



Indian Law Newsletter



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Message from the Chair



By Hunter Abell

Greetings friends and colleagues. I am pleased to announce that the WSBA Indian Law Section will conduct the 26th annual CLE on May 22, 2014. For over a quarter century, this event has allowed practitioners from across our state to interact with fellow attorneys, tribal judges, and distinguished faculty on almost every subject under the sun. This year's CLE will take place at the WSBA Conference Center in downtown Seattle.

I am particularly excited about the unique subject matter that the panels will be addressing. As the second decade of the 21st century continues, the question of the future of tribal courts, their caseloads, and their independence becomes ever more pressing. Toward that end, a panel will address the future of tribal courts with an examination of the independence of various tribal judiciaries. Additionally, given the heated debate over the Affordable Care Act in recent years, the question of health care in Indian Country was seemingly overlooked. Consequently, another panel will address this issue and how it pertains to practitioners in Indian law. The CLE will also include the traditional and highly popular litigation update that has been a staple of Indian Law Section CLEs for many years. Finally, a number of other panels are being finalized that will inform and educate the attendees.

As excited as I am for the educational component of the CLE, I believe that the CLE also serves another important purpose. With the increased sophistication and popularity of our area of practice, the intimate, tight-knit circle of Indian law practitioners of the 1970s and 1980s that could all fit into a phone booth has multiplied into attorneys in every corner of the state practicing in a bewildering array

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Indian Lawyers in the News



On March 1, 2014, **Rion Ramirez** was elected the Chairman of the DNC's Native American Council. Rion also serves as an at-large member on the Executive Committee for the DNC and in July of 2013 was appointed by President Barack Obama to the President's Commission for White House Fellowships.



Amber Penn-Roco

Galanda Broadman has added three new attorneys: **Scott Wheat** and **Joe Sexton** have joined the firm as of counsel and **Amber Penn-Roco** is Galanda Broadman's newest associate. Scott serves as general counsel for the Spokane Tribe of Indians; Joe is recently of the Yakama Nation Office of Legal Counsel; Amber comes to the firm from K&L Gates.



After more than seven years in the Reservation Attorney Office at the Colville Confederated Tribes, **Tim Woolsey** is providing advice to clients on Indian gaming, tribal government, 638 contracting, claims arising in Indian Country, and federal court litigation through Timothy Woolsey, PLLC; he can be reached at timwoolseypllc@yahoo.com or 443.850.7937. Tim has also taken a full-time position raising his newborn twin boys.



Briana M. Coyle has joined the Seattle office of Miller Nash as an associate. She joins the Native American Tribes & Organizations practice team, focusing on supporting the business and regulatory compliance issues of tribal governments and organizations. Coyle received her law degree from the University of Washington School of Law, where she served as president of the school's Native American Law Student Association for two years.

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of areas relating to Indian law. As a result, it can be difficult to maintain that sense of camaraderie and kinship that I believe is a hallmark of our practice. For many practitioners, the CLE is not only an opportunity to earn required CLE credit or be brought up to date on emerging legal issues, it is also an increasingly rare opportunity to meet, interact, and network with friends and colleagues from across the state who share an interest in Indian law. If you have not attended in the past, I encourage you join us on May 22nd. If you have attended in the past, come again and see friends and familiar faces. Your practice will be improved and our entire Section will be enriched by your presence.

Finally, I would like to thank the Section's trustees and officers for the hard work that has already been put into this year's CLE. Aubrey Seffernick, Millie Kennedy, Connie Sue Martin, and Mike Rossotto, in particular, have been working diligently on this project for some time. You will see the fruits of their labors in late May. In the meantime, as always, please do not hesitate to let me know if you have a question or concern regarding the CLE or any other aspect of our Section's activities.

Oklahoma Department of Environmental Quality v. Environmental Protection Agency – D.C. Circuit, Jan. 17, 2014



By Rich McAllister, Of Counsel – Hobbs, Straus, Dean & Walker

On January 17, 2014, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Oklahoma Department of Environmental Quality v. Environmental Protection Agency*, 740 3F.3d 185 (.C. Cir. 2014). The decision partially vacated EPA's 2011 new source review (NSR) rule for Indian Country under the Clean Air Act (CAA), ruling that it does not apply to "non-reservation" Indian Country lands.

The 2011 NSR rule established a federal implementation plan (FIP) designed to help attain national air quality standards for all Indian Country nationwide except where EPA had already approved a tribal NSR program or expressly authorized a State Implementation Plan (SIP) to be enforced.¹ EPA considers Indian Country as defined by statute at 18 U.S.C § 1151 to include Indian reservations, dependent Indian communities, and all Indian allotments. EPA had taken the position that states generally lack authority to enforce a SIP in Indian Country. Where a tribe has not been approved by EPA to administer a CAA



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program over such Indian Country lands, EPA took the position that it has residual authority to adopt a Federal Implementation Plan that applies to those lands. EPA relied on specific language in the CAA providing EPA the authority to directly implement air quality programs where EPA determines that "treatment of Indian tribes as identical to States is inappropriate or administratively infeasible."²

In the 1998 Tribal Authority Rule, which established procedures for a tribe to seek treatment in the same manner as a state (TAS) under the CAA, EPA had interpreted this statutory language as a delegation of federal authority to tribes for lands within the exterior boundaries of their reservations, which includes Pueblos and tribal trust lands. But for "other areas," EPA requires a tribe to make such a showing of its inherent authority over such Indian Country lands.³

Oklahoma asked the court to review EPA's NSR rule, arguing that its SIP should apply to non-reservation Indian Country within the state that is not within a tribe's jurisdiction. The non-reservation lands at issue in the case are two kinds of land areas included in the statutory definition of "Indian Country": "dependent Indian communities" and "Indian allotments" (both individual Indian trust lands

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IRS Finally Agrees Trust Per Capita Distributions are Tax Exempt ... with some limits.



By Wendy S. Pearson, *Pearson Law Offices, P.S.*

On March 10, 2014, the IRS issued the long-awaited guidance on the tax treatment of per capita distribution of tribal trust revenue. Notice 2014-22 (<http://www.irs.gov/pub/irs-drop/n-14-17.pdf>). The IRS reversed its earlier stance and now agrees that these distributions are not includible in the gross income of the recipients. However, the IRS carved out three exceptions to this tax exemption: (1) compensation that has been mischaracterized as a trust per capita distribution; (2) business profits that have been mischaracterized as trust revenue; and (3) gaming revenue that has been mischaracterized as trust revenue.

Importantly, Notice 2014-22 allows an opportunity for comment from tribes until September 17, 2014. In the meanwhile, the guidance can be relied upon by tribes and the IRS to evaluate the tax effect of tribal disbursements that have been identified as trust per capita distributions. The IRS stated recently that in an effort to ensure consistency in the application of the interim guidance, any issues that may arise at the IRS field level involving per capita distributions will be centrally reviewed at the national level of the IRS Indian Tribal Governments Office.

Some brief history about what precipitated Notice 2014-22 is in order. A few years ago, the IRS approached at least two northwest tribes and initiated an audit of the tribes' distributions to members. Among the various types of distributions that a tribe makes, the IRS reviewed the distributions identified as trust "per capita" payments to members. The IRS asserted that revenue earned by the tribe from its trust resources (such as timber, coal, oil, etc.) was taxable when distributed per capita to its tribal members. In other words, each tribal member was required to pay tax on the share of tribal trust revenue received and the tribe was required to issue Forms 1099 to each of those recipients.

The tribes, of course, disagreed with the IRS. For the past two years or more, in concert with the National Congress of American Indians and other national and regional tribal organizations, the tribes argued before Congress, Department of Treasury and Department of Interior that

the Per Capita Act of 1983 explicitly confirmed the long-established law that the per capita distribution of tribal trust resource revenue is exempt from federal and state tax.

Before issuing Notice 2014-22, the IRS consulted with the Department of Interior (DOI) and the Office of Special Trustee (OST). In addition, on January 27, 2014, the IRS hosted an open phone "consultation" with tribes to announce the ruling they expected to issue and to take questions and comments. The IRS did not release the actual ruling at that time, but instead disclosed the general parameters of the expected ruling. Consequently, tribes and tribal organizations requested that the ruling be issued in interim format to allow meaningful review and comment; this request was granted.

Notice 2014-22 represents the IRS concession that the Per Capita Act protects per capita distributions of tribal trust revenue from taxation. The limitations to the IRS concession of this issue are important, however. By Notice 2014-22, the IRS reserves its authority to recharacterize a trust per capita distribution as a taxable payment if it believes the tribe has abused the arrangement. The IRS will look to the facts and circumstances of the arrangement to

"THE IRS REVERSED ITS EARLIER STANCE AND NOW AGREES THAT THESE DISTRIBUTIONS ARE NOT INCLUDIBLE IN THE GROSS INCOME OF THE RECIPIENTS. HOWEVER, THE IRS CARVED OUT THREE EXCEPTIONS TO THIS TAX EXEMPTION[.]"

determine if a "Trust Account is used to mischaracterize taxable income." In other words, the IRS will not simply accept that a distribution characterized by the tribe (or the Department of Interior / OST) constitutes a tax-exempt "trust per capita" payment

when in substance it is really something else. (*i.e.*, the classic form vs. substance test).

Here are the three types of abusive situations that the IRS has carved out as exceptions to tax exemption, based in part or in whole on allegedly real transactions the IRS has encountered in its audits of tribes over the years.

Exception 1, Disguised Compensation. This exception addresses whether a distribution of trust income really qualifies as a "per capita" distribution. If the payment is compensation, it cannot qualify as a tax-exempt per capita distribution. To illustrate this point, the IRS sets out in Example 1 a scenario where the tribal council authorizes per capita distributions to three subsets of members. All members receive \$1x in trust distributions, elders receive \$2x, and two individuals who provide services to the Housing Authority as Director and Assistant Director comprised the third subset and receive \$15x in trust distributions. Notably, in prior years the Director and Assistant Director of the Housing Authority had been receiving taxable wage bonuses and their new "per capita" distribution is in lieu of

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Washington Tribal/State Relations Evolving, But Further Work Is Needed



By Gabriel S. Galanda

Polarity accurately describes the historic legal relationship between the State of Washington and those Tribal Governments indigenous to our state. Tribal sovereignty, *i.e.*, “the right of reservation Indians to make their own laws and be ruled by them,”¹ has always been antipodal to state sovereignty as a matter of Anglo-American jurisprudence.

So much so, that by the late 1800s nascent states were deemed the Tribes’ “deadliest enemies” by none other than the U.S. Supreme Court.² And over the ensuing century, tribal and state governments waged a zero-sum battle over who would regulate Indian Country.

But today, in what is the era of Indian self-determination as a matter of both federal policy and tribal behavior, tribal/state opposition is waning. As noted by Professor Matthew T. Fletcher:

“[T]HE INCREASINGLY COOPERATIVE RELATIONSHIP BETWEEN THE TRIBES AND STATE MUST BE BETTER APPRECIATED WHEN THE COURT NEXT EVALUATES REGULATORY POWER OR ADJUDICATORY JURISDICTION IN WASHINGTON INDIAN COUNTRY.”

States and tribes are beginning to smooth over the rough edges of federal Indian law — jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority — through cooperative agreements. In effect, a new political relationship is springing up all over the nation between states, local units of government, and Indian tribes.³

Washington tribal/state relations and the new political relationship between our state’s sovereigns are indeed evolving. Still, based on the Washington Supreme Court’s three most recent Indian law decisions, more progress is required to achieve tribal/state congruity throughout official state policy. In particular, the increasingly cooperative relationship between the Tribes and State must be better appreciated when the court next evaluates regulatory power or adjudicatory jurisdiction in Washington Indian Country.

Deadliest Enemies

In what is perhaps the most influential decision in all of federal Indian law, *Worcester v. Georgia*, U.S. Supreme Court Chief Justice John Marshall declared that state law “can have no force” within an Indian nation’s territorial

jurisdiction.⁴ That proclamation most certainly polarized tribes and states throughout the country, including Washington, from the moment it became a state in 1889 and for the next 100 years.

Throughout the first half of the 20th century, millions of acres of land were stolen from Washington Indians.⁵ Indian women here were sterilized through the 1930s.⁶ And until modern times, tribal children were removed from their parents, taken out of state and washed of their cultural identity, before being used for manual labor in “Indian schools.”⁷

If such forces of overt “assimilation” and “termination” policy toward Indians were not enough to permanently polarize Indian and non-Indian society, tribal/state governmental relations were deeply wedged in 1963, when Washington unilaterally assumed full criminal jurisdiction and partial civil jurisdiction over Indians on remaining Indian lands pursuant to federal Public Law 280. Professor Robert T. Anderson attributes the State’s grab of tribal

inherent authority to “local racism and jurisdictional jealousy.”⁸

Over the next decade Washington’s “fish wars” ensued, with state and local law enforcement utilizing criminal arrest to deprive Indians of Treaty-reserved

fishing rights, making matters even worse.⁹ An epic clash of sovereigns ensued in the *U.S. v. Washington* litigation, resulting in a controversial decision by U.S. District Court Judge George Boldt that guaranteed the Tribes half of the fish harvest¹⁰ and by 1979, a momentous Indian victory before the U.S. Supreme Court.¹¹

The state was so resistant to Judge Boldt’s decision that the Ninth Circuit Court of Appeals compared it to states in the Deep South that refused to abide by federally mandated desegregation.¹² “Except for some segregation cases ... the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century,” appellate court justices said of the Boldt Decision.¹³ In the end, the judicial affirmation of the Tribes’ reserved Treaty right to fish, expressed as “their source of food and commerce,” solidified a foundation for the economic development we are witnessing today throughout Washington Indian Country.¹⁴

Above all, though, “the Boldt Decision” entrenched Washington Tribes as a legal and political force to be reckoned with.

The Accord

Litigation between the sovereigns continued throughout the 1980s. Yet with federal and state “Indian law”

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Legislative Wrap Up



By Aubrey Seffernick

The Washington State Legislature wrapped up its 2014 session March 13, 2014. In this short 60-day session, the legislature passed a bipartisan budget agreement to add more money to basic education but did not agree on closing any tax exemptions or designate new funding for transportation projects. The legislative focus on education spending was part of Washington's ongoing response to the *McCleary* decision, a 2012 ruling by the state Supreme Court, which found that the state is not meeting its constitutional obligation concerning education funding. In addition to the supplemental budget, a few pieces of legislation significant to tribes did pass both houses and are moving to Governor Inslee's desk for signature.

Recognizing Native American Heritage Day (SB 6078). This bill declares the fourth Friday in November as Native American Heritage Day to honor Native American heritage and pay tribute to Native Americans

for their many contributions to the United States. Senator McCoy worked hard over a number of years to pass this bill out of both houses with broad bipartisan support. The legislation ensures that the holiday will be included in the school calendar, giving teachers another avenue to teach public school students about Native Americans in Washington state.

Although the federal government has occasionally designated days honoring Native American heritage, it has not yet recognized it as a federal legal holiday. If the Governor signs the bill, Washington will be among the first states to honor American Indians with a formal state holiday.

Subjecting federally recognized Indian tribes to the same conditions as state and local governments for property owned exclusively by the tribe (HB 1287). This bill impacts land held in fee simple by tribes both on and off the reservation. The bill exempts from property tax fee land that is within the boundaries of a tribe's reservation and used for any purpose. Land that is leased to a third party for economic development would be subject to a leasehold excise tax. Land located outside of a tribe's reservation and used by a tribe for economic development purposes would also be exempt from property tax, but subject to a payment in lieu of taxes ("PILT") of no more than the equivalent of the leasehold property tax. A number of restrictive amendments to the bill were added by the Senate and eventually adopted by the House, including: a reverse severability

clause, an alternative method to negotiate a PILT if the tribe and local jurisdiction cannot reach agreement, and finally, a grandfathering provision that allows only land currently owned by a tribe to qualify for the exemption.

The first amendment, introduced by Senator Padden, removed the severability clause and replaced it with a "reverse" severability clause such that if any portion of the Act is found invalid, the entire Act is null and void.

The second amendment, introduced by Senator Braun, added a provision that explains what will happen in the event that the tribe and county cannot agree on the PILT amount. In such an event, the Department of Revenue will help determine the rate. But in no event can the PILT be higher than what the leasehold excise tax amount would have been had a private lessee been present. The amendment also clarifies that if the tribe fails to pay the PILT, the property tax exemption is removed for that tax year but the tribe may be able to reinstate it upon payment in good standing.

The final amendment that raised the most concern among tribes was introduced by Senator Rivers. This amendment limits the bill's applicability to property owned by tribes as of

March 1, 2014. The amendment was introduced by Senator Rivers to give the legislature and those county and local jurisdictions opposing the bill an opportunity to determine what property currently meets the definition of "economic development," and determine a set impact of the bill. Coupled with the five-year review by the Joint Legislative Audit & Review Committee (JLARC), as well as the seven-year sunset provision already contained in the bill, the legislature has ample opportunity to assess the impact of the policy and become comfortable that no unintended consequences will occur.

While the Senate amendments weakened the bill, many believe it still represents a significant move forward for tax policy as it relates to federally recognized tribes. In particular, the bill allows for currently-owned tribal fee land used for economic development, either on the reservation or off, to be exempt from property taxation. Moreover, the bill states that the PILT provisions only apply to economic development land off the reservation, meaning that all land currently owned on the reservation and used for economic development will be exempt from property tax AND the PILT provisions. Many tribes see this bill as a strong policy that leads to economic vitality both for tribes and the surrounding communities, and believe that the legislature will be inclined to extend this policy in perpetuity and lift the grandfathering provision after the

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and individual restricted deeded lands) that are not within a reservation. The court agreed with Oklahoma that the CAA authorizes either a State or a Tribe with a reservation to implement air quality programs, and that EPA did not have authority under the CAA to regulate non-reservation Indian country which was not under the jurisdiction of a Tribe. The decision did not alter EPA's or a Tribe's authority under the CAA over Indian reservations.

In its decision, the court relied heavily on a previous decision in *Michigan v. EPA*, 268 F.3d 1075 (2001), which reviewed EPA's 1999 Federal Operating Permits Program.⁴ In that rule, EPA sought to fill the regulatory gap in Indian Country where a tribe had not applied for TAS and a state did not have an approved program. EPA asserted it has residual authority to implement the federal program in Indian Country and in areas outside of reservations for which EPA believed the status of the land as Indian Country is "in question." The *Michigan* decision rejected EPA's position, finding that the CAA vested authority either in states or in tribes that are treated like states. The court held that the CAA only grants authority to EPA to implement a federal operating permit program for a state or tribe if: "(1) the state or tribe fails to submit an operating program or (2) the operating program is disapproved by EPA or (3) EPA determines the state or tribe is not adequately administering and enforcing a program." *Id.* at 1082. The court wrote that EPA may administer a federal program only "in the shoes of a tribe or the shoes of [a] state," and there is no residual EPA authority to regulate non-reservation areas where the Indian Country status of the land is "in question." *Id.* at 1085.

Relying in *Oklahoma DEQ* on principles that it had applied in *Michigan*, the court held that "a state therefore has regulatory jurisdiction within its geographic boundaries except where a tribe has a reservation or has demonstrated its jurisdiction." Since neither a tribe nor EPA had demonstrated jurisdiction over non-reservation land in Oklahoma, the court held that Oklahoma has jurisdiction over non-

reservation Indian Country for implementing the CAA, and vacated the NSR rule with respect to non-reservation Indian Country.

This decision is troubling because the D.C. Circuit ignored many good arguments, including that the state lacked standing because it should have challenged the rule after it was adopted. The CAA provides EPA authority throughout Indian Country, while a state must be specifically demonstrate its jurisdiction over non-reservation Indian Country in order for its SIP to be approved by EPA.

"THIS DECISION IS TROUBLING BECAUSE THE D.C. CIRCUIT IGNORED MANY GOOD ARGUMENTS, INCLUDING THAT THE STATE LACKED STANDING BECAUSE IT SHOULD HAVE CHALLENGED THE RULE AFTER IT WAS ADOPTED."

EPA argued that the CAA 1990 amendments adopted by Congress do not establish a presumption of state jurisdiction over any part of Indian Country. However, the court viewed its decision in *Michigan* to be control-

ling. Although the case involved Oklahoma, the court vacated EPA's NSR rule, which applies nationally, and so its decision about state jurisdiction and the reach of EPA's authority in Indian Country under the CAA may come up in any state. EPA has requested a rehearing of the case on the issues of both standing and the merits of the decision.

Rich McAllister serves as Of Counsel to Hobbs, Straus, Dean & Walker, and as an advisor/facilitator for Triangle Associates Inc. In 2009, Rich retired from the U.S. Environmental Protection Agency Region 10, where he was the primary contact on Indian law and the application of federal environmental law in Indian country. Since joining Hobbs Straus, Rich has assisted tribes, tribal organizations, and Tribally Designated Housing Entities with environmental review, historic properties, and compliance issues.

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- 1 See Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38748 (2011), codified at 40 C.F.R. Parts 49 and 51.
 - 2 42 U.S.C. § 7601(d)(4).
 - 3 63 Fed. Reg. 7254, 7258-59 (Feb. 12, 1998), codified at 40 C.F.R. §49.7(a)(3).
 - 4 64 Fed. Reg. 8247 (1999), codified at 40 C.F.R. Part 71.

IRS FINALLY AGREES TRUST PER CAPITA DISTRIBUTIONS ARE TAX EXEMPT ... from page 3

a bonus. The distribution of trust revenue to the Housing Authority officials will be considered compensation by the IRS. This example illustrates that disparate distributions to subsets of members (\$1x to members and \$2x to elders) may qualify for tax exempt treatment as “per capita” distributions. However, trust distributions of a significantly larger sum to members who provide services to the tribe may be reclassified as compensation by the IRS. The example does not make clear whether it is the 15-to-1 ratio difference in the size of the trust distribution, the prior practice of paying those particular members taxable compensation of the same amount, remitting funds to those individuals in their capacity as Directors who serve an agency, or all the factors combined that make the arrangement abusive.

Exception 2, Disguised Business Profits. This exception addresses the misuse of a trust account to run taxable corporate business profits through the tribe’s trust account in an effort to make those profits tax exempt. In this situation, the tribe intentionally mischaracterizes corporate business profits as “rents” from trust land and then redistributes the same amount of those “rents” as trust “per capita” payments to the group of members who own the corporation. Specifically, the tribe arranged for one of its corporate enterprises (located on trust land) to deposit an amount approximating the corporate net revenues into trust and to label it as “rent.” Subsequently, members of the tribal council authorized the per capita distribution from trust of essentially the same amount to the owners of the Corporation. There are a number of red flags in this scenario. One, the so-called “rent” was tied to the amount of corporate profits and not based on a determination of fair market value rent. Second, the distribution of trust was not necessarily “per capita” or *pro rata*, but rather it was roughly equivalent in amount to what was deposited as “rent” and, moreover, distributed only to tribal members who owned the corporation.

Exception 3, Disguised Gaming Revenues. This exception addresses whether funds deposited into trust really qualify as trust revenue. By this exception, the IRS has stated that a tribe may not evade the legal reach of the Indian Gaming Regulatory Act (IGRA) by intentionally converting its gaming revenue into trust revenue. In this example, a tribal casino (located on trust land) agreed to pay rent in an amount equal to 50 percent of its net gaming revenue, with the other 50 percent of revenue being distributed to the tribe. The rent was deposited into trust and then distributed per capita from trust to every tribal member. The IRS ruled that those trust distributions are mischaracterized gaming revenues which are taxable under IGRA. This example does not provide a bright-line test for what may be considered by the IRS to constitute an abusive tax scheme. It seems the IRS is saying that a lease rate based on 50 percent of net revenues is abusive. But,

clearly a casino can have legitimate rental expenses. So, is a rental rate amounting to 30 percent of net revenue bona fide? What if a lease rate at 50 percent of net revenue was predicated upon market analysis and fair market value determination of rent? The answer to these questions is uncertain, but what is relatively certain is that a process of audit or review of tribal records will ensue to determine whether the IRS concludes the arrangement is abusive.

Notice 2014-22 represents a significant policy shift by the IRS to publically agree that the per capita distribution of trust revenues is tax exempt. I believe the intent of Notice 2014-22 was to clarify the tax treatment of trust per capita distributions so that tribes could confidently rely on their dealings with Department of Interior and the OST as it relates to the administration of trust revenues. However, I am concerned the guidance will do little to reduce the number of IRS audits of per capita distributions because of the stated exceptions in Notice 2014-22. The exceptions are very broad and cannot possibly (nor are they meant to) encompass every circumstance that could be seen as an abusive manipulation of the Per Capita Act protections. So, that necessarily means the IRS will have to look at tribal trust per capita arrangements on a case-by-case basis to make a determination. Put another way, the IRS will still ask to review the trust per capita distributions by tribes as part of an audit or review. And, if there are disparate amounts distributed to subsets of members, I predict the IRS will investigate further to determine whether the tribe mischaracterized the transaction as a tax-free trust per capita. Rental arrangements with enterprises operating on trust land may also be scrutinized as part of a trust per capita audit or review. In some respects, the ruling gives the IRS a reason to audit instead of putting the issue to rest.

I am also concerned about what appears to be a Department of Treasury incursion into the jurisdiction of the Department of Interior. The exceptions to tax exemption set forth in Notice 2014-22 essentially dispute whether Title 25 regulations have been followed. For instance, Exception 1 disputes whether the distributions qualify as “per capita” payments. Exceptions 2 and 3 dispute whether certain funds qualify to be deposited into trust or are of a “trust” character. In both cases, Title 25 defines what can be deposited into trust (25 C.F.R. §§ 115.700-701) and what qualifies as a “per capita” distribution. (*e.g.*, 25 C.F.R. 290.2). Department of Interior and the OST have jurisdiction and authority over Title 25 of the U.S. Code. Department of Treasury and the IRS have jurisdiction and authority over Title 26 of the U.S. Code, the Internal Revenue Code. So, what is to happen if, for instance, the OST accepts rent deposits into trust but the IRS later questions whether the rent exceeds fair market value? Notice 2014-22 seems to give the IRS the authority to recharacterize rents from

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IRS FINALLY AGREES TRUST PER CAPITA DISTRIBUTIONS ARE TAX EXEMPT ... from previous page

trust land as something other than bona fide trust revenue. Fundamentally, this means the IRS may question the OST's administration of trust funds under Title 25.

Certainly, the IRS has to administer the Internal Revenue Code and, to that end, the exceptions outlined in Notice 2014-22 are meant to police against abusive schemes to evade federal tax. Yet, in their public comments during the "consultation" phone call with tribes on January 27, 2014, the IRS and Treasury acknowledged that the exceptions outlined in Notice 2014-22 describe rare situations. If that is the case, then why not plainly concede that trust revenues may be distributed per capita on a tax-exempt basis and rely on collaboration with the OST and upon existing law to deal with the rare instances where a tribe may abuse that protection? Payment for services has always been compensation and Notice 2014-22 does not alter that rule. The Indian Gaming Regulatory Act governs the distribution of net gaming revenues and Notice 2014-22 does not materially advance the plethora of rulings which confirm that those revenues are taxable when distributed. And, the IRS always has in its arsenal of arguments the classic test of substance over form to attack tax avoidance schemes.

Presumably in their consultations with IRS leading up to Notice 2014-22, the OST and Department of Interior strongly conveyed that they have a robust system for ensuring that what goes into trust complies with Title 25 and that authorized distributions of those trust revenues comply with Title 25. Given that the abusive scenarios described in Notice 2014-22 are rare, then it would seem that, on the whole, Title 25 is being administered properly. If it is being administered properly, then there is no reason for the IRS to concern itself with what qualifies as "trust" or "per capita" in its Title 26 rulings.

It seems to me that correcting the rare situations where Title 26 is allegedly being violated in relation to Title 25 trust transactions should be a matter to be worked out between Department of Treasury and Department of Interior/OST. To resolve the issue in the context of an IRS audit of a tribe (or worse yet, an audit of the individual per capita recipient who likely had no control over how the trust transactions were structured) is inefficient and does not get to the core issue. Either OST permitted the trust deposits or distributions and should not have, or OST does not consider the transactions to be in violation of Title 25 and the Per Capita Act. Either way, each agency should be at the table to resolve the matter and to ensure the integrity of their regulations. To that end, I would recommend that Notice 2014-22 be modified to provide for this inter-agency type of collaboration.

If you have any questions about this article, please contact Wendy at 425-512-8850 or wendy.pearson@wspearson.com.

The Northwest Indian Bar Association's Annual Awards Banquet

Thursday, May 1, 2014

Speaker: **Walter Echo-Hawk** (Pawnee)
a Native American speaker, author and attorney

We will also be giving the following awards:

Honorable Gary Bass (Colville)
Lifetime Achievement Award

Alan Stay
Tara Blair "Spirit of Service" Award

Gail Schubert (Inupiaq)
Unsung Hero Award

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WASHINGTON TRIBAL/STATE RELATIONS EVOLVING, BUT FURTHER WORK IS NEEDED from page 4

remaining rather dynamic and most uncertain, litigation-worn Washington tribal and state leaders began to consider the wisdom of forging a new avenue of tribal/state relations. Diplomacy emerged. Relationships formed. Mutual respect occurred. And sure enough, those rough legal edges began to soften.

In 1989, the State and Tribes signed the Centennial Accord, both in commemoration of the 100th anniversary of Washington's statehood and in homage to Washington's first sovereigns. Founded on a government-to-government relationship, the Accord, which today exists in a life of its own, "respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues." The State and Tribes expressly "recognize that their relationship will successfully address issues of mutual concern when communication is clear, direct and between persons responsible for addressing the concern." Pivotaly, a new way was forged.

Ten years later, the State and the Tribes reunited "in the spirit of understanding and mutual respect of the 1989 Centennial Accord and the government-to-government relationship established in that Accord," with a desire to strengthen their relationships and "cooperation on issues of mutual concern." They created the Millennium Agreement, whereby they pledged continued cooperation through the development of "enduring channels of communication ... institutionaliz[ed] government-to-government processes that will promote timely and effective resolution of issues of mutual concern," and a state-tribal "consultation process, protocols and action plan."

The Millennium Agreement coincided with the negotiated introduction of machine gaming to Washington Indian Country in 2000. Machine gaming has since brought unprecedented economic opportunity to Washington tribal communities and, in turn, infused tens of thousands of jobs and billions of dollars into our state's economy.

Good Neighbors

In the years since the Centennial Accord was forged, countless tribal/state controversies have been resolved through communication and cooperation, rather than controversy and litigation. Those government-to-government processes have resulted in numerous pacts between state and tribal government that apportion police power, distribute impacts, share tax revenues and establish fee-for-service relationships.

With Washington's policymakers seeing significant tangible benefits from such accords, including tribal six-figure impact payments to counties, cities and towns, state

statutes and policies encouraging, if not mandating, tribal/state collaboration have proliferated statewide.

In 1995, the Washington Supreme Court promulgated Civil Rule 82.5, which requires Superior Courts to "recognize, implement and enforce the orders, judgments and decrees of Indian tribal courts."¹⁵ Many Washington tribal codes likewise require tribal courts to extend full faith and credit or comity to state and federal court rulings, respectively.¹⁶

In the same spirit, the Legislature passed a statute in 2010 that authorizes cross-deputization agreements between local and tribal governments so that tribal law enforcement officers can enforce state law as "general authority Washington peace officers."¹⁷ As a corollary, state police officers can enforce state criminal process by following tribal criminal search and arrest procedures.¹⁸

Critically, as we ascend from the Great Recession, commerce has not been exempted from the State's new Indian

policy. In 2011, the Department of Revenue amended Washington Administrative Code 458-20-192 to codify "policies and objectives of the Centennial Accord and the Millennium Agreement,"

and require that the agency consult and collaborate with the Tribes on a government-to-government basis; especially to "provide additional guidance regarding business activities engaged in by Indians and by nonmembers doing business with Indians."

The next year, the Legislature enacted a statute requiring all state agencies to establish "a government-to-government relationship" and "make reasonable efforts to collaborate" with Indian tribes.¹⁹

Potentially of most consequence, in 2012 the Legislature created a law that will allow tribes individually to petition the Governor to have the State retrocede from "all or part" of the criminal and civil jurisdiction it usurped from the Tribes under Public Law 280 in 1963.²⁰ The retrocession process involves not only "government-to-government meeting" between a petitioning tribe and the Governor, but "the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements ... with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process."²¹

In all, the process is designed to ensure understanding and reconciliation of "the effects of retrocession on both Indian and non-Indian communities."²² The process epitomizes the new, less-polarized political relationship between our state's sovereigns, and how it permeates state policy. And with still more collaborative work to be done

(continued on page 10)

"THE MAJORITY'S STATED RATIONALE UNFORTUNATELY EPITOMIZES DIAMETRICALLY OPPOSED TRIBAL/STATE RELATIONS OF DECADES PAST."

between the Tribes and their next-door neighbors in local government, the process provides a platform for much other inter-local progress.²³

Nevertheless, recent Washington Supreme Court precedent suggests that tribal/state polarity has not yet altogether vanished from the highest levels of our state's government.

The Outliers

In *State v. Eriksen*, five justices ruled that a Lummi police officer who pursued a non-Indian drunk driver on the Lummi Reservation could not stop her after following her off the reservation or detain her until county police arrived to arrest her.²⁴ This decision reversed on reconsideration a 2010 decision that tribal police can "engage in fresh pursuit of suspected drivers first encountered on the reservation."²⁵

That initial ruling proclaimed: "Our decision today harmonizes with common sense and sound policy."²⁶ Yet in reversing itself a year later, the court expressed concern about "undermining Washington's sovereign authority to regulate arrests in the state" by extending tribal police power off reservation, even in the instance of fresh pursuit."

The majority's stated rationale unfortunately epitomizes diametrically opposed tribal/state relations of decades past. Indeed, they admitted that their ultimate decision "create[d] serious policy problems, such as the incentive for intoxicated drivers to race for the reservation border,"²⁷ and purposefully left the solution to political and legislative devices.

In a decision handed down this summer, *State v. Clark*, the court unanimously affirmed a theft conviction of a Colville Indian based upon a trial court's refusal to suppress the fruits of Omak police officers' search of the defendant's home on reservation trust lands.²⁸ The justices held that "the State does not infringe tribal sovereignty by searching reservation lands unless it disregards tribal procedures governing the execution of state criminal process" thereon.

Although the Colville Tribes have codified procedures for "a State to obtain a tribal warrant in addition to a state warrant," that did not prove to be enough. As the court noted, the tribal provision did "not govern the way the State executes its own process" on Indian lands, thus "the State did not infringe the Colville Tribes' sovereignty with the search."²⁹

The implication that sufficient tribal procedures can govern state and local police officers' execution of state criminal process in Indian Country was "based upon accommodating the interests of the Colville Tribes with those of the State."³⁰ Yet, hearkening back to tribal/state dynamics of old, the court paternalistically warned the Tribes against ever "regulat[ing] the execution of state

criminal process in a manner that meaningfully frustrates the State's ability to punish those who break the law."³¹

And last year, in *Automotive United Trades Org. (AUTO) v. Gregoire*, the court considered whether tribal governments were indispensable parties under Civil Rule 19 to an action brought by a gas station retail association challenging tribal/state fuel tax compacts.³² Although the five-justice majority determined that the Tribes are necessary parties whose joinder is not feasible due to sovereign immunity, they ruled them not indispensable.

The justices professed affording "heavy weight" to the Tribes' sovereign status and "respect for sovereign immunity," but in the final analysis, ceded to citizen-plaintiffs: "Where no other form is available to the plaintiff, the balance tips in favor of allowing this suit to proceed without the tribes."³³

As one commentator suggests, the court's majority failed to appreciate that the State and Tribes "spent much of the latter half of the 20th century in court — at substantial cost — litigating territorial taxation disputes" and that "[i]nstead of direct taxation, states were encouraged by the U.S. Supreme Court to 'enter into mutually satisfactory agreements with tribes for the collection of taxes.'"³⁴ Drawing our state's sovereigns back into court, although potentially healthy for certain special interests, is an unhealthy regression in modern relations between our state's sovereigns.

Today, unlike during most of our state's history, it is well-pronounced state policy that tribal and state governments should be given every opportunity to resolve their differences bilaterally and cooperatively — as equals. That resulting dynamic is one of co-regulation and of benefit-and impact-sharing, rather than of zero-sum legal dueling.

Hopefully, our state Supreme Court will carefully consider this state's new policy of Indian relations when next crafting a remedy that affects the inherent rights of both of our state's sovereigns. Better yet, hopefully there won't be a next time.

Gabriel S. Galanda is the Managing Partner of Galanda Broadman, PLLC, in Seattle, and a member of the Round Valley Indian Tribes. Gabe represents tribal governments, businesses and members in all matters of litigation and transactions. He dedicates this article to those Washington Indians who fought the fish wars and to the tribal lawyers who won the Boldt Decision.

1 *Williams v. Lee*, 358 U.S. 217, 271 (1959).

2 *United States v. Kagama*, 118 U.S. 375, 384 (1886).

3 Matthew L.M. Fletcher, *Retiring the 'Deadliest Enemies' Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 74 (2007).

4 *Worcester v. State of Georgia*, 31 U.S. 515 (1832)

5 Andrew H. Fisher, SHADOW TRIBE: THE MAKING OF COLUMBIA RIVER INDIAN IDENTITY 96-111 (2010); see also Joseph William Singer, *Lone Wolf*,

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- or *How to Take Property by Calling it a "Mere Change in the Form of Investment,"* 38 TULSA L. REV. 37, 45 (2002) (discussing the taking of Indian lands vis-à-vis allotment generally).
- 6 Charles Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255, 273-74 (1992).
 - 7 Lindsay Glauner, *The Need for Accountability and Reparation*, 51 DEPAUL L. REV. 911, 942-43 (2002).
 - 8 See Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 922.
 - 9 See, e.g., Puyallup Tribe of Indians, *Fishing: History*: <http://www.puyallup-tribe.com/history/fishing/> (last visited Oct. 10, 2013).
 - 10 *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974).
 - 11 *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).
 - 12 Rob Carson, *Boldt Decision on tribal fishing still resonates after 40 years*, The News Tribune, Feb. 9, 1974.
 - 13 *Puget Sound Gillnetters Ass'n v. United States Dist. Court*, 573 F.2d 1123, 1126 (9th Cir.1978) (citations omitted), *aff'd in part and vacated in part*, 443 U.S. 658 (1979).
 - 14 *U.S. v. Washington*, No. 70-9213, 2013 WL 1334391, at *24 (W.D. Wash. Mar. 29, 2013) (citation omitted).
 - 15 Wash. CR 82.5(c).
 - 16 Snoqualmie Tribal Code § 5.1 ("The judgments, orders, warrants, decrees, subpoenas, records of a foreign court, and other judicial actions are presumed to be valid and will have the same effect as Tribal Court orders, judgments, decrees, warrants, subpoenas, records and actions ...").
 - 17 RCW 10.92.020.
 - 18 Makah Tribal Code § 1.4.05 ("All judges and personnel of the Tribal Court shall be authorized to cooperate with ... all federal, state, county and municipal agencies ...").
 - 19 RCW 43.376.020. Such legislative and agency pledges carry the force of law pursuant to the state Administrative Procedures Act. *Kennewick Public Hosp. Dist. v. Pollution Control Hearings Board*, 126 Wn. App. 1030 (2005).
 - 20 RCW 37.12.160(1).
 - 21 RCW 37.12.160(2).
 - 22 Anderson, *supra* note 8, at 950.
 - 23 See e.g. *Confederated Tribes of Chehalis Reservation v. Thurston County Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013) (county efforts to tax tribal real property struck down); Gabriel S. Galanda, *Advancing the State-Tribal Consultation Mandate*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 17, 2012) (discussing how states' "little siblings too frequently still act like tribes' deadliest enemies").
 - 24 172 Wn.2d 506, 259 P.3d 1079 (2011).
 - 25 *State v. Eriksen*, 166 Wn.2d 953, 216 P.3d 382 (2009). This opinion has been withdrawn by the court.
 - 26 216 P.3d at 407.
 - 27 172 Wn.2d at 514.
 - 28 *State v. Clark*, 178 Wn.2d 19, 308 P.3d 590 (2013).
 - 29 *Id.* at 31-32.
 - 30 *Id.* at 31, n.6.
 - 31 *Id.*
 - 32 *Automotive United Trades Org. v. State*, 175 Wn.2d 214, 285 P.3d 52 (2012).
 - 33 *Id.* at 233.
 - 34 Trent Latta, *Analyzing Automotive United Trades Organization v. State of Washington*, 66 WASH. BAR NEWS 22, 27 (2012) (citation omitted).

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Questions contact: Melissa Simonsen, Co-Chair of the Committee for Diversity, Deputy Prosecutor and SAUSA for the Colville Confederated Tribes. (509) 634-2460; mvsimonsen@gmail.com.

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- Environmental Law Panel
- The Future of Tribal Courts
- Ethics
- 6.5 CLE credits, including ethics, application pending

LEGISLATIVE WRAP UP from page 5

seven years, if not before, to enable all tribes to access this economic development tool.

Vacating convictions for certain tribal fishing activities (HB2080). This piece of legislation allows a person who was convicted before January 1, 1975, of violating certain statutes or rules regarding the regulation of fishing activities and who claimed to be exercising a treaty Indian fishing right, to apply to the sentencing court for vacation of his or her record of the misdemeanor, gross misdemeanor, or felony conviction for the offense. This bill also allows a person's family member or an official representative of the deceased person's tribe to posthumously apply to the court for vacating a conviction on behalf of the deceased person.

The passage of this bill coincided with the fortieth anniversary of the landmark Boldt decision. In 1974, Judge Bolt issued a decision that recognized tribal treaty rights and allocated half the harvestable salmon in the Northwest to the tribes. Before the Boldt decision, many tribal members were harassed and arrested while asserting their treaty rights to fish for salmon off-reservation. The fortieth anniversary no doubt played a role in igniting

efforts to vacate convictions of those tribal members who were wrongfully arrested while engaging in their treaty-protected fishing rights.

New public records exemption for traditional cultural places and archaeological resources (SB 2724). Under the

Washington Public Records Act, individuals may request public records unless one of the enumerated exemptions prohibits disclosure. Senate Bill 2724 creates a new exemption for records that contain information identifying the location of

archaeological sites, historic sites, artifacts, or the sites of traditional religious, ceremonial, or social uses and activities of affected Indian tribes. The bill is intended to prevent individuals from using the identifying information to engage in "looting or depredation of such sites."

Aubrey A. Seffernick is a member of Miller Nash's tribal practice team, working with Northwest Native American tribes and organizations on gaming, regulatory affairs, tax, licensing, and economic development issues. Aubrey graduated from Seattle University School of Law and currently serves as the Chair-elect of the Washington State Bar Association Indian Law Section.

"IN PARTICULAR, THE BILL ALLOWS FOR CURRENTLY-OWNED TRIBAL FEE LAND USED FOR ECONOMIC DEVELOPMENT, EITHER ON THE RESERVATION OR OFF, TO BE EXEMPT FROM PROPERTY TAXATION."

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