Indian Law Newsletter

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Word from the Chair

By Lauren King

Greetings friends and colleagues!

It has been a tremendous honor to serve as Chair of the Indian Law Section over this past year. Our Section has accomplished a great deal this year thanks to the passion and dedication of the Indian Law Section executive committee and our Section members. We would love for you to become a member of the executive committee – ILS will hold its annual election on Thursday, September 8, at 4:50 p.m. at the University of Washington School of Law following the Indian Law Symposium.

As many of you know, the executive committee has dedicated substantial time this year to working on numerous WSBA proposals that would significantly affect the operation of Sections as we know them. Last winter, ILS successfully worked with 25 other WSBA sections to address procedural and substantive problems with draft proposals published by the WSBA in December. As a result, the WSBA did not move forward with the problematic proposals and agreed to involve section leaders in the WSBA Sections Policy Workgroup so that sections could be actively involved in working on sections policy matters going forward. Detailed correspondence with the WSBA regarding its proposals, as well as a video of the Section Leaders Feedback Forum is available at *www.wsba.org/About-WSBA/Governance/Sections-Policy-Work-Group*.

Recently, another WSBA proposal that would significantly affect the Indian Law Section was introduced for first reading and discussion by the Board of Governors. This proposal considers two alternative WSBA policies relating to religious practices (including traditional Native American blessings) at WSBA events: (1) prohibit

(continued on page 2)

Indian Law News

Betting Against the House: *Santa Ysabel* and Lessons Learned With Internet Gaming

*By Drew Pollom**

With Indian gaming revenues bring in over $28 billion per annum for tribes,[1] it has come imperative for the individual tribes to expand gaming operations to compete in an increasingly crowded industry. One area ripe for natural growth would be internet gaming, an $30 billion worldwide industry.[2] For tribes who wish to take their operations to the World Wide Web, two major roadblocks emerge. First, the technology classifies as Class III gaming,[3] forcing tribes to bargain with the states to use online gaming systems. Second is the transactional barrier created by the Unlawful Internet Gaming Enforcement Act ("UIGEA").[4] Together these two roadblocks have become a one-two punch stifling the growth of Internet gaming. This issue became evident in 2014 when one tribe gambled on an Internet gaming system and lost.

The Iipay Nation of Santa Ysabel ("Santa Ysabel") found out about the problem with Internet gaming the hard way. The Santa Ysabel decided to offer interactive bingo through a Virtual Private Network Assisted Play System ("the system").[5] The game offered a real-money play to California residents only.[6] The system allowed players to play the game from any computer with Internet access, mobile device, or tablet.[7] Essentially, the Santa Ysabel were offering real-time Internet bingo to players inside California, but who could play off the Santa Ysabel reservation. When California approached Santa Ysabel about their con-

(continued on page 7)

In This Issue

Message from the Chair *from page 1*

any religious practice at any WSBA event, including any meetings or CLEs by WSBA Sections; or (2) allow limited religious practices at WSBA events under some fairly strict guidelines. The ILS executive committee, along with many section members, other sections, and other bar associations ,opposed the proposed ban. We have included a copy of the executive committee's letter to the BOG regarding the proposed ban on page 3 of this newsletter. ILS would like to thank everyone who voiced their concerns to us and to the BOG. After its discussion on June 22 of the proposals and the feedback it had received, the BOG agreed to work with interested sections and WSBA members on edits to the proposal before it is set for potential final approval in late September of this year. Please contact Diana Bob (ILS treasurer/secretary) at *diana.bob@stoel.com* if you would like to participate in this effort.

Aside from its work on WSBA policies, ILS has continued its work on outreach and education in Indian law. Starting last fall, the Section began developing a mentorship and scholarship program for law students and young lawyers involved in Indian law. Claire Newman (Chair Elect) and Rachel Saimons (Trustee) spent countless hours preparing for and organizing a productive meeting among Indian law practitioners, law schools from around the state, and law students to discuss goals of a potential mentorship and scholarship program. Our progress on these programs was put on hold last winter due to a Sections Policy Workgroup proposal that would have taken ILS funds out of the our control, making it difficult to budget funds to support the programs. However, ILS looks forward to continuing to work on these programs next year in cooperation with the Northwest Indian Bar Association. The executive committee has budgeted $5,000 for scholarships in the coming year.

Finally, ILS is extremely thankful to all the speakers, WSBA staff, and attendees who made our May 12, 2016 CLE a success. We enjoyed a full day of fascinating discussion on the following topics:

- Jim Webber and Mike Grayum of the Northwest Indian Fish Commission on the Treaty Rights at Risk Initiative
- Maia Bellon, Director of the Washington Department of Ecology, and Todd Bolster of the Northwest Indian Fish Commission on water quality toxicity standards
- John Dossett, General Counsel of the National Congress of American Indians, on jurisdiction over nonmembers
- Donna McNamara of the Suquamish Tribe and M. Brent Leonhard from the Confederated Tribes of the Umatilla Indian Reservation on access to the DOJ National Crime Information Center
- Heather R. Kendall Miller of the Native American Rights Fund on fee-to-trust transaction challenges and Indian Country in Alaska
- Kathryn E. Fort of Michigan State University School of Law on family law issues, including BIA guidelines for ICWA
- Scott A. Wilson of the Law Office of Scott Wilson on unionization in Indian Country
- Brian C. Kipnis of the U.S. Attorney's Office in Seattle on federal tort claims arising from tribes' contracting
- Stanley Pollack of the Navajo Nation Department of Justice on ethics
- Thomas P. Schlosser with the annual litigation update we've come to rely on

Thanks again to our ILS members for your engagement and support this year. Please reach out to me if you'd like to become more involved in the Section's leadership, events, and programs!

Executive Committee's Letter to the BOG Regarding the Proposed Ban on Religious Practices at WSBA Events

TO: WSBA Board of Governors

FROM: WSBA Indian Law Section – Executive Committee

DATE: July 20, 2016

SUBJECT: Proposed WSBA Policy re Religious Practices at WSBA events, including Indian Law Section events

Dear WSBA Board of Governors:

The Indian Law Section's Board of Governors liaison, Kim Risenmay, recently informed us that the Board of Governors is considering two alternative policies at its upcoming meeting in Walla Walla: (1) prohibit any religious practice at any WSBA event, including any meetings or CLEs by WSBA Sections; or (2) allow limited religious practices at WSBA events under some fairly strict guidelines. The Executive Committee of the Washington State Bar Association's ("WSBA") Indian Law Section ("ILS") strongly urges the WSBA Board of Governors not to prohibit religious practices at CLEs by WSBA Sections.

At the Indian Law Section's annual CLE, a representative from a tribal community typically performs an opening blessing. This practice is traditional in tribal communities—the communities with whom practitioners of Indian law interact on a regular basis.

Indeed, the practice is so ingrained in tribal practice that tribal, state, and federal governments and governmental organizations have included traditional blessings in their protocols for meeting with tribal governments.

The National Congress of American Indians opens each resolution with the following phrase:

> [W]e, the members of the National Congress of American Indians of the United States, **invoking the divine blessing of the Creator upon our efforts and purposes**, in order to preserve for ourselves and our descendants the inherent

(continued on page 4)

> sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution.

NCAI Resolution Template (2016), http://www.ncai.org/resources/resolutions-home (emphasis added.)

At a field hearing in 2010 before the Senate Committee on Indian Affairs, the Chairman of the Committee of Indian Affairs respectfully and appropriately "call[ed] on the President of the Affiliated Tribes of the Northwest Indians from Portland, Oregon, Brian Cladoosby, to offer an opening prayer." *See* Opening Statement of Chairman Dorgan (Aug. 10, 2010), available at https://www.gpo.gov/fdsys/pkg/CHRG-111shrg63343/html/CHRG-111shrg63343.htm.

In its Protocol Guidelines for Consulting with Indian Tribal Governments, the Bureau of Reclamation Native American and International Affairs Office states:

> Prayers or Blessings Before the Beginning of Meetings. When hosting a meeting, many tribes will offer prayers or blessings at the initiation or conclusion of a meeting. These invocations may be handled in a variety of ways, depending upon the cultural traditions of the tribe. Frequently, a tribe will have an elder or spiritual leader bless the meeting with a prayer or traditional song, usually in the tribe's language. **Showing respect for the tribe's beliefs and practices, through appropriate behavior, is important for establishing trust and maintaining goodwill**.

Protocol, pp. 15-16 (Sept. 21, 2012), http://www.usbr.gov/native/policy/protocol_guidelines.pdf (emphasis added). The Washington State School Directors' Association has published guidelines for "school district leaders seek[ing] to establish government-to-government relations with neighboring Tribal nations." These guidelines state as follows:

> Prayers/Blessings. It is often customary for Tribes to offer a prayer or blessing at the beginning or conclusion of a meeting. While the practice will vary from Tribe to Tribe, the blessing will be offered by an elder or spiritual leader, sometimes in song, and usually in the Tribe's language. As with all such observances, **it is important to show respect for the blessing through appropriate behavior**.

Protocol Considerations, http://www.wssda.org/Portals/0/Documents/05thc_toolkit_protocol.pdf (emphasis added).

It is important for all entities and individuals, including lawyers, to understand this traditional tribal practice and treat it with respect. Incorporating a blessing at our CLE shows respect to tribal communities and the lawyers who work with them. It also introduces young practitioners to this traditional practice.

(continued on page 5)

Blessings should be permitted at Indian Law Section CLEs for several reasons:

1. First, an outright ban on any religious practices at WSBA events is inconsistent with one of WSBA's published "Guiding Principles," which promotes "diversity, equality, and cultural understanding throughout the legal community." It is inappropriate for WSBA to claim intent to promote diversity and cultural understanding as one of its Guiding Principles, and to then forbid the Indian Law Section from practices that are an inherent and normal part of Native American culture. Furthermore, a policy banning such practices echoes the federal prohibition against Indian religious practices beginning in 1892 which lasted nearly a century and was supported by state-level persecution. In fact, Indian religious freedom was not legally guaranteed until the enactment of the American Indian Religious Freedom Act in 1978. 42 U.S.C. § 1996 *et seq*. As a result, it is particularly important that Indian cultural and religious traditions be recognized, and not muted or banned.

2. Second, barring the Indian Law Section from conducting its meetings in accordance with Native American culture is inappropriate because it effectively precludes full study and appreciation of Indian Law. As emphasized above, it is a common practice to open and close meetings with a prayer or short ceremony. To the extent such blessing or ceremony is viewed as a religious practice, it is well-established that the reference of religion in an educational environment does not automatically violate the Establishment Clause. For example, the Supreme Court has held that the Establishment Clause permits a state legislature to open its daily session with a prayer given by a chaplain paid by the State. Such a practice, the Supreme Court thought, was "deeply embedded in the history and tradition of this country." *Van Orden v. Perry*, 545 U.S. 677, 688 (2005) (quoting *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983)).

   Indeed, Courts have long emphasized the importance of academic freedom in deciding the appropriate curriculum in educational environments. *See Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970, n. 23 (9th Cir. 2011) ("The Establishment Clause does not wholly preclude the government from referencing religion ... Not only would such a drastic and draconian requirement raise substantial difficulties as to what might be left to talk about, but ... it would require that we ignore much of our own history and that of the world in general ... For instance, one could not discuss Egyptian pyramids, Greek philosophers, the Crusades, or the Mayflower if even incidental or colloquial references to objects or individuals of religious significance were constitutionally taboo."); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1377 (9th Cir. 1994) (Court decided that it need not determine which religious rituals can be employed in public school curriculum, but noted that "having children act out a ceremonial American Indian dance for the purpose of exploring and learning about American Indian culture may be permissible even if the dance was [a] religious ritual. Similarly, a reenactment of the Last Supper or a Passover dinner might be permissible if presented for historical or cultural purposes.").

(continued on page 6)

3. Third, recent world events, both in the United States and abroad, show an increasing level of hatred and violence prompted by a lack of understanding of other cultures. Such culture-based discrimination fosters hatred and violence within our country rather than the understanding and tolerance intended by our First Amendment protections. Learning about others' cultures and traditions is the best way to defuse such problems, especially where the individuals learning about the culture are devoting their careers to working with that culture. Witnessing traditional practices such as opening blessings is a critically important way for practitioners to understand the practices of the tribal communities they work with, even though those practitioners do not adopt those traditions into their own lives.

It is important to provide Indian Law practitioners with examples of how to respectfully and appropriately engage with tribal communities. Opening our CLE with a traditional Native American blessing demonstrates a protocol that has already been incorporated into governmental guidelines and policies regarding interacting with tribal governments. It also shows respect to the tribal communities who are the subject of the practice of Indian Law. It would be counterproductive if the WSBA prohibited traditional Native American practices at CLEs that are intended to improve practitioners' abilities to interact with Native American communities. Moreover, it is possible that Section members and other attorneys would decline attending the Indian Law Section's CLEs *because of* WSBA's policy that they perceive to be rejecting their heritage and the important role of Native tradition in their legal practice.

Therefore, the Indian Law Section urges the WSBA not to enact an outright ban on all religious practices. Instead, the WSBA should permit short blessings or ceremonies relevant to the practice area, as in the case of Native American blessings at an Indian Law CLE. Attendees of such events should be informed that the blessing is not part of the CLE and that they are not required to be present for the blessing to obtain CLE credit.

Sincerely,

The Executive Committee of the Indian Law Section

BETTING AGAINST THE HOUSE: SANTA YSABEL AND LESSONS LEARNED WITH INTERNET GAMING from page 1

cerns on the new system, the tribe insisted that the system stayed within the definition of class II gaming because it was bingo.[8] California disagreed, and moved for a temporary restraining order arguing that the system violated the compact between the state and the Santa Ysabel providing class III gaming.[9] The case hinged on the technology itself, and the court noted that the system limited player participation in the bingo to electing the amount of bet and the number of cards to play in the game.[10] The system then plays the game.[11] As a result, the player never plays the game, and no live bingo is played.[12] Based on the definition of electronic facsimile in 25 C.F.R. §502.7, the system incorporated all of the characteristics of the game, because the off-site user watches as the computer "plays" the game.[13] By incorporating all of the elements of the bingo game, the system went from being an electronic aid into an electronic facsimile.[14] The court found that California was likely to succeed on the merits of its breach of compact claim, and issued the TRO on those grounds.

Regarding the violation of compact claim, California also asserted that Santa Ysabel's system violated UIGEA.[15] The statute says unlawful gambling " [m]eans to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made."[16] UIGEA is distinguishable from IGRA in that it does not regulate or prohibit gaming. In fact, the statute contains exemptions to IGRA so as not to impact IGRA's regulatory scheme,[17] such as tribal-state compacts.[18] UIGEA also does not impact the gaming between Indian lands of two or more Indian tribes.[19] What UIGEA does impact is the transactional side of the gaming. By focusing on wire transfers, credit cards, and bank accounts, the statute creates a set of rules that financial institutions have to follow when handling money from Internet gaming.

States have used the UIGEA statute to shut down Internet gaming, and this played out in *Santa Ysabel*, where California also argued that the tribe violated UIGEA.[20] The district court looked at California law, as UIGEA requires that the states where the bet was made and received both outlawed the game. [21] Since the bets were made and received in California, the district court focused on California Penal Code §§319-322, 337a, which outlaws Internet gaming within the state. [22] The court concluded that California was likely to succeed on the merits of a claim that the game violated UIGEA.[23] This analysis was independent of the violations contemplated under IGRA in the court's opinion. The court was able to grant the TRO under UIGEA as well as IGRA.

There are two lessons that Indian law practitioners should take away from the experience of the Santa Ysabel. The first lesson is to review the technology. The system's design in the Santa Ysabel, by its very definition, turned a class II gaming activity into a Class III electronic facsimile. Attorneys must adequately explain to their clients the ramifications of such a transformation. Second, Internet gaming should be addressed in IGRA via the gaming compacts. The Santa Ysabel litigation shows that under the current regime, the states can regulate and stop class III gaming depending on whether the game is played on aid or electronic facsimile. Integrating Internet gaming compact would not only address the issues with IGRA, but also the issues with UIGEA. Currently, UIGEA provides exemptions for gaming inside Indian lands,[24] tribal ordinances,[25] and gambling under tribal-state compacts. An Indian gaming compact that theoretically allowed for a system similar to the one used by the Santa Ysabel would be covered under the Indian gaming compact.

> [T]HERE IS A POTENTIAL LEGAL AVENUE TO PURSUE INTERNET GAMING, ALBEIT A NARROW ONE.

However, even with a gaming compact creating Internet gaming, there still is the problem of confining the gaming within the reservation boundaries. Currently, IGRA regulates Indian gaming occurring on Indian lands.[26] The NIGC hold the clear view that gaming off-reservation is off-limits. Internet gaming transcends reservation boundaries, with connecting players across multiple states. Even if the server holding the game were located on Indians lands, the game would be played off-reservation, as the players would be off-reservation.[27] According to a 2001 opinion letter from the NIGC, IGRA does not authorize off-reservation betting.[28] The letter was part of the decision by the court in the *Santa Ysabel* litigation as a reason to stop Santa Ysabel from running its system.[29] Changing the statute to include off-reservation gaming originating inside Indian lands would also help carve a path for tribes to develop Internet gaming. Integrating Internet gaming provides an avenue for expansion of Indian gaming through the Internet. IGRA's land provisions will likely need amending as well.

Thus, there is a potential legal avenue to pursue Internet gaming, albeit a narrow one. If tribes want to continue to pursue establishing Internet gaming, they will need to negotiate with the state to make it happen. Even then, that tribe would be rolling the dice that the NIGC's interpretation of where reservation gambling can happen is incorrect, or at least not applicable to the current situation.

* Drew is a Review Attorney with Perkins Coie's E-Discovery Services and Strategies department and a former Staff Attorney

(continued on page 8)

Indian Law News You Can Use

Current Developments in Tribal Taxation Issues and Initiatives

By Wendy Pearson, Of Counsel – Hobbs, Straus, Dean & Walker, LLP

This year we have seen a number of positive developments in the way of tax regulations, rulings and initiatives that favor Tribes and their members. There is still much work to be done and this article is as much a call to action as a summary of the major developments. Here is how 2016 is developing on key issues and initiatives:

I. Treasury Tribal Advisory Committee.

The Tribal General Welfare Exclusion Act of 2014 (GWE Act) created the Tribal Advisory Committee to the Secretary of Treasury. The Committee's purpose is to "advise the Secretary on matters relating to taxation of Indians." Pub. L. 113–168, § 3(b)(1). In consultation with this Treasury Tribal Advisory Committee (TTAC), the Secretary is to establish and require training of IRS personnel on federal Indian law and the unique treaty and trust relationship between the federal government and Indian tribal governments. The required training also extends to both IRS personnel and tribal financial officers about implementation of the GWE Act. In that regard, TTAC is specifically required under the GWE Act to define what constitutes "lavish and extravagant" benefits under an Indian tribal government program. TTAC also sees its role as addressing issues that are brought to it by tribes in relation to interpretation and implementation of the GWE Act. A number of issues have already been brought to their attention, such as IRS delays in issuing refunds from previously taxed GWE benefits and uneven application of the GWE Act by other federal agencies such as the Social Security Administration. TTAC wants to start working officially on these matters now. However, progress has been stymied by the inaction of Congress to make all of its allotted appointments to the committee.

Four of the seven members have been appointed, to date. All three of the Secretary of Treasury's appointees have been named: Chairman W. Ron Allen of Jamestown S'Klallam tribe, Treasurer Lacey Horn of the Cherokee tribe, and Chief Lynn Malerba of the Mohegan tribe. Congressman Levin appointed Eugene Magnuson of Pokagon Band of Potawatomi Indians. The three remaining appointments are to be made by Rep. Brady of Texas, Sen. Wyden of Oregon and Sen. Hatch of Utah. Reports indicate that Sen. Wyden has apparently identified an eligible candidate who is going through the requisite security screening and vetting process. Tribes are urged to contact their congressional

(continued on page 9)

Betting Against the House:* Santa Ysabel *and Lessons Learned With Internet Gaming *from page 3*

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1 National Indian Gaming Commission, *Growth in Gaming Revenues in Past 10 years 2004-2013, available at* http://www.nigc.gov/LinkClick.aspx?fileticket=63DH1pii2Z4%3d&tabid=67 (last visited April 22, 2015)

2 David O. Stewart, Ropes, & Gray LLP, *Online Gambling Five Years After UIEGA*, American Gaming Association White Paper, one *available at* http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/final_online_gambling_white_paper_5-18-11.pdf (last visited April 23rd, 2015)

3 25 U.S.C. § 2703 (9).

4 31 U.S. §5363

5 Order Granting Motion For Temporary Restraining Order and Order To Show Cause, 2, *California v. Iipay Nation of Santa Ysabel*, 3:14-CV-02724-AJB-NLS (S.D. Cal. 2014).

6 *Id.* at 2

7 *Id.* at 3.

8 *Id.*

9 *Id.*

10 *Id.* at 11.

11 *Id.*

12 *Id.*

13 *Id.* At 11.

14 *Id.* at 12.

15 *Id.* at 1.

16 31 U.S.C. §5362 (10)(A).

17 31 U.S.C. §5362 (IV).

18 31 U.S.C. §5362 (IV) (C) (II).

19 31 U.S.C.§5362 (IV)(C)(I)(II)

20 *Iipay Nation of Santa Ysabel, supra* note 5 at 13.

21 *Id.*

22 *Id.*

23 *Id.*

24 31 U.S.C.§5362.

25 31 U.S.C.§5362.

26 25 U.S.C. §2703 (4).

27 Kevin K. Washburn, NIGC letter "Win Sports Betting" March 13, 2001, *Available at* http://www.nigc.gov/Reading_Room/Game_Classification_Opinions-old/Other_games/Other_Games-16.aspx

28 *Id.*

29 *Iipay Nation of Santa Ysabel, Supra* note 5 at 13.

representatives to request that the TTAC appointments be completed by these members of Congress.

On June 10, 2016, current TTAC members made an official request of IRS Commissioner Jack Lew to take action to convene the first TTAC meeting. With four of the seven members appointed, TTAC members believe they have a quorum to begin official activities. Under the committee's charter, Treasury is required to identify the staff person who will conduct the meetings – this has not been done. Thus, tribes are urged also to contact Commissioner Lew and the Department of Treasury to urge them to convene the initial TTAC meeting immediately.

Tribes are urged to contact their congressional representatives to request that the TTAC appointments be completed by these members of Congress.

II. Rights of Way Regulations.

In April, 2016, the BIA issued final regulations (25 C.F.R. 169) that comprehensively modify and streamline the rules for obtaining rights of way (ROW) across Indian land. The regulations seek to create consistency as to how ROW's across tribal lands are granted by the BIA. They also codify the tribal consent requirement giving tribes more authority to consent or withhold consent regarding proposed ROW grants. With respect to taxation, the regulations mirror the recent regulatory updates to leases on tribal land. Under the revised regulations, tribes are permitted to levy a tax on permanent improvements within the right of way, on the right of way possessory interest, and on activities within the right of way. Conversely, state and local governments are pre-empted from imposing any such taxes or fees in relation to the rights of way.

The ROW regulations present an important opportunity for tribes to plan for additional tax revenue sources when negotiating rights of way across their land. In order to position themselves to do this, tribes should be creating and updating their tribal tax codes to define and clarify the types of taxes that may be assessed with respect to rights of way. This will require particularized inquiry into the type of rights of way expected to be granted, the activities expected to be conducted within the rights of way, appropriate valuations and tax rates. A good model or starting point may be the current local governmental rates and procedures for assessing and collecting such taxes. Tribal tax codes will also have to be updated to provide adequate procedures for assessment, collection, and taxpayer dispute resolution processes. The operations within the tribe should likewise be augmented to administer the tax provisions of assessment and collection, and to provide for independent reviewing bodies to address dispute resolution.

III. New Guidance on Trust Per Capita Payments under Direct Pay Leases.

Notice 2015-67, issued in September, 2015, clarifies that per capita distributions made to tribes from funds held by the Secretary of the Interior as part of a tribal trust account are excluded from the gross income of tribal members. The funds in the trust account must be from sources which qualify to be deposited into trust per 25 C.F.R. § 115.702. Those include mainly revenue directly derived from the sale or use of trust property. Importantly, the IRS carved out exceptions to this tax-exempt treatment for revenues which they determine have been misclassified as "trust" revenue. The exceptions set out in Notice 2015-67 for mischaracterized trust revenue include lease revenue from a tribal enterprise that amounted to essentially the entire net profit of the business, attempting to convert otherwise taxable compensation to a trust per capita distribution, and disguising 50 percent of net gaming revenue as "rent" from a tribal casino. These exceptions are intended to address abusive situations only and not fair-market, arm's-length leasing arrangements.

"Direct pay" leases were overlooked by Notice 2015-67. Under current BIA regulations, the BIA may approve direct payment to a tribe from the leases and contracts' operators rather than depositing these payments into a DOI-maintained tribal trust account. These are approved by the same process or are subject to the same BIA-approved standards as leases and contracts under which the funds are deposited into tribal trust accounts. On May 26, 2016, the IRS issued "Interim Guidance on the Direct Pay of Tribal Lease Funds" clarifying that these leases will also qualify for tax exemption. The last remaining issue is whether HEARTH Act leases (leases paid directly to the Tribe under HEARTH Act delegation authority) will also qualify for the exemption. The IRS is currently evaluating this issue. Tribal advocates have argued that these leases should qualify for the exemption just as they would if the leases were still being administered by the Bureau of Indian Affairs. In the meantime, it is recommended that tribes with direct pay leasing arrangements under HEARTH Act regulations establish policies and practices to prove these funds directly derive from tribal trust land.

IV. Tribal Tax and Investment Reform Act of 2016 – H.R. 4943.

Tribal Tax and Investment Reform Act of 2016 (H.R. 4943) was introduced on April 14, 2016. This legislation would treat Indian tribal governments in the same man-

(continued on page 10)

ner as state governments for certain federal tax purposes. Currently, the tax code applies rules that make tax benefits and exemptions for governmental entities more restrictive for tribes than for state and local governments. In other cases, the tax treatment of tribal governments has simply been overlooked in the tax code. H.R. 4943 would amend the Internal Revenue Code to address these issues.

The bill would treat Indian tribes the same as states for tax-exempt bond issuances and, importantly, repeal the "essential governmental function" requirement of 26 U.S.C. § 7871. In the area of pensions and employee benefit plans, it would clarify that "governmental plans" include those maintained by Indian tribal governments for their employees and that Section 457 plans (governmental plans) sponsored by tribal governments prior to this bill are grandfathered as eligible employer plans. The bill would also clarify that Indian tribal governments may receive charitable contributions (i.e. deductible contributions under 26 U.S.C. § 170) and receive financial support from tax-exempt Supporting Organizations. The bill improves the effectiveness of tribal child support enforcement agencies by parity of access to the federal parent locator service and federal tax refund offsets. And, finally, the bill clarifies that the adoption tax credit is available for children determined by an Indian tribal government to have special needs. Efforts to find co-sponsors are underway and tribes are encouraged to reach out to their Congressional representatives to support the bill.

V. Proposed Amendments to Indian Trader Statute and Regulations.

Efforts to revise the Indian Trader Regulations at 25 C.F.R. Part 140 have been under way since the beginning of 2016. These regulations have not been updated since 1957; modifying the regulations has been a policy priority of NCAI this year in an effort to address barriers to economic development in Indian Country. Department of Interior (DOI) was keenly receptive to the proposal to amend these regulations. In fact, Assistant Secretary Roberts has identified this effort also as a DOI priority to accomplish before a change of administration. The proposed amendment addresses three parts. First, the proposal would substitute tribal business licensing for federal licensing. Second, the proposal would create a presumption of consent to tribal court jurisdiction. Third, the proposal would pre-empt state taxation on tribal lands, modeled after the recent amendments to the Business Leasing regulations at 25 C.F.R. Part 162, and the new Rights-of-Way regulations at Part 169.

In June, Assistant Secretary Roberts reported on the DOI efforts to amend the Indian Trader regulations. Unfortunately, he said he does not believe DOI can advance proposed regulations to a final rule within the short timeframe left in the administration. DOI, Solicitor's Office, and Department of Justice are concerned about whether the Indian Trader Statute, 25 U.S. Code § 262, gives them the authority to delegate licensing of trade to the tribes. However, DOI does plan to publish a policy statement in support of the dual taxation (state tax pre-emption) component of the proposed amendments before January 2017. In the meanwhile, they will continue to analyze what modifications can be made to the regulations. Assistant Secretary Roberts requested that tribes provide any information for consideration as the Department continues to evaluate their options.

The antiquated Indian Trader Statute was also brought to the attention of Congress. On July 14, 2016, Senator Barrasso (Chairman of the Senate Committee on Indian Affairs) and Senator McCain introduced the "Indian Community Economic Enhancement Act of 2016," S. 3234. Among its provisions is a proposal to amend the Indian Trader Act (25 U.S. Code § 261) to add an authorization for the Secretary of the Interior to waive its licensing authority in favor of a tribe, as follows:

> (b) Waiver.—On request of an Indian tribe, the Secretary of the Interior shall waive any applicable licensing requirement under subsection (a), if the Secretary determines that the Indian tribe has enacted tribal laws to govern licensing, trade, or commerce with respect to the Indian tribe or land held by, or in trust for the benefit of, the Indian tribe.

Congress is seeking comments from tribes through July and August on this bill.

VI. ACT Report.

On June 8, 2016, the Advisory Committee on Tax Exempt and Government Entities (ACT) made its public report to the Commissioner of Internal Revenue (IRS) on its recommendations for administrative, procedural and regulatory improvements on issues effecting tax-exempt and government entities. For the Indian Tribal Governments (ITG) division of the IRS, ACT reported its "Survey of Tribes Regarding IRS Effectiveness with Current Topics of Concerns and Recommendations."

Based on a one-year survey of tribes, tribal organizations and tribal representatives, the ITG subgroup of ACT made specific recommendations to improve communication, training and interaction with tribal governments and their entities. Specifically, ACT recommended the following:

1. ITG should continue its public speaking at the meetings of tribal organizations such as NCAI and NAFOA to update these organizations on

(continued on page 11)

Current Developments in Tribal Taxation Issues and Initiatives from previous page

important tax topics;

2. ITG should continue to present relevant and timely webinars on tax topics;

3. ITG should provide training to its field agents on substantive tax issues, namely the GWE Act;

4. ITG should provide timely regional, face-to-face, training to tribes and tribal entities on substantive tax topics;

5. IRS should exempt tribal governments from the employer mandate under the Affordable Care Act (ACA); and

6. IRS should abandon the proposed payment model under Notice 2015-52 (which requires a plan administrator to remit the "Cadillac" tax on behalf of an employer under the ACA) in favor of allowing employers to calculate and pay tax themselves on any excess benefits provided to employees;

7. IRS should clarify terms and application of the GWE Act.

The ACT recommendations were well received by the IRS. The ITG division is continuing its effort to improve communication with tribes and to clarify the application of substantive tax law to tribes and tribal entities. The ITG division of IRS will be reporting on its latest efforts at the National Intertribal Tax Alliance 18th Annual Tax Conference September 14-15, 2016 at Agua Caliente Casino Resort & Spa.

If you have any questions or comments, please contact Wendy at *wpearson@hobbstraus.com* or 425-512-8850.

Indian Law News You Can Use

Disenrollment: The American Dream Meets the Myth of Scarcity

By Se-ah-dom Edmo

The following is an excerpt from American Indian Identity Citizenship, Membership, and Blood *by Se-ah-dom Edmo, Jessie Young, and Alan Parker available to purchase at* https://squareup.com/store/seahdom-edmo.

In the past eight years, Indian tribes in California have removed five thousand people from their membership rolls. According to the tribes, these disenrollments were necessary to correct longstanding mistakes in membership rolls. For the individuals affected, however, disenrollment from their tribe can mean the division of family and separation from their tribe and culture. It can also mean unemployment, the loss of their homes, and the loss of a share in the revenues generated by the billion-dollar Indian casino industry.

Mainstream media outlets have caught onto the narrative of greedy individuals in power wanting more casino profit. While such story is salacious and seductive, it is a perspective that is also very rooted in Western perspectives of success. With such a microscopic view it is easy to rationalize away the possibility of disenrollment being a part of a systemic problem, one that includes the political and racial oppression of tribes and Indian people as a part of wider racial oppression: a counternarrative that holds Congress and the federal government to the promises made through treaties for education and health care rather than accepting that we only deserve a small portion of what we request to adequately staff Indian Health Service clinics, Bureau of Indian Education schools, and Title VII Indian education programs. There is a federal budget pie and tribes and tribal individuals should therefore fight among one another to get their basic needs met. With only a small percentage of tribes significantly profiting from casino profits, it is a counternarrative that rings true. These are complicated decisions; they are not made in vacuums and have everything to do with structural and institutional racism that perpetuates itself through time.

These are complicated decisions; they are not made in vacuums and have everything to do with structural and institutional racism that perpetuates itself through time.

On May 1, 2014, after two days and more than 11 hours of testimony, the Grand Ronde Tribal Council called for a vote to remand 86 recommendations for disenrollment back to the enrollment committee so its members could consider new material presented by the 16 families affected by the tribes' recent disenrollment action. This pending action includes a nearly 80-member family, descendants from Chief Tumulth, the Cascades Indian chief who signed the 1855 Willamette Valley Treaty. He was hung by Lt. Phil Sheridan (for whom a town near Grand Ronde, Oregon, was named Sheridan) before the Grand Ronde Reservation was established.

The Grand Ronde Tribal Constitution, before September 14, 1999, required that members be "descended from a member of the Confederated Tribes of the Grand Ronde Community of Oregon." In their constitution "descent" means "from any person who was named on any roll or records of Grand Ronde members prepared by the Department of the Interior prior to the effective date of this Constitution."

Before the two-day meeting, the Tribal Council had scheduled eight days to review the enrollment files, listen to enrollment committee hearing recordings, and read the information submitted to the enrollment committee. Because of the gravity of the issue, during the two days of hearing, the Tribal Council waived the usual five-minute time limit on providing input at its business meetings.

Person after person came before the council and told their story, tracing lineage, demonstrating how they meet the requirements of membership according to the constitution and also provided evidence of how they have been involved and engaged with the tribal community. Principal among the claims of the individuals in question was the interpretation, by the tribe and its staff, who had recommended disenrollment to the enrollment committee. That crux of the families' objections was in the language of the Tribal Constitution, specifically the phrase: "any roll or records of Grand Ronde members prepared by the Department of the Interior." Their contention is: despite the fact that Chief Tumulth does not appear on the official roll of the tribe, prepared by the Department of the Interior, his role as signatory to the 1855 Willamette Valley Treaty was, in fact, a record of the Grand Ronde Tribe prepared by the Department of the Interior. The fact that he was unjustly killed before he was able to travel back to, what now is known as, Grand Ronde and be counted along with others in the 1857 official roll of the Grand Ronde Tribe seemed like an act of sacrifice, in the interest of the health, welfare, and protection of his people. The fact that the murder of Chief Tumulth, coupled with the tribes' interpretation of the Constitution, served as the justification for disenrolling the family was not only

(continued on page 13)

DISENROLLMENT: THE AMERICAN DREAM MEETS THE MYTH OF SCARCITY from previous page

tragic to the family members; it was, from their perspective, injustice. Through their testimony, and public comments, many of the individuals affected expressed their respect for the role of the Tribal Council and the enrollment committee, as they function to uphold the constitution, but also expressed a feeling of being singled out, for some reason, by enrollment staff whose recommendation the enrollment committee had adopted. The events of the Tribal Council meeting were reported and summarized on the Tribal Council website; hearings were video recorded and posted on the website just as all of the Tribal Council proceedings are posted.

The story of Chief Tumulth's descendants earned local and national media attention through a story and posting by Oregon Public Broadcasting. In the exploration of their story NPR interviewed David Wilkins, a professor of American Indian Studies at the University of Minnesota and a member of the Lumbee Nation.

Professor Wilkins estimates that as many as 8,000 U.S. citizens have been cast out of tribes over the past two decades. Wilkins worries that tribal disenrollment could be putting tribal autonomy in jeopardy, seeing two possible directions for reconciling this issue—either work on real and transparent citizenship reform or prepare to be subject to limitations set forth by Congress or the Supreme Court.

"At some point there's going to be enough clamor raised by dis-enrollees that there is going to be a congressional hearing or there is going to be a Supreme Court decision that might seriously impinge on what is a true sine qua non of a sovereign nation, that is the power to decide who belongs," Wilkins says.

Professor Wilkins believes that the federal government may step in, at some point, and say that the right to determine, for themselves, who is and is not a citizen will not be deemed an "essential function" of tribal governments. Would the U.S. government let another country step in to decide who was a U.S. citizen or not? If the further restriction on tribal rights is the projected result of mass disenrollment, then what are tribes going to do to stop it? Further, what is behind the motivations for tribal governments to conduct these enrollment audits? While other chapters in this book, and scholarly work, have unpacked the history, legal background, origins, and nature of disenrollment, it is important to call out and discuss a more macroscopic view of the issue and how it operates as an integral part of a larger oppressive machine that disenfranchises not only tribes and individual Indian people, but also many others who are a part of traditionally marginalized groups. If we limit the conversation to only a discussion of Indian law and federal Indian policy, we also ignore the fact that those things exist in relation to a broader and wider sociopolitical world where policies and practice are shaped and justified by racialized and oppressive views such as the inequitable application of the death penalty, mandatory minimum sentences, stand your ground laws, reproductive rights, foster care, and social services as well as the history of immigration, citizenship, and who is considered to be a full person deserving of rights within U.S. borders.

> [T]HE LARGEST TRANSFER OF WEALTH ON THIS LAND OCCURRED THROUGH THE TAKING OF LAND ITSELF AS WELL AS RESOURCES CONTAINED ON THAT LAND FROM TRIBAL CONTROL.

Important prevailing cultural narratives at play here are the social construction and maintenance of the American Dream, the idea that economic attainment is equivalent to success, and all those who are successful deserve to be so.

McNamee and Miller describe the construction of the American Dream this way:

> "America is the land of limitless opportunity in which individuals can go as far as their own merit takes them. According to this ideology, you get out of the system what you put into it. Getting ahead is ostensibly based on individual merit, which is generally viewed as a combination of factors including innate abilities, working hard, having the right attitude, and having high moral character and integrity. Americans not only tend to think that is how the system should work, but most Americans also think that is how the system does work."

McNamee and Miller argue that while merit does indeed affect who ends up with what, the influence of merit on economic outcomes is vastly overestimated by the ideology of the American Dream; generations of wealth (assets—retirement accounts, home and land ownership, and unsold stocks—minus debts, like credit card bills, school loans, and mortgage owed) and income (the money a household earns in a given year) inequity also begets further, potentially exponential inequity. From the seventeenth through the twentieth centuries, during the settlement of the United States, individuals of particular racial groups were not considered full persons and therefore were legally unable to own land, possess a bank account, or participate in business. This accumulation of wealth, for folks of particular races, has resulted in the top 10 percent of earners taking more than half of the country's overall income in 2012, the highest proportion recorded in a century of government record keeping.

(continued on page 14)

Disenrollment: The American Dream Meets the Myth of Scarcity *from previous page*

Second, McNamee and Miller identify a variety of nonmerit factors that suppress, neutralize, or even negate the effects of merit and create barriers to individual mobility, and wealth, citing that the bottom 80 percent share approximately 10 percent of the wealth in the United States, while the top 5 percent share nearly 60 percent of wealth in the United States.

What does all this mean if we apply these concepts to the history and current condition of Indian Country and the rise of disenrollments? To answer this question we have to visit the work of one additional scholar. In her 1997 book, *Homophobia: A Weapon of Sexism*, Suzanne Parr explores the function that homophobia plays in carrying out prejudice, stereotyping, and discrimination against women. She brought to light an important connection between two types of oppression, and the blending of oppressions provides a helpful analysis of how the myth of scarcity works with the meritocracy myth to continue the oppression of tribal people in the United States. Limit educational opportunities, and withhold adequate paying jobs, allow a few people to succeed, so that blaming of those who don't "make it" can be intensified, similar to the Myth of Meritocracy.

Then, encourage those few who do succeed in gaining power now to turn against those who remain behind rather than to use their resources to make change for all. If anyone steps out of line, take his/her/their job away. Let the threat of homelessness and hunger do their work. The economic weapon works.

Under the duress of structural oppression tribal families and communities are vulnerable to the influences of these multiple narratives and beholden to the government allocations of the Department of the Interior, BIA, and Indian Health Service as their primary provider of welfare and health. Centuries of racism and racist policy perpetuate the lack of accumulation of wealth and income among tribal people. While there is an abundance of wealth in the United States to care for all in need, there are only finite amounts of money or resources available to Indian people and tribes, which scares tribal communities into believing they will lose access to the few resources that exist, compelling them to do all they can to limit the number of enrolled citizens/members in their tribes out of fear.

Suddenly the myth of scarcity is transformed to actual scarcity of money and resources to stretch between all people who are eligible for enrollment. Simultaneously, people are tricked into thinking that to get better access to that finite pot of money or resources the best response should be the building of systems of hierarchy to ensure that those who are "truly deserving" are served. Thus the system and pressure to maintain Indian blood is maintained. "We stay in an abusive situation because we see no other way to survive."

The largest transfer of wealth in the United States will not be the baby boom generation transferring its wealth to its children—the largest transfer of wealth on this land occurred through the taking of land itself as well as resources contained on that land from tribal control. Until we see a land transfer that large in scope, nothing will ever overshadow the relatively small transfer of wealth that will come when one generation, however large it may be, transfers wealth to the next.

In November 2013, the same time the Grand Ronde was struggling with questions of disenrollment, the United States was deep in discussions about the impact of federal sequestration in an attempt to balance the budget. In a hearing of the Senate Committee on Indian Affairs, Chairwoman Maria Cantwell (WA) remarked that, "Tribes are increasingly carrying fiscal burden of the health and welfare of tribal citizens through increased match obligations for Indian Health Service and other government grants." Previous study of the committee's proceedings tells us that this is not episodic, but a pattern. In a 2005 hearing on the status of Indian Health Service in the Committee on Indian Affairs, vice chairman Senator Byron L. Dorgan, from North Dakota, stated, "I also want to make the point that Medicare spends about $6,000 per person on health care. The VA spends about $5,200 per person; Medicaid about $3,900 per person. We spend about $3,800 per prisoner because we have Federal responsibilities for the health care of Federal prisoners. The Indian Health Service spends about $1,600 per person for health care of American Indians, and there we have a trust responsibility."

While this practice may be commonplace and seen as acceptable for other such government-funded housing, health, and welfare needs of people in the United States, it also signifies a slippery slope. In exchange for the land here, many tribal nations reserved much of their hunting and gathering rights, as well as the provision, by the United States, for their health and education. These are treaty rights, they are not entitlement programs similar to Medicare or Medicaid, and they are not like state or federal laws that can be struck down by the Supreme Court; treaties with tribal nations are the supreme law of the land. Further, the continued cuts to federal allocations to tribes, if continued, will only exacerbate the already existing health and education disparities amongst tribal people living on and off of reservations. This is a condition of structural duress, and is a very compelling reason to self-limit tribal roles. Tribal leadership becomes a self-regulatory tool under the cumulative mounting pressure of wealth and income inequity, while keeping both the myth of scarcity and myth of meritocracy in play to help to perpetuate this reality into the future.

(continued on page 15)

DISENROLLMENT: THE AMERICAN DREAM MEETS THE MYTH OF SCARCITY from previous page

Late on Thursday, May 1, 2014, Grand Ronde Tribal Council chairman Reyn Leno broke a 4–4 tie on a motion to remand over 70 disenrollment cases, each representing individuals who were recommended for disenrollment, back to the enrollment committee, saying he believed committee members had a right to review the new material that was presented. He was joined by Tribal Council vice chair Jack Griffen Jr., Tribal Council secretary Toby McClary, and Tribal Council members Ed Pearsall and June Sherer in sending the cases back for review. Tribal Council members Kathleen Tom, Denise Harvey, Jon A. George, and Cheryle A. Kennedy said they voted against the motion to remand because they were ready to vote on the disenrollment cases at that time. While it is impossible to fully understand the motivation and intent that sparked these particular cases, after a more macroscopic view of the larger social, philosophical, and ethical perspectives presented, one cannot help but wonder—if tribes were not operating under the structural confines of discrimination, the myths of scarcity and meritocracy, would tribes still be seeking to limit their enrollment? If tribal people truly define themselves by a relational worldview, and if caring and keeping track of family is an act of sovereignty, then the practice of disenrollment cannot philosophically exist within that worldview. What is worse, given the state of the health and welfare in Indian Country, how can tribal leaders turn people away? Have tribes not lost enough people to sickness and violence, lost enough to the prison industrial complex, to the child welfare system, and to assimilation? Similarly and just as important, it would also not be philosophically consistent with a tribal relational worldview to condemn, attack, and criticize individual tribes and tribal leaders for decisions made under the duress and weight of centuries of structural oppression.

Decisions weighed and made historically by tribal leaders, whether to battle or to retreat, whether to sign a treaty or to battle, whether to concede to a forced march or to hold ground—all were made with the best hopes for the best possible future for families and communities under the threat and duress of racism and violence.

It is clear, through the actions and statements of the BIA, that although such threats have moved from the realm of violence and death, they are still finding other ways to threaten sovereignty unless tribes continually work to "limit them." Western societies are accustomed to litigious solutions, where there is a clear winner and a clear loser; however, these types of resolutions are fairly new to many tribes. Additionally, solving such issues in court further superimposes Western thought onto tribal cultures and could also be seen as another form of subjugation. This further drives the critical need for reform to the forefront, unless tribes collectively desire to see future interference by Congress or the Supreme Court.

Ed. Note: Some of the materials in Alexander v. Confederated Tribes of the Grand Ronde *are available via* https://turtletalk.wordpress.com/2016/08/08/grand-ronde-disenrollees-prevail-in-tribal-appellate-court. *An August 2016 Tribal Appellate decision overturned the bulk of the Grand Ronde disenrollments.*

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