Indian Law Newsletter

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Message from the Chair

By Kelly S. Croman

Thank you to all those Section members who attended this year's Indian Law Section CLE at Daybreak Star on May 4. Attendance was beyond expectations and WSBA staff tells us that the evaluations were some of the best they've ever seen.

The CLE was successful because of the dedicated efforts of a large number of people. Your Trustees deserve the highest praise and appreciation for the effort they put into developing an interesting and diverse program, as do the speakers who volunteered their time and energy to prepare interesting and informative presentations and materials. WSBA staff also spent countless hours supporting our efforts, for which we are very grateful. Last but definitely not least, I want to personally thank **Lael Echohawk (Pawnee)**, your Chair Elect, for stepping in to host the day when I was unable to attend due to a family event.

We've also been busy planning and hosting several mini-tele-CLEs. To date we've held four such events, on the following topics: Public Law 109-158 and the limitations of 28 U.S.C. 2501 for tribal trust funds mismanagement claims (11/3/06); hydroelectric relicensing (1/12/07); cultural property law and Washington Senate Bill 5938 (3/2/07); and *San Manuel v. National Labor Relations Board* (4/27/07). All of these one-hour CLEs have been offered free to Section members and have been well-attended.

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The Adam Walsh Act: Protecting Tribal Children While Preventing State Encroachment into Indian Country

By Julio V.A. Carranza

Last summer, the U.S. Congress passed the Adam Walsh Child Protection and Safety Act of 2006 ("Act"), P.L. 109-248,[2] which made significant changes to sexual predatory crimes[1] and established a nation-wide sex offender registry and notification system.[3] Despite the well-intentioned goals of protecting all children in our country from sexual exploitation, the law was passed without any notice to or consultation with Indian tribes.[4] Accordingly, it should come as no surprise that such a law does not respect tribal sovereignty.

Still, to the astonishment of tribes, the Act contains mandatory language requiring tribes to affirmatively declare their participation in the national sex offender program created by the Act, by **July 27, 2007** – or automatically cede civil and criminal authority to the state for purposes of enforcing the new law.

While prior to the Act federal law provided standards for state sex offender registration programs, federal law offered no comparable provisions for sex offenders who were convicted in tribal courts or entered a reservation following conviction from a non-tribal jurisdiction.[5] The

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Announcements

Greg Wong Publishes Tribal Immunity Comment

Greg Wong recently published a Comment in the *Washington Law Review* titled "Intent Matters: Assessing Sovereign Immunity for Tribal Entities," 82 Wash. L. Rev. 205 (2007). Based in part on his analysis of *Wright*, Greg's Comment argues that courts err if they do not examine a tribe's intent to extend its sovereign immunity to a tribal entity, such as a corporation or economic development agency, when analyzing the entity's amenability to suit. Federal, state, and tribal governments receive sovereign immunity as an incident of their sovereignty. Courts examine the federal and state governments' intent to extend or deny sovereign immunity to a governmental entity out of deference to their sovereign status. Courts should similarly examine tribal intent when determining whether a tribal entity enjoys sovereign immunity from suit out of deference to the tribe's sovereign status. When a court does not consider the tribe's intent it limits the scope of tribal sovereign immunity. Such an abrogation of tribal sovereign immunity is impermissible in light of Supreme Court precedent and Congress's silence on the issue. Greg will graduate from the University of Washington School of Law in June 2007, and will begin his legal career at Kirkpatrick & Lockhart Preston Gates Ellis LLP in its Seattle office this fall.

NIBA Honors Bob Anderson and Lael Echo-hawk

On March 15, 2007, the Northwest Indian Bar Association (NIBA) hosted its inaugural Annual Dinner to celebrate recent Indian legal achievements in Washington. NIBA honored Professor Bob Anderson, an enrolled member of the Minnesota Chippewa Tribe (Bois Forte Band), with the *Native Justice Award* "in honor and recognition of [his] bravery, leadership and determination in advocating for the rights of all Indian people and in fighting to educate and enlighten individuals in the area of Indian law." Lael Echo-hawk, an enrolled member of the Pawnee Nation, was honored with *The President's Award* "in honor and recognition of [her] tireless service and commitment to the Northwest Indian Bar Association and the rights of all Indian people." Bob is a tenured professor at the University of Washington School of Law, where he directs the Native American Law Center. Lael is a reservation attorney for the Tulalip Tribes, past two-term NIBA President, and Chair-elect of both the WSBA Indian Law Section and the National Native American Bar Association.

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Debora Juarez Receives Enduring Spirit Award

Enduring Spirit Award honorees, from left, Ivy Cheyney (Suquamish), Helen Hope Hays (Tlingit), Debora Juarez (Blackfeet), and Diane Vendiola (Swinomish)

Debora Juarez, an enrolled member of the Blackfeet Nation, was one of four Native American women to receive the Native Action Network's *Enduring Spirit Award* during the organization's 5th Annual Enduring Spirit Honoring Luncheon. The award recognizes the lifetime achievements of Native American women who through their commitment of time, energy, and volunteerism contribute to healthy communities. Debora is Of Counsel with the Seattle office of Williams Kastner, where she chairs the firm's Tribal Practice Team.

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Announcements *from previous page*

Tribes Victorious in Wright v. CTEC

On May 11, 2007, the U.S. Supreme Court dismissed the petition for writ of certiorari filed by plaintiff/appellant Christopher Wright in *Wright v. Colville Tribal Enterprise Corporation*. Mr. Wright was appealing the Washington State Supreme Court's decision in December 2006, that corporations owned by tribal governments stand immune from suit, absent express waiver of that immunity by the tribe or U.S. Congress. 159 Wash.2d 108 (Wash. 2006). Special congratulations are in order to Colville lawyers **Rit Bellis** and **Bruce Didesch** for successfully redirecting the case as it approached the State Supreme Court and in turn the High Court.

Indian Law Section & NIBA Gift Bar Stipends

The WSBA Indian Law Section and NIBA recently gifted $1,500 stipends to the following graduating Native students to offset the costs associated with bar exam preparation this summer:

• **Marvin Beauvais (Navajo/Crow)** – Gonzaga University Law School – Co-Founder of the school's Native American Law Students' Association Indian Law Caucus; extern with Washington State Division III Court of Appeals Judge Kenneth H. Kato (retired);

• **Brooke Pinkham (Nez Perce)** – University of Washington Law School – Chair of the National NALSA Moot Court Committee; National NALSA Treasurer; Indian Child Welfare Advisory Committee member; former social worker for the United Indians of All Tribes Foundation; and

• **Nicole Royal (Athabascan)** – University of Washington Law School – Best Oral Negotiator and Best Written Contract, Moot Court Contract Drafting and Negotiation Competition; Vice-President of the Student Bar Association; former intern for the U.S. Senate Appropriations Committee.

Over the past few years, the Section and NIBA's Indian Legal Scholars Program has raised and donated nearly **$80,000** in scholarships to aspiring Indian lawyers like Marvin, Brooke and Nicole, from Washington, Oregon, Idaho and Alaska. In August 2004, the American Bar Association bestowed the Program with the prestigious *Solo and Small Firm Project Award*.

Save the Dates!

An Introduction to Basic Indian Law and Tribal Courts, **June 8, 2007**, Foster Pepper PLLC, Seattle, Washington

3rd Annual Emerging Northwest Tribal Economies CLE, **July 12-13, 2007**, Washington State Convention & Trade Center, Seattle, Washington

20th Annual Indian Law Symposium, **September 6-7, 2007**, University of Washington Law School William H. Gates Hall, Seattle, Washington

NIBA Web Updates

Check out the Northwest Indian Bar Association's newly revamped website, *nwiba.org*, for regional Indian legal announcements, including the latest tribal job openings and conference advertisements.

Got an Indian Legal Announcement?

If so, email Indian Law Newsletter Editor Gabe Galanda at *ggalanda@williamskastner.com*.

Message from the Chair *from page 1*

The next mini-tele-CLE will take place on June 29 regarding Public Law 109-248, the Adam Walsh Act, which requires tribes to either affirmatively assert jurisdiction over sex offender registration on the reservation by **July 27, 2007**, or cede civil and criminal jurisdiction to the state. Feel free to contact any of your Trustees to suggest additional topics and/or speakers.

We're also very pleased to have given $750 bar preparation stipends to the following graduating Native law students: **Marvin Beauvais (Navajo/Crow)** of Gonzaga University Law School, and **Brooke Pinkham (Nez Perce)** and **Nicole Royal (Athabascan)** of the University of Washington School of Law. Better yet, the Northwest Indian Bar Association matched our gift amounts, resulting in $1,500 stipends for each of these three aspiring Indian lawyers.

If you have ideas, requests, suggestions or even complaints, let us know. Contact information for all of your trustees is available on the Section website at *www.wsba.org/lawyers/groups/indianlaw/default1.htm*. Just click on Executive Committee. This is your Section, and we want to hear from you.

WSBA Indian Law Section Chair Kelly S. Croman is General Counsel with Marine View Ventures, Inc., the economic development arm of the Puyallup Tribe.

An Open Window: Why Tribes Should Care About the Upcoming Opportunity to Apply for a Noncommercial Radio License

By John Crigler

Beginning Friday, October 12, 2007, and ending Friday, October 19, 2007, the Federal Communications Commission will accept applications for permits to construct new noncommercial educational ("NCE") FM stations. This "filing window" is the first opportunity to apply for new NCE stations since April 2000, and it could be the last for years to come.

Of the 562 federally recognized Native Nations, only 33 hold licenses for NCE radio stations. According to data compiled by the National Federation of Community Broadcasters, Native-owned radio stations account for less than 0.3% of the more than 13,000 radio stations in the United States. An NFCB project called Native Public Media ("NPM") advocates for Native American use of radio spectrum, and provides assistance to tribes interested in establishing their own stations. The mission of NPM is to promote "healthy, engaged, independent Native communities by strengthening and expanding Native American media capacity and by empowering a strong, proud Native American voice."[1]

[T]ribes interested in preserving Native culture and language, and in empowering their communities through this medium, may want to investigate the opportunity for their own radio stations.

Programs vital to Native American communities have been developed through noncommercial radio stations. For example, on the Hopi Reservation in Northeastern Arizona, KUYI broadcasts a children's program, "Shooting Stars," every morning while children ride the bus to school. This program was produced at the request of these students and engages community members, including elders, to read children's stories in both the Hopi and English languages. The Tohono Od'ham Nation, located on the United States-Mexico border, relies on KOHN to keep its citizens informed of the latest national threat levels and local and Federal homeland security activities. Other tribes interested in preserving Native culture and language, and in empowering their communities through this medium, may want to investigate the opportunity for their own radio stations.

The opportunity is not only rare, but affordable. Acquiring the license for an existing broadcast station may cost hundreds of thousands of dollars. Applying for a new NCE station entails the relatively modest cost of preparing and filing an application.

As a starting point, a tribe needs to determine if spectrum is available in the area in which it wants a station. NPM can help tribes investigate this issue, but tribes will need to work with a broadcast engineer to determine if a channel is available, where a transmitter site could be located, and whether electrical power is available at the site.

After a tribe has determined that a station is technically possible, the tribe must decide what legal entity will hold the license, and prepare the FCC application. This article provides guidance regarding the application and the "point" system used by the FCC to evaluate applications when competing applications are filed.

I. The FCC's Filing System

All applications must now be filed through the FCC's electronic filing system. To access this system, an applicant must obtain an FCC Registration Number (FRN) from the Commission Registration System (CORES). Instructions for obtaining an FRN are available on the FCC's website, *www.fcc.gov*.

A. What to File

All applications must be filed on FCC Form 340, dated February 2007. This form and detailed instructions for completing it are also available on the FCC's homepage. In order to complete the form online, an applicant must establish a password protected account in the FCC's Consolidated Database System (CDBS). There is a link to CDBS on the 340 Form. Once a CDBS account is established, the application can be completed at any time, although it cannot be filed until the window opens.

B. The Structure of the Application

Form 340 is divided into seven sections which are briefly summarized below.

Section I – Solicits general information about the applicant, its address, contact information, FRN, and the community of license it will serve.

Section II – Solicits information relevant to the parties to the application (such as its directors, if the applicant is a corporation) and applicant's "basic" qualifications. These questions determine whether the applicant is legally and financially qualified to hold a noncommercial license. A "No" answer to most of these questions will

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Waiving Goodbye to Tribal Sovereign Immunity?

By Gabriel S. Galanda

Tribal sovereign immunity, the legal principle that Indian tribal governments, like other sovereigns, may not be sued without their own consent, is under a full frontal attack. Consider these passages from recent federal and state court opinions:

> Tribal immunity is "divorced from the realities of the modern world."
>
> "[H]opefully [tribes] will eventually conclude that this litigation tactic [of asserting sovereign immunity] is not the best policy to promote a profitable business."
>
> "[T]he constitutional right of the State to preserve its republican form of government trumps the common law doctrine of tribal immunity."

Unless Indian Country reacts to such scathing judicial indictments through more strategically thought out assertions of sovereign immunity, tribal governments *will* lose that right and the ability to develop reservation economies without the threat of ruinous lawsuits.

Presently, sovereign immunity is the strongest defense to litigation attacks against tribal treasuries and the assertion of state regulatory authority on tribal lands. *See Oklahoma Tax Comm'n v. Citizen Band of Potawatomi*, 498 U.S. 505 (1991). Without immunity protection, tribes would be faced with an avalanche of personal injury and class action lawsuits that could bankrupt tribal treasuries. Unimpeded by tribal immunity doctrine, state and local governments could sustain legal attacks on tribal governments *in state courts* that would further erode Indian sovereignty and regulatory control over the reservation.

On May 14, 2007, the Native Nations Institute for Leadership, Management and Policy and Indigenous Peoples Law & Policy Program at the University of Arizona, hosted a roundtable forum on tribal sovereign immunity. Led by Harvard economist and anti-trust expert Joseph Kalt and Indian law professor and Tribal Court Chief Justice Robert Williams, the sovereign immunity forum coincided with the Economic Policy Summit that NCAI hosted in Phoenix. Tribal government and business leaders and tribal attorneys from throughout Indian Country, as well as BIA officials and executives from the private financial, construction and surety markets, participated in the forum.

The lively discussion moved from the arcane (e.g., the mysteries of calculating basis points on commercial loans to tribal governments), to the mundane (as one tribal leader recounted how a safe holding the tribe's gaming receipts fell through the floor of a double-wide trailer that once housed a tribal bank!). Even more importantly, there were passionate defenses of tribal sovereignty and amazing success stories of tribal economic development and diversification achieved through strategic decisions about when, where and how to make limited waivers of immunity and/or avoid asserting an immunity defense in court.

The dialogue made clear that when a tribal government waives sovereign immunity in limited fashion, or foregoes the assertion of the defense in litigation for policy reasons, that tribe is *exercising* its sovereignty – not abandoning it. Moreover, the participants remarked that unless tribal governments define the time, place, manner and limits for claims against them or tribal entities, the Congress or state, federal and even tribal court judges will take it upon themselves to waive, or outright do away with, the tribal immunity defense.

[U]NLESS TRIBAL GOVERNMENTS DEFINE THE TIME, PLACE, MANNER AND LIMITS FOR CLAIMS AGAINST THEM OR TRIBAL ENTITIES, THE CONGRESS OR STATE, FEDERAL AND EVEN TRIBAL COURT JUDGES WILL TAKE IT UPON THEMSELVES TO WAIVE, OR OUTRIGHT DO AWAY WITH, THE TRIBAL IMMUNITY DEFENSE.

In the end, the forum yielded the following proactive business steps and pre-litigation strategies and litigation alternatives to use, and protect, tribal immunity as a nation building tool for Indian Country.

Tribal Organization: Many tribes are organized under Section 16 and/or 17 of the Indian Reorganization Act of 1934 (IRA). Under Section 16, a tribe will have adopted a constitution and bylaws that set forth the tribe's governmental framework. A tribe may also be incorporated under Section 17 pursuant to a standard federal charter issued by the Secretary of Interior, ostensibly to divide its governmental and business activities.

So-called "IRA tribes" must cautiously appreciate the risk that courts could construe the "sue and be sued" language in Section 17 charters as a tribal immunity waiver and thus make tribal treasuries vulnerable to court judgments arising from Section 17 business activities. The Ninth Circuit Court of Appeals recently held that such language did operate to waive a tribal housing authority's immunity, in *Marceau v. Blackfeet Tribal Housing Authority*, 455 F.3d 974 (9th Cir. 2006).

Although the "sue and be sued" language at issue in *Marceau* reads slightly different than that in Section 17 charters, that case illustrates how courts can and will construe such federally-imposed, boilerplate language to

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Emerging Construction Law Issues in Washington Indian Country

By Kristi D. Favard

In early February of this year, Division I of the Washington Court of Appeals failed to address an important issue relating to construction in Indian Country. That issue was whether a Tribe is subject to Washington's Industrial Safety and Health Act (WISHA) when the Tribe provides a limited waiver of sovereign immunity for personal injuries resulting from construction on Tribal land, as is common in construction contracts involving tribes.

In *Townsend v. Muckleshoot Indian Tribe,* 137 Wn. App. 1002 (2007), an unpublished opinion, the Court of Appeals took the easy way out and determined that the tribal sovereignty issue did not need to be decided because the case could easily be decided on another basis. The facts of the case are straightforward. The Muckleshoot Indian Tribe hired a general contractor to build an office building for the Tribe. The plaintiff, David Townsend, worked for the general contractor. While on the job, Mr. Townsend stumbled against a safety railing, which failed, causing Mr. Townsend to fall and become injured. Mr. Townsend then sued the Tribe alleging that the Tribe failed to comply with WISHA.

The Tribe moved for summary judgment on two grounds. First, the Tribe asserted that the state law claim did not apply to the Tribe on Tribal land. Second, even if the state law did apply, the Tribe argued it did not retain control over the job site and had no duty of care to the general contractor's employees. The trial court granted the Tribe's motion for summary judgment. On appeal, the Court of Appeals stated: "the threshold issue in this case is whether the Tribe consented to be sued in Washington state court and to have Washington state law applied to the resolution of the Townsends' personal injury claim – a claim that arose on tribal land."

Importantly, in its Answer to the Complaint, the Tribe stated that it has determined as a policy not to assert its immunity to bar resolution of personal injury or property damage claims that are covered by its liability insurance. However, the Tribe also argued that it did not consent to apply Washington state law through that waiver of sovereign immunity.

In the past, the Court of Appeals has held that WISHA did not apply to Tribal construction projects. In *Humes v. Fritz Companies,* 125 Wn. App. 477, 105 P.3d 1000 (2005), a crane operator was injured while constructing the casino at the Tulalip Indian Reservation. The court held that WISHA did not apply because "the State lacks jurisdiction to enforce a standard of care on the Tribe for conditions at the worksite outside the casino on the day of the accident." *Id.* at 490.

While the Court of Appeals in *Townsend* acknowledged the *Humes* case and other sovereign immunity cases holding that waiver of immunity from suit must be done unequivocally, it also noted that if the Tribe wanted to assert immunity from Washington state law, its Answer had failed to do so. However, with that statement looming, the Court of Appeals decided it did not need to resolve that issue and instead, looked at the Tribe's second issue on summary judgment, which was whether the Tribe had control over the manner in which the contractor's employees were to perform their work.

The Court of Appeals relied on established Washington state law relating to independent contractors to determine whether the Tribe was an employer of the injured employee or whether the general contractor was an independent contractor, and therefore in control of its employees. The Court of Appeals reviewed the contract between the general contractor and the Tribe to determine that the Tribe was not in control of the work performed by the general contractor's employees. The contract contained the following provisions:

> Tribes and contractors should work together to establish provisions in their contracts that fully describe their intent relating to the independent contractor relationship, whom is in control of the work, and, if sovereign immunity is waived, the extent of such a waiver.

> The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract documents give other specific instructions concerning these matters…
>
> The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract…
>
> The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to (1) employees on the Work and other persons why may be affected thereby …

The Court of Appeals held that these contract provisions put the general contractor in charge of the methods of work and workplace safety and therefore, the Tribe was

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Federal Labor Law Held Applicable to Tribal Casinos

By Judd H. Lees

On February 9, 2007, the United States Court of Appeals for the District of Columbia Circuit affirmed the National Labor Relations Board's application of federal labor law to the San Manuel Indian Bingo & Casino in California. In doing so, the Appeals Court ruled that application of the National Labor Relations Act to the Casino did not impair the tribal sovereignty of the San Manuel Band of Serrano Mission Indians, which owns and operates the Casino on its reservation in San Bernardino County, California. The decision will have enormous ramifications on tribal efforts in response to the concerted efforts of Unite HERE and other labor organizations to organize unions at casinos.

The case arose as a result of a union organizing effort by Unite HERE (Hotel Employees & Restaurant Employees) to gain access to workers at the San Manuel Indian Bingo & Casino. The Casino is a tribal governmental economic development project wholly owned and operated by the tribe, and the Casino is located entirely within the limits of the San Manuel reservation. The Casino is operated pursuant to tribal law (the San Manuel Gaming Act) and the tribe, through the General Council, established the budgets, wages, salaries, benefits and general working conditions at the Casino. In addition, the tribe adopted a tribal labor relations ordinance governing labor relations at the Casino. While the project is operated by members of the tribe, not all employees are tribal members, and most of the Casino's patrons are non-members who come from outside the reservation.

The unfair labor practice charge arose out of the Casino's allowance of access to the Casino by representatives of the Communication Workers of America and denial of similar access to business agents of Unite HERE. When the General Counsel for the National Labor Relations Board found merit with the charge and issued a complaint, the Casino responded by filing a motion for summary judgment on the grounds that the Board lacked jurisdiction over the San Manuel Tribe's operations due to tribal sovereignty. The Board denied the motion for summary judgment and determined that it had jurisdiction for several reasons.

First, the Board determined that the National Labor Relations Act (NLRA) is a law of general application thus placing the burden on the Tribe to convince the Board that tribal casinos are expressly excluded from coverage under the NLRA. Based on this burden, the Board determined that nothing in the NLRA suggested that Congress intended to limit the Board from asserting jurisdiction over Indian tribes. Second, according to the Board, application of labor law in this instance would not involve a critical internal matter of tribal self-governance. The Casino represented tribal participation in the economy for commercial purposes, involved the employment of substantial numbers of non-Indians, and catered to non-Indian clients and customers. This participation in interstate commerce warranted federal labor jurisdiction. However, the Board did agree that jurisdiction would not be appropriate in all situations, especially when the tribe is fulfilling "traditionally tribal or governmental functions that are unique to their status as Indian tribes." The Board explained as follows:

Thus, when the Indian Tribes are acting with regard to this particularized sphere of traditional tribal or governmental functions, the Board should take cognizance of its lessened interest in regulation and the tribe's increased interest in its autonomy. In such circumstances, the Board should afford the tribes more leeway in determining how they conduct their affairs by declining to assert its discretionary jurisdiction.

> [T]ribal advocates observe that those tribes with treaty rights to exclude unwanted persons from their reservations may still have the right to do so, notwithstanding the *San Manuel* decision.

For example, in the companion case of *Yukon Kuskokwim Health Corporation*, the Board determined that it had no jurisdiction to order a union election since the tribal facility in question was a hospital providing free care to tribal members under the Indian Self-Determination Act – even though the vast majority of hospital employees seeking union representation were non-tribal members.

Finally, according to the Board's ruling, application of federal labor law to the Casino would not abrogate any treaty rights. The Board thus rejected the Casino's claim that jurisdiction would interfere with the Indian Gaming Regulatory Act since this Act does not address labor relations. The Board also rejected the Casino's claim that the tribe's sovereign right to exclude non-tribal members from a tribe's reservation precludes the Board's assertion of jurisdiction.

In affirming the Board's ruling, the U.S. Court of Appeals for the District of Columbia agreed that "operation of a casino is not a traditional attribute of self-government," pointing out that many of the Casino's employees and customers were not members of the tribe. The Court's analysis relied on a two-step process. First, the Court examined whether application of the federal labor law to the Casino would impinge upon protected tribal sovereignty. Unlike the Board, the Court was troubled by the

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The Si'lailo Way: Indians, Salmon and Law on the Columbia River

by Joseph C. Dupris, Kathleen S. Hill and William H. Rodgers, Jr. (Carolina Academic Press, $38.00)

Reviewed By Vernon Peterson

"The past is never dead. It's not even past."[1] Native fishers can tell you that William Faulkner's remark about the relevance and immediacy of history is in no place truer than on the Columbia River. In "The Si'lailo Way," authors Dupris, Hill and Rodger[2] document, episode by episode, the more than one hundred fifty years' history of persistent efforts by landowners and non-Indian commercial fish interests to dispossess the Indians of the Columbia River and its fisheries. One culmination in that history occurred on March 10, 1957, when Celilo Falls was submerged in the pool behind the Dalles Dam. Celilo Falls, a native fishing and trading center for ten thousand years, was gone, but, as this book shows, not forgotten by the Indians of the Columbia River who maintain their presence on the river and its environs through cultural and political efforts, as well as legal struggles, in cases such as *United States v. Oregon* and other historic, precedent-setting litigation.

The Columbia River is an example of what historian Richard White calls the "middle ground," the place situated "in between cultures, peoples, and in between empires and the non-state world of villages," a place where "diverse peoples adjust their differences," often misinterpreting and distorting "the values and practices of those they deal with," but in the process creating "new meanings and through them new practices – the shared meanings and practices of the middle ground."[3] Non-Indians sought to monopolize the fishery by use of fishwheels or by enclosing river real estate to bar Indians from accessing treaty-reserved usual and accustomed fishing sites. They tried to intimidate Indians with threats of violence, destruction of property and forced removal. The states sought to regulate Indian fishing by requiring licenses and imposing take limits. The Indians consistently resisted these efforts and, in some cases, by "going to the law," became pioneers of federal Indian law, molding the legal landscape of Pacific Northwest resource law forever.

The states sought to regulate Indian fishing by requiring licenses and imposing take limits. The Indians consistently resisted these efforts and, in some cases, by "going to the law," became pioneers of federal Indian law, molding the legal landscape of Pacific Northwest resource law forever.

"The Si'lailo Way" tells the story of this contested "middle ground" with a very different and exciting kind of legal narrative, focusing on and celebrating the lives of the "heroes" of Indian efforts to preserve fishing rights and traditional lifeways on the river. There are Lawyer and Looking Glass, the patient Nez Perce diplomats and treaty negotiators who "worked a diplomatic coup" against the "high-handed tactics" of Isaac Stevens by winning the concession of off-reservation fishing rights, withheld by Stevens until the end of the negotiations.[4] There's White Swan, the force behind *United States v. Winans*,[5] the decision that confirmed the Indians' right to access traditional fishing grounds, the first in the long string of Indian fishing victories in the United States Supreme Court. There's Sampson Tulee, who won the right to fish free from state regulation in *Tulee v. State of Washington*.[6] And there's Tommy Thompson, the universally respected "custodian" of Celilo Falls, who stood and watched that day in 1957 as the waters buried the falls. The authors put faces to many of the storied names in the fishing rights struggle, and show what each of them had to go through on a personal level to establish what are now enduring legal principles. The book also documents the facts of life not visible in a reported decision, how cultural differences and local politics often affected the practical outcome and blunted the impact of court rulings.

The book is a multi-media experience of Columbia River history, illustrated with photographs, drawings, and reproductions of key documents such as federal officials' correspondence, affidavits of Indians and other exhibits from court cases, materials the authors have winnowed from government archives. These documents are incredibly evocative, reinforcing the authenticity of the language and ideas expressed. The book is thus a great and original resource, a newly-opened window into the workings behind some of the apparent mysteries of treaty history, such as the famous Huntington Treaty of 1865, a "false" treaty which purportedly relinquished reserved fishing rights, and which the authors call "a miraculous fraud dressed up in the splendid plumage of an act of Congress."[7]

Mostly though, these are bracing stories, vigorously-told, by turns analytical, polemical and elegiac, but always good-humored. Some two dozen individuals are profiled in the book, boldly labeled as "Traditionalist," "Progressive," "Warrior," "Trustee," "Ecological Visionary," "Inventor," or "Dreamer" to celebrate each individual's particular contribution to the mission to preserve Indian rights and protect the fish. The Columbia River, tamed as it may be in some respects, is still wild and uncontained, and the women and men celebrated in this book have absorbed the river's spirit as "the Si'lailo way." And the

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Of Superheroes, Lawyers, et al.

By Gyasi Ross

Summer blockbuster season is fast upon us, and, being the closeted comic-book nerd that I am, I look forward to "Spider-Man 3" with squealing zeal. Typically, such summertime cinematic fare gets an "F" for importance (or intelligence!) or social resonance. However, I think that the average attorney – Native and otherwise – could stand to learn a profound lesson from ol' Spidey. Through his lesson, it is possible that we might be able to shed our suits and become a superhero of sorts.

Summer blockbusters are always cool. Maybe not the movie themselves ("Battlefield Earth" or "Pearl Harbor," anyone?), but oftentimes the time, energy and the weather that surrounds summertime movies create an atmosphere and context that is memorable. I still remember going to see "Batman" with Jack Nicholson in the summer of '89 or "Howard the Duck" in '86. To a kid, these were not movies; instead, they were events, deserving of holidays.

Still, as an avowed comic-book nerd, "Spider-Man" was the culmination of all brainless summer fare. The movie not only had comic-book integrity and accuracy, but it also had all those amazing special effects. Critics – in an unlikely alliance between brace-faced comic-book aficionados and literary tastemakers – *loved* the movie's action, storyline and the chemistry between the malnourished hero and somewhat-cute heroine. However, I think there was a socially vital piece that was overlooked by the bulk of the movie-going public – critic and civilian alike: the importance that the movie gave the adage "With great power comes great responsibility."

See, Peter Parker (p/k/a "Spider-Man") did not pay attention to his old Uncle Ben when he told him this tidbit of wisdom. Peter was not a bad kid – not at all disrespectful or pugnacious. Instead, Pete was just *hopelessly busy*, caught in the web of his own life, and did not see the importance of using his great power for the good of people at large. As fate (i.e., the director Sam Raimi) would have it, Peter's reluctance to use his power for good backfired as a man that he could have easily detained ended up, in Greek-tragedy fashion, killing his Uncle Ben.

I think we, as attorneys, are in that position of "great power." Alexis de Tocqueville described lawyers as the "American aristocracy." Assuming this description is accurate, how much more so is this true within our own Native communities?

Think about it – when any one of us goes to our respective homes, *everyone* knows that we are lawyers. When Natives introduce us to others, we are their "lawyer friend"; to many, *many* folks, we *are* the only attorneys that they know. In those communities, where employment opportunities are scarce and money is tight, we can always find a job. In short, we are given a special status based upon our academic achievement and state licensing.

> [W]e have a duty to ensure that our loved ones – Natives – do not suffer because of our laziness or reluctance to get involved.

I submit, then, that we likewise have a special responsibility to our communities and our people. We have been placed in a unique position of power and oftentimes prosperity; hence, like Spider-Man, we have a duty to ensure that our loved ones – Natives – do not suffer because of our laziness or reluctance to get involved.

Summertime is filled with opportunities to get involved – pow-wows abound, kids are out of school, youth centers (such as Iwasil Boys and Girls Club) are filled to the brim. We are all busy; yet, opportunities abound to tutor summer school, stop in and say "hi" at day care, help with a basketball camp.

Our people *will* give us a special audience and listen to us merely because of who we are. It is up to us to assume and utilize that position of power for the benefit of Native people; we have the opportunity to step out of our suits – Clark Kent style – and become someone's superhero.

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A "New World" to Claim – The Arctic

By Robert J. Miller

Recent news reports state that global warming and the shrinking Arctic icecaps are opening new sea lanes and making barren islands suddenly very valuable. In fact, the international community might experience a new race of exploration, conquest and acquisition for this "new world" - these newly available lands and sea routes. Conflicts could arise over shipping lanes, islands, fish stocks, minerals and oil that are now becoming accessible and commercially exploitable.

Governments are even now engaged in asserting their sovereignty over these areas and assets. Canada, Denmark, and the United States are already involved in diplomatic disputes over these issues. For example, Canada and Denmark have sent diplomats and warships to plant their flags on tiny Hans Island near northwestern Greenland. In 1984, Denmark's Minister for Greenland Affairs landed on the island in a helicopter and raised the Danish flag, buried a bottle of brandy, and left a note that said "Welcome to the Danish Island." Canada was not amused by this assertion of Danish sovereignty. In 2005, the Canadian Defense Minister and troops landed on the island and hoisted the Canadian flag. Denmark lodged an official protest. In addition, Canada, Russia and Denmark are claiming waters all the way to the North Pole. Moreover, the United States and Canada are disputing Canadian claims that the emerging Northwest Passage sea route is in its territory. The U.S. insists the waters are neutral and open to all but Canadian Prime Minister Stephen Harper states that he will place military icebreakers in the area "to assert our sovereignty and take action to protect our territorial integrity."

This kind of conduct is nothing new. It mirrors exactly the actions taken by European and American governments in the 15th-20th centuries in their race to claim the lands and the assets of the New World of the Americas, Africa, and other areas. That race was conducted under the international legal principle known today as the Doctrine of Discovery. Under various papal bulls, Spain and Portugal could establish claims to the lands of indigenous, non-Christian, non-European peoples by merely "discovering" the lands. Spanish, Portuguese, and later English and French explorers engaged in numerous types of Discovery rituals upon encountering new lands. The hoisting of their flag and the cross and leaving evidence that they had been there was part of the Discovery process. In 1776-78, for example, Captain Cook established English claims to British Columbia by leaving English coins in buried bottles. In

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The United States' "Debt" to American Indians

By Robert J. Miller

The United States owes a lot to the Indian Nations. Unquestionably, American Indians helped early European settlers to survive and succeed on this continent and American Indian governments contributed mightily to the political thinking that led to the formation of the federal government that was created by our Founding Fathers.

The United States, however, also owes over 300,000 American Indians something else: up to $200 BILLION for the mismanagement of their property over the past one hundred years.

In 1996, the Native American Rights Fund filed a class action law suit against the United States for the mismanagement of tribal and individual Indian assets - Cobell v. Kempthorne. The case has already resulted in more than twelve federal court opinions but has not even progressed beyond the discovery phase. The federal government and its attorneys have actively resisted this case every step of the way. In fact, two Cabinet secretaries and the Assistant Secretary for Indian Affairs were held in contempt of court in 1999 and were fined more than $625,000 for discovery violations. Federal district court judge Royce Lamberth was recently removed from the case by the D.C. Circuit Court of Appeals for his growing bias in favor of the Indian plaintiffs.

> THE UNITED STATES APPARENTLY WANTS TO CONTINUE MANAGING INDIAN ASSETS BUT WANTS TO PREVENT ANY FUTURE POSSIBLE LIABILITY NO MATTER HOW WOEFULLY IT MIGHT MANAGE AND FAIL TO PROTECT THESE ASSETS.

In 1996, this case was discussed as being worth in the $2-10 billion range in damages that the U.S. either embezzled from Indians or had just "lost" through its incompetence. But today, the case is valued as possibly being worth up to $200 BILLION for the 300,000+ plaintiffs. Attorney General Gonzalez has even opined that the tribal governments' claim for similar problems could result in this high of a verdict.

The case has arisen from the complicated history of federal Indian policies and because the United States became the trustee for the Indian Nations and individual Indian people. Starting in 1887, with the passage of the General Allotment Act, the United States has been responsible for the oversight and management of most of the

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lapse in tribal sex offender registration was – and remains – especially troubling, since one of the "most destructive problems affecting children in 'Indian country' is sexual abuse."[6] The Act is designed to fill jurisdictional gaps on the reservation and thus help protect tribal communities from sexual abuse, by requiring tribal participation in the national sex offender registration and notification system.[7]

According to the Act, the following categories of tribes that fail to disclaim state jurisdiction by July 27 will be treated as having acquiesced to state civil and criminal authority for purposes of enforcing the Act:[8]

- Tribes subject to state authority pursuant to Public Law 280 (as further discussed below);[9]
- Tribes electing to participate under the Act by July 27, which later withdraw their participation;
- Tribes the U.S. Attorney General determines are likely incapable of substantially implementing the requirements of the Act.

Importantly, tribes do not have to be fully compliant with the federal sex offender registry and notification requirements by July 27, 2007. Tribes must achieve full compliance by July 27, 2009. And one to two year extensions can be obtained from the U.S. Attorney General, in which case a tribe would have until July 27, 2010 or 2011 to become fully compliant with the Act.[10]

The Sex Offender Registration/Notification System

By electing to participate as a registered jurisdiction to the exclusion of the state, a tribe must fully implement the following requirements of the Act:

1. Maintain a jurisdiction-wide sex offender registry and website.[11]
2. Ensure that the tribal sex offender registry includes:[12]
   a. Physical description of the sex offender;
   b. Text of the provision of law defining the criminal offense for which the sex offender is registered;
   c. Criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender;
   d. Current photograph of the sex offender;
   e. Fingerprints and palm prints of the sex offender;
   f. DNA sample of the sex offender;
   g. Photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction; and
   h. Any other information required by the Attorney General.
3. Make sure sex offenders on the reservation register, understand the tribal registration requirements, and remain registered.[13]

With such requirements comes a notable financial burden that electing tribes must be prepared to bear. According to the federal government, implementation of the necessary sex offender website hardware and software could exceed $40,000.[14] And, that amount does not contemplate the direct and indirect costs of tribal technical, law enforcement and other services that will be needed to implement the Act. Although the Act contemplates grant funding to tribes for implementation, the U.S. Attorney General has not yet established a funding program under the Act.[15]

Tribal Participation Election

The steps for tribes to elect to participate in the national sex offender registry and notification system are as follows:

1. **Pass a Tribal Resolution by July 27**. First and foremost, a tribe must enact a "resolution or other enactment of the tribal council or comparable governmental body," which either (a) expresses an intent to implement all of the duties imposed by the Act or (b) designates the tribe as a registration jurisdiction via cooperative agreements with local jurisdictions.[16]
2. **Contact U.S. DOJ by July 27**. A tribe must transmit a tribal resolution or enactment to the Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) office. Tribes may send the resolution/enactment to Leslie A. Hagen, Smart Office/Office of Justice Programs, U.S. Dept. of Justice, 810 7th St., NW, Suite 8241, Washington, DC, 20531, (202) 616-6459, Leslie.Hagen@usdoj.gov.
3. **Explore Federal Funding**. An electing tribe should work with the SMART office to secure funding authorized under the Act for implementation of the above-outlined sex offender registry and notification system requirements.
4. **Implement the Act by July 27, 2009**. Tribes must fully implement the requirements of the Adam

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Walsh Act within two years – or obtain an extension until 2010 or 2011 – or risk having the U.S. Attorney General decertify the tribes and allow the state enforcement of the Act. [17]

Recommendations

Since the Adam Walsh Act was just recently passed and there are no guiding implementation regulations, much of the responsibilities and practical enforcement issues are still unknown. Despite the coercive nature of the new federal law, tribes should consider taking the following actions to further safeguard their communities from sexual predators.

- Elect to establish a tribal sex offender registration system and/or to enter into a cooperative agreement with local government for that purpose;
- Evaluate inherent banishment or exclusionary authority to keep reservation sex offenders at bay; and
- Enact tribal law specific to a particular reservation community to identify, punish and/or deter sexual predators.

These are just a few of the legal options tribes have to keep their reservations and children safe.

P.L. 280

P.L. 280 tribes, please take note. The U.S. Department of Justice appears to be construing the Adam Walsh Act to confer both criminal and civil jurisdiction to states with "full" or "partial" criminal and/or civil jurisdiction on the reservation pursuant to P.L. 280. The federal government sent a letter to the tribes stating "delegation to the state is automatic if a tribe is subject to the law enforcement jurisdiction of the state under 18 U.S.C. 1162 (P.L. 280)."[18] While tribes that have ceded criminal authority to the state by way of P.L. 280 appear clearly subject to state criminal enforcement under the Act, the same does not necessarily hold true for civil regulatory authority on the reservation.

P.L. 280 of course did not grant states "civil regulatory" jurisdiction on the reservation. *See e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-215 (1987). As such, tribes maintain civil regulatory jurisdiction to, e.g., civilly banish or exclude sexual predators from the reservation. However, P.L. 280 tribes that do not affirmatively assert such civil regulatory jurisdiction over sex offenders by July 27 risk ceding that authority to the state. A tribe that does not elect to comply with the Act but later attempts to exclude a sex offender from the reservation *could* be faced with a jurisdictional objection from the offender – i.e., an argument that the tribe ceded civil exclusion authority over sex offenders to the state under the Act. Thus, even P.L. 280 tribes should consider electing to participate in the national sex offender registry and notification system as outlined above.

In sum, the Adam Walsh Act highlights the need for tribes to implement safeguards to ensure the health and safety of Indian children and adolescents on the one hand, while protecting and strengthening tribal sovereignty and self-governance on the other. All the same, tribes should take appropriate legislative action by July 27, 2007. As the old saying goes – "Speak now or forever hold your peace."

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1 Pub. L. No. 109-248, 120 Stat. 587 (partially codified at 42 U.S.C. §§ 16901-16991).

2 Of particular importance, the Act adds felony child abuse and neglect to the Major Crimes Act's list of offenses that are subject to federal prosecution when committed by an Indian against the person or property of another Indian or other person within Indian country. *Id.* at § 16911(5)(a)(iii).

3 *Id.* at § 16911; The Sex Offender Registration and Notification system was established "to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators." *Id.* at § 16901.

4 *See* National Congress American Indians Memorandum to Tribal Leaders, available at *www.ncai.org/ncai/resource/documents/governance/Adam_Walsh_Act/Adam_Walsh_Memo_4.12.07.doc* (accessed May 29, 2007).

5 *Id.*; Sex Offender Registration in Indian Country, Tribal Judicial Institute, available at *www.law.und.edu/npilc/judicial/web_assets/pdf/TJI06sexoffend.pdf* (accessed May 23, 2007); *see also* Larry EchoHawk, Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation, 5 N.Y.U. J. Legis. & Pub. Pol'y 83 (2001).

6 EchoHawk, Child Sexual Abuse, *supra* note 5 at 85. Native American children suffer the second highest rate of reported child abuse and neglect. *See* Table 3-11 Race and Ethnicity of Victims, 2005 Child Maltreatment, Administration for Children and Families, available at *www.acf.hhs.gov/programs/cb/pubs/cm05/table3_11.htm* (accessed May 23, 2007).

7 Letter from Laura Rogers, U.S. Office of Justice Programs, May 3, 2007, available at *www.tribal-institute.org/download/Adam%20Walsh%20Tribal%20Letter.pdf* (accessed May 23, 2007).

8 42 U.S.C. § 16927.

9 *See* 18 U.S.C. § 1162.

10 42 U.S.C. §§ 16923 - 16924; *see also* Laura Rogers Letter, *supra* note 7.

11 *Id.* at §§ 16912-16919. Under the Act, sex offenders are classified as Tier I, Tier II, or Tier III. *Id.* at § 16911. Since Tier II and Tier III each maintain imprisonment exceeding one year and Congress limited tribes authority to impose jail sentence in excess of a

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result in the dismissal of the application unless the "No" is carefully explained in an exhibit.

Section III – Solicits information relevant to determining whether the applicant will provide a first or second NCE service to at least 10% of the total population in its predicted (60dBu) contour *and* at least 2,000 people. This question is important because it may result in a decisive "fair distribution of service" preference, awarded under Section 307(b) of the Communications Act (and known fondly as a "307(b) preference"). This preference comes into play only if two or more mutually exclusive applications specify different communities of license.

Section IV – Asks the applicant to certify whether it qualifies for certain points awarded under the point system, which is used to award a construction permit when two or more qualified mutually exclusive applicants apply and when no applicant is entitled to a 307(b) preference. The possible points are:

Established Local Applicant – 3 points

Diversity of Ownership or Stateside Network 2 points

Technical Parameters 1 – 2 points

Section V – Solicits information about attributable interests in licenses and construction permits for other stations (including full service commercial and noncommercial stations and translators). This information is used to break point system ties. The first tie-breaker awards a preference to the applicant with the fewest authorizations. If two or more applicants are still tied, the second tie breaker awards a preference to the applicant with the fewest pending applications.

Section VI – Requires the applicant to certify that the information contained in the application is "true, complete, and correct." The certification should be signed by an authorized representative of the applicant. For corporations, that representative should be an officer of the corporation. It is not necessary to submit a signature, but it is wise to keep a signed and dated copy of the application as evidence that the certification was proper.

II. The Backlog Order

On March 27, 2007, the FCC released an order (the "Backlog Order") that applied the point system to approximately 200 mutually exclusive applications and tentatively selected some 76 applicants to receive construction permits. The Backlog Order is the best available guide for understanding how the point system works. Here are a few take-away principles.

A. Back to Basics

An applicant must establish that it is eligible to hold a noncommercial license. Its "basic qualifications" include a showing that it has an educational purpose which will be advanced by a radio station, that it possesses requisite "character qualifications," complies with limits on alien ownership, and is financially qualified. If these qualifications are not demonstrated, its application will be dismissed without ever advancing to a "fair distribution" or point system analysis. Similarly, if Section VII of the application does not establish that the technical facilities proposed comply with technical and environmental requirements, the application will be dismissed without regard to the applicant's qualifications under the point system.

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year, Tribes will not have any Tier II or III offenses. *Id.; see* Civil Rights Act of 1968, 25 U.S.C. §1302(7) (limiting the sentences tribal courts may impose to a maximum of $5,000 and one year in jail for any crime). Thus, it is unlikely that Tribes will be required to place but a limited group of Tier 1 offenses (as defined by their own tribal criminal code) onto the Internet. Forthcoming implementing guidelines may provide further direction for this issue.

12 *Id.* at § 16914.

13 *Id.* at § 16916.

14 *See* Technical Assistance, SMART office, available at *www.ojp.usdoj.gov/smart/faq.htm#registry* (accessed May 28, 2007).

15 *See generally*, Title VI, sections 621-629, Pub. L. No. 109-248. Under the Act, the Attorney General is mandated to establish and implement a Sex Offender Management program, under which the Attorney General may award a grant to a jurisdiction to offset the costs of implementing the sex offender registry and notification system. This also includes awarding bonus payments to tribes that promptly comply and implement the registry and notification standards not later than July 27, 2008. *Id.*

16 *Id.* at §16927(a)(1)(A), (B). A tribe may choose to do nothing but under the Act still is treated as allowing Congress to cede to the state authority to implement the requirements of the Act.

17 As of this date, no appellate courts have directly examined issue related to tribal compliance with the Adam Walsh Ac. However, a recent dissent opinion in *State v. Jones*, 729 N.W.2d 1, 19-20 (Minn. 2006), which addressed the issue of whether Minnesota, a "full" PL-280 state, could enforce a sex offender registry statute against a Leech Lake Band of Ojibwe tribal member, outlined similar tribal compliance procedures under the Act.

18 *See* Laura Rogers Letter, *supra* note 7 at p. 2.

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B. Expect No Mercy

Although the point system is technically a hearing designed to select the "best" applicant, it is applied in an unforgiving fashion. Late-filed applications or applications that do not provide required information are likely to be dismissed. The FCC will generally assume the accuracy of any information contained in applications, but will not do an applicant's work for it by supplying missing information. There are only limited opportunities to amend an application once it is filed, and no opportunity to improve one's position under the point system.

C. Documentation Counts

Claims for localism and diversity credits must be documented. The documentation must not only demonstrate that the claims are valid at the time the application is filed, but that the applicant has a binding commitment to abide by these principles in the future. The FCC will not award credit for undocumented claims.

D. Coverage Rules

The FCC's point system awards signal coverage in two different ways. First, it awards a potentially dispositive 307(b) preference to applicants that provide a first or second noncommercial service to at least 2,000 people and 10% of the population within the predicted contour. This means that an applicant entitled to no points will prevail over an applicant entitled to the maximum number of points if the 0-point applicant receives a 307(b) preference. Second, if 307(b) criteria are not applicable, an applicant that provides coverage to a greater area *and* population may receive one or two points for "technical superiority."

E. The Establishment Clause

In order to receive the localism credit, an entity must be both "established" and "local." A nonprofit entity is "established" if the entity itself has been in existence for at least two years.

An established entity must also be local. A non-local parent may not claim localism through a subsidiary, nor base its claim on the location of a "branch office," rather than of its own headquarters. The FCC will not "look through" the entity to the residence of its members or directors.

F. Less Later Is More Now

A claim to advance diversity of ownership is awarded if the applicant does not have an attributable interest in another overlapping station. This claim is based upon a "snapshot" of the interests held by the applicant and its principals at the time the application is filed. The FCC rejected a diversity claim based upon a promise that a director, who held an attributable interest in an existing overlapping station at the time the application was filed, would resign later if the application was granted.

One exception to the principle just articulated is that the Commission will award a diversity credit based upon an applicant's commitment to divest itself of an overlapping translator station or Class D station. The Commission concluded that, in these circumstances, a waiver of its rule was justified in order to permit a secondary station to be replaced by a full-service station.

G. Best Is Better

Up to two points are awarded for the applicant with the "best" technical proposal. To be technically superior to another applicant, the preferred applicant must serve 10% (one point) or 25% (2 points) more area *and* population than the "next best" applicant. But what if there is no "next best" applicant because one of two other applicants serves more area than the second, while the second serves more population than the first? The "best" still gets credit, provided the area and population it serves is superior to the area and population served by each of the other applicants.

H. One is the Loneliest Number

All ties in the Backlog Order were resolved by using the first tie-breaker – the fewest existing authorizations. The Commission nevertheless explained that in applying the second tie-breaker – the lowest number of pending applications – the applicant should always count its own application as a pending application. Thus, the lowest number of pending applications any applicant may claim is "one."

I. Minor Majors and Major Majors

Although the directors of a nonprofit organization typically do not own shares or hold other equity interests in the organization, directors are analogized to equity owners for purposes of applying the FCC's rules concerning "attribution" and "major changes" of ownership. For example, if a director of an applicant holds an interest in the licensee of another station, that interest will be "attributed" to the applicant. A change of more than 50% of the directors of a nonprofit corporation is ordinarily considered a major change that could result in the dismissal of an application. To avoid the harsh effect of applying this rule to applications that may be pending for years, the FCC waived its major change rule when applicants showed that "they have experienced gradual ownership changes over long periods and not as an outgrowth of the party's desire to gain control over the NCE application."

By contrast, the Commission denied a waiver of the major change rule when changes in directors occurred "suddenly," as a result of a struggle to gain control of the

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allow suit against tribal sovereigns. Accordingly, IRA tribes should reconsider doing business under their Section 17 corporate charter in favor of pursuing economic development activities as a Section 16 (or other) entity.

Tribal Corporate Formation: The Washington Supreme Court recently explained that "a tribe may waive immunity by incorporating the enterprise under state law, rather than tribal law." *Wright v. CTEC*, 159 Wash.2d 108 (Wash. 2006). Tribes that do not yet have business formation codes should pass such tribal laws – another necessary tool to build for vibrant tribal and inter-tribal economies.

If it makes political and business sense for tribally owned enterprises to be incorporated under tribal law, tribes should form them under tribal rather than state law. In addition to cloaking tribally owned businesses with immunity, incorporating under tribal law could also shield tribal companies –especially those doing business off the reservation – with tribal regulatory protection, to the exclusion of state authority.

Tribal Legislative Intent: In a recent *Washington Law Review* article titled "Intent Matters: Assessing Sovereign Immunity for Tribal Entities," 82 Wash. L. Rev. 205 (2007), Greg Wong argues that courts err if they do not examine a tribe's intent to extend its sovereign immunity to, e.g., a tribal corporation or economic development agency, when analyzing such an entity's amenability to suit.

Courts, which examine the federal and state governments' intent to extend or deny immunity to a governmental entity, should likewise defer to tribal sovereign status by examining a tribe's intent when determining whether a tribal business entity stands immune from suit. In order to allow such judicial deference to tribal self-rule, tribes should pass resolutions that affirmatively declare tribal intent regarding whether or not their business entities should be afforded immunity protection.

Tribal Administrative Procedures Acts: One forum participant commented that tribal legislative actions should be challengeable by tribal members much like state and federal actions can be contested pursuant to administrative procedure acts, which operate to waive governmental immunity in limited fashion.

As both Professors Kalt and Williams explained, the doctrine of sovereign immunity originated in merry-old England, where the courts held that the King, who basically owned the courts, "could do no wrong." The notion that a tribal government could deny its own citizens a forum to hold that government accountable for its decisions (or omissions) seems foreign to indigenous legal traditions and the customs and traditions of many Indian tribes on this continent.

While the *Ex Parte Young* doctrine may allow already suit against tribal officers for equitable relief in limited instances, tribes should consider creating processes and affecting limited immunity waivers to allow heightened transparency and accountability in tribal policymaking.

Reservation Due Process: In *Wright*, the Washington State Supreme Court held that tribally owned corporations stand immune from suit, absent express waiver of that immunity by the tribe or U.S. Congress. Importantly, the court commented that the plaintiff in *Wright*, a non-Indian employee who sued for discrimination, was not left without a remedy; he "could have filed a grievance or sought

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entity. In these circumstances, the Commission dismissed the application after concluding that the present applicant was "not the entity that originally filed the application."

J. More Law, More Often

Between now and the opening of the filing window, the FCC plans to issue public notices that will provide more information about filing procedures and application requirements. Expect more point system rulings as well. There are approximately 22 remaining proceedings involving mutually exclusive applicants for NCE applicants. Twelve of these involve questions of international law, such as treaties with Canada or Mexico. The remaining ten involve contested cases. The rulings on these cases, as well as any petitions to deny the applications of tentative selectees, may shed additional light on the point system.

III. Conclusion

The complex regulatory process makes it essential to get legal and technical advice before filing an application for a new station; but the potential rewards are high. Resources and assistance are available through Native Public Media, and Native FM stations currently in operation can serve as models for a start-up station. If your tribe is interested, investigate this opportunity promptly. The filing window will open for only a brief period of time and may not open again soon.

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1 *See* www.nativepublicmedia.org.

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relief through the Tribal Employments Rights Office" or "recover[ed] damages under a policy of insurance."

Judges who are asked to dismiss a suit against a tribal government or corporate entity are primarily concerned about whether the tribal government would otherwise afford the plaintiff some form of due process of law – i.e., "constitutional rights to access to the courts and to trial by jury." *Seminole Tribe of Florida v. McCor, 903 So. 2d 353 (Fla. 2d Ct. App. 2005).* Thus, tribes should consider promulgating and following employment laws that confer employees' grievance rights and perhaps even allow them to seek limited redress (e.g., equitable relief such as reinstatement) in tribal administrative and/or judicial forums.

Tribal Tort Claims Laws: For much the same reason, tribes should also enact tribal tort claims acts to ensure that people who are injured on the reservation have an opportunity to be made whole. Again, sovereign immunity is a governmental power to define the time, place, manner and limits for any suit against the sovereign, and waiving immunity in limited form is an exercise – not a waiver – of sovereignty.

Tribes like the Colville, Tulalip and Quinault Nations have crafted laws that allow a plaintiff who can prove that he or she was actually injured to recover damages through tribal legal processes, up to certain available liability insurance proceeds. Such tribes have exercised their sovereignty to define the terms under which they will allow redress to injured people – rather than allowing non-tribal courts or Congress to do so.

Tribal Liability Insurance Procurement: As explained in a recent *Indian Law Newsletter* article I co-authored with Debora Juarez, the insurance industry has no problem with taking gross advantage of tribal governments, if tribes let them. Standard form tribal insurance policies may not even provide tribes legal defense to tort claims. So what then is the essential benefit of the insurance bargain?

Those same policies likely disallow tribes from selecting legal counsel with expertise in federal Indian and tribal law to defend and advise them about the types of sovereignty issues and immunity alternatives discussed in this piece. In addition, those policies may allow an insurer to assert a tribe's immunity from suit without tribal consent, or deny coverage to the tribal insured if the tribe decides for policy reasons against asserting immunity as a defense to suit.

What's more, arbitration language in the policies may operate to divest a tribe's justice system of jurisdiction, and waive tribal immunity from countersuit under *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411(2001), in the event the tribe must sue its insurer for insurance defense and/or indemnification.

And, those policies may not provide a self-governance or "638" tribe any private coverage if the tribe is "eligible" for defense by the U.S. Department of Justice pursuant to 1990 amendments to the federal self-determination act. Under "638 contracts," the U.S. funds tribal governmental programs that it would otherwise provide tribes, and must defend 638 tribes from tort claims arising from those programs (as further discussed below). But, with the Bush administration unrelenting in its refusal to defend tribes from 638-related claims, such policies could leave tribes without any private insurance protection as well.

For these reasons, senior tribal leadership and tribal lawyers – not just mid-level tribal staff – must take an active role in insurance procurement and tort claims handling for tribal governments and enterprises.

Alternative Dispute Resolution (ADR): Generally speaking, in commercial dealing tribes prefer that any dispute arising from the deal be heard in tribal court, while tribal business partners prefer state court as the forum for any such dispute. Binding arbitration, with appropriate enforcement of any arbitration award in tribal and/or state court, has become a popular compromise in major tribal business dealings.

While arbitration language likely operates to waive tribal immunity under *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411(2001), vesting jurisdiction in a private arbitration panel eliminates the possibility that a tribe's sovereignty, immunity or jurisdiction would be adjudicated – or eroded – by a court.

Also, when faced with lawsuits not subject to mandatory arbitration, tribal governments could propose arbitration as an alternative mode of dispute resolution and consent to arbitrate a matter on the merits (a legal strategy discussed below). Yakama Nation leaders have a saying: "We don't put our treaty on trial." ADR contract language is one way to enforce tribal business rights and allow redress for tribal business partners, while keeping your sovereignty out of trial.

Federal Tort Claims Act Tenders: Under self-governance agreements called "638 contracts" (named after P.L. 93-638), the federal government funds tribal governmental programs that the U.S. would otherwise provide tribes in fulfillment of its trust responsibility. A 1990 amendment to the federal self-determination act provides 638 tribes protection under the Federal Tort Claims Act (FTCA) for claims resulting from tortious acts or omissions arising from their performance of self-governance contractual functions.

Importantly, the U.S. Department of Justice must defend 638-related tort lawsuits against self-governance tribal defendants, including having any tribal defendants replaced by the U.S. as the defendant to the lawsuit. Assuming the current federal government honors its legal, contractual and trust obligations to defend self-governance tribes, FTCA claim procedures help take tribal sovereignty and immunity out of the legal firing line.

(continued on next page)

Waiving Goodbye to Tribal Sovereign Immunity? *from previous page*

If the U.S. does not keep its promise to a 638 tribe, that tribe, if backed by proper liability insurance, could compel its carrier to underwrite a lawsuit in federal court against the federal government to compel it to defend and indemnify the tribe. Such a tactic would be reasonably related to the defense of the underlying tort lawsuit and thus should be covered under the tribe's insurance policy.

Early Settlement: Settling rather than dismissing personal injury or contract claims with merit, especially those brought by non-Indians, may be wise for at least two reasons. First and foremost, asserting immunity as a bar to suits brought by reservation patrons is not "the best policy to promote a profitable business." *Seminole, supra.*

Simply put, non-Indians will not return to the reservation for business or fun – activities that fuel tribal economies – if they cannot feel assured that their rights will be protected in the event something goes wrong. A liability insurance policy that honors tribal sovereign decision-making would make such an alternative even easier as insurance proceeds – rather than tribal monies – would be available to help make the injured party whole.

Secondly, as Professor David Getches has observed: "While it is not always possible to prevent the [U.S. Supreme] Court from hearing an Indian case, the dismal record for tribes from the last fifteen years of Supreme Court cases should encourage tribes to settle." Since 2001, the High Court has been presented with 28 cases involving the tribal immunity doctrine.

Thankfully Indian Country has dodged those 28 bullets, as the Court has not taken any of those opportunities to abrogate tribal immunity. (Recall the Court not too long ago "suggest[ing] a need to abrogate tribal immunity, at least as an overarching rule" and "defer[ing] to the role Congress may wish to exercise in this important judgment." *Kiowa v. Manufacturing Technologies, 523 U.S. 751 (U.S. 1998)*).

But if Indian Country continues to roll the dice, our luck *will* run out. The next tribal immunity case that ends up before the conservative block of Justices, including Antoine Scalia and Clarence Thomas, will very likely sound the death knell for tribal immunity, which would leave tribal treasuries exposed to high stakes class action litigation and tribes vulnerable to state regulatory encroachment through the courts. Accordingly, tribes must heed Professor Getches' advice and carefully consider settling certain claims short of motion practice.

Consent to Suit on the Merits: Tribes should also consider litigating certain suits, such as frivolous tort claims, on the merits. Consistent with defining the time, place, manner and limits for any claims against a tribal or tribal entity, a tribe could consent to a particular court's jurisdiction and limit any potential judgment against it to available liability insurance proceeds. *See generally Collins v. Memorial Hospital of Sheridan Cnty.*, 521 P.2d 1339 (Wyo. 1974). Such a tactic could allow the tribe to dismiss or defeat the lawsuit on the merits, without putting tribal sovereignty or immunity on trial.

That is precisely how the Muckleshoot Tribe recently defeated a lawsuit. In *Townsend v. Muckleshoot Indian Tribe*, the Tribe answered a state court civil complaint arising from a construction project, explaining: "As a matter of policy, the Tribe has determined to not assert its immunity to bar resolution of personal injury or property damage claims that are covered by and within the coverage limits of its liability insurance." 137 Wash. App. 1002 (Wash. App. 2007). (Again, you can see the importance of a strong liability insurance policy.) The Tribe then convinced the state court that plaintiffs could not prove their case as a matter of law and accordingly, the a summary judgment dismissal was entered in favor of the tribe. All the while, the tribe never allowed its sovereign immunity to be scrutinized or indicted by the state judiciary.

Indian people do not say or express "goodbye." We say "see you next time." Let's do what we can to avoid waiving goodbye to tribal immunity so Indian Country will have its protection next time – perhaps when we need it the most.

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Emerging Construction Law Issues in Washington Indian Country *from page 6*

not in control. Therefore, the Tribe's summary judgment victory stood.

While the second issue in the case certainly provided the Court of Appeals with an easy, non-controversial way to decide the case, the Court of Appeals missed an opportunity to address the scope of a limited waiver of sovereign immunity for personal injury in construction contracts on Tribal land. The Court of Appeals also missed an opportunity to address whether WISHA applied because of the language in the contract and in the Tribe's Answer to the Complaint. Such a decision would have assisted contractors and Tribes in drafting future contracts to make clear agreements regarding worker injury.

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Federal Labor Law Held Applicable to Tribal Casinos *from page 7*

effect of application of federal labor law on the tribal labor ordinance that governs relations with Casino employees. Nevertheless, the Court determined that the resulting impairment of tribal sovereignty was negligible since the San Manuel Tribe's gaming activity was primarily commercial. The tribal labor ordinance in question was thus "ancillary" to the commercial activity.

Second, the Court determined that the Casino fell under the NLRA's definition of "employer" rather than the statutory exception for "any State or political subdivision thereof." The Court determined that the National Labor Relations Board's determination in this respect was a permissible construction of the statute.

As a result of the *San Manuel* decision, application of federal labor law to tribal operations will have to be examined on a case-by-case basis. In the event the tribal activity in question is deemed "commercial" or is Indian gaming, and notwithstanding that fact that such tribal activities are *governmental* in nature, with all net revenues used for essential *governmental* services, the Board will probably exercise jurisdiction. In the event the tribe is fulfilling a more "traditional" tribal or governmental function unique to its tribal status – such as the health care facility in the *Yukon Kuskokwim Health Corporation* case – the Board may choose not to exercise its jurisdiction.

In addition, the Act cannot be applied to regulate the relationship between a tribal employer and a tribal member employee since the Board appears to recognize the inherent sovereign right of tribes to self-regulate their relations with tribal member employees. This may then result in exclusion of tribal member employees from federal labor law protection as well as any collective bargaining unit even if the union prevails in its casino organizing efforts. With regard to non-member employees, the Board and Court's analysis may call for recognition of tribal sovereignty in the event the tribe can point to a treaty right that would be abrogated by application of federal labor law.

Moreover, tribal advocates observe that those tribes with treaty rights to exclude unwanted persons from their reservations may still have the right to do so, notwithstanding the *San Manuel* decision.[1] Such exclusion rights, they argue, would allow tribes to exclude union representatives.

Critics of the decision point out that the *San Manuel* decision impinges upon the Indian Gaming Regulatory Act of 1988, which requires Indian casinos to enter into regulatory contracts called "compacts" with the state in which they operate. Some such compacts – e.g., California's master compact – already require tribes to abide by a Tribal Labor Relations Ordinance, which is very similar to the National Labor Relations Act in terms of the protections afforded tribal employees. In addition, critics argue that the Board's and Court's treatment of the NLRA as a law of general application is flawed.

The Court of Appeals' affirmance of the *San Manuel* decision could have an enormous impact on tribes since, unlike many laws for which courts have drawn a distinction between federal agency lawsuits, from which tribes are generally not immune, and private suits, from which tribes are generally immune, the NLRA provides a federal agency forum for private suits by various charging parties – including unions and individuals. All that is necessary for the NLRB to pursue an action is for the private charging parties to demonstrate that their unfair labor practice charges have sufficient merit to proceed to hearing. The NLRB then acts as prosecutor to obtain injunctive relief and/or damages on behalf of the private party labor union or individual.

Labor organizations such as Unite HERE will be emboldened to redouble organizing efforts in the burgeoning Indian gaming labor market. Casino management, which may be understandably unschooled in the vagaries of the National Labor Relations Act, may run afoul of the Act, resulting in potential back pay liability on behalf of the union or employee and, in extreme cases, bargaining orders requiring recognition of a union. Pending federal legislation such as the Employee Free Choice Act, if passed, will only make organized labor's unionization efforts easier.

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1 *See* Lael Echo-hawk, "San Manuel's 'Treaty Exception': Will the Tribes' Treaty Right to Exclude Preclude Application of the National Labor Relations Act to Tribal Gaming Enterprises," *Indian Law Newsletter* (September 2006), at p. 4.

Emerging Construction Law Issues in Washington Indian Country *from previous page*

Despite the Court of Appeals' failure to address this issue, Tribes and contractors should work together to establish provisions in their contracts that fully describe their intent relating to the independent contractor relationship, whom is in control of the work, and, if sovereign immunity is waived, the extent of such a waiver. Simple language in a construction contract will adequately address these issues.

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The Si'lailo Way: Indians, Salmon and Law on the Columbia River from page 8

authors' splendid way of telling these stories shows that old ways of doing and being in the world can be fresh examples for today if they are remembered in the right way. The fight for the Columbia River and fishing rights is not over. It's not even past.

My favorite section of the book is Chapter 14, describing the work of the Celilo Fish Committee, the informal, Indian-controlled management structure that regulated the Celilo fishery as the local Indians "were swamped by other Indians, wannabe Indians, used-to-be Indians, and non-Indians."[8] The tensions visible in the dynamics confronting the Fish Committee run as undercurrents throughout the book. First is the question whether the fishing right is held by tribes or by individual Indians. The Celilo Fish Committee addressed the issue in various guises: as conflicts between recognized and unrecognized Indians, between river and reservation perspectives, and between tribal councils and tribal members. Federal law provides one answer. *Washington v. Passenger Fishing Vessel Ass'n*, among other cases, holds that title to the treaty-reserved fishing right "is in the tribes, not individuals, although held by the tribe for the common use and equal benefit of all the members."[9] And *Settler v. Lameer*, upheld, against challenge by tribal fishers, the treaty tribes' full sovereign authority to govern the conduct of tribal members exercising the treaty-reserved fishing right at usual and accustomed sites.[10]

But as "The Si'lailo Way" shows, tribal traditional law recognizes a complex web of interests in tribal and customary sites, such as those reflected in Sampson Tulee's remarkable will, passing, in terms borrowed from Anglo law, "undivided interests" in his rights in fishing sites to "be continued on and on, from generation to generation to the descendants of my children."[11] At times these interests are overlapping and conflicting and pit Indian against Indian, tribal member against tribal government. Tommy Thompson worked with the Fish Committee to urge the Indians to heed traditions and customs on the fishing grounds in order to ensure enforcement of regulations and to provide access and opportunity for all Indian families to secure fish for food and barter. The relative success of this effort, inspired by and dedicated to the Indian fishing community on the river, became irrelevant once the falls was inundated behind The Dalles Dam.

The pressures to use the Columbia River and Gorge for chiefly economic uses inimical to the survival of fish persist. But just as persistent, the Indian presence on the river has yielded one positive result: more than thirty "in-lieu" and "fishing access" sites have been carved out of the Columbia's shores. These sites are dedicated to Indian use in order to partially replace ancient fishing grounds inundated by construction of the dams. As thorough as the book is, I wish that the authors had devoted a little more thought and space to the significance of these sites dedicated for exclusive Indian use. The Columbia River's place in the world has changed dramatically since the treaties were signed. It is now subject to the extreme forces of globalization and atomization, the first expanding the range of visible contacts and points of reference in the world, while the second produces increased scrutiny and exploitation of the local. The protected in-lieu and access sites, dispersedly scattered along the thread of the river, now enjoy a unique immunity from time.

The sites most closely resemble the Nez Perce National Historical Park, the most unique component of America's park system. Consisting of 38 sites in Washington, Oregon, Idaho and Montana, stretching from young Chief Joseph's burial site at Colville, Washington, to Bear Paw Battlefield in northern Montana, it commemorates the history of Chief Joseph's band of Nez Perce and their 1877 flight from the U.S. military, which was trying to uproot them from their ancestral homeland in northeastern Oregon's Wallowa Valley and force them onto the reservation established for the Nez Perce Tribe in Idaho. The National Park Service's Nez Perce park brochure states that the multi-site park is "as much an idea as it is actual physical property," and "in some cases the idea is the stronger force, for the physical remains of the past have either disappeared or the original appearance has been greatly altered."[12]

That "idea" is a strong force in the Columbia River and its environs, and can be realized in part at the in-lieu and access sites. It is easy to sympathize with those whose traditions evoke the lives of ancestors who possessed the Columbia in every sense of the term. "The Si'lailo Way" is about the continuing force of that sense of "possession." To hold, and to be held by, a place greater than the time you have in it. All of us who've traveled through the Columbia Gorge possess the river as we are able to hold it as image in mind and heart. But we shouldn't sentimentalize that notion too much, either, for there is a blank flip-side to that coin: the things in the Gorge no longer there to see.

I recommend you begin this book at the end, with the two dozen pages of Corps of Engineers photographs of the Columbia River and environs, mostly of the great Celilo Falls submerged in the pool behind The Dalles Dam in 1957. When I look at them I'm reminded of an anecdote in Marc Reisner's "Cadillac Desert" about William Mulholland, who ran the Los Angeles Department of Water and Power during the early 20th century, when the city stole all the water from the fertile Owens Valley (a valley, which in turn, the farmers had stolen from the Indians a few decades earlier). This is roughly the story told in the movie "Chinatown." Mulholland had a clever idea for getting more water for L.A. from the Yosemite Valley. Here's what Mulholland told the Superintendent

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The Si'lailo Way: Indians, Salmon and Law on the Columbia River *from previous page*

of Yosemite Park (and it helps to imagine that the voice is that of John Huston):

> What I would do if I were custodian of your park, is I'd hire a dozen of the best photographers in the world. I would build them cabins in the Yosemite Valley and pay them something and give them all of the film they wanted. I'd say, 'This park is yours. It's yours for one year. I want you to take photographs of it in every season. I want you to capture all of the colors, all of the waterfalls, all the snow, and all the majesty. I especially want you to photograph the rivers. In the early summer, when the Merced River roars, I want to see that.' And then I'd leave them be. And in a year I'd come back, and take their film, and send it out and have it developed and treated. And then I'd print the pictures in thousands of books and send them to every library. I'd urge every magazine in the country to print them and every gallery and museum to hang them. I would make certain that every American saw them. And then do you know what I would do? I would go in there and build a dam from one side of the valley to the other and stop the goddamn waste![13]

Think of that as you turn the last pages of "The Si'lailo Way," and study those photographs of the old Celilo fishery, fifty years gone now. The characteristic arrogance – the hubris – that is memorialized in that astonishing anecdote dominates Western thinking about resource use, and it has been the daily fare on the Columbia River, and in the uses made of the river, for more than a century. Don't underestimate that hubris. But don't underestimate Indian perseverance, either. The authors address this in their last chapter about how Congress destroyed "Celilo Falls and Indian treaty fishing properties of great historic and religious value without justification, accounting, or regret."[14] If you've paid attention, chapter by chapter, this conclusion doesn't seem overstated. The U.S. Supreme Court won't protect Indian sacred sites because it would create a "religious servitude."[15] So there's a gap a wide as the Columbia River between mainstream and indigenous thinking about sacredness and the resources and landscapes that are integral to a balanced life. But, again, what's past is not dead. It's not even past.

Two last thoughts on Celilo's future. First, Looking Glass, frustrated with the pandering and false inducements offered by federal treaty negotiators, said he wanted to talk "straight" to the U.S. President and his representatives: "We will have a short talk, not a long one."[16] Finally, the authors' last words in "The Si'lailo Way": "Pom-pom means 'drums beating like hearts.' The hearts of Indian people beat today for the permanent return of Celilo Falls."[17]

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1 William Faulkner, "Requiem for a Nun," Act I, Scene III, in *Novels: 1942-54* (Library of America 1994).

2 William H. Rodgers, Jr. is the Stimson Bullitt Professor of Environmental Law at the University of Washington School of Law, and the author of dozens of books and articles about Indian law and the environment. Joseph C. Dupris (Lakota – Cheyenne River Sioux) and Kathleen S. Hill (Klamath/Modoc/Paiute) are former professors at Humboldt State University and co-founders of Quail Plume Enterprises.

3 Richard White, *The Middle Ground: Indians, Empires an Republics in the Great Lakes Region, 1650-1815* p. x (Cambridge U. Press 1999).

4 J.C. Dupris, K.S. Hill, and W.H. Rodgers, Jr., *The Si'lailo Way: Indians, Salmon and Law on the Columbia River* 25-37 (Carolina Academic Press 2006).

5 198 U.S. 371 (1905).

6 315 U.S. 681 (1942).

7 *The Si'lailo Way* at 45.

8 *Id.*, at 199.

9 443 U.S. 658, 679 (1979).

10 507 F.2d 231 (9th Cir. 1974).

11 Tulee's will is reproduced in *The Si'lailo Way*, at 20.

12 National Park Service, "Nez Perce National Historic Park" (GPO 1995) (brochure on file with author).

13 Marc Reisner, *Cadillac Desert: The American West and its Disappearing Water* 91-92 (Penguin 1993).

14 *The Si'lailo Way*, at 361.

15 *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988).

16 *The Si'lailo Way*, at 37.

17 *Id.*, at 373.

A "New World" to Claim – The Arctic *from page 10*

1774, he erased Spanish marks of ownership and possession in Tahiti and replaced them with English ones. Upon learning of this, Spain dispatched explorers to restore its marks of possession. Furthermore, in 1742-49, French military expeditions buried lead plates throughout the Ohio country to reassert the French claims of discovery dating from 1643. The plates stated that they were "a renewal of possession."

Americans also engaged in Discovery rituals. The Lewis & Clark expedition marked and branded trees and rocks in the Pacific Northwest to prove the American presence and claim to the region. They also left a memorial or memo at Fort Clatsop in March 1806 and gave copies to Indians to deliver to any whites that might arrive to prove the U.S. presence and claim to the Northwest. The memorial stated that its "object" was that "through the medium of some civilized person … it may be made known to the informed world" that Lewis & Clark had crossed the continent and lived at the mouth of the Columbia River on the Pacific Ocean. This was nothing less than a claim of discovery and possession of the region and a claim of ownership under the Doctrine of Discovery.

A decade later, as the U.S. and England argued over the Pacific Northwest and the possession of Fort Astoria at the mouth of the Columbia, Secretary of State John Quincy Adams and President James Monroe took actions based directly upon the principles of Discovery. In 1817, as they despaired that England would voluntarily return Fort Astoria, Adams and Monroe ordered an American diplomat and naval captain to sail to Astoria "to assert the [American] claim of territorial possession at the mouth of Columbia River." Adams wrote that this mission was designed "to resume possession of that post, and in some appropriate manner to reassert the title of the United States."

Accordingly, Monroe and Adams ordered the American diplomat John Prevost and Captain James Biddle to sail to the Columbia and to "assert there the claim of sovereignty in the name of … the United States, by some symbolical or other appropriate mode of setting up a claim of national authority and dominion." The President and Secretary of State were ordering them to engage in Discovery rituals. Prevost and Biddle did as they were ordered. In August 1818, Captain Biddle arrived at the north side of the mouth of the Columbia River and in the presence of Chinook Indians he raised the U.S. flag, turned the soil with a shovel, and nailed up a lead plate that read: "Taken possession of, in the name and on the behalf of the United States by Captain James Biddle." He repeated this Discovery ritual on the south shore of the Columbia and hung up a wooden sign declaring American ownership of the region.

John Prevost arrived at Fort Astoria in September 1818 and with the cooperation of the English he proceeded to use Discovery rituals to reclaim the fort for the United States. First, the English flag was lowered and the U.S. flag was hoisted in its place. Then the English troops filed a salute, the American flag was taken down and the Union Jack was returned to its place, and the American diplomat sailed away with his Discovery mission accomplished.

In 1823, the United States Supreme Court in *Johnson v. M'Intosh* declared that the Doctrine of Discovery had been the law on the North American continent since the beginning of European exploration and controlled how Europeans and Americans could claim and acquire land from the Indian nations. Discovery is still the law in the United States today and in the international arena as is well demonstrated by the actions of modern day countries attempting to claim new lands and assets in the Arctic. We appear to be at the start of a new race to establish claims to this "New World" of the Arctic as the icecaps retreat, and it is evident that the rituals and principles of the Doctrine of Discovery provide the legal framework for claims to newly discovered lands and assets.

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The United States' "Debt" to American Indians *from page 10*

tribal and Indian land and assets in Indian country. As the trustee, the U.S. was responsible under trust law to reasonably lease and develop, and then to collect and pay the rents and profits from these assets to the Indian owners. The allegation of the *Cobell* plaintiffs, and the widely accepted truth of the matter, is that the U.S. has failed miserably in exercising its fiduciary and trust responsibilities to carefully protect these assets and to collect the monies due and then to pay them to the Indian owners. Under the accepted state law of trusts, the U.S. owes an accounting to the *Cobell* plaintiffs to identify all these funds and then to personally pay for any lost or uncollected funds due. The U.S. has actively resisted performing an accounting and seems to not want to find out what it owes these Indian people; people who are among the poorest of the poorest U.S. citizens. The United States has claimed to the federal court that it would cost more than $500 million to perform an accounting for the past 120 years of its trusteeship over Indian assets. The U.S. appears to be fighting a rearguard action in court while hoping for some kind of legislative fix.

Many people would like to see the *Cobell* case disappear. Congress has twice already considered "midnight" riders to kill the case. Senator John McCain and the Senate Committee on Indian Affairs have talked about proposing settlement amounts between $7-8 billion dollars and recent Senate and House bill have proposed these amounts.

On March 1, 2007, the Bush administration responded to questions from the Senate Committee on Indian Affairs. The administration now proposes to settle all the trust mismanagement claims and to pay for all the needed Indian trust reform efforts with $7 billion. This is in spite of the acknowledged true price tag of the lost and mismanaged funds that could run into the hundreds of billions of dollars.

In their letter, Attorney General Alberto Gonzales and Interior Secretary Dirk Kempthorne told the Senate Committee that the administration was prepared to "invest" $7 billion to settle all trust mismanagement claims. But they also appear to demand that the Congress extinguish the government's liability for all future trust claims. This last statement is the most egregious aspect of this sordid history. The United States apparently wants to continue managing Indian assets but wants to prevent any future possible liability no matter how woefully it might manage and fail to protect these assets.

The proposal was immediately called a "bad faith offer" by the *Cobell* attorney. You might also think this sounds like a bad-faith settlement if it were your assets that the U.S. controlled but wanted to avoid any responsibility for doing so in a careful and responsible manner. Senator Byron Dorgan (D-N.D.), the chairman of the Senate Indian Affairs Committee, said: "This is the first time that the federal government has acknowledged a multi-billion dollar liability for the mismanagement of the Indian trust funds over the past century and more. That is a significant admission." A more significant admission would be for the United States to live up to the debt it owes these Indian people and to account for and pay them the money that is legally theirs but which has been mismanaged and withheld from them for the past one hundred years.

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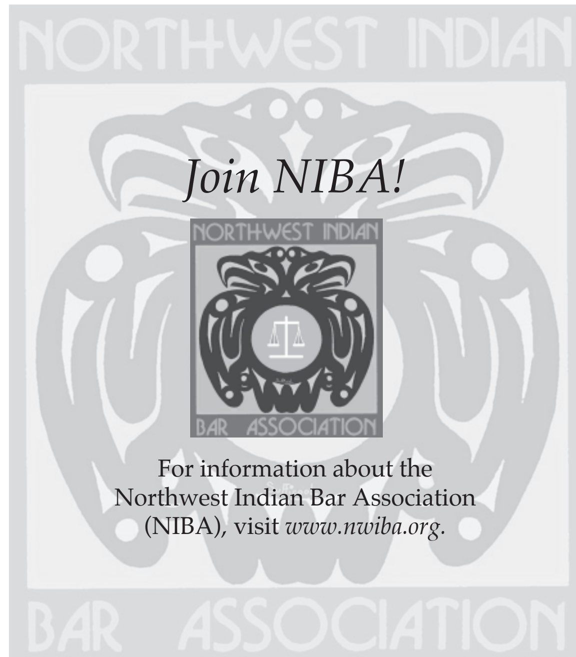

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