Federal Indian Law

Newsletter of the Federal Bar Association Indian Law Section

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A Word From the Chair

By Elizabeth Ann Kronk

Aaniin! As usual, it has been a busy few months for the Indian Law Section. I am incredibly grateful for the hard work and dedication of those individuals who serve on our Section committees. As you can see from the update below, our committees and conference co-chairs have been quite busy recently.

36th Annual Indian Law Conference (April 7-8, 2011)

We will once again host our annual Indian Law Conference on April 7–8 at the Hilton Buffalo Thunder Resort on the Pueblo of Pojoaque. The conference will be chaired by Professor Kristen Carpenter; Professor Angela Riley, Paul Spruhan, and Tracy Toulou will be the co-chairs. Native peoples have long been innovators in governance, economic development, and cultural revitalization. Accordingly, the conference takes a deliberate look at some of the "best practices" in federal Indian law as a means of approaching challenges faced by American Indian, Alaska Native, and Native Hawaiian peoples.

Panel discussions will cover Indian land and trust law, finance, criminal justice, gaming, taxation, and the environment—looking, in each instance, at a continuing legal challenge and the ways that tribes, agencies, legislators, courts, and others are responding to it. Other sessions will address domestic and international advocacy, along with ethical considerations of in-house tribal legal counsel. Focus group panels will provide "nuts and bolts" information and strategies on water law; tribal family, women, and children's programs; religious freedoms; civil jurisdiction; and environmental justice. An exciting line-up of speakers from private practice, education, government, and tribal leadership will provide the latest updates on these topics.

This year's conference also features plenary addresses by University of Colorado Law School Dean David Getches, Seneca Nation President Robert Odawi Porter, Vice-Chairwoman of the National Indian Gaming Commission Steffani Cochran, and Acting Solicitor of the United States Neal Katyal. A special program will honor the Native American Rights Fund's 40th anniversary and its leadership role in best Indian law practices. Finally, back by popular demand is the Thursday Night Barbeque, held this year at the Poeh Museum on the Pueblo of Pojoaque. We hope you will join us for a forward-thinking, practically-oriented, and inspiring conference! To register for the conference or for additional information, please go to: www.fedbar.org/2011IndianLawConf.

Nominations for the Lawrence Baca Lifetime Achievement and Indian Law Section Outstanding Service Awards

The Lawrence Baca Lifetime Achievement Award and Indian Law Section Outstanding Service Award will be presented at the 36th Annual Indian Law Conference on April 8, 2011. Prior recipients of the Lawrence Baca Lifetime Award

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include Lawrence Baca, Professor Phillip Frickey, and John EchoHawk. Prior recipients of the Indian Law Section Outstanding Service Award include Jack Lockridge, Hon. D. Michael McBride, and Professor Elizabeth Kronk. The Award and Nomination Committee, which is responsible for selecting the recipients of these awards, is chaired by past FBA President and Indian Law Section Chair Lawrence Baca. **The deadline for nominations is Friday, Feb. 25, 2011**. Please submit nominations to Lawrence Baca at lawrence.baca@yahoo.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 20 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.

Qualifications for Indian Law Section Outstanding Service Award

Only FBA members and FBA staff can qualify for this award, and only service rendered during the previous year is considered. Award recipients must demonstrate their 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.

Development of Federal Indian Law Committee

As reported in our last newsletter, the section's newly formed Development of Federal Indian Law Committee (DFILC) is up and running. The DFILC is charged with keeping the Indian Law Section Executive Board updated on important developments in Indian country, as well as recommending when the section and potentially the Federal Bar Association should take action. Professor Angelique EagleWoman, associate professor of law at the University of Idaho School of Law, chairs the DFILC, whose members include Gabe Galanda, Chrissi Nimmo, Brent Leonhard, Libby Rodke Washburn, Professor Rebecca Tsosie, Burton Warrington, and Sarah Wheelock. The DFILC suggested to the Indian Law Section Executive Board that the FBA participate as an amicus in *United States v. Jicarilla Apache Nation*, a case where the U.S. Supreme Court recently granted certiorari. The Indian Law Section asked the FBA Board of Directors to consider this request at its Jan. 29 meeting. In response to this request, the FBA Board of Directors gave the section permission to submit an amicus brief in the case. We are especially thankful to Professor Matthew Fletcher, Brent Leonard, and Hon. D. Michael McBride for taking the lead on advising the FBA Board of Directors on this issue. We are in the process of forming an ad hoc committee to continue to work on this issue in anticipation of submitting an amicus brief in the case.

We will continue to work hard to serve the Indian Law Section. As always, please feel free to contact me at any time with questions or concerns, at elizabeth.kronk@umontana.edu. Chi Miigwetch! ◆

Inside the Beltway Update

By Timothy Q. Evans

On the Hill

As 2010 concluded, Congress intensified its efforts to finish several pieces of priority legislation before the end of the lame duck session and the start of the new 112th Congress in January. Among its efforts to ratify an arms control treaty, repeal the military's "don't ask don't tell policy," extend expiring tax cuts, and address other nationwide priorities, Congress touched on several issues affecting Indian country.

One of the most pressing issues facing Congress during the lame duck session was the completion of a federal budget for FY 2011. Congress passed several very short-term continuing resolutions maintaining FY 2010 funding levels before eventually passing a continuing resolution (CR) that will maintain FY 2010 levels through March 4, 2011. Along the way, the House passed a proposed long-term CR that would have funded the federal government through the end of FY 2011. The proposed long-term CR included language addressing the 2009 Supreme Court opinion *Carcieri v. Salazar*. This *Carcieri* "fix" language would have reaffirmed the secretary of the Interior's authority to take land into trust for all federally recognized tribes under the Indian Reorganization Act and validated all such acquisitions to date. The final CR passed by Congress did not include a Carcieri "fix," however, and any further attempts at a legislative fix will have to start again in the 112th Congress.

Internet gaming legislation also arose during the waning days of the lame duck session. Senate Majority Leader Harry Reid (D-Nev.) circulated a proposed legislative rider to legalize and regulate internet poker. The legislation was perceived by various Indian tribes and organizations as giving the State of Nevada and Las Vegas casinos a competitive advantage over tribes and other casino operators in regulating and offering online poker. Early opposition to the proposal and time spent on other legislative priorities kept Sen. Reid from ever offering the legislation.

The House and Senate adjourned on Dec. 22, 2011, and the new 112th Congress convened on Jan. 5, 2011. During the intervening recess, incoming House Natural Resources Committee Chairman Doc Hastings (R-Wash.) announced the establishment of a Subcommittee on Indian and Alaska Native Affairs. During the 111th Congress, oversight and legislative responsibilities for Indian and Alaska Native issues were handled by the Office of Indian Affairs, and matters were conducted at the Full Committee level. The Subcommittee on Indian and Alaska Native Affairs will be chaired by Rep. Don Young (R-Alaska). Other members assigned to the subcommittee are ranking member Dan Boren (D-Okla.), Jeff Denham (R-Calif.), Daniel Benishek (R-Mich.), Paul Gosar (R-Ariz.), Raúl Labrador (R-Idaho), Kristi Lynn Noem (R-S.D.), Dale Kildee (D-Mich.), Ben Luján (D-N.M.), Colleen Hanabusa (D-Hawaii), Edward Markley, ex officio (D-Mass.), and full committee chairman Doc Hastings, ex officio.

Assignments for the Senate Committee on Indian Affairs were also announced: Daniel Akaka (D-Hawaii), chair; John Barrasso (R-Wyo.), ranking member; Maria Cantwell (D-Wash.); Kent Conrad (D-N.D.); Mike Crapo (D-Idaho); Al Franken (D-Minn.); John Hoeven (R-N.D.); Daniel Inouye (D-Hawaii); Mike Johanns (D-Neb.); Tim Johnson (D-S.D.); John McCain (D-Ariz.); Lisa Murkowski (D-Alaska); Jon Tester (D-Mont.); and Tom Udall (D-N.M.).

Executive Branch

White House Tribal Nations Conference

On Dec. 16, President Barack Obama and members of his administration reaffirmed their commitment to Indian country during a gathering of tribal leaders at the Department of Interior in Washington, D.C., for the White House Tribal Leaders Summit. This was the second annual summit hosted by President Obama, in which representatives from all federally recognized tribes were invited to engage the administration on issues unique to their tribal communities. The summit capped a weeklong series of events hosted by the National Congress of American Indians (NCAI) and the National Indian Gaming Association (NIGA), which included a joint NIGA/NCAI legislative meeting on Dec. 13, an NCAI-led preparatory meeting for tribal leaders on Dec. 14, and roundtable meetings of tribal leaders with federal department and agency heads on Dec. 15.

Speakers at the White House Tribal Nations Conference included President Obama, Department of the Interior Secretary Ken Salazar, and Department of the Interior Assistant Secretary–Indian Affairs Larry Echo Hawk. During his remarks, President Obama spoke of his administration's commitment to strengthening the relationship between the federal government and tribal nations and his efforts to stimulate economic growth in Indian communities. The President highlighted his administration's investment in Indian roads, innovative new loans to reach reservations with broadband, and his commitment to improving education on tribal lands. He also spoke of the administration's accomplishments, which include permanent reauthorization of the Indian Health Care Improvement Act, settlement of lawsuits concerning

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tribal water rights and the longstanding *Cobell* trust litigation, and reform of public safety and justice programs in Native communities. The President noted in his remarks that he also supports legislation clarifying that the secretary of the Interior may take land into trust for every federally recognized tribe, in response to the Supreme Court's decision in *Carcieri v. Salazar*. Of particular note, the President announced that the United States will support the United Nations Declaration on the Rights of Indigenous Peoples, and said it will complement his ongoing efforts to address historical inequities faced by tribal communities in the United States. Other speakers at the summit expressed similar commitments to restoring tribal homelands, conducting meaningful and comprehensive tribal consultation, clearing the logjam of trust land applications, spurring renewable energy development on tribal lands, ensuring healthy tribal communities, and respecting Indian sovereignty.

NIGC Consultation Sections

The National Indian Gaming Commission recently concluded the consultation sessions it announced in notices in the Federal Register on Nov.19 and Nov. 26, 2010. The NIGC is conducting a comprehensive review of all regulations implementing the Indian Gaming Regulatory Act. Eight tribal consultations were held throughout the country in January and February in San Diego; Brooks, Calif.; Shelton, Wash.; Norman, Okla.; Santa Ana Pueblo; Washington, D.C.; Rapid City, S.D.; and Hollywood, Fla. The agency accepted written comments through Feb. 12, 2011.

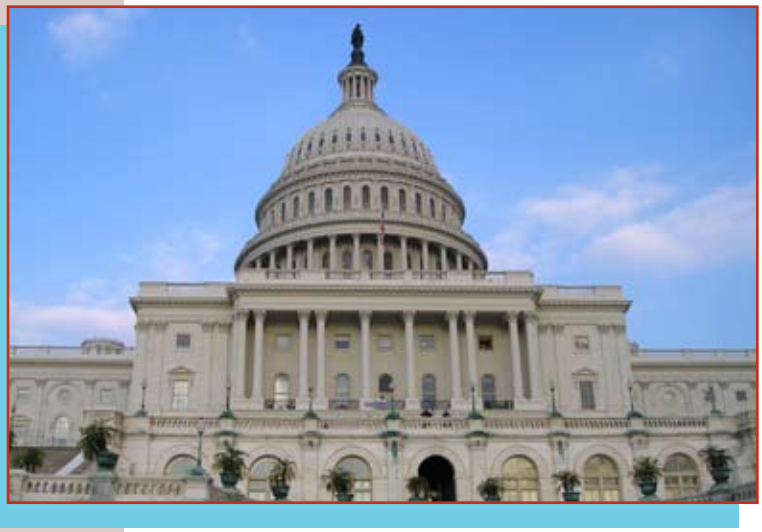
Assistant Secretary–Indian Affairs

Assistant Secretary–Indian Affairs (AS-IA) Larry Echo Hawk recently issued final determinations to acquire land into trust for the Navajo Nation, the Payullap Tribe of Washington, and the Suquamish Indian Tribe of Washington (*Federal Register*, Nov. 22, 2010); the Cherokee Nation of Oklahoma (*Federal Register*, Dec. 8, 2010), and the Cowlitz Tribe of Washington (*Federal Register*, Jan. 4, 2011). A lawsuit has been filed challenging the Cowlitz acquisition. The assistant secretary also issued a proposed finding against federal acknowledgment of the Tolowa Nation from Fort Dick, Calif. (*Federal Register*, Nov. 24, 2010).

On Jan. 14, 2011, Secretary of the Interior Ken Salazar and AS-IA Echo Hawk provided the Department of the Interior's draft tribal consultation policy to tribal leaders at the White House Tribal Nations Conference. A 60-day tribal comment period ends on March 14, 2011. There will be an additional 60-day public comment period beginning in April. The draft policy will also be submitted to department bureaus for a 14-day period of employee review and comment.

Position Changes

The Department of the Interior is undergoing a restructuring that resulted in several new people filling key positions. George Skibine, formerly deputy assistant secretary for policy and economic development–Indian affairs, took on a new role as deputy assistant secretary for management–Indian affairs. Jodi Gillette, formerly associate director of the White House Office of Public Engagement, assumed the role of Interior deputy assistant secretary for policy–Indian affairs. Pilar Thomas, formerly deputy solicitor–Indian affairs, transitioned to a new role at the Department of Energy. Also, Jim Hall left his post as Republican counsel to the Senate Committee on Indian Affairs and moved across the Capitol to assume the role of legislative director for freshman Rep. Stephen Fincher (R-Tenn.). Chris Fluhr, longtime House Republican aide on Indian country matters, has assumed the role of staff director of the newly formed Subcommittee on Indian and Alaska Native Affairs of the House Committee on Natural Resources, working under the leadership of Rep. Don Young (R-Alaska), subcommittee chairman, and Rep. Doc Hastings (R-Wash.), committee chairman. ◆



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

Supreme Court Update

By Ann Tweedy and Cameron Fraser

So far this term, the Supreme Court has heard argument in one Indian law case, *United States v. Tohono O'odham Nation*, and granted certiorari in *United States v. Jicarilla Apache Nation*. The Court also granted certiorari in *Madison County v. Oneida Indian Nation*, but remanded the case before briefing was finished. Several petitions for certiorari are pending before the Court.

In *Madison County v. Oneida Indian Nation*, Madison and Oneida Counties (New York) asked the Court to overturn the U.S. Court of Appeals for the Second Circuit's opinion holding that tribal sovereign immunity barred the counties from using the remedy of foreclosure to recover unpaid property taxes on the lands at issue in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*). In addition to the sovereign immunity question, the counties raised the question of whether the Oneida Indian Nation's reservation was diminished or disestablished, an issue that the Second Circuit decided in the nation's favor in 2003. On Jan. 10, 2011, the Supreme Court vacated the judgment and remanded the case in light of the Oneida Nation's passing a Nov. 29, 2010, ordinance that waived its sovereign immunity from actions to enforce real property taxes.

On Nov. 1, 2010, the Court heard argument in *Tohono O'odham Nation*, where the United States seeks review of the U.S. Court of Appeals for the Federal Circuit's decision upholding the nation's ability to bring separate suits in both the Court of Federal Claims (CFC) and a U.S. district court for causes of action against the United States based on alleged breaches of federal trust responsibility related to the nation's trust assets. The United States argues that 28 U.S.C. § 1500, which divests the CFC of jurisdiction over "any claim for or in respect to which the plaintiff … has … any suit or process against the United States" pending in another court, precludes the CFC from hearing the case. The appeals court held that section 1500 does not obviate the CFC's jurisdiction because the nation seeks different relief in its two actions. The nation seeks primarily equitable relief in its district court action, where the nation's focus is on an accounting that would amount to specific performance; it seeks damages, or relief at law, in its CFC action. More specifically, the district court action, according to the Federal Circuit, is focused on "old money"—i.e., existing trust assets that should have appeared in federal records but did not because of mismanagement. The CFC action, on the other hand, is based on "new money"—i.e., money that the nation should have earned as profits but did not due to mismanagement. The appeals court determined that § 1500 bars the maintenance of a CFC action and a simultaneous action in another court only if the two actions are based on the same set of operative facts and seek the same relief. It determined that, since the actions did not seek the same relief, § 1500 did not bar the CFC action. The United States argues that the appeals court interpreted § 1500 too narrowly and, moreover, that its interpretation threatens significant adverse consequences. Specifically, the United States argues that (1) the appeals court's statutory interpretation is inconsistent with the text of § 1500 and disregards established principles of jurisdiction and sovereign immunity, and (2) the Tohono O'odham Nation does not actually seek different relief in the two actions. The United States also argues that the Federal Circuit's decision "imposes a substantial litigation burden on the United States and the courts and threatens inconsistent judicial rulings."

On Jan. 7, 2011, the Court granted certiorari in *United States v. Jicarilla Apache Nation*. The question presented is "[w]hether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe." The U.S. Court of Appeals for the Federal Circuit held that the United States, as the fiduciary, could not block the nation from discovering information otherwise protected under the attorney-client privilege (documents and communications between the United States and its attorneys) when the information relates to fiduciary, including trust mismanagement. The case has been set for argument on April 20, 2011.

Seven petitions for certiorari of interest are currently pending before the Supreme Court: *Day v. Apoliona*, *Eastern Shawnee Tribe of Oklahoma v. United States*, *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Company*, *Native Wholesale Supply v Oklahoma*, *Osage Nation v. Irby*, *Schwarzenegger v. Rincon Band of Luiseño Mission Indians*, and *Yellowbear v. Wyoming*.

On June 15, 2010, the United States sought review of the U.S. Court of Appeals for the Federal Circuit's decision in *Eastern Shawnee Tribe of Oklahoma v. United States*. The appeals court held that 28 U.S.C. § 1500 does not bar the tribe from pursuing a breach of trust claim in district court seeking an accounting

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and other relief while simultaneously pursuing a claim based on the same set of operative facts in the Court of Federal Claims that seeks money damages stemming from claims revealed as a result of the accounting. The tribe filed its opposition brief on Sept. 15, 2010, and the United States filed its reply brief on Sept. 29. As this case presents a question similar to that presented in *Tohono O'odham Nation v. United States* (discussed above), which the Court heard on Nov. 1, it is on hold until the Court decides that case.

The Osage Nation filed its cert petition in *Osage Nation v. Irby* on Oct. 22, 2010, seeking reversal of the U.S. Court of Appeals for the Tenth Circuit's opinion holding that the Osage Nation's reservation had been disestablished. One of the questions presented by the nation is "[w]hether, in determining whether Congress disestablished an Indian reservation, express statutory text, unequivocal legislative history, and the expert view of the Executive Branch are controlling, as the Second, Eighth, and Ninth Circuits have ruled, or whether, instead, other indicia external to the statutory text and federal government's view, such as modern demographics, can override ambiguous statutory text, as the Tenth Circuit and Seventh Circuit have held." The case has been distributed for conference of Feb. 18, 2011.

On Oct. 25, 2010, a group of Native Hawaiians who are beneficiaries of a 'public trust' created in the Hawaii Admission Act petitioned for certiorari in *Day v. Apoliona*, on appeal from the Ninth Circuit. Petitioners contend that the trust was breached and present the question "[w]hether officials of the State of Hawai'i may expend funds subject to the trust established by § 5(f) of the Hawai'i Admission Act for the betterment of Hawaiians without regard to the blood quantum established by § 201(a)(7) of the Hawaiian Homes Commission Act, 1920[.]" The case has been distributed for conference of Feb. 18, 2011.

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

The Court also invited the acting solicitor general to file a brief in *Schwarzenegger v. Rincon Band of Luiseño Mission Indians*, where the state of California is asking the Court to overturn the Ninth Circuit's finding that the state negotiated in bad faith with the Rincon Band when it demanded in tribal-state compact negotiations under the Indian Gaming Regulatory Act that the band pay revenues into the state's general fund and did not offer the band sufficient concessions in return. The questions presented are (1) "[w]hether a state demands direct taxation of an Indian tribe in compact negotiations under Section 11 of the Indian Gaming Regulatory act, when it bargains for a share of tribal gaming revenue for the State's general fund"; and (2) "[w]hether the court below exceeded its jurisdiction to determine the State's good faith in compact negotiations ... when it weighed the relative value of concessions argued by the parties in those negotiations."

On Dec. 2, 2010, petition for certiorari was filed in *Yellowbear v. Wyoming*, from the Tenth Circuit. Yellowbear seeks federal habeas review of his state court conviction for the murder of his daughter. He argues that the state court lacked jurisdiction to hear the matter because the alleged crime took place within the exterior boundaries of the Wind River Reservation. The case has been distributed for conference of Feb. 18, 2011.

Petition for certiorari in *Native Wholesale Supply v Oklahoma* was filed on Dec. 3, 2010. It s an appeal from the Supreme Court of Oklahoma, which concluded that (1) an Oklahoma court is a constitutionally sanctioned forum for the exercise of personal jurisdiction to adjudicate an alleged violation of a state statute by Native Wholesale Supply, a nonresident corpora-

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Northeast Region Update

By Nicole Friederichs

The U.S. Court of Appeals for the Second Circuit's decision in *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), marked another chapter in the Oneida Indian Nation's long struggle to secure rights to its ancestral lands. Following the Supreme Court's decision in *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985), the Oneida Indian Nation resumed this action against the state of New York and two counties, seeking redress for allegedly unlawful transfers of approximately 250,000 acres of ancestral land in central New York. The case remained pending while the Supreme Court handed down its decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), and the Second Circuit's decision in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005) arrived shortly thereafter. Relying almost entirely on *City of Sherrill* and *Cayuga*, the appeals court found that laches barred the Oneida Indian Nation's possessory claims, and that the nation's Nonintercourse Act claim and contracts-based claim were also barred under equitable defenses.

In its amended complaint, the Oneida Nation argued that "under Federal common law, the Nonintercourse Act and the Treaty of Canandaigua, [it] … ha[s] 'possessory rights' in the subject lands" and sought "damages for unlawful possession" of those lands and "disgorgement of the amounts by which defendants have been unjustly enriched by reason of the illegal taking of the subject lands…." Similarly, the United States, as an intervenor, sought a "declaratory judgment 'that the Oneida Nation has the right to occupy the [subject] lands … currently occupied by the State", as well as monetary damages and possessory relief. The district court, drawing on *City of Sherrill* and *Cayuga* as precedent, held that the claims "predicated on [the Oneidas'] continuing right to possess land … and seek[ing] relief returning that land and damages based on … dispossession were subject to the laches defense." However, the court also held that the Oneida Nation's nonpossessory claim—the claim for disgorgement by New York when it acquired the lands pursuant to twenty-six agreements—was valid because "such a claim was not disruptive" since it "only seeks retrospective relief in the form of damages, is not based on Plaintiffs' continuing possessory right to the claimed land, and does not void the agreements, but rather reforms them through an exercise of [the court's] equitable power[s]."

The Second Circuit upheld the district court's analysis on the possessory claims, reiterating that "*Cayuga* expressly concluded that 'possessory land claims'—any claims premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title—are by their nature disruptive and that, accordingly, the equitable defenses recognized in *Sherrill* apply to such claims." The appeals court rejected the Oneida Nation's argument that the defendants had failed to establish all the elements of a laches defense, namely that the defendants were prejudiced by the unreasonable delay of this action. Instead, the court found this failure "ultimately unimportant," since

> the equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury.

The Second Circuit reversed the district court's holding as to the nonpossessory claims. The appeals court held that the Oneida Nation's disgorgement/contract claim was barred by New York's sovereign immunity. Finally (and although the district court did not base its holding on the nonpossessory claim as a violation of the Nonintercourse Act), the appeals court analyzed whether *Cayuga* also bars the Oneida Nation's Nonintercourse claim. (The United States argued on appeal that "a finding that the challenged land transactions violated the Nonintercourse Act is in and of itself sufficient to support a damages award.") Without answering the specific question of whether the Nonintercourse Act supports a claim in damages, the court examined whether the equitable defenses recognized in *City of Sherrill* and *Cayuga* can also apply to nonpossessory claims. Finding that they do, the court explained that the "dispositive question in ascertaining the applicability of *Sherrill's* equitable defense is not whether a current possessory right is asserted, but whether a plaintiff's claim is inherently disruptive." As a result, even a nonpossessory claim which seeks to establish an agreement as unconscionable, and therefore invalid, would "call into question and disrupt settled expectations regarding the ownership of land stemming from the original transfer of title to New York." Judge Gershon, sitting by designation, filed an opinion concurring in part and dissenting in part, concluding that "*Cayuga* does not

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Plains Region Update

By Shilee Mullin

In a case pending in the U.S. District Court for the District of South Dakota, *Flandreau Santee Sioux Tribe v. South Dakota*, No. 07-4040 (D.S.D), the Flandreau Santee Sioux Tribe alleges that the state of South Dakota refused to negotiate a tribal-state gaming compact in good faith pursuant to the Indian Gaming Regulatory Act (IGRA). On Oct. 29, 2010, the court determined that the tribe is not required to produce its financial information to the state. *Flandreau Santee Sioux Tribe v. South Dakota*, No. 07-4040, Slip op. at 3-5 (D.S.D. Oct. 29, 2010) (unreported). The Oct. 29, 2010, decision arose out of the state's service of a notice of deposition pursuant to Fed. R. Civ. P. 30(b)(6) on the tribe, requiring that the tribe produce certain financial information, among other things. The tribe moved to quash the notice of deposition, arguing that it should not be required to produce any financial information. In response, the state argued that "it needs the financial records so it can learn how much money the tribe makes on its gaming and how much each member of the tribe receives from gaming." The court disagreed, finding that IGRA lists the subjects that may be negotiated and "[n]one of the seven listed subjects is financial." Thus, the court concluded: "The State does not need to know the Tribe's financial affairs to prove the State negotiated for a new compact in good faith."

The U.S. Bankruptcy Court for the District of Kansas, in *In re Howley*, 439 B.R. 535 (D. Kan. 2010), determined that the per capita payments of a Prairie Band of Potawatomi Indians member were not exempt property under Chapter 7 of the Bankruptcy Code. The tribal member argued that, pursuant to the Prairie Band of Potawatomi Law and Order Code, the per capita payments constituted exempt property pursuant to the "local law" exemption of the Bankruptcy Code, 11 U.S.C. § 522(b)(3)(A). The court found that the "local law" exemptions are available only where the debtor is domiciled where the local law is applicable, and that, since the tribal member did not reside on the tribe's reservation, the local law exemption did not apply. The court also found that, even assuming the Prairie Band's exemptions constituted local law (an issue the court did not resolve), the language of the Prairie Band's exemption rendered it applicable only in tribal court.

In *Nebraska v. U.S. Dep't of Interior*, 625 F.3d 501 (8th Cir. 2010), the court found that the National Indian Gaming Commission (NIGC), in making a determination that a parcel of land qualified as "restored lands" under the Indian Gaming Regulatory Act, failed to consider the Ponca Tribe of Nebraska's restoration act. The case arose out of the tribe's request to conduct gaming on a parcel of land in Carter Lake, Iowa as part of "the restoration of lands for an Indian tribe that is restored to Federal Recognition" exception to the general prohibition against gaming on lands acquired in trust after 1988 in IGRA (commonly referred to as the "restored lands exception"). The tribe initially sought to place the land into trust pursuant to the Ponca Restoration Act (PRA), for the purpose of providing tribal health services. The tribe entered into a Cooperative Agreement with the City of Carter Lake, Iowa, agreeing that the operation of a medical clinic and pharmacy on the parcel would be mutually beneficial.

The Bureau of Indian Affairs' regional director considered the tribe's request and advised the relevant state and local officials that she intended to place the land into trust. State and local officials appealed the regional director's decision, arguing that the PRA did not allow taking the subject land into trust, and that the tribe actually sought to use the land for gaming purposes. The Interior Board of Indian Appeals (IBIA) affirmed the decision, finding that the PRA granted the secretary of the Interior the same authority to take land into trust as the Indian Reorganization Act, and that the tribe's alleged intent to use the parcel for gaming purposes was speculative. Instead of seeking review of this decision, the state and local officials reached what the court called "a purported agreement," forgoing litigation in exchange for the tribe's agreement not to conduct gaming on the land. Thereafter, the tribe's attorney sent an email correspondence to the BIA outlining the purported agreement and stating that the tribe acknowledges that the land is not eligible for gaming under. The land was taken into trust in 2003.

In 2005, the tribe requested that the NIGC issue a determination that the lands constitute "Indian lands" and "restored lands" for a "restored tribe" within the meaning of IGRA. The tribe then asked the NIGC to approve a site-specific gaming ordinance for the Carter Lake land, stating that the land qualified for gaming under the restored lands exception. Counsel for the Office of Indian Gaming recommended that the NIGC chairman disapprove the gaming ordinance, which the chairman did. The tribe appealed to the full NIGC Commission, which reversed the chairman's decision and found that the chairman improperly relied "on the Tribe's intended use of the land" and on "events that occurred after the [DOI] final agency decision was made." The states of Iowa and Nebraska (the land abuts the state of Nebraska) filed suit against the NIGC and the Department of the Interior (DOI) in the U.S. District Court for the Southern District of Iowa, arguing that

"(1) the NIGC lacked jurisdiction to make a restored lands determination necessary to allow gaming; (2) the NIGC decision was arbitrary and capricious in lacking a fact-based well-reasoned analysis; and (3) the NIGC decision was contrary to the 1990 Ponca Restoration Act [asserting that the only land that may be taken into trust under the PRA are parcels located in Boyd and Knox Counties, Nebraska]." The district court reversed the NIGC's determination, finding that the agency lacked the authority to issue the restored lands declaration, and rejected the NIGC's determination that the purported no-gaming agreement was not legally enforceable. The court did not reach the issue of whether the NIGC decision was contrary to the Ponca Restoration Act.

The NIGC and DOI appealed to the Eighth Circuit, asking it to remand the case to the NIGC to permit the agency to weigh the factors relevant to a restored lands determination, and determine whether the PRA limits restored lands status to land taken into trust in Boyd and Knox Countries, Neb. (the NIGC and DOI declined to contest the lower court's determination that that the NIGC erred by excluding the purported agreement from its restored lands determination). The appeals court held that it need not divine whether the NIGC or DOI possesses authority to make the restored lands determination because the NIGC and DOI averred that NIGC would not make a determination without the DOI's concurrence. But the court determined that the NIGC's improper exclusion of the purported no-gaming agreement necessitated remand. The court also held that the DOI must make an initial determination as to whether the Ponca Restoration Act limits the restored lands to Boyd and Knox Counties, Neb. Thus, the court remanded the case to the NIGC to reconsider its restored lands analysis. ◆

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foreclose plaintiffs' nonpossessory claims."

Shortly after the Second Circuit's decision in *Oneida Indian Nation*, the U.S. District Court for the Northern District of New York issued its decision in *Onondaga Nation v. State of New York*, No. 5:05-cv-0314, 2010 U.S. Dist. LEXIS 99536 (N.D.N.Y. Sept. 22, 2010). Relying on *Oneida Indian Nation*, *Cayuga*, and *City of Sherrill*, the court granted the defendants' motion to dismiss the case. The Onondaga Nation alleged that various lands situated in present-day central New York were unlawfully acquired by the state of New York in violation of the Nonintercourse Act, the United States constitution, and two treaties. The court noted that the Onondaga Nation's "claims represent the type of inherently disruptive action which *Cayuga* instructs is barred under *Sherrill*'s formulation of a laches defense." The court found it unimportant that the Onondaga Nation sought only declaratory relief because "the claims themselves expressly seek to undermine the validity of the original transfer of the subject lands and dramatically upset the settled expectations of current land-owners." The case was dismissed with prejudice. ◆

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tion that claims to have no minimum contacts with Oklahoma; and (2) federal law bars Oklahoma from enforcing state law against Native Wholesale Supply, a tribally-chartered corporation wholly owned by an individual of Native American ancestry. Native Wholesale Supply asks the Supreme Court to consider the following questions: (1) whether a contract entered into by an Indian tribe and fully performed outside the exterior boundaries of the state in which the tribe's reservation is located can constitutionally subject the out of state vendor to the personal jurisdiction of the state in which the tribe's reservation is located; and (2) whether a state can prohibit an Indian tribe located within its boundaries from purchasing goods from Indians on a reservation outside the state. The state of Oklahoma initially waived its right to respond, but the Court requested a response, which is due March 21, 2011.

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

Recent Developments in Federal Indian Consultation

by Gabriel S. Galanda

Two months ago, in the last edition of *Federal Indian Lawyer*, I published "The Federal Indian Consultation Right: A Frontline Defense Against Federal Sovereignty Incursion," suggesting that the battle line in the ongoing war between federalism and tribalism might first be drawn in tribal council chambers, by and through federal-tribal consultation.[1]

Federal agencies have an obligation to "meaningfully consult" with Indian tribes if there is any possibility that a federal action, whether on or off reservation, would upset the United States' Indian trust responsibility or adversely affect a tribe's land, resources or treaty or usufructuary rights.[2] If a pre-emptive consultation strike proves insufficient to protect tribal sovereignty and Indian ways of life against federal encroachment, tribal governments should escalate the battle to the U.S. district court, where the federal Indian consultation right can be wielded in search of an injunction or writ of mandamus to halt threatened federal action.

Soon after that article was published, there were there a series of significant federal legal and political developments concerning the Indian consultation right. This follow-up piece discusses those developments. Through such developments, and as tribal governments recognize and exercise its power, the right of tribal consultation grows stronger by the day. To be clear, the burgeoning federal Indian right is not a privilege. Nor is it charity bestowed upon tribes by the federal government. Nor is the federal Indian right "just words." It is a right, rooted in the U.S. Constitution; intrinsic to Indian treaties; required by Indian trust doctrine; affirmed by federal common law, statutes, regulations, and policies; and embodied in international legal norms.

As I noted in the first article, President Obama's November 2009 executive memorandum on tribal consultation "may represent one of the Obama Administration's most important federal Indian policy accomplishments to date," particularly insofar as federal agencies are required to get with the Indian consultation program.[3] The administration should be heralded for its commitment to interfacing with tribal governments, as governments, and for its recent endorsement of the United Nations Declaration on the Rights of Indigenous Peoples. As discussed below, the declaration resounds with a *profound* nation-state commitment to consultation with indigenous peoples.

But Indian country cannot ignore the reality that on President Obama's watch, federal agency bureaucrats, counsel, and line staff all too frequently still fail to meaningfully consult with tribal governments about proposed federal actions that threaten Indian sovereignty and ways of life. In the last six months, U.S. district courts have found both the U.S. Department of Agriculture (USDA) and the Department of the Interior's Bureau of Land Management (BLM) in breach of the federal Indian consultation right because they failed to meaningfully consult with affected tribes.[4]

Indian country must stand prepared to forge new battle lines in defense against United States encroachment, beginning each potential fight with consultation. Indeed, it would be naïve for tribes to think that in the minds and hearts of the federal decisionmakers, consultation always means collaboration and/or conciliation.

Quechan Tribe v. U.S. Department of Interior

Last November, the Quechan Tribe of the Fort Yuma Indian Reservation filed suit for a preliminary injunction to void the Department of Interior's approval of a 709-megawatt solar farm planned for over 6,000 acres of

[1]Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Federal Sovereignty Incursion*, Federal Indian Lawyer (Fall 2010 supp.).
[2]*See Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995) (citing *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1987)) (defining "meaningful" consultation).
[3]President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009) [hereinafter Obama Memorandum].
[4]*Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Agriculture*, No. 10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, No. 10-2241, 2010 WL 5113197 (S.D. Cal. Dec. 15, 2010).

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public land in California's Imperial Valley. Those lands, which are managed by the BLM, contain an estimated 459 "cultural resources," most of which are of significance to the Quechan People.[5] The United States did not dispute the legitimacy of the cultural resources or that the lands had a "history of extensive use by Native American groups."[6] The tribe alleges that the Department of Interior "reached its approval decision prior to evaluating the eligibility of cultural resources identified in the Project area and without engaging in required consultation with tribes" as required by law. The district court agreed, issuing a preliminary injunction enjoining the solar power project from proceeding on Dec. 15, 2010.

In holding that the Department of the Interior acted arbitrarily and capriciously, the court found that the agency violated the general imperative that "federal agencies owe a fiduciary duty to all Indian tribes, and that at a minimum this means agencies must comply with general regulations and statutes … ."[7] Although the court found that the agency did consult with other tribes and did meet with the Quechan (primarily via "informational meetings where the Tribe's opinions were not sought"), it found that this manner of "consultation" did not amount to the "government-to-government" consultation required by law: "In other words, that BLM did a lot of consulting in general doesn't show that its consultation with the Tribe was adequate under the regulations."[8]

The court made clear: "The consultation requirement is not an empty formality; rather, it 'must recognize the government-to-government relationship between the Federal Government and Indian tribes' and is to be 'conducted in a manner sensitive to the concerns and needs of the Indian tribe.'"[9]

The tribe's motion for summary judgment and permanent injunction will be filed soon. With a view towards a hearing on that motion, the BLM recently met with the tribe, no doubt attempting to cure its consultation gaffe(s). Barring an unforeseen reversal by the district court, the *Quechan* preliminary injunction ruling stands as the most sweeping common law affirmation of the federal Indian consultation right to date—a decision that must be consulted by any tribe or tribal lawyer defending against federal encroachment.

U.N. Declaration on the Rights of Indigenous Peoples

On Dec. 16, 2010, President Obama took his efforts to "promote more consultation with the tribal nations"[10] one step further by formally endorsing the United Nations Declaration on the Rights of Indigenous Peoples.[11] Adopted by the United Nations General Assembly in 2007, the endorsement of the Declaration is a "stated commitment to improve the conditions of Native Americans and to address broken promises."[12] One of these "promises"—already found in various federal laws—is made explicit in Articles 10, 11, 19, 28, and 32, and requires that "before adopting and implementing legislative or administrative measures that may affect [indigenous peoples]" and "prior to the approval of any project … affecting their land," the federal government must obtain a tribes' "free, prior and informed consent."[13]

A subsequent announcement by the U.S. State Department elaborated on its understanding of "free, prior, and informed consent" as "call[ing] for a process of meaningful consultation with tribal leaders" and "continu[ing] to consult and cooperate in good faith with federally recognized tribes and, as applicable, Native Hawaiians, on policies that directly and substantially affect them and to improve our cooperation and consultation processes … ."[14] Thus, although not substantively adding to the consultation right, the United States' long-awaited endorsement of the declaration stands as a bold international commitment to execute what has been recognized as the primary objective of the international indigenous rights movement: the indigenous right to exercise a high level of control over an indigenous people's traditional lands and a specific procedural method to enforce that right.[15] The declaration should be added to every American tribe's consultation war chest.

Department of Interior's Draft Tribal Consultation Policy

On Jan. 14, 2011, the Department of Interior released

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[5]Quechan, *supra* note 4, at *1.

[6]*Id.*

[7]*Id.*, at *4 (citing Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 788 (9th Cir. 2006) and 36 C.F.R. § 800.2(c)(2)(ii)(B)).

[8]*Id.* at *6.

[9]*Id.* at *3 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(C)).

[10]Press Release, President Barack Obama, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), *available at* www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference.

[11]U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

[12]S. James Anaya, *UN Expert Welcomes United States' Endorsement of the Declaration on the Rights of Indigenous Peoples*, unsr.jamesanaya.org/docs/statements/2010_statement_unsr_us_support_declaration.pdf (last visited Jan. 26, 2011).

[13]UNDRIP, *supra* note 11.

[14]Press Release, U.S. Department of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples (Dec. 16, 2010), *available at indigenouspeoplesissues.com/attachments/article/8074/US-UNDRIP-Announcement.pdf*.

[15]Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility ad Accountability under International Law* 137, 141 (Fl. Int'l U. L. Res. Paper Series, Paper No. 11-01).

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its Draft Policy on Consultation with Indian Tribes for tribal comment. The draft policy is part of the department's fulfillment of President Obama's executive memorandum that directs all federal departments and agencies to develop a "plan of actions" to implement tribal consultation per President Clinton's Executive Order 13175.[16] Although undoubtedly a step in the right direction, the first and last sections of the draft policy are contradictory. According to the preamble,

> The obligation for Federal agencies to engage with Indian Tribes on a government-to government basis is based on the Constitution, treaties, statutes, executive orders, and policies. Federal agencies meet that obligation though consultation with Indian Tribes.[17]

Yet the draft policy ends with a pronounced "DISCLAIMER":

> Except to the extent already established by statute, this Policy is intended only to improve the internal management of the Department, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person. The Department also does not waive any applicable privilege that it may hold by virtue of this Policy.[18]

How can the federal Indian consultation right exist under the highest laws of the land, yet not be enforceable at law? Although it is perhaps intended by Interior lawyers to insulate the department and its agencies (like the BLM) from liability for failing to meaningfully consult with affected tribes (like the Quechan Tribe), the disclaimer, if kept in the final policy, falls short in accomplishing that purpose.

Both President Obama's and President Clinton's directives contained similar disclaimers,[19] but neither disclaimer has prevented U.S. district courts from enjoining illegal federal actions resulting from agencies' failure to consult. In *Confederated Tribes and Bands of the Yakama Nation v. U.S. Department of Agriculture*,[20] for instance, the Yakama Nation utilized both President Clinton's executive order and President Obama's executive memorandum, in conjunction with several other federal laws, to enjoin the USDA from permitting a low-bid private contractor to move garbage imported from Hawai'i over and into the Yakama Nation's treaty-protected lands in Washington state. Neither President's liability disclaimer resulted in the USDA being absolved of liability. Because the presidential documents merely order federal agencies to carry out an existing Indian right, guaranteed by the U.S. constitution, treaties, federal case law, statute and regulation, and (now) international law, it should come as no surprise that clever disclaimer language falls short as a matter of law and equity.

If a tribe can show that an agency within the Department of the Interior has not acted in conformity with its own consultation regulations, the agency will be enjoined for acting arbitrarily and capriciously per the federal Administrative Procedures Act—regardless of any disclaimer in the policy.[21] The ability of tribes to use the department's own consultation policies against the agency was demonstrated in *Yankton Sioux Tribe v. Kempthorne*.[22] There, the department's Office of Indian Education Programs (OIEP) attempted to restructure the administration and supervision of tribal schools operated under BIA grants. The tribe sought an injunction to prevent the restructuring, alleging that "OIEP failed to meaningfully consult with the tribes as required by

> This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person (emphasis added).

with Obama Memoranda, *supra* note 3,

> This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person (emphasis added).

[16]*See* President William J. Clinton, Consultation and Coordination With Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 6, 2000) [hereinafter Clinton Order]. This Executive Order was actually a supplement to President Clinton's Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994). This Memorandum was updated in 1998 with Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

[17]Department of the Interior, Policy on Consultation with Indian Tribes 1, *available at* www.doi.gov/governments/loader.cfm?csModule=security/getfile&pageid=119393.

[18]*Id.* at 9.

[19]*Compare* Clinton Order, *supra* note 16, at § 10,

[20]*Supra* note 4.

[21]*U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 235 F.R.D. 521, 528 (D.D.C. 2006); *see also Doe v. Schachter*, 804 F. Supp. 53, 63 (N.D. Cal. 1992) ("[W]hen a plaintiff alleges that an agency violated its own regulations, the regulations themselves may constitute the 'meaningful standard against which to judge the agency's exercise of discretion.'") (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

[22]442 F. Supp. 2d 774 (D.S.D. 2006).

statute and BIA policy."[23]

The court found that although OIEP held three rounds of "consultation meetings" with the tribe, the BIA ultimately failed to inform the tribe about a change in funding policies as a part of the reorganization.[24] Citing to President Clinton's executive order—inclusive of the liability disclaimer—as the force-giving factor behind the BIA's consultation policies,[25] the court held that where a federal agency "has established a policy requiring prior consultation with a tribe, and therefore created a justifiable expectation that the tribe will receive a meaningful expectation to express its views before policy is made, that opportunity must be given."[26] The court issued the requested injunction.

Thankfully, it *is* "just words" for a federal department or agency to disclaim liability for its failure to honor the federal Indian consultation right.

Affiliated Tribes of Northwest Indians Resolution No. 11-23

On Feb. 3, 2011, the 57 tribal governments from Oregon, Idaho, Washington, southeast Alaska, Northern California, and Western Montana that comprise the Affiliated Tribes of Northwest Indians (ATNI), passed a resolution, reciting that:

> [T]he federal Indian consultation right requires the United States and its agencies, as well as states and local governments,[27] to meaningfully consult with tribal governments, on a government-to-government basis, regarding any matter of tribal implication, in order to allow any affected tribal government to express its views and assert its rights in advance of any non-tribal governmental action or decision-making.

In reference to President Obama's Executive Memorandum, ATNI proclaimed:

> [M]any federal agencies have yet to comply with President Obama's Memorandum by promulgating a detailed plan of action to implement Executive Order 13175 and in turn honor the federal Indian consultation right; and . . .
>
> [M]any federal agencies, as well as state and local governments, continue to breach the federal Indian consultation right, as well as related Treaty, trust and other guaranteed tribal rights and federal responsibilities, by failing to meaningfully consult with tribal governments regarding matters of tribal implication.

To give but one example, President Obama's Labor Department and its various agencies have yet to promulgate an action plan or set of policies regarding tribal consultation. And although these agencies have not developed such a plan or policies, they are increasingly seeking to exert federal regulatory power over tribal government, casino and other employers per so-called federal laws of general applicability.[28]

At its winter conference, ATNI resolved that it and its 57 member tribes will, together with the National Congress of American Indians, "immediately request that the White House, including the Domestic Policy Council and Office of Intergovernmental Affairs, cause any federal agency that has not yet complied with President Obama's Memorandum by promulgating a detailed plan of action to implement Executive Order 13175, to do so immediately." Other tribes should join ATNI and NCAI in seeking to hold any derelict federal agencies accountable regarding the Indian right of consultation.

Also, in keeping with the spirit of the ATNI Resolution, which affirms and further shapes that right as a matter of inter-tribal policy, tribal governments should promulgate their own consultation laws, regulations and policies.[29] Imagine the power of the federal Indian consultation right, bolstered by *tribal* consultation law, and tribal remedies.

In closing, the federal Indian consultation right is alive and well. Even in the face of the types of United States tribal consultation transgressions that have borne out in the *Quechan* and *Yakama* litigation—or perhaps as a result of those federal transgressions—the right of Indian consultation is taking hold nationwide and beyond. The more tribal governments exercise the right, the more prevalent and stronger the right, and all that is tribal sovereignty, will become—especially in relationship to growing federalism.

Consider, finally, the words of ancient Chinese military general Sun Tzu, from *Art of War*:

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[23] *Id.* at 781.
[24] *Id.* at 785.
[25] *Id.* at 783.
[26] Id. at 784 (citing *Lower Brule*, 911 F. Supp. at 399).
[27] With state government and its little siblings – counties, cities and towns—representing the most imminent threat to tribal sovereignty, vis-à-vis regulatory authority and taxing power in Indian country, it is time to advance and develop consultation law and policy that further compels state and local government to meaningfully consult with tribal governments. I am currently working on scholarship in this regard.

[28] *See, e.g.*, the following recent decisions applying federal labor laws on tribal lands: *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1306 (D.C. Cir. 2007); *Solis v. Matheson*, 563 F.3d 425, 434-35 (9th Cir. 2009); *Menominee Tribal Enterprises v. Solis*, No. 09-2806, 37 Indian L. Rep. 2049 (7th Cir. 2010).
[29] Gabriel S. Galanda, *The Federal Indian Consultation Right: Exercising It*, Presentation at the Affiliated Tribes of Northwest Indians Winter Conference, Feb. 2, 2011 at 26, *available at*: docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0BxQL_nl5m1i-9YTQwYzM3NzQtYzE3OS00OWUwLTg2NDgtZjE3ZGE5NzM2OWRk&hl=en (last visited Feb. 7, 2011).

UN Declaration Sets New Agenda for U.S.–Indian Relations

by Robert T. Coulter

On Dec. 16, 2010, the U.S. government officially endorsed the United Nations Declaration on the Rights of Indigenous Peoples and joined the international community in recognizing that American Indians and other indigenous peoples have a permanent right to exist as peoples, nations, cultures, and societies.

The United States is the last of the four countries in the UN to reverse its original position against the UN Declaration. This endorsement reflects the worldwide acceptance of indigenous peoples and our governments as a permanent part of the world community and the countries where we live. The Declaration on the Rights of Indigenous Peoples is the most significant development in international human rights law in decades. International human rights law now recognizes the rights of indigenous peoples as peoples, including rights of self-determination, property, and culture.

For me, the United States' endorsement of the UN Declaration marks the culmination of over three decades of hard work by indigenous peoples and other members of the international human rights community. In 1976, when the Six Nations and I began the work of drafting and proposing a declaration to be adopted by the United Nations, we did not know that our idea would one day be universally accepted and supported first by indigenous peoples and eventually by the countries of the world. We knew of the terrible inadequacy of legal regimes and the gross violations of indigenous peoples' human rights in most countries. We turned to international law primarily because of the need to overcome and improve national laws and practices, and because of the desire to regain a place for indigenous peoples in the international community.

Our work to ensure justice for Indian nations in this country begins in earnest with the United States' endorsement of the UN Declaration. To see the promise of the declaration become a reality, we must continue to fight for laws, policies and relationships that take into account the permanent presence of Indian nations in this country and throughout the world.

The declaration sets an agenda for the United States and Indian nations to design a reasonable approach to a progressive realization of the duties and responsibilities in it. It serves as a guide for consultations among Indian and Alaska Native nations and U.S. governmental departments and agencies to improve the government-to-government relationship among Indian and Alaska Native nations and the United States.

In our work for Indian rights, we can and should use the Declaration on the Rights of Indigenous Peoples as a powerful affirmation of our rights. Only through continued use will its provisions become our reality. We can use the declaration to evaluate laws that are now on the books, and for laws that may be proposed. Does the law measure up to the standards of the declaration? Does the law or bill satisfy the requirements of the declaration? It should. If it does not, it should be changed or discarded.

The declaration can also be used as a guide for procedures and processes in dealing with indigenous peoples. Some of the most important rights in the declaration are the right to participate in the decision-making process and the right to be consulted on important matters relating to indigenous peoples. The rights proclaimed in the declaration can also be used to defend against proposals and actions that violate Indian rights. The declaration can be used in this way by all people: Indian leaders, public officials, educators, and others.

The declaration can also be used to support and advocate for positive legislation and positive government action relating to Indian peoples. In particular, the declaration can be used as a basis for making demands that the federal government fulfill its responsibilities to tribes and carry out its obligations to promote and respect the human rights of Indian nations and tribes. Congress needs to hold hearings to examine the United States' human rights obligations to Indians and to assess whether existing laws and policies adequately respect the rights established in international law.

Continuing to work in this way to ensure justice for Indian peoples is the best way to celebrate and honor the United States' endorsement of the UN Declaration on the Rights of Indigenous Peoples. This is a very important first step in the process. We thank all of the advocates, leaders and government officials who have made this vision of freedom and equality a reality. For further information about the UN Declaration and how you can participate in its implementation, contact the Indian Law Resource Center at (202) 547-2800 or (406) 449-2006, or go to www.indianlaw.org. Chi Megwetch. ◆

Robert Tim Coulter, founder and executive director of the Indian Law Resource Center in Helena, Mont., and Washington, D.C., has practiced Indian and human rights law for more than 30 years.

UN Special Rapporteur on Violence Against Women Investigates Epidemic of Violence Against Indian Women in the United States

by Dr. Kirsten Matoy Carlson

Rashida Manjoo, United Nations special rapporteur on violence against women, recently investigated the epidemic of violence against Indian women in the United States. According to U.S. Department of Justice statistics, one out of three Native women will be raped in her lifetime, and three out of four will be physically assaulted. Manjoo learned about these staggering statistics when she visited the Eastern Band of Cherokee Indians (EBCI) on Jan. 27–28, 2011.

Federal laws limiting tribal criminal authority greatly contribute to this epidemic of violence. Unlike all other local communities in the United States, Indian nations and Alaska Native villages are legally prohibited from prosecuting non-Indians, and the Indian Civil Rights Act limits the sentencing authority of tribal courts over Indian offenders committing acts of sexual and domestic violence on tribal lands.

Members of the National Congress of American Indians (NCAI) Task Force on Violence Against Women highlighted for the special rapporteur specific areas that need improvement in order for sovereign tribal nations to increase the safety of women. The recommendations included: restoring tribal criminal jurisdiction over non-Indians; increasing the sentencing authority of Indian tribes; increasing federal support to Indian tribes to enhance their response to violence against women; and creating a new funding stream that specifically provides services to Native survivors of domestic and sexual violence. The members of the NCAI Task Force hope that Manjoo will hold the United States accountable under international human rights law, which has a higher standard for protecting women.

As UN special rapporteur on violence against women, Manjoo is required to gather information on and formulate recommendations for the prevention and remedy of violations on human rights. "The right to be safe and live free from violence is a human right that many in this country take for granted—but not Native women, who are beaten and raped at rates higher than any other population of women in the United States," said Terri Henry, councilwoman for the EBCI and co-chair of the NCAI Task Force. "This is a human rights crisis that Indian country has been aware of for some time. We are glad that the rest of the world is finally beginning to take notice."

The EBCI is one of 565 federally recognized, sovereign Indian and Alaska Native nations in the United States. The land base of the EBCI, known as the Qualla Boundary, includes an area of 56,000 acres of land located in five western North Carolina counties. It is a rural, remote area that has six traditional Cherokee townships. The EBCI is responsible for the safety and protection of women within the Qualla Boundary. Tribal emergency medical personnel, law enforcement services, prosecutors, courts, and services are charged with handling domestic violence and sexual assault cases and the EBCI is directly responsible for holding Indian perpetrators of such crimes accountable. Despite these responsibilities for responding to violent crimes against women, the EBCI and all other Indian tribes have no criminal authority over non-Indians and cannot prosecute non-Indians for committing crimes against their citizens on their lands. Nationally, non-Indians commit 88% of all violent crimes against Indian women.

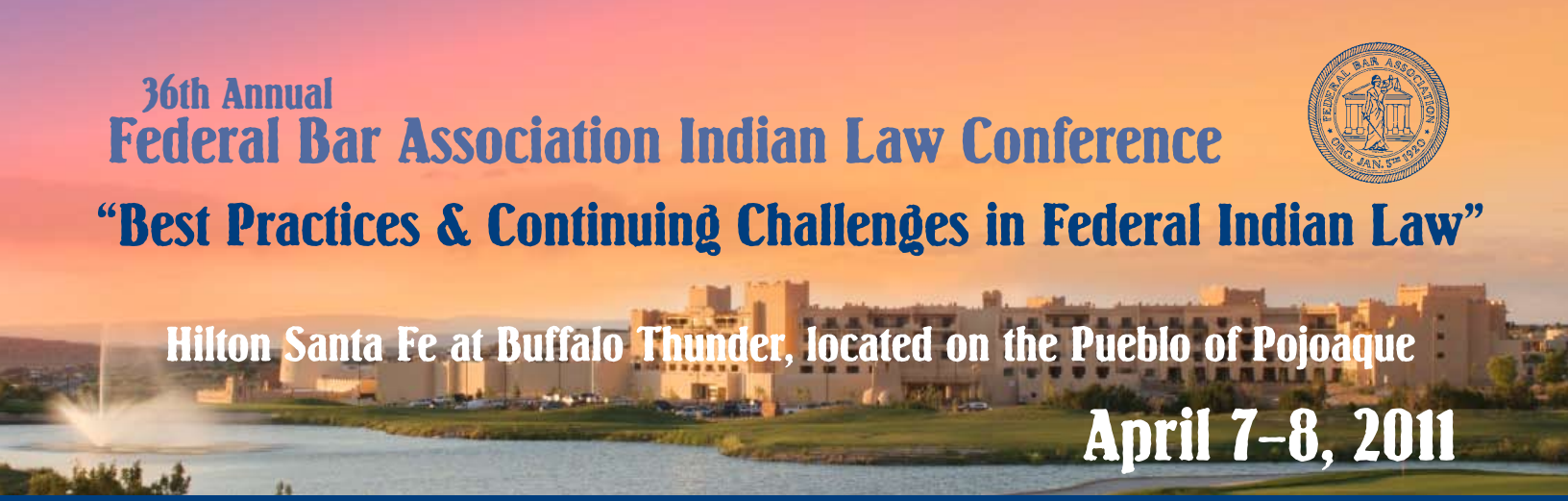
The special rapporteur visited the EBCI tribal courts, the police department, and the Cherokee Hospital providing services to women. She will report the findings from her trip, along with recommendations to the United States on how to better protect women's human rights and to stop violence against women, to the United Nation's Council on Human Rights. The special rapporteur's visit was jointly hosted by the EBCI, the National Congress of American Indians, Clan Star, and the Indian Law Resource Center. ◆

Dr. Kirsten Matoy Carlson is a staff attorney with the Indian Law Resource Center in Helena, Mont.

Consultation continued from page 13

So it is said that if you know your enemies and know yourself, you can win a hundred battles without a single loss. If you only know yourself, but not your opponent, you may win or may lose. If you know neither yourself nor your enemy, you will always endanger yourself.

For a tribe, the revitalized federal Indian consultation right is most certainly a way to know your enemies, and to know yourself. With continued vigilance in exercise of that guaranteed right, we shall hope that the rest of this proverb bears out for Indian country. ◆



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