with the federal government. The Court of Federal Claims had held that the plaintiffs failed to state a claim on which relief could be granted and that their claims were barred by the six-year statute of limitations in 28 U.S.C. § 2501. Certiorari is sought on the issue of whether the statute of limitations begins to run on a claim for recovery of a trust corpus in the absence of the trustee's repudiation of the trust. The petition has been scheduled for conference on Jan. 15, 2010.

On Dec. 18, 2009, the plaintiffs in *Cobell v. Salazar* (No. 09-758) filed a petition for a writ of certiorari on the question of whether the U.S. Court

of Appeals for the District of Columbia Circuit's decision that the government need not conduct an accurate and complete accounting of all funds in Individual Indian Money trust accounts (but rather need only conduct "the best accounting possible, in a reasonable time, with the money Congress is willing to appropriate) is inconsistent with the Trust Reform Act and Supreme Court precedent. The $3.4 billion settlement of the *Cobell* litigation announced in December 2009 has not yet been approved by Congress, and the plaintiffs filed the petition to protect themselves in the event that the settlement is not finalized. The petition was filed together with a motion asking the Court to hold the petition in abeyance pending congressional enactment of legislation specified in the *Cobell* settlement agreement and the district court's final approval of the settlement. The deadline for congressional approval of the settlement has been extended to Feb. 28, 2010.

On Dec. 21, 2009, a petition for a writ of certiorari was filed in *Rosenberg v. Hualapai Indian Nation* (No. 09-742) by an individual who sued Hualapai River Runners, a whitewater rafting business owned and operated by the Hualapai Indian Nation, in Arizona state court for injuries suffered in a whitewater rafting accident and whose case was dismissed on sovereign immunity grounds. The Hualapai Indian Nation's brief in opposition is due on Jan. 25, 2010.

Denied Petitions

Eight petitions for writ of certiorari raising Indian law issues have been denied this term:

- *Roy v. United States* (No. 09-346)—An appeal from a Minnesota state court decision affirming a tribal member's conviction under the state's felon-in-possession of a firearm law; the defendant tribal member argued that the Minnesota statute prohibiting felons from carrying firearms is civil/regulatory and therefore not within the purview of the state's Public Law 280 jurisdiction, and that the state prosecution was barred by treaties between the United States and the Chippewa in which the Chippewa specifically reserved the right to hunt and were provided annuity payments for firearms and ammunition;
- *Smith v. Shulman* (No. 09-512)—A tribal member's appeal of a federal appeals court decision dismissing his action challenging the assessment of federal income taxes and penalties against his on-reservation income upon finding that the U.S. Tax Court has exclusive jurisdiction of such actions (discussed in more detail above);
- *Benally v. United States* (No. 09-542)—An appeal from a decision of the U.S. Court of Appeals for the Ninth Circuit in which the Ninth Circuit denied an Indian defendant's motion for a new criminal trial where a juror, in an affidavit, stated that other jurors made derogatory remarks about Indians and discussed the need to "send a message back to the reservation;
- *Pyke v. Cuomo* (No. 09-242)—An appeal from a decision of the U.S. Court of Appeals for the Second Circuit where the circuit court dismissed Native American plaintiffs' equal protection claims against state law enforcement officials arising from unrest on the Mohawk Indian Reservation;
- *Elliott v. White Mountain Apache Tribal Court* (No. 09-187)—An appeal from a decision by the U.S. Court of Appeals for the Ninth Circuit dismissing plaintiff's claims for failure to exhaust tribal court remedies (discussed in the Fall 2009 issue of *Federal Indian Law*);
- *Harjo v. Pro-Football Inc.* (No. 09-326)—An appeal from a decision by the U.S. Court of Appeals for the D.C. Circuit holding that the doctrine of laches precluded consideration of plaintiffs' action to cancel the trademark for the Washington Redskins football team (discussed in the Fall 2009 issue of *Federal Indian Law*);
- *Barrett v. United States* (09-32)—An appeal of a decision by the U.S. Court of Appeals for the Tenth Circuit holding that a tribal chairman was not immune from federal income taxes on his salary, which was paid by tribal funds received under the Indian Tribal Judgment Funds Use or Distribution Act (discussed in the Fall 2009 issue of *Federal Indian Law*); and
- *Hendrix v. Cofey* (No. 08-1306)—An appeal of a decision by the U.S. Court of Appeals for the Tenth Circuit holding that there is no federal subject matter jurisdiction over claims relating to disenrollment from membership in an Indian tribe and that such claims fall exclusively under tribal jurisdiction).

Inside the Beltway Update

Executive Branch

At the summit of tribal nations held on Nov. 5, 2009, President Obama signed a presidential memorandum directing federal agencies to provide a detailed plan within 90 days on plans to improve the implementation of President Clinton's Executive Order 13175 on tribal consultation (the text of the President's remarks at the summit is available at www.whitehouse.gov). In response to the memorandum, several agencies consulted with tribes on improving the agencies' tribal consultation policies:

- The Department of the Interior sought comments through Jan. 15, 2010, and hosted meetings across the nation in Dececmber and January. Tribal consultation meetings were held on December 2 in Anchorage, Alaska; December 9 in Portland, Ore.; Dec. 14 in Washington, D.C.; Jan. 5 in Fort Snelling, Minn.; Jan. 7 in Oklahoma City, Okla.; Jan. 12 in Phoenix, Ariz.; and Jan. 14 in Palm Springs, Calif.
- The Department of Labor hosted its meetings in conjunction with the Department of Interior's meetings and accepted comments and questions.
- The Department of Justice began hosting conference calls by region in early December and accepted comments through Jan. 11, 2010.
- The Department of Transportation issued a letter to tribal leaders and accepted comments through Jan. 15, 2010.

The Department of Interior is also conducting tribal consultation and seeking comments on potential draft revisions to 25 C.F.R. Parts 81 and 82 concerning tribal reorganization under the Indian Reorganization Act and the Oklahoma Indian Welfare Act. Consultation meetings have been held on or scheduled for Dec. 2 in Anchorage, Alaska; Jan. 12 in Brooks, Calif.; Jan. 14 in Pala, Calif.; Jan. 20 in Minneapolis, Minn.; and Jan. 26 in

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Oklahoma City, Okla. In addition, the department also collected comments on its strategic plan through Nov. 10, 2009.

The Department of Justice held listening sessions in Minnesota in late October to discuss public safety issues in Indian Country. The Bureau of Indian Affairs reports rates of violent crime at ten times the national average in some parts of Indian Country.

The Small Business Administration announced proposed changes to its 8(a) program, including joint ventures between Alaska Native Corporations and tribally owned entities and other firms. Comments on the proposed changes were accepted through Dec. 28, 2009.

On Dec. 8, 2009, the Obama Administration announced the settlement of the long-running *Cobell v. Salazar* Indian trust mismanagement case. The settlement by the parties, which needs both judicial and legislative approval, is worth over $3 billion. $1.4 billion would be paid to the individual Indian plaintiffs, and $2 billion is authorized to fund an existing land consolidation program. The settlement also creates an Indian education scholarship fund of up to $60 million to improve access to higher education for Indians. The deadline for congressional approval of the settlement has been extended to Feb. 28, 2010. More information is available at www.cobellsettlement.com.

And on Dec. 15, 2009, the Bureau of Indian Affairs issued its proposed finding that the Shinnecock Indian Nation of New York, whose petition for federal recognition was filed in the 1970s and completed over a decade ago, meets the criteria for federal recognition. A final determination is due in mid-2010.

LEGISLATIVE BRANCH

U.S. Senate

The Senate Committee on Indian Affairs (SCIA) held several hearings during the final months of 2009. The SCIA held an oversight hearing on the federal acknowledgement process on Nov. 4, 2009, and an oversight hearing on drug trafficking and gang activity in Indian Country on November 19. On Dec. 3, 2009, the committee held an oversight hearing on dental health care in Indian Country and chronic underfunding of contract health services. On December 8, the Committee held a hearing on a bill to address the management of the Utah Navajo Trust Fund, and on December 17, the committee held an oversight hearing on the *Cobell* settlement.

The SCIA held an oversight hearing on land-into-trust, land title, probate and other backlogs at the Interior Department on Dec. 8, 2009. On December 17, the committee, by a voice vote, approved S. 1703—better known as the *Carcieri*-fix bill, because it would remedy aspects of the Supreme Court's decision in *Carcieri v. Salazar*. The committee also accepted an amendment that requires the Department of the Interior to come up with a list of tribes that may be affected by the *Carcieri* decision.

Also on December 17, the Senate Committee on Indian Affairs approved S. 1011, the Native Hawaiian Government Reorganization Act of 2009—better known as the Akaka bill after its sponsor Sen. Daniel Akaka (D-Hawaii)—which would recognize the right of Native Hawaiians to reorganize into a single governing entity recognized by the United States. The House Natural Resources Committee approved H.R. 2314, the House version of the bill sponsored by Rep. Neil Abercrombie (D-Hawaii), on December 16, moving the bill to consideration by the entire House of Representatives.

On Dec. 21, 2009, Sen. Byron Dorgan (D-N.D.) announced that S. 1790—a bill to permanently reauthorize the Indian Health Care Improvement Act unanimously approved on Dec. 3, 2009—was included in H.R. 3590, the national health care reform package that was passed by the Senate on December 24. Previously, Sen. Dorgan had issued a letter inviting tribal input on the services of the Bureau of Indian Affairs and the Indian Health Service.

U.S. House of Representatives

On Nov. 4, 2009, the House Natural Resources Committee held a hearing on H.R. 3742 and H.R. 3697—legislation introduced in the House to address the Supreme Court's decision in *Carcieri v. Salazar*—but has yet to take action. On December 2, the committee held a hearing on H.R. 725, the Indian Arts and Crafts Amendment Act of 2009. The hearing was followed by a committee mark up on December 16, where the bill was reported to the full House favorably.

Northeast Update

In *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir. 2009), the U.S. Court of Appeals for the Second Circuit upheld the Department of the Interior's determination not to acknowledge the tribal existence of the Schaghticoke Tribal Nation. The nation argued on appeal that the department's determination was the product of improper political influence by Connecticut state officials and was issued in violation of the Vacancies Reform Act. The appeals court agreed with the district court that the nation presented insufficient evidence to support a claim of improper political influence. Relying on its earlier decision in *Town of Orangetown v. Ruckleshaus*, the Second Circuit court noted that "even if the Connecticut elected officials 'intended to' influence the [nation's] Reconsidered Final Determination, there is no evidence that they '*did* cause the agency's action to be influenced by factors not relevant under the controlling statute.'" The court also rejected that the Schaghticoke Tribal Nation's argument that the determination was made in violation of the Vacancies Reform Act. The Interior Department's regulations allow for Indian acknowledgement decisions to be made by either the assistant secretary–Indian affairs (AS-IA), or the AS-IA's authorized representative. The Schaghticoke determination was made the associate deputy secretary, who was appointed by the secretary of the Interior to perform Indian acknowledgement duties because both the assistant secretary–Indian affairs and the principal deputy assistant secretary–Indian affairs positions were vacant. The appeals court held that there was no violation of the Vacancies Reform Act because the "Secretary of the Interior … performing the Assistant Secretary's duties, simply named an 'authorized representative' … to decide whether to acknowledge the Schaghticoke."

In *Nulankeyutmonen Nkihtaqmikon v. Impson*, 585 F.3d 495 (1st Cir. 2009),

the U.S. Court of Appeals for the First Circuit faced a second appeal from Nulankeyutmonen Nkihtaqmikon (NN), a group of Passamaquoddy tribal members challenging the Bureau of Indian Affairs' approval of a lease of Passamaquoddy lands for the construction of a liquefied natural gas facility. NN first filed suit in 2005, arguing that the bureau's action of approving the lease violated the National Environmental Policy Act, the National Historic Preservation Act, the Leasing Act, the Administrative Procedure Act, and the Endangered Species Act. The district court granted the BIA's motion to dismiss, NN appealed, and the circuit court held that "exhaustion of agency remedies was 'mandatory' under governing precedent, subject only to … established exceptions … ." The court remanded and instructed the district court to consider whether NN merited an exception to the exhaustion requirement. On remand, NN did not raise any exceptions to the exhaustion requirement, but rather argued that the appeals court erred in imposing the exhaustion requirement in the first place. The district court dismissed the case again. Meanwhile, NN had filed a protective administrative appeal with the Board of Indian Appeals. In its second appeal, NN argued that judicial review of agency action under the Administrative Procedure Act does not require exhaustion of administrative agency remedies unless both internal agency review is available and the final agency action is rendered inoperative during such review. In response, the BIA changed its position and argued that its approval of the lease was inoperative under its regulations. The First Circuit did not address the merits of the parties' arguments but instead affirmed the lower court's judgment. Noting the BIA's commitment to afford NN internal agency review, the appeals court concluded that NN had not demonstrated any error as to the court's imposition of the exhaustion requirement, nor shown that any serious injustice would result from the requirement's imposition.

Also, the U.S. Court of Appeals for the Second Circuit issued a summary order in *Frazier v. Turning Stone Casino*, No. 08-5919-cv (2d Cir. Oct. 8, 2009), dismissing for lack of subject matter jurisdiction a case brought by boxing legend "Smokin'" Joe Frazier against a casino owned by the Oneida Indian Nation alleging that his picture was used without his permission to promote a boxing match between his daughter and the daughter of Muhammad Ali. Citing its earlier decision in *Romanella v. Hayward*, the court also held there was no diversity jurisdiction since "[a]n Indian Tribe is not a citizen of any state for the purposes of diversity jurisdiction" and noted that relief against the Oneida Indian Nation, the casino, and its agents could be sought in the Oneida Indian Nation's courts.

Southeast Update

In *Memphis Biofuels LLC v. Chickasaw Nation Industries Inc.*, 585 F.3d 917 (6th Cir. 2009), a case involving a contract dispute between a federally-chartered corporation owned by the Chickasaw Nation and a biodisel refining company, the U.S. Court of Appeals for the Sixth Circuit held that incorporation under the Indian Reorganization Act (IRA) does not automatically waive tribal sovereign immunity. The court also found no waiver of the corporation's sovereign immunity because the Chickasaw Nation had not explicitly waived its sovereign immunity in the corporate charter and the corporation's board had not approved a waiver with respect to the plaintiff company, as required by the charter. Chickasaw Nation Industries Inc. (CNI) is a corporation wholly owned by the Chickasaw Nation and incorporated under Section 17 of the IRA, 25 U.S.C. § 477 (a Section 17 Corporation). CNI entered into an agreement with Memphis Biofuels LLC (MBF), a Delaware limited liability company. During the course of negotiations, MBF insisted on the inclusion of a provision expressly waiving any sovereign immunity of CNI and a representation and warranty that the waiver was valid and enforceable. The agreement also contained a provision requiring arbitration of disputes. Annotations to the draft agreement by CNI's lawyers stated that CNI board approval was necessary to waive tribal-sovereign immunity, but both parties ultimately signed the agreement notwithstanding the lack of board approval. CNI repudiated the agreement, MBF filed a demand for arbitration, and CNI refused to arbitrate.

CNI filed suit against MBF in the Chickasaw Nation district court, seeking a declaratory judgment that the sovereign immunity waiver was invalid for lack of board approval and injunctive relief to prevent arbitration. MBF then filed suit in federal district court for declaratory relief that the CNI waiver was effective, an order compelling arbitration, and a temporary restraining order prohibiting CNI from proceeding with its case in the nation's district court. CNI moved to dismiss the federal court suit for lack of subject matter jurisdiction or, in the alternative, to stay the suit based on MBF's failure to exhaust tribal court remedies. The federal district court dismissed the case for lack of diversity and federal question jurisdiction, and MBF appealed. The Sixth Circuit Court of Appeals determined that CNI enjoyed tribal sovereign immunity and therefore that the district court's dismissal for lack of jurisdiction was proper. In deciding what it said was an issue of first impression in the Sixth Circuit and addressing what it found to be a circuit split on whether incorporating a tribally-owned corporation under Section 17 of the IRA constitutes a waiver of tribal sovereign immunity, the court, citing case law from the Ninth Circuit, held that incorporating under Section 17 does not automatically waive tribal sovereign immunity. The court found significant the fact that 25 U.S.C. § 477 itself is silent regarding any waiver of sovereign immunity, noting that congressional abrogations of tribal sovereign immunity are supposed to be explicit. The court also held that equitable doctrines did not apply to waive CNI's tribal sovereign immunity even though CNI represented that it waived such immunity. The court cited precedent holding that the unauthorized acts of tribal officials are not sufficient to waive tribal immunity, and because board approval was not obtained as required under the corporation's charter, the court held the purported waiver to be invalid.

In *T.P. Johnson Holdings LLC v. Poarch Band of Creek Indians*, No. 3:09-CV-305-WKW[WO], 2009 WL 2983201 (M.D. Ala. Sept. 17, 2009), the court granted the Poarch Band of Creek Indians' motion to dismiss a lawsuit filed by plaintiff landowners who owned property adjacent to

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a casino operated by the tribe and two entities wholly-owned by the tribe. The plaintiffs, alleging that they were injured when a portion of the casino parking deck intruded onto their land, brought state law claims to quiet title and for ejectment and trespass. The tribe moved to dismiss based on lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. The court granted the tribe's motion. The court found that the plaintiffs' could not rely on the U.S. Supreme Court's 1985 decision in *Oneida County, N.Y. v. Oneida Nation of N.Y. State* for the proposition that all land dispute cases involving Indian tribes provide a basis for federal question jurisdiction since the *Oneida* case involved a tribe asserting an aboriginal title or right of occupancy that could only be terminated by the federal government, thereby providing jurisdiction, while the present case involved a claim for simple infringement of a real estate right under state law. The court also found that even assuming that "any conceivable claim to land, however recent, made by an Indian tribe arises under federal law," the plaintiffs' suit would nonetheless fail under the well-pleaded complaint rule because, at most, a defense to the claim for the land would arise under federal law if and when the tribe asserted some federal-law right to the land.

There were several cases in the U.S. District Court for the Southern District of Florida involving disputes between the Miccosukee Tribe of Indians and the federal government regarding water management and related issues. In *Miccosukee Tribe of Indians of Florida v. United States*, No. 08-22966-CIV, 2009 WL 2872989 (S.D. Fla. Sept. 1, 2009), the tribe alleged violations of the Endangered Species Act resulting from federal efforts to build a bridge as part of a water delivery project in the Everglades National Park's Tamiami Trail. Specifically, the tribe alleged the project would change the water flow and levels in certain areas and thereby harm two endangered species. The court granted the federal government defendants' motion to dismiss on the grounds that Congress enacted the Omnibus Appropriations Act of 2009, which included a specific command to the U.S. Army Corps of Engineers to immediately construct the Tamiami Trail project. The court noted the conflict between the Endangered Species Act, with a lengthy review and consultation process, and the Omnibus Appropriations Act, with its call for immediate construction, and held that the appropriations act controlled as the later-enacted statute. The court thus found that the appropriations act deprived the court of any ability to grant the tribe relief, thereby rendering the tribe's claims moot and subject to dismissal for lack of subject matter jurisdiction. The court in *Miccosukee Tribe of Indians of Florida v. United States*, No. 08-22875-CIV, 2009 WL 3154248 (S.D. Fla. Sept. 28, 2009) also cited the Omnibus Appropriations Act to dismiss the tribe's claim for injunctive and declaratory relief for the federal defendants' alleged violations of the Clean Water Act. The claim stemmed from the defendants purported failure to obtain water quality certification from the state of Florida in connection with a federal project to construct the Tamiami Trail Bridge and relocate one mile of the Tamiami Trail.

In *Miccosukee Tribe of Indians of Florida v. United States*, No. 08-23001-CIV, ___ F. Supp.2d ___, 2009 WL 2970498 (S.D. Fla. Sept. 16, 2009), the tribe alleged that the federal government's water management actions infringed on the tribe's constitutional and statutory rights by permitting high water levels to exist on a 189,000-acre tract of land for which the tribe held a perpetual lease. The land is encompassed within a federal flood control project authorized by Congress in 1948 and currently operated by the Army Corps of Engineers and the South Florida Water Management District (SFWMD). The tribe alleged violations of the Florida Indian Land Claims Settlement Act, due process, equal protection, and a mandamus action to compel the defendants to reduce the water level. The federal defendants moved to dismiss. The court held that the specific language of the tribe's lease and the Florida Indian Claims Settlement Act made the tribe's rights to the leased land subservient to the Army Corps' and SFWMD's rights and duties to regulate water levels. The court also held that its precedent specifically holding that the tribe does not have a property interest sufficient to support a due process claim based on water levels on the leased land made the current claim frivolous. Finally, the court dismissed the tribe's prayer for mandamus relief because the defendants' discretionary decision-making in raising or lowering water levels is outside the court's mandamus jurisdiction. The tribe's claim that the defendants violated its equal protection rights—because the defendants' actions protect non-Indian people from excess flood water while the tribe's lands and people are not provided any relief—survived dismissal.

There were also several cases worthy of note dealing with criminal procedure and the rights of Indian prisoners. In *United States v. Squirrel*, __ F.3d __, Nos. 08-4150 and 08-4151, 2009 WL 4578715 (4th Cir. Dec. 7, 2009), the appeals court overturned the district court's finding that two defendants who pled guilty to the murder of a member of the Eastern Band of Cherokee Indians were jointly and severally liable under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663 et seq., for additional restitution of nearly $1.5 million to the decedent's estate for lost future earnings and tribal per capita payments. The appeals court found that the defendants' conduct as accessories-after-the-fact did not cause or increase the financial losses to the decedent's estate and thus did not meet the requirement of direct and proximate causation of loss for restitution under neither the MVRA nor the defendants' plea agreements. The court ordered the case vacated and remanded with instructions to amend both judgments by deleting the additional restitution amount.

In *United States v. Bird*, No. 2:09cr15, 2009 WL 4801374 (W.D.N.C. Dec. 8, 2009), the Court ordered a member of the Eastern Band of Cherokee Indians to pay restitution for the medical services of his victim. While the tribal member's convictions and sentence appeals were pending, the federal government moved for a writ of continuing garnishment as to tribal gaming proceeds due to the defendant and the writ issued to the tribe as garnishee. The tribal member objected to the garnishment. The court held that

restitution orders may be enforced by the United States in the same manner as a fine (18 U.S.C. § 3664(m)(1)(A)(i)), such judgments may be enforced in the manner of a federal or state law civil judgment (18 U.S.C. § 3613(a)), and the Federal Debt Collection Procedures Act (FDCPA) permits the United States to garnish property of a debtor (28 U.S.C. § 3205(a)). Notably, the Court held that tribal per capita distributions from gaming proceeds are not exempt from garnishment because the FDCPA explicitly includes Indian tribes in the definition of a "garnishee" having custody of a debtor's property to which the act applies. The court found this language to constitute an explicit Congressional abrogation of tribal sovereign immunity, and thus that the tribe's per capita payments to the defendant were subject to garnishment.

In *Flanagan v. Shipman*, No. 308Cv204-RV/WCS, 2009 WL 4043063 (N.D. Fla. Nov. 20, 2009), the plaintiff inmate filed a complaint alleging that the defendant senior prison chaplain violated his First and Fourteenth Amendment rights, as well as rights under the Religious Land Use and Institutionalized Person Act, by canceling or imposing limitations on Native American religious services. The defendant prison chaplain filed a motion to dismiss for failure to exhaust administrative remedies. In his motion, the chaplain argued that any damages claims against him in his official capacity were barred by Eleventh Amendment immunity, and that any such claims in his personal and official capacity are barred by the Prison Litigation Reform Act (PLRA) provision at 42 U.S.C. § 1997e(e), which requires a prisoner to exhaust administrative remedies in the manner set forth by the institution in order to give defendant officials fair notice of the claims and information available to the prisoner. The court found that the plaintiff inmate complied with the prison's administrative review rules so as to put prison officials on notice that Native American services were no longer allowed or limited. The court thus denied the chaplain's motion to dismiss on exhaustion grounds, but it dismissed the plaintiff's claims seeking monetary damages against the defendant chaplain in his official capacity under § 1983 based on Eleventh Amendment immunity. The court also held that the plaintiff could proceed against the defendant chaplain in his individual capacity with the plaintiff's § 1983 monetary claim and his claim under the Religious Land Use and Institutionalized Person Act.

Finally, in *Coushatta Tribe of Louisiana v. Abramoff*, Civ. No. 07-1886, 2009 WL 3068189 (W.D. La. Sept. 21, 2009), a case involving the continuing fallout of the Jack Abramoff lobbying scandal, the court affirmed the magistrate judge's denial of a group of insurance companies' motion to resume the deposition of Michael Scanlon, a former associate of Abramoff, which motion was denied on the basis of Scanlon's Fifth Amendment privilege against self incrimination. (The underlying magistrate judge's order is discussed in greater detail the Fall 2009 edition of *Federal Indian Law*.)

Oklahoma Update

The U.S. Court of Appeals for the Federal Circuit issued its opinion in *Eastern Shawnee Tribe of Oklahoma v. United States*, 582 F.3d 1306 (Fed. Cir. 2009), a case involving an alleged breach of fiduciary duty and other duties by the United States with respect to property and other assets owned by the Eastern Shawnee Tribe. The tribe filed suit in both the U.S. District Court for the District of Columbia and, eight days later, in the U.S. Court of Federal Claims. In the district court case, the tribe sought relief that included an accounting an a reconciliation of its trust funds, a declaration that the United States breached its duties, and equitable relief. In the Court of Federal Claims case, the tribe alleged that the United States and breached its trust duties to the tribe and requested consequential and incidental damages, as well as interest, costs and attorneys fees. The Court of Federal Claims dismissed the suit there for lack of jurisdiction, citing 28 U.S.C. § 1500, which the court found barred the tribe's action in the Court of Federal Claims because the tribe's other case was pending before the U.S. District Court for the District of Columbia. On appeal, the federal circuit court reversed the Court of Federal Claims' dismissal of the tribe's case and remanded the case. The appeals court held that because the tribe did not seek consequential damages in the district court case and the district court could not award consequential damages, the tribe's action in the Court of Federal Claims was not statutorily barred, noting that the relief a plaintiff requests is the relevant consideration for determining whether jurisdiction is barred under 28 U.S.C. § 1500.

In *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, __ F.Supp.2d __ (N.D. Okla. Sept. 2, 2009), the tribe sued the defendant corporations to recover alleged natural resources damages to land on behalf of the tribe and tribal members. The defendants argued that the tribe lacked standing to sue on behalf of private-landowner tribal members who owned private lands on which damages were allegedly sustained. The tribe argued that standing was appropriate under the the *parens patriae*, or "parent of the nation," doctrine. The court held that the tribe did not have Article III standing to address the alleged wrongs against individual tribal members who were private landowners, but that the tribe could continue with its claims for damages to tribal lands "to the extent it is asserting a quasi-sovereign interest in recovering damages to natural resources within the tribe's authority."

Memphis Biofuels LLC v. Chickasaw Nation Industries Inc., 585 F.3d 917 (6th Cir. 2009), a case from the U.S. Court of Appeals for the Sixth Circuit involving the sovereign immunity of a corporation owned by the Chickasaw Nation and incorporated under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, which was extended to Indian tribes in Oklahoma through the Oklahoma Indian Welfare Act, is discussed in the Southeast Regional Update.

Southwest Update

In *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009), the South Fork Band Council of Western Shoshone of Nevada, the Timbisha Shoshone Tribe, the Te-Moak Tribe of Western Shoshone Indians of Nevada, the Western Shoshone Defense Project, and the Great Basin Resource Watch (tribes) appealed from a denial of their motion for preliminary injunction challenging a life of mine permit issued by the Bureau of Land Management (BLM) to a gold mining operation on the side of Mount Tenabo in Nevada. The tribes claim that Mount Tenabo has religious

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significance and that the issuance of the permit violates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4, the Federal Land Policy Management Act (FLPMA), 43 U.S.C. §§ 1701-1787, and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq. After the district court denied the tribes' request for an injunction, they appealed to the U.S. Court of Appeals for the Ninth Circuit. (The tribes did not appeal the district court's denial based on based on their RFRA claims.) The Ninth Circuit rejected the tribes' religious claims under the FLPMA but reversed the district court's denial of a preliminary injunction because the Environmental Impact Statement (EIS) failed to adequately analyze the environmental impacts of the project under NEPA.

Rejecting the tribes' claim under the FLPMA, the appeals court upheld the district court's finding that the BLM did not act arbitrarily and capriciously when it identified and relied in its study on references to particular sacred sites on Mount Tenabo (instead of treating the entire mountain as sacred to the tribes). The appeals court also rejected the tribes' claim that the BLM's approval of the permit violated Executive Order No. 13007, which requires agencies to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and … avoid adversely affecting the physical integrity of such sacred sites[,]" finding that the BLM determined that the proposed mining project would neither harm areas of the mountain identified as sacred nor materially affect access to those areas. The Ninth Circuit did, however, reverse the district court's findings regarding the adequacy of the environmental review under NEPA. The appeals court found that the EIS prepared by the BLM did not adequately consider the environmental impacts of the extraction of millions of tons of ore, mitigation of the impacts on local springs and streams, or the extent of fine particular emissions. Based on its finding that the EIS was inadequate, the Ninth Circuit ordered injunctive relief in favor of the tribes.

In *Ute Distribution Corporation v. Secretary of Interior*, 584 F.3d 1275 (10th Cir. 2009), the U.S. Court of Appeals for the Tenth Circuit denied an action for declaratory relief brought by the Ute Distribution Corporation (UDC) on the basis that the action was untimely. The action, which was filed in 1995, sought a declaration that certain water rights were not partitioned under the Ute Partition and Termination Act of 1954, which partitioned and distributed the assets of the Ute Indian Tribe between its mixed-blood and full-blood members and terminated federal supervision over the trust and restricted property of the mixed-blood members. UDC was created to manage the assets of the mixed-bloods. In 1961, the secretary of the Interior finalized the termination of the mixed-blood Utes. The district court in *Ute Distribution Corporation* dismissed the UDC's complaint as barred by the six-year statute of limitations in 28 U.S.C. § 2401(a), finding that the water rights were an asset susceptible to distribution in 1961 and were in fact divided pursuant to the Ute Partition and Termination Act. The Tenth Circuit upheld the district court's finding on appeal, reiterating a decision issued by the U.S. Court of Federal Claims in 1977 which likewise dismissed as untimely a claim that the secretary failed to divide the assets (including the water rights) as required by the Ute Partition and Termination Act of 1954.

In *Water Wheel Camp Recreational Area v. LaRance*, No. CV-08-0474, 2009 WL 3089216 (D. Ariz. Sept. 23, 2009), Water Wheel, a non-Indian business that operates a trailer park on the Colorado River Indian Reservation, and Robert Johnson, its owner and president, sought to enjoin a judge and clerk of the Colorado River Indian Tribes Tribal Court from proceeding with an eviction action against Water Wheel and the residents of the trailer park. The eviction proceedings began in tribal court when the Colorado River Indian Tribes (CRIT) filed a petition for eviction against Water Wheel for failure to pay rent under a lease entered into with CRIT in 1975. After the lease expired in 2007, Water Wheel refused to vacate the property. The tribal court granted CRIT's petition and awarded CRIT more than four million dollars in damages, attorneys' fees, and litigation costs. After the tribal appeals court upheld the trial court's decision, Water Wheel and Johnson filed an action in the U.S. District Court for the District of Arizona seeking to enjoin the tribal court ruling, claiming that the tribal court lacked jurisdiction to enforce the lease under *United States v. Montana*.

Finding that the legal status of the land in question had already been litigated between Water Wheel and the United States (in which litigation Water Wheel conceded that the land was held in trust for CRIT), the federal district court found that the tribal court had jurisdiction under *Montana* because Water Wheel voluntarily entered into a lease with CRIT with full knowledge that the land was tribal property. With respect to Johnson, however, the district court found that no consensual relationship existed between him and CRIT since, although he assumed all of Water Wheel's stock and the lease which specifically listed CRIT as the lessor, Johnson (unlike Water Wheel) did not intentionally enter into a consensual relationship with CRIT. (The federal district court also noted that the tribal court did not assess the voluntariness of Johnson's relationship with CRIT.) Citing the Supreme Court's recent decision in *Plains Commerce Bank v. Long Family Land & Cattle*, the district court found that Johnson's relationship with CRIT was not consensual since he did not intend to interact with CRIT at the time he assumed his interest in Water Wheel. (Johnson alleged that at the time he assumed his interest in and became the president of Water Wheel, he was told that the lease was administered by the BIA, that building permits were to be obtained from local and state agencies, and that electrical services were to be obtained from an off-reservation provider.) The district court also found that a tribe's power to exclude must be exercised within the *Montana* framework, and therefore that the liability imposed on Johnson through the power to exclude did not provide a basis for CRIT's jurisdiction over him. The district court thus directed the tribal court to vacate its judgment against Johnson and upheld its judgment against Water Wheel. On Dec. 18, 2009, the district court denied Water Wheel's motion for an injunction pending appeal.

In *Acosta-Vigil v. Delorme-Gaines*, ___

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F.Supp.2d ___, No. 1:09-CV-929, 2009 WL 4641813 (D.N.M. Dec. 2, 2009), an enrolled member of the Assiniboine/Sioux of the Fort Belknap Reservation sought habeas relief in the U.S. District Court for the District of New Mexico, challenging the jurisdiction of the Tesuque Pueblo Court over him. Acosta-Vigil claimed that exhausting tribal remedies would be futile because he would not be allowed counsel during his appeal (he waived his right to counsel twice before the tribal court). The district court denied the petition upon finding that Acosta-Vigil failed to exhaust tribal court remedies.

And in *Miranda v. Nielson*, No. CV09-8065 (D. Ariz. Dec. 14, 2009), a magistrate judge issued a report and recommendation regarding the limits of sentencing under the Indian Civil Rights Act. In *Miranda*, a Pascua Yaqui tribal member who did not have defense counsel was sentenced to 2 1/2 years in prison arising from an eight-count criminal complaint. Addressing the issue of whether ICRA allows sentencing for one year for each count or whether the one year limit applies to all counts arising from the same incident, the magistrate judge held that "Congress did not intend to allow tribal courts to impose multiple consecutive sentences for criminal violations arising from a single transaction. To hold otherwise would expose a tribal court defendant to a lengthy prison term without the protection of representation by counsel and other critical constitutional rights." The magistrate judge found that the tribal member's offense constituted one single transaction and recommended that the habeas petition be granted and that the case be remanded to the Pascua Yaqui Tribal Court for re-sentencing. After the parties submitted additional briefing, the district court judge agreed with the magistrate judge's recommendation and granted a writ of habeas corpus to Miranda on Jan. 12, 2010.

On the state court level, the Supreme Court of Nevada adopted the "existing Indian family exception" to the Indian Child Welfare Act in *In re N.J.*, __ P.3d __, No. 51125, 2009 WL 5030670 (Nev. Dec. 24, 2009), noting that neither the child's father, a member of the Ely Shoshone Tribe, nor the tribe was not contesting the termination of parental rights; that the only person contesting termination was the non-Indian mother; and that the foster family that was taking care of and planning on adopting the child was "committed to educating her about her Indian heritage." The court did not address whether this "exception" is consistent with the text of the act and congressional intent. ◆

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