



Indian Law Newsletter



Published by the Indian Law Section of the Washington State Bar Association

Volume 15

January 2007

Number 1

Message from the Chair



By Kelly S. Croman

Thank you for the opportunity to serve as your chair over the next year. The Section membership is represented again this year by a very strong and diverse group of trustees who are committed to ensuring that their work benefits the membership throughout the year. Thanks to the good work of immediate past Chair **Christina Marie Entrekin (Oneida)** and last year's trustees, the Section is in good shape to hit the ground running this year.

Your trustees met in October and November to begin planning activities for 2006-07. With their leadership and assistance, the Section held its first mini-tele-CLE in some time on November 3, 2006, on the important and timely issue of Pub. L. 109-158 and the limitations of 28 U.S.C. 2501 for tribal trust funds mismanagement claims. Even on very short notice, the one-hour phone-in CLE had over 20 participants. The Section plans to host several more mini-tele-CLEs over the course of the year. Big thanks are due to **Tom Schlosser** and **Kyme McGaw** for organizing the first tele-CLE.

The trustees have also begun to plan the Section's annual CLE for May 4 of 2007. We hope to announce a tentative agenda and speakers shortly after the New Year. If you have topics of interest or suggested speakers for either a mini-CLE or the Spring CLE, please don't hesitate to let us know as soon as possible.

We've also begun making appointments to Section committees.

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New Opportunities to Develop Wind Power on Tribal Lands



By Michael P. O'Connell

Title V of the Energy Policy Act of 2005 provides new legal authorities that should simplify and expedite development of wind power on tribal lands. See 25 U.S.C. § 3504.

Under Title V, tribal governments can enter leases and other business arrangements and grant rights of way on tribal land without the delay usually caused by Bureau of Indian Affairs (BIA) review of tribal leases and applications for BIA-issued rights of way, BIA environmental review under the National Environmental Policy Act (NEPA) and other federal environmental laws triggered by BIA action. Moreover, tribes can approve such agreements and rights of way without the time, cost, and risk of potential federal administrative appeals and judicial review of BIA approval of tribal leases and rights of way applications. Moreover, projects located on tribal land are not subject to state and local land use or environmental laws and regulations.

Many Indian tribes have expressed interest in developing their energy resources under Title V. BIA regulations required by Title V to implement these new authorities may be issued in March 2007. Once final regulations are issued, the BIA ordinarily will have 270 days to approve or disapprove a tribal energy resource agreement (TERA) application. That time period may be extended, if neces-

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ANNOUNCEMENTS

Bob Anderson Tenured



Professor Robert "Bob" Anderson, an enrolled member of the Minnesota Chippewa Tribe (Bois Forte Band), was recently granted tenure by the University of Washington School of Law. Bob is the Director of the Native American Law Center. Before joining the law school, he was a Senior Staff

Attorney for the Native American Rights Fund in Boulder, Colorado, and Anchorage, Alaska, for twelve years. Bob litigated major cases involving Native American sovereignty, hunting and fishing rights, and natural resources. From 1995 to 2001 he served as an appointee of U.S. Department of Interior Secretary Bruce Babbitt where he provided legal and policy advice on a wide variety of Indian law and natural resource issues. Bob teaches Indian Law, Public Land Law and first-year Property Law. He was selected by students as a Philip A. Trautman Professor of the Year in 2005. He co-authored the 2005 edition of *Cohen's Handbook of Federal Indian Law*. Bob's tenure and leadership of the Native American Law Center is a fitting tribute to late Professor Ralph Johnson. Congratulations, Bob!

Debora Juarez Featured by *Seattle Magazine*

The January 2007 edition of *Seattle Magazine* includes Debora Juarez as one of three Indian law attorneys among the Seattle's top 155 lawyers. Debora, an enrolled member of the Blackfeet Nation, is Of Counsel with Williams, Kastner & Gibbs, PLLC and a former Indian Law Section Trustee. Debora is a former King County Public Defender, King County Superior Court Judge, Executive Director of the Washington State Governor's Office of Indian Affairs, Columbia Legal Services Native American Project attorney, and Morgan Stanley investment banker. In the article she is quoted as saying: "The thing I'm most proud of is mentoring Indian law students. Over 20 years many Indian students have clerked for me or worked as an associate for me. It's been really gratifying to watch them grow up and become excellent lawyers." Congratulations, Debora!



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Newsletter

Gabriel S. Galanda, Editor

Section logo designed by Scott Sufficool

South Dakota Includes Indian Law on Bar Exam

The South Dakota Board of Bar Examiners recently made South Dakota the third state to include federal Indian law on a state bar licensing examination. According to their newly adopted bar exam regulations:

Indian Law includes basic principles of federal Indian law, including but not limited to civil and criminal jurisdiction, the Indian Civil Rights Act, the Indian Child Welfare Act, and the Indian Gaming Regulatory Act. It does not include tribal laws or customary laws. Indian Law is tested by one 30-minute essay question.

In 2002, New Mexico became the first state to include Indian law as a bar exam topic, and Washington became the second state to do so in October 2004. Washington will begin testing federal Indian jurisdictional topics on the Summer 2007 bar exam. Bar leaders in Arizona, Oklahoma,

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Washington Supreme Court Gets it "Wright": Upholds Immunity for Tribal Corporations

By Gabriel S. Galanda

On December 7, 2006, the Washington State Supreme Court handed down its most important decision on tribal rights in decades. The state's highest court ruled in *Wright v. Colville Tribal Enter. Corp.*, that Indian corporations owned by tribal governments and created under tribal law stand immune from suit, absent express waiver of that immunity by the tribe or U.S. Congress. See No. 7758-3, Slip Op. (Dec. 7, 2006).¹

But as discussed below, *Wright* did not come without warning: tribal governments must avoid forming businesses under state law. Rather, tribes should develop their own corporate codes and charter corporations pursuant to such tribal law. Tribes should consider passing employment laws that allow employees the opportunity to file a grievance or even seek limited redress in tribal court. And, in this day and age of Indian economic development, tribes must think twice before asserting their sovereign immunity in tort litigation.

Background

In July 2002, Colville Tribal Services Corporation (CTSC), a subsidiary of Colville Tribal Enterprise Corporation (CTEC), hired Christopher Wright, a non-Indian, as a pipe-layer and equipment operator. Both CTEC and CTSC are wholly owned by the Confederated Tribes of the Colville Reservation ("Tribe") and, importantly, chartered under the Tribe's corporate code. Mr. Wright worked on a project to construct a waterline for a U.S. Navy housing development in Oak Harbor, Washington.

Mr. Wright alleged racial harassment and resigned in February 2003. He could have filed a grievance and sought relief with the Colville Tribal Employment Rights Office, or filed suit in tribal court pursuant to the Colville Civil Rights Act, but apparently he did not.

In November 2003, Mr. Wright sued CTEC, CTSC and his former supervisor in Island County Superior Court, alleging race discrimination, racial harassment, hostile work environment, negligent supervision, and negligent infliction of emotional distress. CTEC and CTSC successfully moved the Superior Court to dismiss his lawsuit with prejudice for lack of subject matter jurisdiction. The court record (naturally) does not indicate whether the Tribe's insurance defense counsel considered alternatives to dismissal motion practice that would not place tribal sovereignty squarely before the state judiciary; alternatives such as reaching an early, nominal settlement with Mr. Wright,

or allowing him to prove his case on the merits through *limited* consent to suit.

The Washington Court of Appeals Division One reversed the trial court, finding in pertinent part that tribal sovereign immunity did not protect CTEC or CTSC. See *Wright v. Colville Tribal Enter. Corp.*, 127 Wn. App. 644, 111 P.3d 1244 (2005). CTEC and CTSC petitioned for review (against the advice of some tribal lawyers), which the Supreme Court granted. See 156 Wn.2d 1020 (2006). The Tribe appeared as *amicus curiae*, or "friend of the court." The court heard oral argument on May 16, 2006.

Ruling

The Washington Supreme Court's four-justice majority decision in *Wright* began with a recitation of well-established U.S. Supreme Court case law on Indian sovereign immunity:

Tribal sovereign immunity protects a tribal corporation owned by a tribe and created under its own laws, absent express waiver of immunity by the tribe or Congressional abrogation.... Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and 'unequivocal' waiver or abrogation. ... Tribal sovereign immunity protects tribes from suits involving both 'governmental and commercial activities,' whether conducted 'on or off a reservation.'

See Slip Op., at 4-6 (citations omitted).

The court then concluded that "tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own laws. ... unless the tribe waives or Congress abrogates immunity" *Id.* at 7-8. And, since the immunity of CTEC and CTSC was "neither waived nor abrogated," the State Supreme Court over-ruled Division One's decision and thereby reinstated the trial court's dismissal of Mr. Wright's lawsuit with prejudice.

According to the *Spokesman-Review*, Mr. Wright is considering whether to appeal the Washington Supreme Court's decision to the United States Supreme Court.

Lessons

Wright is certainly a big win for Indian country, particularly tribes who engage in "commercial activities" – on or off the reservation. But the decision was not rendered without warning to tribes. The Washington Supreme Court did suggest that the tribal act of incorporating an enterprise under state law, rather than tribal law, "may" waive that business' immunity and thus subject the enterprise to suit. It was inconsistent for the court to assert on the one hand that a tribe that merely files corporate formation

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The Model Tribal Secured Transactions Act



By Bruce A. King

In June 2005 the National Conference of Commissioners on Uniform State Laws (NCCUSL) released the Model Tribal Secured Transactions Act (MTSTA), a version of Article 9 of the Uniform Commercial Code (UCC) – that was drafted by NCCUSL and the American Law Institute. It is intended to serve as a model for adoption by tribes that would like to have a law of secured transactions. This article paper discusses the importance of tribal adoption of secured transactions codes as an element of a tribe's program to encourage tribal economic development. It also discusses some differences between the MTSTA and UCC that are pertinent to a tribe's choice of using one or the other as a model for its own statute.

The MTSTA is available on the NCCUSL website along with an Implementation Guide and Commentary.¹ The committee that wrote the MTSTA consisted principally of law professors and lawyers with deep experience in commercial and tribal law. Several tribes participated in the drafting process, including lawyers and other representatives of the Cherokee Nation, the Navajo Nation, the Chitimacha Nation, the Oneida Nation, the Crow Nation, the Confederated Tribes of Warm Springs, the Chickasaw Nation, the Little Traverse Bay Bands of Odawa Indians, the Sac and Fox Nation, and several California rancherias. The project also received considerable support from the Helena, Montana Branch of the Federal Reserve Bank of Minneapolis.

One might ask why a secured transactions code is necessary if tribes have survived this long without one. A key reason is to promote economic development and encourage the availability of consumer and commercial credit, at a reasonable cost in terms of interest rates and transactions costs. A secured transactions code provides a predictable mechanism for regulating creditor enforcement of secured transactions. It can thereby encourage lenders who might have some reluctance on that score to extend credit to tribes and tribal members. Establishing a certain regime for the perfection and priority of security interests, and an established procedure for enforcing them, makes it possible for tribal members who wish to establish businesses in Indian Country to be able to leverage their assets more effectively, and thus expand their businesses more quickly. Using borrowed capital to grow a business is as important to the small business as it is to the large. A secured transactions law is essential to make leveraged finance widely available.

Choosing a Model

In adopting a secured transaction code, how should a tribe proceed? Drafting a new code from whole cloth would be prohibitively time-consuming and expensive, and would have a significant disadvantage in that it would be very difficult for outsiders to use. The unfamiliarity of the legal system would raise transactions costs for users, who would need to invest the time to familiarize themselves with it. This would effectively limit the number of lenders willing to make this investment, which would inevitably reduce the available credit sources, and would probably raise the cost of credit in Indian Country, because lenders compete for business based on rates.

The more realistic choice is to select a pre-existing code as a model, and then adapt it to the tribe's particular needs and customs. This maximizes consistency across borders, which lowers transactions costs and encourages competition among lenders, and still ensures that the code reflects important tribal customs and values. There are a couple of models and approaches that a tribe can choose from:

1. A tribe can use as its starting point Article 9 of the UCC. Each state has adopted the current version of Article 9, with local variations that adapt it to peculiarities of state law and business. Tribes that decide to take the UCC approach might find it convenient to use as their starting point the version of the UCC that was adopted by the state in which the tribe is located, giving consideration to that state's variations from the uniform code and the tribe's own particular circumstances that it wants to have reflected in its own code. This standard UCC approach can be an incorporation of Article 9 by reference, with a specific list of exceptions (which is what the Lummi Tribal Nation did when it adopted the entire Washington version of the UCC²) or, better, it can take the form of adopting an entire modified code as positive law *in extenso*, which the Navajo Nation did with Articles 1, 2, 3, and 9 of the UCC.³
2. There are two model tribal secured transactions codes. One is the Model Tribal Code – Secured Transactions (Third Draft) prepared in 1997 by the University of Montana's Indian Tribal Law Clinic. A version of this was adopted in 1998 by the Hoopa Valley Tribe.⁴ Later the NCCUSL formed a committee to begin work on what was published in 2005 as the MTSTA. The initial reporter for the was Maylinn E. Smith of the University of Montana School of Law in Missoula, Montana, and presumably the MTSTA built upon the foundation laid by the University of Montana model code.

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Are You in Good Hands? Ensuring Tribal Insurers Honor and Protect Sovereignty



By Gabriel S. Galanda &
Debora Juarez

Corporate America has for too long deceived, disrespected and ignored Indian people. Energy companies have pillaged tribal lands for oil and gas and underpaid Indians for rights-of-way across allotted lands. Power-house financial institutions that were either unable or unwilling to assist tribes Before Casinos (“B.C.”) – before Indian gaming blossomed into a multi-billion dollar industry – are now roaming the halls of tribal administration buildings trying to land large Indian financial investment accounts or commercial loans. Insurance companies, which also gave little attention to Indian people B.C., now pocket lucrative tribal premiums.

It is high time Indian Country insist and ensure that Big Business, which eloquently talks the talk of tribal sovereignty, also walks the walk. The intent of this particular article is to help Indian tribes and Alaska Native Corporations convey that message to their friends in the multi-trillion dollar insurance industry. Native people are paying millions upon millions of dollars in insurance premiums each year to ensure the protection of the tribal treasury and other Indian assets. But do you know that those expensive insurance contracts that purport to safeguard Indian property and monies probably waive tribal sovereignty, jurisdiction and immunity?

Now increasingly drawn to the reservation by the \$23 billion Indian gaming industry, insurers and their agents sell tribes on how they will “protect the tribe and its sovereignty” – and they command five- or six-figure premiums to do so, at least ostensibly. But those same insurers commonly retain discount lawyers with no Indian legal experience to defend tribal insureds from attack. And when sued by tribal insureds for contractual insurance coverage, those same insurers routinely object to the jurisdiction and authority of tribes and their courts. When all’s said and done, the insurance industry is responsible for many federal and state court decisions that have eroded away tribal jurisdiction over reservation-based disputes.

Indian Country must take a renewed approach to insurance procurement. Tribes and Alaska Native Corporations can no longer afford to treat their insurance policies as form contracts, by rubber stamping whatever insurance agents are packaging and selling. Rather, Indian business leaders and tribal lawyers must approach *and negotiate* those two-inch thick insurance policies/contracts as they

would a multi-million dollar real estate acquisition or commercial loan transaction. Tribal insureds now must get what they deserve in exchange for those exorbitant premiums – business partners who will make decisions, or honor tribal decisions, that are in the best interest of the tribe and all of Indian Country.

What follows are some practical tips for Indian decision-makers to ensure that the insurance they purchase not only maximizes the protection that should be afforded to tribal assets, but does not waive Indian sovereignty, jurisdiction and immunity.

Ensuring Tribal Choice of Defense Counsel to Facilitate Sovereign Decisionmaking

Insurance companies command trillions of dollars in premiums – \$3.4 trillion worldwide and \$946 billion domestically last year. And they control billions of dollars in damage claims – \$61.2 billion in the U.S. in 2005, the year the likes of Hurricane Katrina caused the most property damage in our country’s history. (Note the enormous disparity between premium dollars and estimated damages in the U.S. alone last year.) In turn, insurers exert great influence over, among many other things, the legal marketplace. Insurers often dictate to law firms the hourly rate they will pay for defense of an insured, rather than those legal businesses commanding their standard rate as is common with most attorney-client relationships. Ultimately insurance companies command sizeable discounts on the legal bills they must pay on behalf of their insureds. But as the old adage goes, you get what you pay for.

Consider the everyday tort lawsuit brought by non-Indian Joe Citizen against a tribal insured for injuries allegedly sustained in a casino. If the facts he alleges against the insured could, if proven, impose liability upon the tribe within its policy’s coverage, the insurer must retain and pay outside lawyers to defend the tribe.¹ When the insurer and/or its claims adjuster are presented with that tort claim, they often hire the same local discount defense lawyers that they hire to defend non-Indian businesses from personal injury suits. But in the context of even the most routine slip-and-fall claim, federally recognized Indian tribes and Alaska Native Corporations have vastly different legal rights than off-reservation grocery or hardware store owners. Therefore, the cookie-cutter approach to insurance defense, which is common in the business world, is not acceptable in Indian Country.

Many tribal insurance policies allow the insurer to select defense counsel for the tribe when it faces a tort claim or lawsuit. Take, for example, one popular tribal insurance underwriter’s Tribal Officials Errors and Omissions Liability Occurrence Form, conferring what is commonly known as director and officers, or “D&O,” coverage, which states:

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Tribal International Trade to Create Global Sovereignty

By Lawrence SpottedBird



*"If we cannot control our own direction and destiny, then many First Nations will continue to manage their own poverty."
– National Chief Phil Fontaine¹*

For tribal international trade, international not only means foreign countries, it also includes intertribal trade among the 560-plus tribal nations in the United States, the 660-plus First Nations in Canada, and tribal governments in Central and South America. Increasing tribal international trade can also support the globalization of our tribal nations. We then do not rely on the relationship of just one government, but can establish relationships with many governments worldwide. This would then enable us to diversify our economic trade partners and not be reliant on the political climate of just one nation or country.

As many tribes across the U.S. gain momentum in building their local economies through gaming (\$22.6 billion in gross revenues in 2005), many more still have tremendous difficulty in finding the necessary catalyst to move their economic activity forward and not "continue to manage their own poverty." What then can they do? - especially if a tribe is located in a remote, distressed location with little hope of gaining access to the necessary infrastructure upon which sustainable economic development can be nurtured.

In my twenty-five-plus years of involvement in Native American business and economic development, I have never felt as optimistic as I do now in the future that awaits our tribal nations. We are better educated, more experienced in business, have greater access to capital and have stronger governments. Of all the tools tribes now have at their disposal, I believe the following two provide the greatest opportunities in the coming years to further enhance this positive momentum in economic development. The first is technology and telecommunications in remote tribal communities; the second is tribal international trade.

As Chief Fontaine states above, a real and lasting solution to broad-based sustainable economic development in Indian country can only come from the Indian nations themselves. And that development can start today through formalizing and nurturing tribal international trade.

Historically, this existed in the Americas before the occupation of the English and Europeans. Ancient trading routes among Indian peoples have existed for centuries and sophisticated channels of trade and communication spanned the continent, frequently following the major river systems. Some closely neighboring tribes might ex-

change corn, for instance, for meat or fish. Some tribes that were located greater distances apart still had established trade among each other. For example, quartz from the Rocky Mountains, seashells from the Atlantic and Gulf coasts and copper from the Great Lakes region – all have been found in archeological sites throughout the continent – attest to the existence and diversity of intertribal trade.

Today, tribes should organize a national trade organization to develop policies to support each others economies. Gaming tribes now purchase billions of dollars in goods and services and should actively purchase from other tribes. In Alaska, the 12 major regional Native corporations and over 200 Native village corporations drive over half the vast economy of the state.

To support intertribal trade, several Indian nations, such as the Mohegan Tribe of Connecticut, have developed preference programs that provide all Native vendors with certain advantages when competing for tribal contracts. Nationwide however, many Native owned companies are finding it difficult to sell to tribes. Some tribes actively utilize their TERO Programs to ensure tribal contractor participation, but still miss other opportunities to purchase goods and services from other tribes or Native American individuals. There are many reasons, but one reason is there is no formal tribal international trade policy in place.

Already being discussed at previous tribal trade conferences is the possible creation of purchasing cooperatives that would allow Indian nations to pool their buying power and thereby reduce their costs of goods and services. This is exactly the level that tribal leaders should be working together. Just as this country grew to become the world power that it is, with fifty unified states, so too can the united tribal nations of this continent. What we now need is a tribal international trade center that will develop those intertribal policies and agreements to lay the foundation for the development of tribal international trade. The tribal international trade center will then have the ability to support any tribe – both large and small in building effective, efficient and profitable international trade worldwide.

Not surprisingly, as tribes become successful in global trade, the federal, state and local governments and others will wish to interfere – this I am sure will come. To prepare for and strengthen the tribes' legal position, Indian nations should consider pooling their resources and establish this tribal international trade center now! It is here that policies can be developed and the negotiation and execution of bilateral trade agreements can be executed. Such agreements could serve as the legal foundation for commerce between any two tribal nations, whether they are tribes here in the United States, Canada, Mexico, Central America or South America. These agreements can then lay the foundation for tribal international trade policy that can be recognized by the United Nations and foreign governments worldwide, further strengthening each tribal

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Sherrill and Cayuga: A Call to Revisit Pre-1966 Indian Monetary Claims



By Sharon Haensly

Tribes and their members should be concerned that their pre-1966 money claims to property may vaporize due to the mere passage of time. The federal government had promised to preserve these claims under a 1982 law known as the Indian Claims Limitations Act ("ICLA").¹ The list of large and small Indian tribes with these claims reads like a Northwest Indian Country Who's Who: Lummi, Swinomish, Yakama Nation, Nisqually, Lower Elwha, and hundreds more. Individual allottees' claims are also listed. The federal government published this list of *over 38,000 money claims* in 1983.

1. The Nature of ICLA Money Damages Claims

The listed ICLA claims list are outrageous, a textbook reminder of the injustices that were and continue to be inflicted on Indians and their lands.² There are thousands of trespass damages claims involving roads, pipelines, power lines, and utility towers that others illegally constructed on Indian lands. There are countless other claims based on illegal land sales to third parties. There are also money claims for fisheries destroyed by dams; reservation lands that were unlawfully flooded; and tidelands and Indian water rights that were illegitimately taken. These examples, however, barely scratch the surface of the kinds of money claims involved. Tribes and their members were never properly compensated.

The ICLA list also includes thousands of individual Indian claims, including rights-of-ways and flooded lands. Additionally, "forced fee patents" occurred when the Department of the Interior placed Indian land in fee before the trust period expired and without the Indians' consent.³ "Secretarial transfers" involved Interior's illegal sale of allotments without the heirs' consent.⁴ The courts have tended to poorly treat these latter two kinds of claims, largely out of reluctance to displace or otherwise penalize thousands of non-Indians whom now occupy the land.⁵ There remain, however, a few possibilities for judicial recourse in these kind of cases, depending upon the facts. Tribes and allottees should also explore legislative solutions through Congress. There is also the possibility that the BIA misclassified the claims.

Tribes should act now. Since 1983, Interior has rejected several thousand ICLA claims for reasons that are unclear.⁶ Many of the ICLA claims strike at the very heart of the tribal struggles for a land base, economic sovereignty and self-reliance. Tribal economies will directly benefit by follow-

ing through on the ICLA claims. While ICLA expressly does not preserve claims for reclaiming possession of land, an action for money damages can be used as leverage in negotiations.⁷ Reclaiming reservation lands means fixing the problem of jurisdictional checkerboards.⁸ The reclaimed lands and monetary compensation will help implement tribal economic development plans.

2. A Brief History of ICLA

Tribes can no longer safely assume that these historic money claims remain safe from the passage of time. The recent disastrous ruling by the Second Circuit Court of Appeals in *Cayuga Indian Nation v. Pataki*⁹, which the U.S. Supreme Court refused to review, should be the call to Indian Country to seriously reexamine these ICLA claims, determine their legal status, and either litigate or settle those with merit.

Advocating tribal action requires understanding the history of events leading up to the ICLA. In 1966, Congress passed a law that, for the first time, set a deadline for the United States to sue to collect money damages, including for destroying Indian property.¹⁰ As the 1972 deadline approached, Congress extended the deadline to allow Interior, tribes, and their members to identify and preserve money damages claims. Tribes and their members then began a 15-year odyssey of providing Interior with information about pre-1966 injustices that warranted money damages.¹¹

Congress' last deadline extension came in 1982 with enactment of the ICLA.¹² The ICLA established that deadlines for the thousands of Indians' listed, pre-1966 money claims would not be triggered *unless* Interior either: (1) rejected a particular claim or category of claims; or (2) submitted to Congress a legislative proposal for resolving them.¹³ So, for decades, the federal government, tribes and their members understood that most or nearly all of these listed claims had been *preserved*. Preserving the claims gave the federal government time to determine whether to sue or legislatively resolve the matter. Not surprisingly, the United States appears to have left most ICLA claims unresolved.

3. The Oneida, Sherrill and Cayuga cases

The first Supreme Court case to interpret ICLA was firmly decided in favor of tribal rights. In 1985, the U.S. Supreme Court in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("Oneida II"), held: "So long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live."¹⁴

Decades later, in March 2005, the Supreme Court in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), upheld Oneida II. Sherrill did not involve ICLA-listed money claims, but instead addressed the Cayuga

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A Look at Intergovernmental Relations Concerning Child Support in Washington State



By Jerry R. Ford

There has been a great change in Indian Country as to how tribes are establishing and collecting child support for this current generation and those yet to come. There are the rumblings of a new sense of cooperation between tribes and local-state-federal governments. The tribes are empowering themselves to watch after their most important resource, the children, in culturally specific methods unique to each nation. Yet in today's society, the tribes cannot exist in a vacuum and must face the reality that not only must they coexist with mainstream government but need to find ways to benefit and grow from the relationship. The challenge is to do so while maintaining sovereignty and winning concessions necessary to maintain governmental and cultural integrity.

The purpose of this article is to explain what has been created in a partnership between the Puyallup Tribe of Indians and a local government agency, the Pierce County Prosecuting Attorney Family Support Division, in order to help overcome some of the more fundamental problems standing in the way of intergovernmental cooperation in child support issues. It sets forth the history of the relationship, the current status and what this new relationship means in the area of tribal-state relations in child-support administration in the years to come. This article contains solely my observations and opinions and represent neither the policy of the Pierce County Prosecutors Office nor of any other entity or individual.

Any discussion of child support establishment and enforcement in Indian Country in Washington state must begin with the abysmal situation that existed just a few years ago. There was massive distrust between the state, local governments and the tribes. There existed no cohesive strategy for providing adequate and appropriate services to Indian children in need of support. Nobody spoke to anyone else and each sovereign entity did exactly as it pleased without consideration for the impact such actions have on others and even on themselves. Tribes refused to enforce state child-support orders on the reservation, especially against workers at casino and other tribal operations. This reaction could have been foreseen, given the heavy-handed nature in which the state tried to force its programs upon the tribes. And the tribes, in order to preserve their independence, often simply found it easier to say no and forgo a viable child-support program. The state refused to consider the realities of reservation life and set child-support orders based on statistical income averages of mainstream America as well as created huge arrearages

that set most tribal members in such deep holes that many have never recovered. Tribal members seldom replied to the documents from state court, and there was an amazing lack of participation from tribal members in the process as there was little or no cultural relevance between what the state was seeking and the realities for most tribal members. Many people simply gave up and chose to ignore the state, which often had disastrous consequences in both the short and long term.

There was, and still is, if you dig deep enough, distrust between the majority government and the tribes. There has been unwillingness, by both sides, to cooperate to act in the best interests of the children. A local prosecutor will say that those Indians will never set a "fair" amount of support and even if they did, they will not enforce so that collections can be made in order to "protect tribal members." And even if they did, that the case is still that prosecutors' case and no one is going to take it away from him. It is a common misconception by many in state government that one plan can be made by the state for dealing with all 29 tribal nations in Washington, which constitutes a complete failure by the state to recognize the individual nature of each tribe and the uniqueness of its sovereignty. The tribes have refused to honor payroll deduction orders from the state against tribal members and even non members who are simply working for a tribal entity. Instead of seeking a resolution that supports the children, the tribes often took pride in the fact that they had thwarted the state. It is clear that little or no successful communication could take place under these very stressful and divisive circumstances.

Attempts at negotiations between the tribes and the government for working agreements have been all over the place, with state and local workers left unsure how to deal with cases involving tribal members both on and off the reservation. Once compacts have been reached, there is little incentive or resources spent on complying with existing agreements, let alone expanding these agreements into new areas. There is little consistency between local-state and tribal governments as a consequence. The only way to work out differences is to make contact directly or through intermediaries which can be very difficult and time consuming. There is no proven process to recruit and train needed staff to make intervention and resolution a reality, not just a pipe dream. It also blurs the necessary distinctions that must exist between governmental entities so that ongoing communication depends on the individuals doing so and can change on an almost daily basis.

Tribal governments hold such lack of faith in state action that there was no real incentive to enforce state support orders on the reservation, whether against tribal members or not native workers. Many non-native parents worked for tribal entities as a means of avoiding or delaying enforcement of their child support obligations. State orders were automatically suspect as too often involving

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Northwest Tribal Attorneys Eclipse \$75,000 in Native Law Student Scholarships

Seattle – The Northwest Indian Bar Association (NIBA) recently gifted another \$15,000 in scholarships to thirteen Northwest Native law students as part of an ongoing effort to support Indian students seeking a legal education.

In only three years, NIBA and its sister group, the Washington State Bar Association Indian Law Section, have gifted over \$75,000 in scholarship monies to aspiring Indian lawyers from Washington, Oregon, Idaho and Alaska. The scholarship monies are raised and distributed through the Indian Legal Scholars Program, which the American Bar Association honored with the prestigious “Solo and Small Firm Project Award” in 2004.

“During this holiday time of year, NIBA is particularly pleased to be able to gift these scholarships to our Native law students,” said NIBA President Lisa Atkinson (Northern Cherokee/Osage). “Each student represents the future of our Tribes, the protection of our rights, and our commitment to continuing to strengthen our communities through supporting the education of our Native people.”

The following Native law students were recently honored with scholarships ranging from \$1,000 to \$1,500, in recognition of their commitment to academic excellence and advancing the rights of Pacific Northwest Indian people.

- **Marvin Beauvais (Navajo/Crow)**, a third-year student at Gonzaga University Law School, co-founder of the school’s Native American Law Students’ Association (NALSA) chapter, and extern with The Honorable Kenneth H. Kato, Washington State Division III Court of Appeals Judge.
- **Brooke Pinkham (Nez Perce)**, a third-year University of Washington Law School student, past chair of the National NALSA Moot Court Committee, treasurer for National NALSA, and former social worker for the United Indians of All Tribes Foundation.
- **Nicole Royal (Athabaskan)**, a third-year UW law student from Alaska, vice-president of the UW Law School Student Bar Association, and former intern for the U.S. Senate Appropriations Committee.
- **Natasha Valerie Singh (Koyukon Athabaskan – Stevens Village)**, a third-year UW law student from Alaska and vice-president of UW’s NALSA chapter, who volunteered for the Get Out the Native Vote this year.



- **Karol Dixon (Athabaskan)**, a third-year law student at the University of New Mexico School of Law, who clerked this past summer with the Native American Rights Fund.
- **Malcolm Begay (Navajo)**, a third-year law student at Lewis & Clark Law School in Portland, OR, and president of the law school’s NALSA chapter.
- **Lavette Holman (Shawnee/Cherokee/Osage)**, a second-year law student at Gonzaga University Law School and vice-president of the law school’s NALSA chapter, who paddled for a Nisqually Tribal canoe during Tribal Canoe Journeys 2005.
- **Ronna Washines (Yakama)**, a second-year Gonzaga University law student, president of the law school’s NALSA chapter, and mother of two young boys.
- **Robbie Smith (Skokomish)**, a graduating third-year Arizona State University law student from Shelton, Washington, and secretary of the ASUNALSA chapter.
- **Gabriel Moses (Nez Perce)**, a second-year law student at the University of Oregon School of Law, president of the law school’s NALSA chapter, who received a graduate teaching fellowship for the UO Many Nations Longhouse.
- **Hillary Eagle-eye Renick (Pomo/Ft. McDermitt Paiute-Shoshone)**, a second-year University of Oregon law student, former executive assistant at the Yakama Indian Health Center, and subsistence fisherwoman.
- **Saza Osawa (Makah)**, a first-year law student at UW law school and former human resource assistant with Indian Health Services.
- **Jaina Fisher (Tlingit)**, a first-year UW law student and volunteer at the United Indians of All Tribes Foundation’s Daybreak Star.



Although the Northwest tribal lawyer groups have long supported law students through financial assistance, the organizations’ recent scholarship donations represent their most sizeable contributions. This past year, the Program expanded as the Section offered stipends to any graduating Native law student who took the summer Washington State bar exam.

The scholarship monies come from membership dues, a benefit auction and charitable grants from the Chehalis, Jamestown S’Klallam, Lummi, Muckleshoot, Port Gamble S’Klallam, Puyallup, Squaxin Island, Suquamish, Swinomish, and Tulalip Tribes.

Message from the Chair from page 1

- **John Sledd**, who has headed up the Nominating Committee for several years, has agreed to chair the committee again this year. In the near future, two additional members will be selected to assist John, who has done a terrific job in past years to bring a diverse slate of committed and capable candidates to the Section for its elections.
- **Chris Masse** has agreed to chair the Legislative Committee, which hasn't been active for the past several years. Chris frequently works with Tribes and their attorneys and lobbyists throughout the state in intertribal legislative efforts, and we welcome her expertise and enthusiasm.
- The Budget Committee will be chaired by Section Treasurer **Gyasi Ross (Blackfeet)**, with committee members **Lael Echo-hawk (Pawnee)** – Section Chair-elect – and **Gabe Galanda (Round Valley)**.

Thank to you all of those who have volunteered their time to assist with the important work of these committees.

The Section will continue to publish this newsletter under Gabe Galanda's leadership and with the tremendous efforts of all those who contribute articles throughout the year. This is a purely voluntary effort by all contributors for which we owe a large debt of gratitude.

Other plans in development include improvements to the Section's website. We hope to roll out those improvements throughout the year. In the very short term, you should notice updated upcoming events notices and links.

We also plan to continue the Section's very successful partnership with the Northwest Indian Bar Association in the Indian Legal Scholars Program. In recent years, that program has provided over \$75,000 in scholarships and stipends to aspiring Indian lawyers from Washington, Oregon, Idaho and Alaska.

We are also very lucky to have the continuing assistance of former trustees **Bob Anderson (Minnesota Chippewa (Bois Forte Band))**, Gabe Galanda, Tom Schlosser, and John Sledd who have all offered their help to the Section for the coming year. Their experience and wisdom is very valuable, and I want to publicly thank them for the work they've already done, and the work they've committed to doing in the future.

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

Kelly S. Croman is an attorney with the Squaxin Island Legal Department, and current Chair of the WSBA Indian Law Section. She can be reached at (360) 432-1771 or kcroman@squaxin.nsn.us.

Announcements from page 2

Oregon, Idaho and Montana are exploring whether to follow suit. And, University of New Mexico Law School Professor Gloria Valencia-Weber will soon publish an article in the *University of North Dakota Law Review* on the impact of bar testing federal Indian law.

NIBA 1st Annual Dinner

The Northwest Indian Bar Association (NIBA) will be hosting its 1st Annual Dinner to celebrate recent Indian legal achievements in Washington, on Thursday, March 15, 2007, at a hotel to be announced in downtown Seattle. Professor Bob Anderson will be honored for his commitment to Indian legal education. NIBA is seeking sponsorships from tribes, state and tribal bar groups, Northwest law firms, local law schools and businesses who support tribal economies. All proceeds from the dinner will go towards the NIBA and the Indian Law Section's national award-winning *Indian Legal Scholars Program*. For sponsorship information, contact past NIBA President Lael Echo-hawk (Pawnee), at laeleh@yahoo.com.

NIBA Web Updates

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

Got an Indian Legal Announcement?

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

New Opportunities to Develop Wind Power on Tribal Lands from page 1

sary, to allow the BIA to complete its NEPA review of a tribe's TERA application.

Before Title V

Most tribal land within Indian reservations is owned in trust for tribes by the United States. Before Title V, federal law required, with very few exceptions, that leases of tribal land must be approved both by the tribal landowner and the BIA. Regulations adopted by the BIA establish limitations on the term and renewal of surface leases, rental payments, and other details of the lessor-lessee relationship. Leases not validly approved are unenforceable. Non-lease management agreements "encumbering" tribal land for seven years or more also must be approved both by the tribal landowner and the BIA.

Rights of way on tribal land generally are issued by the BIA, pursuant to detailed regulations, subject to tribal approval. In some cases, rights of way on tribal land are issued as leases, subject to BIA approval.

Before approving a lease or encumbrance of tribal land or issuing a right of way, the BIA must comply with NEPA, the Endangered Species Act, the National Historic Preservation Act, and other laws that apply to federal agency action. If an environmental impact statement (EIS) is required under NEPA, that adds at least one year *before* the BIA can take final action to approve a lease or encumbrance or issue a right of way. In addition, the Office of Special Trustee, a relatively new agency within the Department of the Interior, must independently review compensation paid to tribes under leases, encumbrances, and rights of way to ensure that tribes receive fair compensation.

Project opponents, if any, could challenge BIA approval of a lease through the Interior Board of Indian Appeals and then seek judicial review in federal court. In a fast moving business environment, the BIA's drawn-out review process, and the uncertainty it creates, can mean death for a good project. To give Indian tribes greater control over their own energy resources, and to promote energy development on tribal land, Congress enacted Title V.

What Title V Provides

Title V authorizes tribes to grant leases and enter business agreements for wind energy generation for up to 30 years. These leases and business agreements are renewable at the option of tribes for an additional 30 years. Business agreements within the scope of Title V include joint ventures, options, management agreements, and other agreements for producing and marketing wind power and other energy resources on tribal land. Tribes also may grant energy-related rights of way across tribal land for similar base-term and renewal periods. An Indian tribe may grant these rights once it enters a TERA with the BIA.

A TERA must address requirements for tribal oversight of resource development, economic return to the tribe, term and renewal of energy resource agreements and rights of way as well as amendments, compliance with applicable environmental laws, and remedies for breach. TERAs also must establish procedures for environmental review under tribal law and procedures for review of all significant environmental effects of a proposed lease, business agreement or right of way, compared to a no action alternative. The environmental review must include analysis of potential effects on cultural resources, identification of proposed mitigation measures, if any, and incorporation of appropriate mitigation measures into the lease, business agreement or right of way. A TERA also must include a process for consultation with any affected state regarding off-reservation environmental impacts, if any, a process for ensuring that the public is informed of and has an opportunity to comment on environmental impacts of the proposed tribal action, and tribal response to relevant and substantive comments before tribal approval of the lease, business agreement or right of way.

While these procedures resemble NEPA procedures in some respects, there are material and significant differences that should simplify and expedite tribal environmental review and approval of energy agreements and rights of way. Tribes are not required to issue draft and final EISs or hold hearings, and the Environmental Protection Agency is not authorized to review and publish notice of comments on tribal environmental review documents in the Federal Register, as it does for federal EISs. Final decisions by tribes under Title V are not subject to review in federal or state courts. Many tribes already have adopted tribal administrative procedure acts and others are likely to establish procedures for tribal administrative and judicial review of actions taken by a tribe under its TERA.

After exhausting any tribal remedies, a person or entity demonstrating an interest of that person or entity will sustain an adverse environmental impact as a result of a tribe's failure to comply with a TERA may petition with the Director of the Office of Indian Energy and Economic Development, Department of the Interior for review or the tribe's compliance with its TERA. The Director must afford a tribe notice of and an opportunity to cure or otherwise resolve any such petition within a reasonable time. The Director must act on such a petition within 120 days, unless the Director extends the time to act for an additional 120 days. While the Director's decision may be subject to judicial review, the grounds for that review are likely to be relatively narrow. That should help courts resolve any such disputes quickly.

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New Opportunities to Develop Wind Power on Tribal Lands*from previous page***Practical Considerations**

Indian tribes are governments which have both sovereign powers and sovereign immunity. A tribe can regulate and tax energy development on tribal land. Depending on the terms of a lease, business agreement, or right of way, a state also may be able to tax non-tribal entities participating in wind power generation on tribal lands. Some states have laws or have entered agreements with tribes to reduce the burden of such state taxes; and some tribes are willing to reduce tribal taxes in order to promote energy development on tribal lands. Many tribes also have employment, environmental, and other laws that may affect project development on tribal land.

A tribe does not waive its sovereign immunity to suit merely by entering a lease or business agreement or by issuing a right of way. Many tribes have established tribal government corporations and enterprises involved in energy development which also have sovereign immunity.

Significant business agreements with tribes and tribal government business entities typically provide limited waivers of sovereign immunity, and include provisions addressing governing law, exhaustion of tribal remedies, binding arbitration clauses, and provisions for judicial enforcement of arbitration clauses and awards. Federal and state courts have limited jurisdiction over on-reservation energy development and in many cases lack jurisdiction to enforce these provisions. In many cases, tribal courts may be the only courts with jurisdiction to enforce limited sovereign immunity waivers, arbitration clauses and arbitration awards. Special care should be given to negotiation of dispute resolution provisions.

Most federal environmental laws, including the Migratory Bird Treaty Act, apply on Indian reservations. However, federal agencies generally have retained responsibility for permitting and enforcement of federal environmental laws on Indian reservations. This can make a difference both substantively and procedurally.

Conclusion

TERAs authorized by Title V should simplify and expedite development of wind power on tribal land. This in turn may make wind power projects on tribal land more competitive and in some cases superior compared to off-reservation alternatives constrained by state and federal regulatory processes.

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Washington Supreme Court Gets it "Wright": Upholds Immunity for Tribal Corporations*from page 3*

papers with the Secretary of State may waive the company's immunity; yet on the other, to acknowledge that an immunity waiver "will not be implied but must be unequivocally expressed" by the tribe. *Id.* at 8-9.

Notwithstanding, *Wright* should be taken as a warning to tribal governments to create corporate codes and charter tribally owned businesses under those tribal codes, or risk having Indian businesses be sued – very possibly in state court. In addition to affording Indian businesses immunity protection, chartering such businesses under tribal law would mitigate against state adjudicatory jurisdiction over claims against such companies (assuming the tribe or Congress *clearly* waives the business' immunity protection).

Moreover, reading between the lines of the two-justice concurrence in *Wright*, tribes should consider promulgating and following employment laws that confer employees' grievance rights and perhaps even allow them to seek limited redress (e.g., equitable relief such as reinstatement) in Tribal court. *See Id.* (Madsen, concurrence), at 16. Why? Because tribal, state and federal judges increasingly "doubt the wisdom of perpetuating the [immunity] doctrine," suggesting to Congress "a need to abrogate tribal immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 758 (U.S. 1998). Courts believe it unfair for reservation-goers to be deprived of rights to grieve or have their case aired before a trier of fact, particularly in situations that involve "unknowing" non-Indian patrons or employees (like Mr. Wright) and/or arise out of Indian "commercial" enterprises (like CTEC/CTSC).

Tribes must also realize that once a dismissal motion is filed, the tribe relinquishes control over the outcome of a lawsuit to the judicial system. In *Wright*, the fate of tribal immunity in Washington (and beyond) was left to the state's appellate courts.

For these reasons, tribes can no longer automatically assert their sovereign immunity in tort litigation. Tribes must carefully consider all of their legal options before moving to dismiss – e.g., reinstating or reassigning an aggrieved employee; reaching a nominal monetary settlement, perhaps with insurance proceeds; or allowing a plaintiff to prove his/her case on the merits by consenting to suit through a *limited* waiver.

Thankfully for Washington tribes and tribal businesses, and all of Indian country, the Colville Tribes fought the tough appellate fight – and the *Wright* court got it right.

Gabriel "Gabe" S. Galanda practices Indian law and gaming with Williams, Kastner & Gibbs PLLC's Tribal Practice Team in Seattle. Gabe's practice focuses on complex, multi-party Indian law and gaming litigation, representing Indian tribes. He also assists tribal governments and Alaska Native corporations with

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The Model Tribal Secured Transactions Act from page 4

The MTSTA

What is the MTSTA and how similar is it to UCC Article 9? The MTSTA is based closely on Article 9, but it is different in many respects. Some of this is inevitable, and some reflects policy choices. For example, the articles of the UCC are intimately connected in many respects. Thirty-six terms used in the Article 9 are defined in other articles. Further, Article 8 deals with the issuance and transfer of stock and other investment securities, and Article 9 contains cross referenced provisions dealing with security interests in investment securities that relate back to Article 8. For this reason, simply adopting Article 9 alone without a considerable amount of technical adaptation would be problematical.

Drafting a secured transactions code is very difficult, because, like a tax code, it needs to take into account the variety of people and companies, their circumstances, and the full range of transactions people enter into, and the range of personal property that exists, both tangible and intangible. As a technical drafting matter, the MTSTA is very well done. It comes with an exceptionally useful Implementation Guide and Commentary. Its drafters paid particularly close attention to the choice that tribes need to make from among creating their own office in which to file financing statements (for which it has provided a draft tribal regulation), having a group of tribes create a common filing office, or entering into a compact with the nearby state government to allow its UCC filing office to accept tribal financing statements (for which the Implementation Guide and Commentary provides a form of Memorandum of Understanding to be used with the state).

One important distinguishing feature of the MTSTA is that it has considerably shortened and simplified UCC Article 9. Article 9 was originally published in 1962, and was revised in 1972. There were subsequent less extensive revisions over the years, until 1998, when a completely rewritten Article 9 was published. It was subsequently amended a few times, and was adopted by the states in 2001. The earlier code had simply not kept up with modern commerce. The 1998 version has more detailed provisions for intellectual property, health care receivables, electronic

chattel paper, perfection by control of security interests in bank accounts, and syndicated loan transactions. In addition, the drafters of the 1998 code consciously tried to draft textual solutions to troublesome precedents that had either strayed from the original intention of the code drafters or reflected splits of opinion between the courts of various states. The 1962 and 1972 versions were drafted in a plain-English style and, compared to the 1998 code, they established broad principles, whereas the 1998 code is much longer, more complicated, and drills down to solve specific problems. The 1998 code is a fine code, but it can be bewildering to navigate.

The drafters of the MTSTA code apparently decided that it was better to draft as a model tribal code a somewhat simpler, easier-to-read version. Compared to the 1998 code, the MTSTA is refreshingly straightforward to read. In that regard, it is similar to the 1962 or 1972 codes. In its essentials its legal substance for most transactions is the same as the 1998 code, but it simplified things mainly by writing in clearer English and by dropping some of the more esoteric features of the 1998 code. Despite this, for most common loans, the MTSTA is very similar in substance and layout to Article 9. A security agreement must be in writing, describe the collateral, be signed by the debtor, and be backed by consideration – or the giving of “value” in common UCC parlance.⁵ For a security interest in equipment, inventory, accounts receivable, or general intangibles, the security interest can be perfected by filing a financing statement,⁶ and a secured party holding the earliest financing statement will outrank those who filed subsequently unless the security interest is a “purchase money” security interest.⁷ The MTSTA follows the Article 9 approach of not requiring financing statements to perfect security interests in consumer goods that are not subject to another statute.⁸ In keeping with common tribal practice,⁹ the MTSTA suggests that nonjudicial repossession not be permitted in any consumer or commercial transaction without either a court order or post-default consent from the debtor,¹⁰ but otherwise the provisions for enforcement of security interests are essentially the same as those in Article 9.

There are some differences in the menu of property that can be used as collateral under the MTSTA. For example, it is not possible under the MTSTA to use as collateral one’s rights as the beneficiary of a letter of credit. Also, it is not possible to reliably grant and perfect a security interest in a bank account. If a tribe’s focus is on consumer credit, letters of credit are not important, and the tribe might not want to allow for security interests in individual’s bank accounts in order to protect them from overreaching creditors, but depending upon the profile of the business community in a tribe, or that the tribe wants

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**Washington Supreme Court Gets it “Wright”:
Upholds Immunity for Tribal Corporations** *from previous page*

economic development and diversification initiatives, and works with corporate entities that do business in Indian Country. Gabe is a descendant of the Nomlaki and Concow Tribes and enrolled with the Round Valley Indian Tribes. He can be reached at (206) 628-2780 or ggalanda@wkg.com.

1 Available at: www.courts.wa.gov/opinions/?fa=opinions.recent.

to develop, the absence of these security devices could be important. In making a selection of a model code, it is important to recognize that each tribe has a different demographic and commercial profile, and has its own commercial aspirations that need to be kept in mind throughout the code writing process.

Thus, tribes considering how to approach the drafting of a secured transactions code have a key decision to make. Do they opt for a more comprehensive code that lawyers around the U.S. will immediately understand and find easy to use, or do they opt for starting with the MTSTA, a less complicated code for day-to-day transactions on the reservation, adding back to it any commercial provisions that may be needed, and requiring outsiders to take some time to familiarize themselves with it? Tribal members may find the simplicity and the uniqueness of the MTSTA attractive. Tribal members as borrowers may find outside lenders somewhat less willing to learn a new code and to extend credit under it. Tribal lawyers may have two minds about the prospect of practicing comfortably under both tribal and state secured transactions codes on a day-to-day basis. If the UCC approach is taken, however, close analysis of the MTSTA is important, for it has dealt very well with the manner in which tribal customs can be integrated into the code, and with the options for the filing of financing statements.

Tribal Customs and Other Tribal Laws

No matter what code a tribe uses as its starting point, it is important that careful consideration be given to how well the code suits tribal values and customs. Model codes of any sort cannot be adopted on an “off the shelf” basis that does not take the tribe’s circumstances into account, or else they may be impractical, unpopular, and resisted.

For example, after a long history of creditor abuse of tribal members, many tribes have ordinances that forbid the nonjudicial repossession of property, which is a cornerstone of the enforcement of security interests in moveable personal property. In keeping with this, MTSTA § 9-609(a) requires either a court order or debtor consent granted after the loan default in order for a creditor to be able to repossess collateral.¹¹ In adopting a secured transactions code, a tribe needs to balance legitimate creditor interests against the interest in protecting tribal consumers from overreaching creditors. From an economic development perspective, an important policy consideration is whether the perceived need of businesses in Indian Country to have the same protection outweighs the effects of any reluctance that commercial lenders would have to extend credit without having the right to repossess on default. For example, one practical commercial necessity for accounts receivable financing is the ability of the lender, after default, to notify

account debtors that they should make payments to the lender, and for lenders to be able to use the remedy of setoff against bank accounts. In the time it would take to go to a court, the accounts receivable could be collected by the defaulting borrower, or the bank account could be drained, which is a much more precarious situation for the lender than requiring the lender to seek court approval to repossess a tangible object (other than inventory) that cannot be disposed of free of the lenders’ security interest the way money can be spent.

This is just a facet of the larger question of how the balance between creditor and debtor rights will be struck. If the practical, cost-effective enforcement of a security interest is in doubt, the loan will be risk rated as an unsecured loan, and either will not be made or will be made at a higher rate of interest. This is one reason why consumer loans in and outside of Indian Country that are secured by highly mobile and rapidly depreciating personal property bear higher interest rates than business loans. For a tribe that is considering its tribal members as consumers, and that also wants to adopt a secured transactions code as a spur to economic development, there are several ways to strike this balance. The enhanced debtor protection rules could be applied to all loans across the board. They could be reserved for debtors who are individuals or for debtors who are individuals whose loans are strictly for consumer credit purposes. The distinction could be drawn at the business – consumer line regardless of the legal nature of the borrower (having in mind the individual who may purchase a recreational boat through a personal corporation or limited liability company).

As the Implementation Guide and Commentary to MTSTA § 9-404 reminds us, some tribes make regular financial distributions to tribal members, which are essentially dividends paid from the profits of tribal businesses. A tribe may have an ordinance that forbids and renders void any attempt by a tribal member to use that income stream as collateral for a loan or to transfer the income stream in any other way. UCC § 9-408(c) contemplates that such prohibitions would be overridden by the adoption of Article 9, in order to enhance the financeability of assets. Simple adoption of either code as written would impliedly repeal the prior tribal non-assignment statute. Similarly, the MTSTA Implementation Guide and Commentary notes that some tribes have restrictions on the transferability of sacred objects.¹²

Under the UCC, following a trade custom – “usage of trade” – is an implied provision of a business transaction unless the contract itself has language that negates the parties’ ability to rely on that custom.¹³ The MTSTA provides optional language at Section 9-114(c) that would allow a tribe to include in the notion of “usage of trade” a

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The Model Tribal Secured Transactions Act from previous page

“local custom or tradition” of the tribe “having such regularity of observance ... as to justify an expectation that it will be observed with respect to the transaction in question.” In commercial contracts between tribal members and outsiders, could this give rise to an outsider’s legitimate concern about being “home-towned” in a dispute and thus reluctant to do business? If so, the usual “usage of trade” would seem more appropriate in a commercial context.

The MTSTA suggests a provision that allows a consumer purchaser of goods that are financed to assert against an assignee of the security interest its defenses against the seller of the goods.¹⁴ UCC §9-403(d) and (e) take no position on this, but merely follows whatever the state’s otherwise applicable consumer laws would provide.

One area in which there are considerable local variations in UCC adoption by the states concerns the relationship of the code to other state lien statutes. If a tribe has its own miscellaneous lien laws, these need to be suitably cross-referenced and either they or the secured transactions code will need to be adapted to the other.

The tribal civil jurisdiction code will need to be reviewed to make sure that there is a court with general or specific jurisdiction that can accept foreclosure cases.

The MTSTA and UCC Article 9 represent sets of policy choices on these and other points. The MTSTA Implementation Guide and Commentary properly urges each tribe to consider its own circumstances in the final drafting and adoption of the MTSTA. It would be a mistake for a tribe to unthinkingly adopt either Article 9 or the MTSTA. There could be many unintended consequences.

Points of State and Tribal Intersection

Parties to transactions live in different jurisdictions, they move back and forth after documents are signed, loan funds may be disbursed by a lender off the reservation and received either on or off the reservation, and collateral may be in one place when a security interest attaches, and be located somewhere else when a loan goes into default and the security interest needs to be foreclosed. Every secured transactions code needs to grapple with its application to cross-border transactions. In the United States, this has come to be conceptualized in three levels. A security agreement is, first, a contract between a lender and a borrower. At a second level, a security agreement will be perfected, a concept that involves its priority against third parties, whether a competing lienholder, attaching creditor, or the special third party that is the borrower’s trustee in bankruptcy. At a third level, if collateral has migrated to another jurisdiction, the judicial enforcement of the security interest occurs in the courts of the other jurisdiction, and if the

repossession of the collateral breaches the peace, it breaches the peace of the other jurisdiction.

At the first level, that of the substantive law of the contract between the lender and borrower, the post-1998 UCC allows the parties the freedom to choose the applicable law of the contract, except, in a consumer transaction, the chosen jurisdiction must bear a reasonable relation to the transaction, and the choice of law may not deprive the consumer of an unwaivable protection of a statute of the place where the consumer principally resides.¹⁵ The choice of law may also be disregarded if it evades a “fundamental policy” of the state whose law would otherwise apply.¹⁶

When we turn to perfection and priority, the pre-1998 UCC took a more sovereignty and territorial approach than it does now. If we think of a loan between a Colorado bank and borrower, secured by a piece of moveable equipment, such as a generator, the place to file the financing statement was the place where the generator was located. The law of the location of the generator at the time of foreclosure determined the perfection and priority status, and established the foreclosure procedure. If the collateral was moved to Wyoming after the loan was made, the lender had to know that and had four months to file a financing statement in Wyoming, or its security would have become unperfected. Wyoming law would govern perfection and priority.¹⁷ Judicial enforcement would of course occur in Wyoming courts. The need to keep an eye on what the borrower was doing with the collateral was a burden, and resulted in lenders filing financing statements in multiple jurisdictions to be safe. As an alternative, the 1998 code opted for a simpler rule in the paradigm case of ordinary equipment or intangibles:

(a) the financing statement should be filed in the state where the debtor is located (for a corporation, for example, where it was incorporated, and for an individual, in the state of principal residence).¹⁸

(b) the perfection and priority rules are governed by the law of the debtor’s location when perfection is by filing rather than possession or notation on a certificate of title, even if the collateral is eventually moved to another place.¹⁹

Under both the UCC and MTSTA, judicial enforcement would occur where the collateral was located at the time.

In stepping back from a state territorial approach to perfection and priority the current version of Article 9 has greatly simplified the steps of performing reliable lien searches before the loan is made, perfecting the security interest, and maintaining perfection. The cost of these activities is typically passed on to the borrower, so the result is both practical and less expensive for the borrower.

The MTSTA takes a different, more sovereignty-oriented approach. The MTSTA applies to secured transac-

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tions “within the jurisdiction of this [T]ribe.”²⁰ (It would so apply even if it did not say that because when a legislative body enacts a statute it applies throughout its jurisdiction unless it expressly states otherwise.) In any event, absent a valid choice of law to the contrary, the MTSTA will apply to secured transactions throughout the fullest extent of the tribe’s substantive jurisdiction. Now let us return to two levels of analysis noted above: choice of law as to the contract between the parties, and to perfection and priority.

Choice of Law. At the level of the parties’ ability to chose the applicable law, MTSTA §9-117(b) places three limitations on a tribal member’s right to agree that the substantive law of a state or other outside jurisdiction may apply to the security agreement as a contract:

- (a) when the transaction is a consumer transaction;
- (b) perfection and priority rules; and
- (c) where the choice of non-tribal law would lead to a result that is contrary to a “fundamental policy” of the tribe. (This is no different than the UCC,²¹ and is common in other countries as well.)

Consumer Situations. If a consumer in South Dakota borrows money from a bank in North Dakota, under the UCC the parties may chose North Dakota law, as would be expected in a bank form contract.²² The UCC, however, says that the choice of law other than where the consumer principally resides may not deprive the consumer of the unwaivable benefits of the consumer’s home state consumer protection laws.²³ Thus, North Dakota law will apply to the contract, and the consumer will enjoy the consumer protections of both jurisdictions that have not been validly waived. The MTSTA takes a different approach, that of requiring the application of the tribal code to the transaction.

Let us assume a retail installment sale secured transaction between a tribal resident and an outside merchant with a branch retail store on the reservation, in which the contract provides for the law of the surrounding state to apply. This choice of law clause would be deemed valid under the state’s UCC. Under the MTSTA it is valid only if the transaction does not fall within the boundaries of tribal substantive jurisdiction. If the transaction is within the tribal substantive jurisdiction, the tribal code applies,²⁴ and the tribal consumer will be guaranteed that the tribe’s consumer protection laws are available, if there are any. By precluding the ability of a tribal member to agree to the choice of state law, does the MTSTA deprives the tribal consumer of the benefit of the state’s consumer protection laws if they are more favorable to the consumer, or if the tribe has no consumer protection law? Section 9-201(b) of the MTSTA offers some assistance, providing for the application of any other “applicable rule of law which estab-

lishes a different rule for consumers,” and “any other applicable tribal, federal or State statute or regulation that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit,” and “any consumer –protection statute or regulation.” This should mean that a tribal consumer protection statute and a federal consumer law will apply, but would the State’s consumer protection law be “applicable?” This would seem unlikely, as it would be a regulatory encroachment in tribal legislative affairs. It would be “applicable” in the sense that if the reservation did not exist, the parties the transaction would be within the state. It could be argued that it is “applicable” by virtue of the choice of law clause, but that argument is may be foreclosed by MTSTA §9-117(b)(1), which states that the choice of law rules apply to a “consumer transaction,” because the transaction is a loan, a promise to repay, and a grant of security for the promise to repay. There is no such thing as a security agreement untethered from an obligation, and neither UCC Article 9 nor the MTSTA govern obligations to lend or to repay loans. If the tribal consumer tries to argue that the state consumer protection laws apply, there could be an interesting role reversal: the secured party might try to defend itself by arguing for a broad interpretation of tribal jurisdiction and pre-emption.

Perfection. As noted above the general rule under the UCC is that the substantive law of the debtor’s location governs perfection and priority. Since this rule has been universally adopted by the states, there is a simple rule that each state respects that tells a potential secured creditor where to search for filed financing statements, where to file to perfect, and what state’s laws will apply to the priority of the security interest. The MTSTA takes more of a sovereignty approach, with the result that there will be instances in which both state and tribal law will have claim to apply within their own terms, and the parties will have a question on their hands that will be expensive to resolve in the courts if the two sources of law differ in a material way on the merits.

Section 9-301(1) of the MTSTA states that perfection and priority are mandatorily governed by the laws of the tribe

- Similar to the UCC, when an individual debtor has his or her “principal residence” in the reservation or when an entity is the borrower, if the entity was created under tribal law or has its sole place of business or chief executive office (if there is more than one place of business) in the reservation. MTSTA §§9-301(1)(B), 9-316(d) and (e).
- If the “security interest is created pursuant to this [act].” MTSTA §9-301(1)(A). This would appear to

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include every security interest created by a security agreement that has a valid choice of the tribal code as the applicable law.

If this interpretation of the latter provision is correct, then it seems likely that perfection of security interests in some transactions will facially be subject to both the tribal and state secured transactions act. For example, assume a secured transaction between two tribal members, with the borrower living off the reservation, and a security agreement that includes a choice of law clause selecting tribal law. Under the MTSTA a financing statement filed under the tribal system will perfect the security interest, but under the state UCC, it will not, and a filing in the state system will be required. Secured parties in this situation will probably file in both places out of caution, but under current UCC practice, this would not be required. If the collateral is kept off, or migrates off the reservation, and the borrower files a bankruptcy proceeding, off-reservation creditors would be tempted to challenge the perfection of the security interest if it were perfected only by means of a tribal filing.

For the collateral types that are covered by both codes and where the tribe has entered into an arrangement with the state for the state's UCC filing office to be the location where MTSTA financing statements are to be filed, there may be few cases where the two codes will reach different results. For UCC collateral not covered by the MTSTA (such as letters of credit and bank accounts), the question is not one of conflict between two codes, but of continuing to have classes of collateral where the parties are in the same situation that they are in now as to all collateral within tribal jurisdiction, that of wondering how to perfect the security interest, and how it will be treated in a default or bankruptcy situation.

One question that tribes need to ask themselves in working with the MTSTA is whether it would be better to adopt to adapt a code that is more closely modeled on the UCC so that in close cases parties are not tempted to gain litigation advantage by exploiting the differences between the codes in the thicket of state and tribal court jurisdiction, which in essence burdens ordinary commercial transactions with the cost of these cases. A second question is whether to opt for the convenience of adopting an identical code so that lawyers and lenders who deal with tribes and tribal members do not have to keep clearly on the tops of their heads the subtle differences between the MTSTA and the UCC.

Conclusion

It would be economically beneficial for tribes to adopt secured transactions codes. There are two good models to work from, Article 9 of the UCC, and the MTSTA. Both are

sound codes within their own four corners. The UCC has the advantage of being somewhat more comprehensive as to the range of commercial collateral, and the convenience of similarity to the state codes, but it is a complex code. The MTSTA is more reader-friendly, and in the great majority of transactions it will apply in the same way as the UCC, but there are places where it is different, requiring people to be alert to the differences. Those differences may in some cases lead to litigation that tests the boundaries of tribal legislative jurisdiction. Whichever code is chosen as a model needs to be carefully tailored to the tribes' particular situations and customs.

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- 1 www.nccusl.org. There are a few technical amendments that are also available on the website.
- 2 See, note 3 *supra*.
- 3 See, Tribal Legal Code Project: Commercial Codes, *supra*, note 3.
- 4 www.hoopan-sn.gov/downloads.
- 5 MTSTA §9-202(b).
- 6 MTSTA §9-310(a).
- 7 MTSTA §§317, 318(h).
- 8 MTSTA §9-309(1).
- 9 As on the Navajo reservation, see, *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F. ed. 587 (9th Cir. 1983).
- 10 MTSTA §9-609(a).
- 11 See, Implementation Guide, p. 18, and commentary to §9-609.
- 12 Implementation Guide, p. 19.
- 13 UCC §1-303(d).
- 14 MTSTA §9-403.
- 15 UCC §1-301(c) and (e). Before 1998, the code required that the jurisdiction whose law was chosen bear a reasonable relation to the transaction. Former UCC §1-105(1).
- 16 UCC §1-301(f).
- 17 Former UCC §9-103(b) and (d).
- 18 UCC §§ 9-307(b) and (e), 9-501(a)(2).
- 19 UCC §9-301(1).
- 20 MTSTA §9-110(a).
- 21 UCC §1-301(f).
- 22 UCC §1-301(c).
- 23 UCC §1-301(e).
- 24 MTSTA §§ 9-110(a)(1), 9-117(b)(1).

The [insurer] shall have the right and duty to select counsel and defend any suit against the insured.... The [insurer] shall have the sole right to assign counsel to defend any suit against the insured, and the insured agrees and consents to the [insurer's] exercise of that sole right.

Why? So the insurer can pay discount non-tribal defense lawyers to defend any suit against the tribal insured. And such policy language *has* been invoked by carriers when they unilaterally retain defense lawyers with no experience representing Indian people, to defend tribal insureds.

Notwithstanding any such insurance contract language, tribal insurers have a duty to employ defense counsel who understand the significant legal, political and social implications of even the most frivolous tort lawsuit against a tribal sovereign, even if tribal defense lawyers cost insurers a bit more per hour given their specialty. Still, tribal insureds get only what the insurers are willing to pay for – discount defense lawyers who simply do not understand Indian Country, let alone the profound consequences of litigation against a sovereign tribal government in this day and age. If that is not a bad-faith insurance practice, what is?

Now ponder the tribal insured's opportunity to assert sovereign immunity and move to dismiss Joe Citizen's lawsuit. Current common law makes clear that tribes, tribal businesses and casinos, and tribal officials and employees who act within the scope of their employment, are all generally immune from tribal, state or federal suit.² Still, an experienced Indian defense lawyer would first explain to the tribe that courts, including Indian courts, are increasingly skeptical of federal Indian jurisdictional defenses like sovereign immunity, feeling that aggrieved reservation-goers should not be deprived the right to have their case aired on their merits before a judge or jury. That is particularly true in cases that involve "unknowing" non-Indian patrons and/or arise out of tribal "commercial" enterprises (despite the fact that such businesses' proceeds provide essential *governmental* services to tribal people).³

Indian defense counsel would also advise the tribal insured that it can no longer automatically assert the defense of sovereign immunity because courts increasingly "doubt the wisdom of perpetuating the doctrine," suggesting to Congress "a need to abrogate tribal immunity, at least as an overarching rule." See *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*⁴ That tribal lawyer would further explain to the tribe that once it files a motion to dismiss, it essentially relinquishes the tribe's (and Indian Country's) control over the outcome of the lawsuit, to the judicial system.

On the other hand, a non-tribal defense lawyer may not appreciate this legal and political context, particularly the intense scrutiny courts give federal Indian jurisdictional defenses, or the profound negative effect of the published opinions judges write, urging Congress's modification or outright abrogation of legal doctrine like tribal immunity. As such, that lawyer might very well haul off and file the motion to dismiss Joe Citizen's suit, giving rise to the perfect storm for the next federal or state appellate court decision, or congressional bill, that will divest Indian courts from inherent authority over certain reservation disputes, or severely impact sovereign immunity.

When tribal sovereignty is at stake, tribes simply cannot allow insurers to be pennywise and poundfoolish, by assigning defense counsel based upon cost rather than expertise. Tribal business leaders must insist that the tribe "shall have the sole right to assign counsel to defend any suit against the insured." Like large non-Indian companies that demand of their insurers and obtain the right to select defense counsel, tribes and Alaska Native Corporations must enjoy that same prerogative to assign lawyers they trust. If the insurer balks at such language, the tribe and insurer could agree that they will jointly select counsel, which would have the practical effect of giving the tribal insured veto power over the carrier's choice of inexperienced defense lawyer.

Expressly Retaining or Waiving Sovereign Immunity

Consider two points about the interplay of tribal immunity and insurance law. First, numerous courts have ruled that a tribe's purchase of liability insurance is not enough, without more, to constitute a clear and unequivocal immunity waiver.⁵ While an insurance policy that includes a clear provision waiving tribal immunity *could* allow suit against the tribe,⁶ a policy by itself would not. For public policy reasons, some tribes have purchased liability insurance for certain business activities and passed tort claims laws that operate to waive immunity, but only to the extent of the policies' available coverage and limits.⁷ Yet if a tribe does not wish to affect a blanket immunity waiver by purchasing insurance (as is the case for most tribes), their policy should provide that nothing therein should be read to waive immunity or confer jurisdiction to any court.

Secondly, unless the policy provides otherwise, an insurer is not, as a matter of law, authorized or empowered to waive or otherwise limit a tribal insured's sovereign immunity.⁸ Put more bluntly, an insurer has absolutely no business asserting Indian immunity as a defense to suit unless they have received the express consent of the tribal sovereign.⁹ Notwithstanding, there have been situations where insurers and claims adjusters have meddled with,

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or even made, the deplorable decision to assert sovereign immunity without tribal permission – yet another bad-faith practice. Many, but not all, tribal policies make clear that in the event of a claim or suit against the tribe or tribal officers or employees, the insurer shall not assert or waive tribal immunity absent written authorization from the tribe. All tribal policies should make clear that only the tribal sovereign shall decide whether or not to assert its immunity.

Not Allowing the Policy to Waive Tribal Jurisdiction

Due to aggressive tribal economic development and diversification, there are more significant insurable Indian assets – e.g., buildings, automobiles, operations and employees – than ever before. As a result, there are an increasing number of tribal insurance coverage disputes, about whether the carriers should cover and/or defend claims against a tribal policy. In that instance, the very same insurer that commanded an exorbitant premium and promised to “protect and defend,” vehemently objects to the tribe’s assertion of civil jurisdiction over the insurer. An insurer’s objection to Indian jurisdiction is essentially why a reservation auto injury lawsuit ended up before the U.S. Supreme Court, *National Farmers Union Ins. Co. v. Crow Tribe of Indians*.¹⁰ That case thankfully yielded a win for Indian Country – a decision mandating that non-tribal courts not intercede in litigation involving questions of tribal authority so Indian courts can initially determine such cases.¹¹

A tribal court *should*, as a matter of self-governance, be allowed to assert subject matter jurisdiction over any dispute about a tribal insurance policy’s coverage. If insurers can accept Indian money, shouldn’t they also accept Indian justice systems? Under the federal Supreme Court’s landmark decision in *Montana v. United States*, insurers that enter into “consensual relationships with the tribe or its members” through insurance contracts, *should* be subject to tribal court jurisdiction in disputes arising out of such a contract.¹² But that presumes the subject policy does not waive tribal jurisdiction through choice-of-forum and/or arbitration provisions. Consider another policy provision advanced by that same tribal insurance underwriter, a standard “Binding Arbitration” endorsement providing that:

If we and the [tribal] insured do not agree whether coverage is provided under this Coverage Part for a claim made against the insured, then either party may make a written demand for arbitration. ... [A]rbitration will take place in the county or parish in which the address is shown in the Declarations is located. Local rules of law as to procedure and evidence will apply.

Arguably, this language divests an Indian court from jurisdiction to entertain a reservation-based insurance coverage dispute and vests that authority with a non-tribal arbitration tribunal. The endorsement could also be read to disallow the application of tribal law in such a dispute, in favor of “local” or state law.

What’s more, the provision would likely be read to waive the tribal insured’s sovereign immunity from any suit or countersuit the insurer may advance, as a result of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*.¹³ In that case, the Supreme Court ruled that the inclusion of an arbitration clause in a form contract constitutes “clear” manifestation of intent to waive tribal immunity. As a result, the tribe could be preliminarily subject to the subject matter jurisdiction of a state or federal court in an action by the insurer to, e.g., compel arbitration rather than allow tribal adjudication of the matter.¹⁴

A tribal insured may very well decide that a non-Indian forum such as an arbitration panel should adjudicate any insurance coverage dispute with its insurer, and that it wishes to waive immunity in limited form relative to any such dispute. But those vital legal/political decisions and exercises of sovereignty must be made by tribal leadership as they would in a complex, commercial transaction; not inadvertently by rubber stamping a two-inch insurance contract assembled by a broker that the tribe mistakenly trusts will protect their sovereignty.

Supplementing, not Supplanting, FTCA Coverage

Under government-to-government agreements authorized by the federal self-determination act, the federal government supplies funding to over 200 tribes, allowing them to conduct programs that the U.S. would otherwise provide them in fulfillment of its trust responsibility to Indians.¹⁵ A 1990 amendment to that act provides tribes and/or tribal employees full protection under the Federal Tort Claims Act (FTCA) for claims resulting from negligent or wrongful, perhaps even intentional, acts or omissions arising from their performance of self-governance contractual functions.¹⁶ In that instance, a claimant’s remedy against the tribal defendants, vis-à-vis the federal government, is “exclusive of any other civil action or proceeding for money damages,” including any tort lawsuit against tribal governments and tribal employees covered by the FTCA.¹⁷

Federal courts have affirmed the applicability of the FTCA to tortious acts arising out of, e.g., health care clinics and human service programs, including alcohol and drug abuse prevention;¹⁸ schools and early learning centers;¹⁹ law enforcement;²⁰ and, general contractor construction work.²¹ Essentially, the FTCA provides self-governance tribes primary tort liability coverage for a host of everyday

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personal injury claims.²² Importantly, the U.S. Department of Justice (DOJ) must defend personal injury claims or lawsuits against self-governance tribal contractors and/or employees that fall within the ambit of the FTCA. Most self-determination contracts make that clear. The federal defense duty is a critical means of protecting the tribal treasury, resulting from decades of tribal investment in self-determination law and policy.

An insurance policy for a self-governance tribe – and their premium amounts – should expressly reflect the protection afforded the tribe by the federal government pursuant to the FTCA, and the relationship between the tribe’s insurance coverage and FTCA protection. Moreover, the policy should make clear that the insurer shall not tender an FTCA-covered claim or suit to the federal government without written tribal authorization (just as an insurer cannot waive tribal immunity without express tribal consent). Only a tribe should be allowed to invoke its trust relationship with the federal government by requesting federal tort defense.

And if for public policy reasons the self-governance tribe opts against tendering the federal defense – much like deciding against asserting tribal immunity – the insurance contract should reflect the insurer’s continued duty to defend the matter. Another policy provision advanced by tribal insurance underwriters provides:

It is the intent of this policy that any claim or ‘suit’ covered ... under the [FTCA] as it applies to Self-Determination Contractors under Pub. L. 101-512 shall be deemed to be other insurance ... excess over such claims or ‘suits.’ It is further the intent of this policy that when this insurance is excess over such claims or ‘suits,’ we will not have the duty ... to defend any claim or suit for which the insured is entitled to defense by the U.S. Department of Justice under the provisions of the [FTCA].

In the eyes of the insurers, such language alleviates their duty to defend self-governance tribal insureds when “they are *entitled* to defense” by DOJ. Put another way, insurers do not believe they need defend any self-governance tribal defendants when a tribe, for public policy reasons, decide against tendering the defense of an FTCA-covered claim to the federal government.

Even worse, insurers might read that language to suggest that if DOJ does not defend a self-determination contractor/employee even though they are entitled to federal defense, the carriers need not defend them either. With the current federal executive branch increasingly reluctant to honor the United States’ legal, contractual and trust obligations to defend self-governance tribes under the FTCA, such tribes must impose even clearer defense

obligations on their insurers. Accordingly, a self-governance tribe’s insurance policy must make clear that the insurer has a duty to defend a claim or lawsuit against the tribal insured unless and until “they are *provided* defense” – i.e., until DOJ formally agrees to defend the matter under the provisions of the FTCA.

It is nothing short of a bad faith insurance practice to defend Indian sovereignty on the cheap, or abuse inherent tribal rights for economic gain. Has your tribal insurer committed bad-faith – are you in *bad* hands?

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1 See e.g., *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 908 (1986).

2 See, e.g., *Santa Clara v. Martinez*, 436 U.S. 49, 58 (1978); *U.S. v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); *Bellue v. Puyallup Tribe of Indians*, Puyallup Tribal Court of Appeals No. 94-3045 (Puyallup 1994); *Colville Tribal Enterprise v. Orr*, 5 CCAR 1 (Colville Confederated 1998).

3 Consider, for example, this “concurrency” by a Florida appellate court judge:

The average tourist has no idea that her Florida constitutional rights to access to the courts and to trial by jury do not apply to any claims that may arise while she visits the hotel and casino. The Tribe itself does not post warnings that its tourist attraction is exempt from these basic Florida constitutional protections. In this case, the Seminole Tribe and, indirectly its commercial insurance company, are raising the jurisdictional bar to prevent judicial resolution of a relatively minor and defensible personal injury claim. However, they could raise the same bar for a serious wrongful death action.

Although the insurance policy is not in our record, many general liability policies issued to governmental bodies contain an agreement that the insurance company will not itself rely upon the government’s sovereign immunity, but these clauses do not prevent the governmental entity from raising its sovereign immunity. The rule of law requires this court to reach this outcome, but hopefully the Seminole Tribe of Florida will eventually conclude that this litigation tactic is not the best policy to promote a profitable business.

Seminole Tribe of Florida v. McCor, 903 So. 2d 353, 361 (Fla. 2d Ct. App. 2005) (Altenbernd, concurrence).

4 523 U.S. 751, 758 (U.S. 1998).

5 See e.g., *McCor*, 903 So. 2d at 359 (“The purchase of insurance by an Indian tribe is not sufficient to demonstrate a clear waiver by the tribe of its sovereign immunity. Although it may be a plausible inference that the purchase of insurance indicates an intention to assume liability and waive tribal immunity, such an inference is not a proper basis for concluding that there is a clear waiver by the Tribe.”); *Long v. Chemehuevi Indian Reser-*

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vation, 115 Cal. App. 3d 853, 861 (Cal. Dist. Ct. App. 1981), citing *Loncasson v. Leekity*, 334 F. Supp. 370, 374 (D. N.M. 1971) and *Atkinson v. Haldane*, 569 P.2d 151, 168-69 (Alaska 1977); *Dixon v. Picopa Construction Co.*, 772 P.2d 1104 (Ariz. 1989) (“(W)e have held that the presence of liability insurance is irrelevant to determining whether a tribe has waived its immunity ...”); *St. Claire v. Turtle Mountain Chippewa Casino*, Turtle Mountain Court of Appeals 97-013 (1998).

Similarly, Congress’s enactment of federal legislation requiring tribes to carry liability insurance in certain business contexts does not constitute an unequivocal immunity waiver. While the Indian Self-Determination Act, 25 U.S.C. 450f(c)(3)(A), mandates that tribes purchase insurance to cover tribal business activities carried out pursuant to the Act, and denies the insurance carrier the right to raise tribal immunity as a defense to recovery, the Ninth Circuit Court of Appeals has repeatedly held that Section 450f(c)(3)(A) does not constitute an unequivocal waiver of a tribal insured’s immunity. *Demontiney v. U.S.*, 255 F.3d 901 (9th Cir. 2001); *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989); see also *Pink v. Modoc Indian Health Project*, 157 F.3d 1185 (9th Cir. 1998).

- 6 See e.g., *Gallegos v. Pueblo of Tesuque*, 46 P.3d 668 (N.M. 2002)
- 7 For example, the Navajo Nation Sovereign Immunity Act includes a provision that permits suit against the Nation where any money damages would be covered by insurance. The Navajo Nation Superior Court has held that the Act’s insurance exception constitutes a waiver of immunity, and a federal court would likewise rule that the provision constitutes a clear waiver of the Nation’s immunity. *Johnson v. Navajo Nation*, 14 Indian L. Rep. 6037, 6040 n.4 (Nav. Sup. Ct. 1987); see also Joseph Calve, *Pequots Won’t Gamble on Lawsuit at New Casino*, Conn. L. Trib., Mar. 2, 1992, at 1 (explaining that the Mashantucket Pequot Tribe affected a limited immunity waiver allowing tort recovery in cases arising at their casino but only up to the amount of available liability insurance).

A tribe can also affect a limited immunity waiver with respect to any settlement or consent to the litigation of a particular claim or suit, such that the Tribe does not waive or otherwise limit its sovereign immunity beyond available insurance coverage and limits. See generally *Thomas v. Broadlands Community Consol Sch. Dist.*, 109 N.E.2d 636, 641 (Ill. Ct. App. 1952) (allowing tort action against school district “when liability insurance is available to so protect the public funds, the reason for the rule of immunity vanishes to the extent of the available insurance”); *Beach v. City of Springfield*, 177 N.E.2d 436 (1961) and *Collins v. Memorial Hospital of Sheridan Co.*, 521 P.2d 1339 (1974) (both holding that municipal government’s purchase of liability insurance constituted a waiver of immunity but only up to coverage limits). While these cases were rejected by the courts in *Loncasson* and *Atkinson*, *supra* footnote 5, the opinions support the notion that a government can enact a limited waiver allowing a settlement or judgment but only up to available policy limits.

- 8 See, e.g., *Squirrel v. Bordertown Bingo*, 125 P.2d 680, 683 (Ok Ct. App. 2005) (“Tribe’s insurer is estopped from asserting Tribe’s sovereign immunity to deny coverage under the Oklahoma Workers’ Compensation Act.”); *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*, 720 P.2d 499, 527 (Ariz. 1986) (“Because the Tribe has the power either to insist upon or to waive its sovereign immunity, that immunity is considered a personal defense not available to the Tribe’s surety.”); *Lee v. Little Lodge Headstart, Fort Berthold District Court*, Civil No. 02C-0366 (2004) (“The defense of sovereign immunity remains available for the tribal entity, however ... federal law only precludes the insurance carrier from invoking the defense ...”); see also *McConnell v. Adams*, 829 F.2d 1319, 1330 (4th Cir. 1987) (holding that insurance policy does not provide coverage where the insured sovereign is not obligated to pay damages because *the insured* has not waived its sovereign immunity); C.J.S. Insurance 968 (1993) (“An insurance policy covering any sums which insured shall become obligated to pay does not afford coverage where

insured is not obligated to pay any sums because of immunity.”) (emphasis added).

- 9 See generally *Lee, Id.*
- 10 471 U.S. 845 (U.S. 1985).
- 11 Put more precisely, a non-tribal “court should stay its hand ‘until after the tribal court has had a full opportunity to determine its own jurisdiction.’” *Strate v. A-1 Contractors*, 520 U.S. 438 (U.S. 1997).
- 12 450 U.S. 544 (U.S. 1981); *Allstate Indem. Co. v. Stump*, 994 F. Supp. 1217, 1221 (D. Mont. 1997) (tribal court had subject matter jurisdiction over declaratory judgment action because “Allstate entered a consensual insurance contract with a tribal member”), *aff’d*, 191 F.3d 1071, 1075 (9th Cir. 1999); *Malaterre v. Amerind Risk Management*, 373 F. Supp. 2d 980, 985 (D. N.D. 2005) (“While (the insurer) is a non-member ... the case seems to fall squarely within the first Montana exception as (the insurer) entered into a contract with the tribe.”).
- 13 532 U.S. 411 (2001).
- 14 Although, a number of courts have applied the tribal exhaustion doctrine to arbitration clauses, holding that when faced with an arbitration demand the tribal court should be “given the first opportunity to address (its) jurisdiction and explain the basis (or lack thereof) to the parties.” *Lien v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996); *National Farmers, supra* footnote 10; see also *Bank One, N.A. v. Shumake*, 281 F.3d 507, 514 (5th Cir. 2002), *cert denied*, 154 L. Ed 2d. 25 (U.S. 2002) (affirmed the district court’s dismissal of bank’s complaint seeking an order compelling arbitration, to allow previously filed tribal court action to proceed); *Basil Cook Entres., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 63-69 (2d Cir. 1997) (dismissed federal petition seeking order to compel arbitration because of pending tribal court action).

In *Stock West, Inc., v. Confederated Tribes of the Colville Reservation*, 973 F.2d 1221, 1228, fn. 16 (9th Cir. 1989), the Ninth Circuit Court of Appeals rejected an argument that the policy of federal alternative dispute resolution embodied in an arbitration clause “should overcome the policy of comity in favor of the tribal court,” particularly “where the validity of the arbitration clause in the contracts are themselves in dispute.”

- 15 25 U.S.C. 450f, b(j); *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234-35 (8th Cir. 1996).
- 16 That amendment provides in pertinent part:

With respect to claims resulting from the performance of functions ... under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act ... an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior (BIA) or the Indian Health Service in the Department of Health and Human Services (IHS) while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: Provided, that after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act ...

See 25 U.S.C. 450f notes.

- 17 8 U.S.C. 2679(b)(1); 25 C.F.R. 204.
- 18 See *Walker v. Chugachmiut*, 46 Fed. Appx. 421 (9th Cir. 2002); *State Farm Mut. Auto. Ins. Co. v. Swan*, 2002 WL 31973731 (D. Or.

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government's sovereign immunity - the creation of tribal global sovereignty.

I had the opportunity to host a group of Korean businessmen last year in the Seattle area. I took them to the reservations of the Port Gamble S' Klallam Tribe, the Tulalip Tribe, the Muckleshoot Tribe and the Puyallup Tribe. This group had the chance to meet staff and tribal council members to discuss trade. What the Koreans found out was there were many independent tribal governments who are in early stages of business growth on their reservations—similar to where Korea was not too long ago. They were impressed with all tribes we visited, and the varying opportunities with each tribe. They were amazed that there are over 560 tribes nationwide – each with other unique opportunities. They saw first hand the opportunities with the Port Gamble Tribe that has fiber-optic cable on their reservation to build their technological and telecommunications infrastructure, to the Puyallup Tribe who have a partnership with the Port of Tacoma and a tribal foreign-trade zone.

While in Korea, I visited many high-tech and low-tech enterprises, each with the desire to reach the American marketplace through partnerships with tribes. The question they often asked was, "How can I do business with the tribes?" Before learning of the independent tribal governments, those same Korean businessmen only knew about the United States and specific states' international trade programs. Of course, the federal government and state governments often do not even mention opportunities for trade with tribes. At best, tribal leaders are sometimes invited to attend state sponsored trade delegations as an afterthought, never as the focus. Tribes need to be able to answer this question now. Tell those same Korean businessmen and other businessmen worldwide how they can "do business" with tribes.

I also observed a strong national pride in the Korean culture, while they have enjoyed the success of an emerging global economic power. It reminded me of visiting the gaming tribes who have realized tremendous economic success from gaming. These tribal governments have expressed pride in their culture by incorporating it into their architecture, by creating cultural education programs, by revitalizing their languages, and by teaching their children what it means to be part of that tribe.

This common value of a nation's unique culture is a global phenomenon that can prove to create a unique bond between those foreign countries and tribal governments. Unfortunately, this same cultural pride is not one that carries much value in this country.

In summary, for tribes to broaden their reach on a global scale and develop their tribal governments into emerging global economic powers – they must establish alliances with each other first. They can then establish alliances with those emerging economic powers that will create a diverse and viable foundation for trade. By dealing with international governments worldwide, only then will tribes fully realize what it means to be a sovereign nation – a global, tribal sovereign nation.

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¹ Comments at First Ministers Meeting, Kelowna, British Columbia, Canada, November 25, 2005.

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2002); *Waters v. U.S.*, 812 F. Supp. 166 (N.D. Cal. 1993) (each involving tribal health clinics); *Buchanan v. U.S. Dept. of Health & Human Services*, 177 F. Supp. 2d 1005 (N.D. Cal. 2001) (tribal drug and alcohol abuse program); *U.S. v. CNA Financial Corp.*, 168 F. Supp. 2d 1125 (D. Alaska 2001) (tribal alcohol abuse facility); *Wooten v. Hudson*, 71 F. Supp. 2d 1149 (E. D. Okla. 1999) (IHS hospital employee acting under a self-governance contract).

¹⁹ *Cf. Wide Ruins Community School v. Stago*, 2003 U.S. Dist. LEXIS 16147 (D. Ariz. 20003).

²⁰ *See U.S. v. Schrader*, 10 F.3d 1345 (8th Cir. 1993); *Allender v. Scott*, No. CIV-04-0835 BB/RLP, Memorandum Opinion (D. N.M.

Jan. 27, 2005); *Locke v. U.S.*, 215 F. Supp. 2d 1033 (D. S.D. 2002); *cf. Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067 (N.D. Cal. 2004).

²¹ *See Val-U Const. Co. of South Dakota, Inc., v. U.S.*, 905 F. Supp. 728 (D. S.D. 1995).

²² For a procedural discussion, see also Gabriel S. Galanda, "Shielding the Tribal Treasury from Attack: Eliciting Civil Legal Protection Under the Federal Tort Claims Act," *Indian Law Newsletter*, Vol. 15, No. 1, January 2006; see also 25 CFR 204.

Sherrill and Cayuga: A Call to Revisit Pre-1966 Indian Monetary Claims from page 4

Indian Nation's claim that local taxes did not apply to the Nation's fee property. While the Court upheld dismissing the Nation's case on grounds of "laches" – i.e., that too much time had passed between the injustice and the lawsuit – the Court emphasized that it was not disturbing its *Oneida II* ruling on ICLA money claims.¹⁵

Nonetheless, the Second Circuit in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), seized on the Supreme Court's laches ruling in *Sherrill*. It dismissed the Cayuga Nation's trespass money claim. Amazingly, the Pataki court upheld dismissal based on laches even though the Nation's claim was included in the 1983 ICLA list.¹⁶

The Cayuga Nation, the United States, and many amici tribes asked the Supreme Court to review and reverse the Second Circuit's decision. They carefully explained that Congress in enacting the ICLA intended to preserve the listed damages claims, and that the Second Circuit's ruling went directly against the ICLA, and the Supreme Court's *Oneida II* and *Sherrill* rulings. The Supreme Court, however, denied the Nation's petition.¹⁷ Accordingly, the Second Circuit's devastating ruling in *Cayuga Indian Nation* is now precedent in that circuit, and certainly will be used by defendants nationwide in ICLA money damages cases.

4. A Plan of Action

Tribes should take an organized approach to their ICLA claims by first determining which claims Interior either rejected or proposed for Congressional resolution. A next step might be to develop criteria for prioritizing the outstanding claims. Tribes and allottees should submit Freedom of Information Act requests for records on the claims. In most cases, tribes and allottees should first ask that the United States pursue the claims before bringing any lawsuits. And, Tribes will have to grapple over whether and how to handle their members' outstanding ICLA claims, which could be quite large in number.

The time to act is now. ICLA envisioned insulating pre-1966 Indian money against the passage of time. This assumption has now been undermined through recent court developments. Delaying action on these claims will only

fuel defendants' arguments that laches has turned Indian claims into meaningless pieces of paper.

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1 24 U.S.C. § 2415.

2 BIA, Notice of All Statute of Limitations Claims, 48 Fed. Reg. 13698 (March 31, 1983); 48 Fed. Reg. 51204 (Nov. 7, 1983).

3 48 Fed. Reg. at 13699.

4 *Id.*

5 *See, e.g., Nichols v. Rsvay*, 610 F. Supp. 1245 (D.S.D. 1985), *aff'd*, 809 F.2d 1317 (8th Cir. 1987).

6 *See, e.g., BIA, Notice of rejected claims*, 54 Fed. Reg. 52071 (Dec. 20, 1989).

7 28 U.S.C. § 2415(c) provides, "Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right to possession of, real or personal property."

8 *See, e.g., Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989).

9 *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006).

10 Pub. L. No. 89-505, 80 Stat. 304 (28 U.S.C. § 2415).

11 *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 242-43 (1985); *see also, e.g., S. Rep. No. 92-1253* (1972), *reprinted in* 1972 U.S.C.C.A.N. 3592.

12 Pub. L. 97-394, 96 Stat. 1976.

13 28 U.S.C. § 2415.

14 470 U.S. at 225 (emphasis added).

15 *Id.*

16 *Id.*

17 *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006).

default judgments and setting large judgments that many considered unconscionable. There has been such a lack of education and awareness between the factions that beginning to make a change has taken several years and is a constant struggle. There is a great need for the establishment of a cohesive culturally sensitive planning process to address these many issues facing all governments in Washington.

Several years ago, the Puyallup Tribe of Indians became one of the first tribal child-support programs in the United States to be formed with federal grant money. After several years of trial and error, a vibrant and growing child-support program is now in existence. Using federal dollars and guided by federal regulations, the Puyallups have created a program that seeks to meet the needs of its members and is very interested in protecting the sovereignty of the tribe while still making a priority of working with other agencies they do business with. The Puyallups have sought after and obtained the common ground on many issues while slowly dealing with the more difficult areas of disagreement with other governments. Disagreements, though serious and delay causing, have not prevented the creation and growth of a smooth operating relationship.

One of the key partnerships that the Puyallups have developed is with the Pierce County Prosecutor Family Support Division. Contact was made with that office as results of collaboration with the Washington State Division of Child Support State Tribal Relations Unit. After a letter, a phone call ensued and arrangements were made for the Puyallup Child Support Director and some of her staff to visit the Prosecutor's office. Several weeks later a three-hour meeting was held. I believe this meeting was the first of its kind in the state that has led to such a close working relationship. After this meeting, contact was made between myself and the line workers from the tribe. I and my supervisor at the time visited the program and had the opportunity to observe Tribal Court. We had no idea of what to expect but came away impressed as to level of professionalism and dedication to the needs of children shown by all involved with the Puyallup Tribal Court and the Puyallup Child Support Program. Several of the tribal workers then toured my office and had a chance to observe the Pierce County Court System first-hand. After this, regular contact slowly began, as each side felt out what it wanted and was willing to give. Over time, respect, admiration and ultimately friendship have developed between the tribe and me. Steps are being taken to spread this relationship to other members of my office through an upcoming visit by the Pierce County Family Support Division to learn more about the Puyallup Tribal Child Support program. Individual workers from both programs will be

able to interact and gain a new understanding and respect for the jobs their counterparts perform on a daily basis.

In order to facilitate this growth, I have had to educate myself as to both tribal and state issues concerning child support. This has taken several years and is an ongoing process. I find there is little real interest that would drive someone in the mainstream to learn what's necessary to function as an effective liaison. An individual, from the state's perspective, must be highly motivated to make a serious change in the state's approach to tribes in general and specifically concerning child-support issues. We have too long had the status quo in which mainstream America either ignores or downplays any approach that does not meet the criteria of political correctness. This also means saying one thing and never following through with effective action to bring meaningful change to the table. To make changes that have been long over due, passion has to be ignited in the parties holding the power. To be successful, one has to work past the many roadblocks placed in our way by many well meaning people that are highly resistant to significant, relationship altering change.

What does this level of cooperation mean in terms of day-to-day operations between the Puyallup Tribal Child Support Program and the Pierce County Prosecutor Family Support Division? For the first time there is two-way communication on the working of cases and the exchanging of information and services that benefit both parties. Pierce County has agreed to do initial service of process and genetic testing on inmates at the Pierce County Jail who are involved in cases with the Puyallup Tribe. Each case at Pierce County that has any tribal connection is scrutinized and contact made with the Tribe to determine which program would be in the best position to offer services to the parties involved. Cases are freely transferred between the offices without any resentment or jealousy of any sort. In fact, I go out of the way to find cases involving non-Puyallups living on the reservation who are still part of the greater tribal community. Thus, at a small cost in caseload to Pierce County, I am able to reinforce respect for the Puyallup Program within my office and by association, with the Washington State Division of Child Support.

What began as a small outreach between two neighboring programs has slowly begun to reach out to other agencies. Pierce County has initiated contact, through the State Tribal Relations Unit, to our local tribal TANF provider, the South Puget Intertribal Planning Agency (SPIPA) about coordinating the providing of child-support services to their clients in an effective manner. I have also been able to access the resources of the Puyallup Tribal Program to make contact with various other tribes throughout Wash-

(continued on next page)

A Look at Intergovernmental Relations Concerning Child Support in Washington State from previous page

ington and in several other states. I have found that I have gained more from the relationship than I have given. All this was obtained at the minor cost of listening, being reasonable and respectful of the tribes I deal with. By acting this way, when serious issues come up, the position of a party to the negotiation will be given much greater consideration.

So the question becomes, where do we go now? What remains to be done in order to make child support one of the first of many basic issues that tribes can deal with in common with local, state and federal governments?

First and foremost, there must be a reaching out by people to people on a larger scale. As one individual, I have been, through the use of respectful yet determined methods of communications, able to make inroads in tribal-state relations where few have gone or even been willing to attempt. The great difficulty is that the larger the scale the greater the tendency to institutionalize the problem and create cumbersome rules and regulations. There must be order in every situation but order cannot be an end to itself. People will have to realize that everyone and every entity has its own specific concerns that exist in conjunction with the common problems that we all face. We have to rise above petty issues and take one small step after another. It isn't always about winning and losing, although this all that it seems to have been about for many years in the past. It is not always about the pure exercise of power but of the delicate hand of negotiation to establish a win-win situation resulting in a balance between the needs of all parties.

There is so much prejudice and ill feeling that must be overcome in order to succeed in establishing a functioning inter governmental child support program. Ancient distrust and misconceptions will have to be addressed. There is no one way to do things. Each tribe, each government will have to address their own needs and then negotiate

with each other in a sense of understanding and cooperation. It sounds impossible but it can happen. We will need to create a small group of highly dedicated individuals who will meet and have the duty to get over the hurdles that the nature of mankind has placed in the way of our success. Initially, this group will need the cooperation of all players having a stake in the outcome which would include Tribes, Tribal Associations, as well as federal, state and local governments. I envision this group moving from one area of the state to another, working first with those tribes which are establishing 4-D sanctioned child support programs. This group would listen to the needs of the tribe and of the state and facilitate conversations to establish working relationships and to minimize the areas of conflict to ease the resolution process. Comprehensive plans can be drafted for one area at a time, and with the completion of each one, the process becomes easier and easier.

Further down the road, hopefully we will be able to establish and fund a formal organization with both state and tribal representatives working together to serve the needs of the children. Just imagine people talking to each other, resolving the issues that separate them and acting for the best interests of the children. It can happen.

It is clear that the problems facing the establishment and operation of child-support programs by Tribes in cooperation with existing governmental operations are burdensome but are not insurmountable. Much has been done by a few individuals that sets the example for what could be. This article is only a bare beginning, and no one has all the answers. Only time will show if real change occurs based upon substantive efforts of all the parties involved.

Jerry R. Ford is a Pierce County Prosecuting Attorney. He can be reached at (253) 798-6519.



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