



# CALIFORNIA INDIAN LAW NEWSLETTER

Joanne Willis Newton, Editor

## Message from the President

Hello,

I am very pleased to report that this fourth annual newsletter marks the tenth anniversary of CILA and our annual Indian law conference. As you may know, CILA was formed in 2000 to serve as the representative of the Indian law legal profession in California. Over the last decade, we have addressed a range of issues at our annual conferences, always seeking to address the most timely and important issues for our members and the broader California Indian community. We also have given out a number of scholarships to native law students.

If you are reviewing this while attending our 10th Annual Indian Law conference, welcome. If you are not attending the conference, please let the Board of Directors know what we can do to make the conference more relevant to your work, interests, or concerns, whether regarding topics, format, or location. And if you have not yet volunteered some of your time to CILA activities or donated to our scholarship fund, please consider doing so.

CILA is only as strong and effective as the personal and other contributions made to it by its members. The Board of Directors always welcomes new ideas regarding how better to serve our community, especially if they come with offers to help get things done. We have a number of committees, none of which require Board membership for participation. These include conference planning, scholarship, public relations, newsletter, outreach, and State Bar. For

## *Jeffredo v. Macarro*: The Ninth Circuit's Latest Word on Disenrollment Disputes

By Mark Myers

Tribal disenrollment controversies are on the rise, and the issue of distributions from casino revenues has raised their profile in California. The number of tribal members disenrolled is estimated at over 10,000 nationwide,<sup>1</sup> with up to 5,000 disenrolled in California alone.<sup>2</sup> Predictably, disenrolled members have sought relief in federal court, most often under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 ("ICRA").

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example, if you can write a short newsletter article, or would like to help set up a program to mentor local Native law students, or undertake any other CILA-related activity, please contact the chairperson of the relevant committee. That contact information, as well as other information on CILA, is available on our website, [www.calindianlaw.org](http://www.calindianlaw.org).

Thank you for your interest in CILA. On behalf of all of the members of the Board of Directors, thank you for your dedication to this field of law and to Indians and Indian tribes throughout California.

Dan Rey-Bear  
President



In March the Ninth Circuit handed down its latest decision in a disenrollment case, *Jeffredo v. Macarro* (9<sup>th</sup> Cir.) 599 F.3d 913, cert. denied (2010) 130 S.Ct. 3327. In most respects, it is a straightforward application of the landmark ICRA membership dispute case, *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49. *Jeffredo's* examination of a novel legal theory is worth noting, however, as is its implicit suggestion that Congress might take action. It also drew a noteworthy dissent.

See *Jeffredo v. Macarro* on page 2.

*Jeffredo v. Macarro* from page 1.

*Jeffredo* deals with a habeas petition filed by sixteen members disenrolled from the Pechanga Band of the Luiseño Mission Indians. The district court dismissed the petition, and the disenrollees appealed. The panel majority found the petitioners were not in custody or subject to the type of detention a writ of habeas is intended to remedy. The majority observed that while the petitioners had lost their tribal membership along with access to tribal services and facilities, they had not been expelled from the reservation, banished, or subject to any kind of physical restraint.

*Santa Clara* casts a long shadow over disenrollment cases. The ICRA makes available the remedy of habeas in federal court “to test the legality of [one’s] detention by order of an Indian tribe,” and *Santa Clara* held this was the only type of relief federal courts could grant, 436 U.S. at pp. 69-71, though other remedies may be available in tribal fora. (*Id.* at pp. 65-66.) It also emphasized tribal sovereignty and the consequent necessity of allowing tribes to define their own membership. (*Id.* at pp. 59-60, 71-72 and n.32.)

Habeas relief is available only to remedy a severe restraint on a petitioner’s liberty, akin to physical custody or a restraint on movement. (*Moore v. Nelson* (9<sup>th</sup> Cir. 2001) 270 F.3d 789, 791.) Federal courts narrowly construe the ICRA’s abrogation of tribal sovereign immunity; therefore, the requirement is not more lenient under the ICRA than in federal or state cases, *id.* at pp. 791-92, and in fact it may be stricter.

The petitioners relied on a novel theory based on the Second Circuit’s holding in *Poodry v. Tonawanda Band of Seneca Indians* (2d Cir. 1996) 85 F.3d 874. In that case, tribal members involved in a political dispute were summarily convicted of treason, stripped of their tribal membership, and given an order permanently banishing them from the reservation. Tribal efforts at expelling them had not yet proved successful, however.

*Poodry* relied in part on *Trop v. Dulles* (1958) 356 U.S. 86, a case where the petitioner was denaturalized. There, the Supreme Court found the punishment of denaturalization of a natural-born citizen unconstitutional because of its severity: “a form of punishment more primitive than torture . . .” (*Id.* at p. 101.) In *Poodry*, the Second Circuit in a split decision held the disenrollment, the banishment, the imminent threat of exclusion, and several other restraints or penalties, while not actual physical custody, amounted to detention.

While the majority in *Jeffredo* recognized that loss of tribal membership entailed a great personal loss as well

as loss of political rights, distributions from casino revenues, and access to tribal services, it held this did not amount to custody or detention. The majority distinguished *Trop*, noting denaturalization in that case was penal and left the plaintiff stateless.

The majority also considered the argument that the petitioners were subject to expulsion in the future. While the majority acknowledged §1303 requires “a severe actual or potential restraint on liberty,” 599 F.3d at 919 (citation omitted, emphasis added), it also held that the restraint must be imminent. (*Id.* at pp. 919-20.) The majority noted that no eviction or exclusion procedures had commenced, *id.* at p. 920, possibly (though not clearly) leaving open the door for habeas relief in the future if more severe restrictions were imposed.

The dissent, however, pointed out that under tribal law, the petitioners were only allowed to travel on reservation roads to and from their homes if invited by an enrolled member or the tribal council. (599 F.3d at p. 923.) Petitioners were also subject to summary expulsion by tribal rangers on the basis of any behavior that appeared suspicious or illegitimate. (*Ibid.*)

Although the restraints and threats in *Poodry* were apparently more extreme, the principles it espouses are arguably applicable here. *Poodry* found the mere threat of removal adequate, 85 F.3d at p. 895, and noted the devastating effects of disenrollment. (*Id.* at p. 897 [“[A] deprivation of citizenship does more than merely restrict one’s freedom to go or remain where others have the right to be: it often works a destruction of one’s social, cultural, and political existence.”])

Significantly, the panel distinguished *Poodry* rather than rejecting it. Given a set of facts more like those in *Poodry*, such as a more imminent threat of expulsion, or disenrollment as political payback or a penalty for misbehavior, it remains possible the Ninth Circuit might follow the Second.

*Jeffredo*’s opening paragraph closes with an observation, perhaps an invitation: “Only Congress can aid these appellants.” Such remarks are typical in disenrollment or denial of membership cases, starting with *Santa Clara*: “Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of §1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.” (436 U.S. at 72.)

See *Jeffredo v. Macarro* on page 5.

## California's Tribal Customary Adoption Law

By Kimberly Cluff

In October 2009, Governor Arnold Schwarzenegger signed Assembly Bill 1325, the California Tribal Customary Adoption statute. Assemblymen Paul Cook and Jim Beall were the authors with the Soboba Band of Luiseño Indians sponsoring the bill and over fifty California Indian tribes actively supporting the effort. AB 1325 went into effect on July 1, 2010.

AB 1325 is a legislative response by the California Native community to increasing pressure by state courts to consent to permanent plans of adoption for their dependent tribal children.

In California, as with all other states, conventional adoption is the formal creation of legal parenthood that requires that the pre-existing parental rights of biological parents be terminated - either by consent or involuntary termination. Even with the increased acceptance of "open adoption," adoption under state law typically severs the child's relation to the birth parents and extended family. Once termination of parental rights (TPR) is completed by state court order, the child and the parent become legal strangers to each other; the child is a legal orphan and only then is able to be adopted by other adults.

This model of conventional adoption runs counter to pan-tribal cultural norms. Many tribes embrace fluid concepts of family and parentage, placing great importance in shared responsibility for child-rearing, often resulting in various relatives, clan members and extended family having essential parenting roles with tribal children. Under this cultural construct, most tribes in the United States have practiced adoption through tribal law, custom or tradition; a common term used to describe adoption in tribal culture is "making relatives." However, TPR and termination of the rights of extended family, clan members or tribal relations is outside the purview of tribal authority or tribal courts.

For many tribes, TPR is associated with some of the most oppressive government policies aimed at tribes and Indian people. Devastating government programs associated with the genocide of American Indian people included forced removal and adoption of American Indian children and the system of American Indian boarding schools. Given the intersection between TPR, conventional adoption and American Indian children, adoption evolved into a very negative construct for tribal communities.

In California, when an Indian child cannot reunify with birth parents, tribes, in order to avoid TPR, have often advocated for a long-term plan of guardianship. However, guardianship does not necessarily offer the permanency that conventional adoption does (as the parents or other parties may petition to terminate the guardianship), nor does it allow for the same type and level of supportive resources for the child as compared to TPR and adoption. Thus, tribes and native families have been forced to choose between a culturally offensive plan of TPR and a plan of guardianship, which is perceived by state and federal agencies as inferior. Further, because of state and federal mandates to secure adoption, many tribes have reported being pressured to accept TPR and adoption despite articulating fundamental opposition to TPR.

The new California Tribal Customary Adoption statute was born out of the tensions between tribal cultural norms, existing state law, and the desire to have Indian children in permanent safe homes but abhorrence for the legal construct of TPR. Further adding to the need for Tribal Customary Adoption (TCA) in California is the lack of robust tribal court systems.

The process of TCA is built around the existing dependency law process but provides that the Tribe will create the framework for the adoption and the state court will adopt the Tribe's framework. Most importantly, with a TCA, the Tribe and state court can complete the adoption without terminating the birth parents' parental rights.

In the early stages of a dependency case in which an Indian child is involved, the county must include TCA in the concurrent planning process. (Welf. & Inst. Code, § 366.24, subd. (b).) If the Indian child cannot be reunified with the birth parents, the Tribe can identify TCA as the preferred permanent plan. The state court then continues the case to provide the Tribe time to complete the tribal adoption through their governance process, custom, tradition and/or tribal ceremony and for the Tribe to prepare the Tribal Customary Adoption Order (TCAO), which establishes the rights and responsibilities of the parties in the context of the complex interests of all involved. (Welf. & Inst. Code, § 366.24, subd. (c)(6).) Once completed the TCAO is filed in the state court and, barring any challenges the state court extends Full Faith and Credit to the tribe's TCAO. (Welf. & Inst.

See *Customary Adoption* on page 8.

## When “Indian Country” Isn’t: The California Court of Appeal Interprets *McClanahan*



By Adele Traversie Bagley

On March 5, 2010, the California Court of Appeal ruled that Angelina Mike, a member of the Twenty-Nine Palms Band of Mission Indians (“Tribe”), must pay state income tax on the distributions she received from her Tribe while residing on a nearby reservation. (*Mike v. Franchise Tax Board* (2010) 182 Cal.App.4<sup>th</sup> 81.) This ruling, which affirmed the state’s position that it may tax the per capita distributions of tribal members who live on the reservation of a tribe other than their own, has significant implications for tribes throughout California, and potentially, across the country.

This matter arose when Ms. Mike sought a refund of the California income taxes withheld by the Tribe on her California Income Tax Return. In 2000, Ms. Mike resided on the reservation of the Agua Caliente Band of Cahuilla Indians (Agua Caliente Tribe). The Agua Caliente Tribe’s reservation is located 18 miles from Ms. Mike’s reservation, which has no housing whatsoever. During that year, Ms. Mike received a distribution of upwards of \$385,000 from gaming operations conducted at the Spotlight 29 Casino on her own Tribe’s reservation. The Franchise Tax Board initially refunded the income taxes in question, but later ruled that she was not entitled to tax exemption. Ms. Mike exhausted her administrative remedies and then filed suit seeking a refund of the income taxes she paid.

The central issue in the case involves the interpretation of the term “Indian country.” In *McClanahan v. State Tax Commission of Arizona* (1973) 411 U.S. 164, the Court held that the state of Arizona could not tax the income of a Navajo Tribal member, derived from a tribal source, where the member lived on the Navajo reservation. In the Court of Appeal, Ms. Mike argued that the *McClanahan* exemption applies when the taxpayer resides in *any* “Indian Country,” including reservation lands of a tribe in which the taxpayer is not a member. The Franchise Tax Board, however, argued that the *McClanahan* exemption only applies when the taxpayer in question lives on the tribal lands of his or her own tribe.

San Diego Superior Court Judge Richard E. Strauss ruled in favor of the Franchise Tax Board. Judge Strauss held that because Ms. Mike did not reside on *her own* Tribe’s reservation, the income she derived from the Tribe’s per capita distributions were not exempt from taxation under the *McClanahan* exemption. Ms. Mike appealed.

Writing for the Court of Appeal, Justice Alex C. McDonald affirmed Judge Strauss’ ruling, citing *Washington v. Confederated Tribes of Colville Indian Reservation* (1980) 447 U.S. 134. The Court in *Colville* distinguished between tribal members, and Indians residing on a reservation other than their own, likening the latter to non-Indians for tax purposes.

Justice McDonald further noted the Supreme Court decision *Duro v. Reina* (1990) 495 U.S. 676, which cited *Colville* in holding that an Indian could not be tried in another tribe’s court for a crime allegedly committed on that tribe’s reservation. Justice McDonald continued that although Congress later passed the so-called “Duro fix,” which established that a tribe has criminal jurisdiction over non-member Indians for a crime occurring on tribal lands, the *Colville* rule survives because Congress has not superseded it by legislation.

Disputing the significance of the distinction between tribal members and non-members in the case of the Agua Caliente Tribe and her own, Ms. Mike cited anthropological linkages between the two groups as support for the argument that the *McClanahan* exemption should apply despite her residence on another reservation. The Court rejected Ms. Mike’s argument that tribes are artificial constructs and that the Court should instead consider the common history and lineage of her Tribe and the Agua Caliente Tribe.

Ms. Mike also challenged the income tax on equal protection grounds, arguing that the tax is discriminatory against tribes with relatively small reservation lands and limited housing options. Indeed, Ms. Mike’s reservation consists of two parcels, totaling roughly 400 acres, compared with the neighboring Agua Caliente Tribe’s reservation, which is comprised of 32,000 acres. The first parcel of Ms. Mike’s reservation contains the tribal gaming facility, parking lot, and sanitation plant. The second parcel consists of undeveloped desert land, which lacks basic infrastructure and has no connections to electrical, water, or sewer facilities.

However, the Court also rejected Ms. Mike’s equal protection argument, citing *Colville* and stating “...there is a rational basis for treating Indians who have left their own tribe’s reservation like all other

See *McClanahan Interpretation* on page 8.

*Jeffredo v. Macarro* from page 2.

Other courts and judges have expressed dissatisfaction with the status quo: “I agree with my colleagues that this case raises issues of cultural and political accommodation that may justify consideration of this question by Congress.” (*Poodry*, 85 F.3d at p. 906 (Jacobs, J., dissenting).) “[T]his case is deeply troubling on the level of fundamental substantive justice. . . . Nevertheless, . . . [t]his is a matter in the hands of a higher authority than our court.” (*Lewis v. Norton* (9<sup>th</sup> Cir. 2005) 424 F.3d 959.) And occasionally judges, though recognizing their own lack of jurisdiction, have been clearly outraged and incensed with the tribes.<sup>3</sup>

In the past, the legislative and executive branches had no qualms about dictating tribal membership. Historically, some tribes were forced by *ad hoc* administrative or military action to amalgamate and combine their membership, while others were legislatively required to include members of other tribes on their rolls. While Congress has not recently shown much interest in tribal membership decisions, there are signs this might change.

Recent disenrollment disputes have focused on the tribes’ motives.<sup>4</sup> In California, the most frequent charge is that tribal leaders are motivated by greed, and that that ruling factions in smaller gaming tribes are cutting out rival claimants to casino revenue distributions.<sup>5</sup> In some situations, political quarrels, feuds, retribution against whistleblowers, and even racial animus have been blamed. The tribes, however, generally maintain they are trying to protect their members by disenrolling people who do not meet *bona fide* requirements. Thus far Congress has not been inclined to intervene, but that could change if disenrollees’ charges of unjust treatment prove persuasive.

One severe proposal came from the Congressional Black Caucus. Dissatisfied with the Cherokee Nation of Oklahoma’s disenrollment of 2,800 descendants of emancipated slaves owned by tribal members before the Civil War, Rep. Diane Watson introduced H.R. 2824, which sought to withdraw all federal funding, put an end to the tribe’s gaming operations and, tribal officials feared, terminate the tribe.<sup>6</sup> Another member of Congress, Rep. Mike Thompson of California’s 1st Congressional District, has taken note of local disenrollments and requested a congressional oversight hearing.<sup>7</sup>

For the present, however, Congress has shown no serious signs of acting,<sup>8</sup> and the prediction that “some court is going to say ‘we’re outraged’ and put it to them”<sup>9</sup> seems unlikely, at least in the Ninth Circuit.

*Mark D. Myers is career law clerk to the Hon. Larry A. Burns of the U.S. District Court for the Southern District of California. The observations and opinions are solely those of the author, in his individual capacity.*

*Editor’s Note: Michele Fahley, a member of CILA’s board of directors, serves as deputy general counsel for the Pechanga Band. However, she was not consulted and had no part in the writing or publication of this article.*

<sup>1</sup> See Larson, *Bureau of Indian Affairs Upholds Robinson Disenrollments; Those Affected Vow to Fight Decision*, Lake County News (Apr. 19, 2010), available online at <http://lakeconews.com/content/view/full/13568/919/> (quoting estimate of American Indian Rights and Resources Organization’s estimate of 11,000 disenrolled nationwide).

<sup>2</sup> Ruckman, *Disenrollment Disputes Flare Across Indian Country*, Native American Times (July 18, 2008) p. 1 (estimating 5,000 disenrollments in California, the highest of any state).

<sup>3</sup> See Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership* (2010) 14 Lewis & Clark L.Rev. 311, 325 (quoting Judge Lawrence Karlton’s expressions of outrage and condemnation in *Lewis v. Norton*).

<sup>4</sup> Bazar, *Native American? The Tribe Says No*, USA Today (Nov. 29, 2006) p. 1A (quoting various sources blaming greed, factions, political payback, and racism).

<sup>5</sup> See, e.g., Painter-Thorne, *supra* note 3 at p. 325 (quoting Judge Karlton’s estimate of “30 millionaires and 20 impoverished people” as a result of a rancheria’s disenrollment of members).

<sup>6</sup> Chavez, *Watson Reaffirms Her Freedmen Support*, Cherokee Phoenix & Indian Advocate (July 1, 2008) p. A1.

<sup>7</sup> Larson, *Efforts Increase to Draw Attention to Indian Disenrollment Problem*, Lake County News (May 10, 2010) available online at <http://lakeconews.com/content/view/full/13862/919/>.

<sup>8</sup> See Painter-Thorne, *supra* note 3, at pp. 338–39 (discussing the likelihood of congressional action).

<sup>9</sup> *Id.* at p. 325 (quoting Judge Karlton).

Coming May 2011 to southern California, the **Fifth Annual Tribal Courts Conference**, presented by California Indian Legal Services. Visit [www.calindian.org](http://www.calindian.org) for updated information.

## The Obama Administration and Indian Country

By Bryan H. Wildenthal



In the May 2009 CILA Newsletter, I reported on the high hopes in Indian Country regarding President Barack Obama's new administration. The President, within months of taking office, asked Congress for big increases in funding for the Indian Health Service (IHS) and tribal courts, law enforcement, and education, and sought approval for tribes to issue tax-exempt bonds. After months of delay, he nominated Utah Law Professor (and former Idaho Attorney General) Larry EchoHawk (Pawnee) for the post of Assistant Secretary of the Interior for Indian Affairs.

More than a year later, as we look back from the autumn of 2010, the Obama Administration has built on these steps, with the help of a Congress controlled by the President's fellow Democrats. Much remains to be done. But in contrast to some policy areas where the administration has disappointed many supporters, the Obama record in Indian Country has been quite strong so far.

EchoHawk was confirmed by the Senate as Assistant Secretary in May 2009 and moved quickly to appoint staff and embark on long-overdue business, focusing on three areas he identified as major concerns for Indian Country: economic development, education and, especially, law enforcement and policing. The Bureau of Indian Affairs had been essentially leaderless and rudderless during the final years of the Bush Administration.

Hilary Tompkins (Navajo) received Senate confirmation in June 2009 after delays caused by a Republican senator's hold. She became the Solicitor (top lawyer) for the Department of the Interior, in charge of legal matters including public lands, mineral and water rights, and Indian law issues. This was the post held in the 1930s and 40s by Felix Cohen, the renowned author of the famous Handbook which molded the modern field of Indian Law.

Within the White House, President Obama appointed Kimberly Teehee (Cherokee) in June 2009 as his senior policy advisor for Native American affairs.

In November 2009, the President hosted a summit meeting at the White House for leaders of nearly 400 Indian Nations, the largest such assemblage since President Bill Clinton's similar summit in 1994. Obama ordered federal departments and agencies to submit,

within 90 days, detailed plans showing how they would implement a long-ignored executive order issued by President Clinton that sought to promote better government-to-government relations between the United States and its Indian Nations. Agencies such as the Department of Justice (DOJ) began issuing their plans in early 2010. It remains to be seen how these will be fully implemented, but the very fact of such efforts has been termed "hugely significant" by Lawrence Baca (Pawnee), former Deputy Director of the DOJ Office of Tribal Justice, and immediate past President of the Federal Bar Association.

Perhaps most dramatically, the Obama Administration announced in December 2009 a proposed \$1.4 billion settlement of the Cobell litigation, a massive class-action launched in 1996 challenging the federal government's mishandling of Indian trust accounts arising from the 19th-century "allotment" (breaking up and selling off) of large areas of tribal land. The settlement, which also calls for an additional \$2 billion from Congress to help tribes purchase fractional interests in trust land from willing sellers, requires legislation by Congress to take effect.

A hearing in March, however, before the House Natural Resources Committee highlighted harsh criticism that the Cobell settlement proposal has received from some Indian Country leaders. Concerns have been raised about attorney fees, and the extinguishment of numerous claims for asset mismanagement that were lumped into the settlement along with the trust accounting claims that were the primary focus of the litigation for the past 14 years. Wisconsin Law Professor Richard Monette (former Chairman of the Turtle Mountain Chippewa Band) declared that the proposed settlement would "itself be a breach of trust." Others have suggested, however, that it is the best deal Indian Country is likely to get, and that no one will benefit from continued delay and litigation. Congress, in any event, has yet to approve the settlement, with Senate procedural hurdles, not surprisingly, a major roadblock.

Some important benefits for Indian people were included in President Obama's health care reform legislation, which passed Congress in early 2010 over vociferous and unanimous Republican opposition. The new law, among many other provisions, permanently reauthorizes the Indian Health Care Improvement Act (IHCIA) of 1976, which had lapsed in 2001 at the outset

See *Obama* on page 8.

## A.G. Opinion Delivers Mixed Results for Tribal Employment Rights Ordinances

By Rovianne Leigh

Earlier this year, the California Attorney General concluded that hiring preferences in Tribal Employment Rights Ordinances (TEROs) do not violate the equal protection guarantee or the Proposition 209 prohibition of discrimination in public contracting or public employment. (Op. Att’y. Gen. No. 07-304 (March 8, 2010).) This recent Opinion makes clear that a *state implemented* tribal hiring preference that is limited to members of a federally recognized Indian tribe should be viewed as a political classification - not a racial one. (See also *Morton v. Mancari* (1974) 417 U.S. 535 [in which the United States Supreme Court concluded over 35 years ago that Indian tribes maintain a *political* and *legal* relationship with the federal government].) This political versus racial classification is important because it demonstrates that classifications favoring Indian tribes do not violate the federal or state constitutional equal protection guarantees. In that regard, the Attorney General’s conclusion correctly reaffirms the political, governmental status of Indian tribes.

The Attorney General unfortunately failed to conclude that compliance with TERO payments (or TERO taxes) is also required. Instead, the Attorney General concluded that while the California Department of Transportation is not prohibited by law from voluntarily paying TERO fees in its discretion, it is not required to pay TERO taxes for highway work performed on tribal lands. (Op. Att’y. Gen. No. 07-304 at p. 20.) This portion of the analysis runs afoul of the full intent of a TERO, which seeks to address tribal employment issues by implementing hiring preferences *and* by providing funding for TERO programs. It also fails to hold that TERO payments, in addition to hiring preferences, are similarly justified by Supreme Court precedent. (See *Montana v. United States* (1981) 450 U.S. 544; see also *FMC v. Shoshone-Bannock* (9<sup>th</sup> Cir. 1990) 905 F.2d 1311 [holding that the Tribe’s Employment Ordinance - including *both* its hiring preference and payment provisions - was enforceable under *Montana’s* “consensual relationship” test].)

Tribes enact TEROs to promote the employment of tribal members, expand job training opportunities for Native American workers, and strengthen tribal communities. Typically, TEROs require non-tribal employers performing work on tribal lands to: 1) honor preferential employment and training standards to ensure that Native American workers have

opportunities to work on such projects; and, 2) provide a TERO payment or fee to the Tribe, which is often calculated as a percentage of the total dollar amount of the project’s payroll or contract for work performed. TERO taxes help tribes implement their TERO programs as well as provide job training and related services to their members. TEROs not only expand job training and employment opportunities for Native American workers, they also promote important tribal interests in the health, welfare, and financial well-being of tribal members and tribal self-government.

TERO payments greatly assist tribal governments to provide training and employment opportunities to tribal members who may live in impoverished communities. TEROs therefore directly impact a tribal government’s ability to address the health, welfare and economic security of its tribal members. For these reasons, both the hiring preference and payment provisions of a TERO should be fully implemented pursuant to the Court’s analysis in *Montana v. United States*, *supra*, 450 U.S. 544.

In *Montana*, the Supreme Court held that tribes may “regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” (450 U.S. at p. 565.) Employment contracts and rights of way should fit squarely within this framework. The *Montana* case also holds that tribes retain the “inherent power” to regulate nonmembers when their conduct threatens or directly affects the “political integrity, the economic security, or the health or welfare of the tribe.” (*Id.* at p. 566.) An employer’s refusal to comply with a TERO would certainly “threaten” or “directly affect” the political integrity, economic security, and health or welfare of a tribe. (*Ibid.*) Despite the Attorney General’s conclusion to the contrary, TERO payments to a tribe should be required under *Montana*.<sup>1</sup>

The Attorney General’s conclusion that TERO payments are not required under either *Montana* exception is disappointing. (Op. Att’y. Gen. No. 07-304 at p. 17.) However, the Opinion notes that there is “little doubt that the Legislature’s discretion would be upheld if it were to determine that it would serve a public interest to pay TERO taxes....” (*Id.* at p. 18.) The Opinion

See *A.G. Opinion* on page 10.

*Obama* from page 6.

of the Bush Administration. It substantially boosted funding for the IHS, though still not enough to make up for years of shortfalls. The President touted the IHCA reauthorization in a statement noting that he had co-sponsored it as a senator in 2007, that the "responsibility to provide health services to American Indians and Alaska Natives derives from the nation-to-nation relationship between the federal and tribal governments," and that "we have taken a critical step in fulfilling that responsibility by modernizing the Indian health care system and improving access to health care."

According to various reports, the health care law will enhance numerous IHS programs, including long-term care, mental health, mammographies and cancer screening, facility construction, and treatment of communicable and infectious diseases such as tuberculosis, hepatitis, and HIV/AIDS. It should also help with recruitment of health care professionals in Indian country.

Also, the jobs bill that President Obama signed earlier in March included some limited authority for tribes to issue tax-exempt bonds, for things like sewage and water-supply projects.

In July 2010, President Obama signed the most important new Indian legislation in years, the Tribal Law and Order Act (TLOA). The TLOA amended various sections of federal law to improve law enforcement within Indian Country. Most notably, it raised the maximum criminal sentence which tribal courts are authorized to impose from one to three years. The TLOA was passed in an omnibus bill that also included amendments to enhance enforcement of the Indian Arts and Crafts Act.

All in all, hopes appear to remain high in Indian Country for further progress in Washington, as the Obama Administration heads toward the midterm elections. A substantial and positive start has been made. But a long hard road remains ahead.

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*Customary Adoption* from page 3.

Code, §§ 366.24, subds. (c)(6) and (8), 366.26, subd. (e)(2).) Upon accepting the TCAO, the state court issues an Order of Adoption and terminates jurisdiction over the case. (Welf. & Inst. Code, § 366.24, subd. (c)(14).) If disputes arise after the Order of Adoption is executed, the parties may utilize family mediation services of the court or dispute resolution processes through the tribe; further the parties may request assistance from the court to resolve any remaining disputes. (Welf. & Inst. Code, § 366.26, subd. (i)(2).)

Laws that differentiate between dependent Indian and non-Indian children tend to provoke strong and vociferous condemnation or support, there is little middle ground. Legal battles over native children are often truly ugly and tragic. Tribal Customary Adoption is not the answer to this cultural or legal divide - it is simply an additional option that proponents hope will provide culturally appropriate permanency for tribal children without reliance on the offensive legal construct of terminating parental rights.

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*McClanahan Interpretation* from page 4.

taxpayers in California, because, for most practical purposes, those Indians stand on the same footing as non-Indians resident on the reservation."

Despite Ms. Mike's arguments that Indians need not live on their own reservation to live in "Indian country," the Court of Appeal ultimately ruled otherwise, in favor of the Franchise Tax Board. Mr. Richard Freeman, attorney for Ms. Mike, stated that his client intends to appeal the decision. In an interview with Debra Gruszecki of The Desert Sun Newspaper on March 9 (MyDesertSun.com), Mr. Freeman stated "I think [the California Court of Appeal's ruling is] absolutely wrong," and continued "I think the Supreme Court is going to be the tribunal that is going to have to decide this issue."

Given the implications of this decision, *Mike v. Franchise Tax Board* is a case to be watched by tribes and practitioners of Indian law.

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*Adele Traversie Bagley is a member of the Cheyenne River Sioux Tribe of South Dakota and graduate of U.C. Berkeley Law School (Boalt Hall). She currently resides in Miami, Florida and works at the law firm of Daniel H. Forman.*

## *Rincon v. Schwarzenegger* and the Future of California Indian Gaming

By Dan Rey-Bear

In April 2010, a divided panel of the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Rincon Band of Luiseno Mission Indians v. Arnold Schwarzenegger* (9<sup>th</sup> Cir. 2010) 602 F.3d 1019. The Ninth Circuit held that the State of California did not negotiate in good faith as required by the Indian Gaming Regulatory Act (“IGRA”) where it asserted a nonnegotiable demand for a percentage of a tribe’s net profits for unrestricted state use, which constituted an impermissible tax under IGRA, and that the state could not rely on existing gaming exclusivity as consideration for additional revenue sharing.

Based on that decision, the Department of the Interior in August 2010 disapproved a gaming compact for the Habematolel Pomo of Upper Lake, in Lake County. Also, in September 2010, after the Ninth Circuit denied rehearing, the State of California filed a petition for a writ of certiorari to the United States Supreme Court regarding the *Rincon* case. These decisions and actions present notable issues for the future of Indian gaming in California.

In *Rincon*, the Tribe objected to the State’s positions in compact renegotiations in 2003 to 2006, wherein the State offered exclusivity, which the Tribe already had under Proposition 1A. Also, the Tribe objected that the State sought money for its general fund, whereas IGRA restricted revenue sharing to matters related to regulation, infrastructure, or impacts concerning gaming. As the State’s expert conceded, if the Tribe invested substantially to allow for additional gaming, the Tribe would gain only approximately \$2 million in additional revenue, while the State would gain \$38 million.

Based on this record, the Ninth Circuit majority concluded that the State negotiated in bad faith, as prohibited by IGRA. First, the court rejected the State’s argument that general fund revenue sharing is “directly related to operation of gaming activities[,]” as required by IGRA. Second, the court rejected the State’s argument that pursuit of state general economic interests is consistent with IGRA’s purpose, especially given that the state here would be the primary beneficiary of the gaming rights under negotiation. Third, the court concluded that the State did not offer any meaningful concessions in exchange for its revenue sharing proposal because the Tribe already enjoyed the right of exclusivity as a matter of

state constitutional law, which already had provided the consideration for other revenue sharing under the 1999 compact. Finally, the court found that the State’s belief that IGRA permitted the revenue sharing it sought was objectively unreasonable. In this, the court found that the State could not rely on the federal government’s prior actions in allowing other, similar compacts to go into effect to the extent that they were consistent with IGRA where such approval was requested by Indian tribes.

Against all this, the Ninth Circuit dissent contended that the majority decision confounded taxation and revenue sharing, that it improperly valued the asserted consideration, which included a 25-year compact extension, and that IGRA allowed the State to use revenue sharing for general purposes. In sum, the dissent asserted that the majority decision would require the State to authorize whatever additional gaming the Tribe sought, and that it would result in chaos as tribes throughout the country would seek to reopen compact negotiations based on the majority decision.

In the subsequent Habematolel decision, the Assistant Secretary refused to approve a compact providing for payment of 15 percent of casino revenue to the state general fund, plus \$900 for every gaming machine above 350, provided that the revenue sharing requirement would end if any nontribal gaming facility came within 100 miles of the Habematolel facility. While the Tribe broke ground on the facility earlier this year, that construction had to stop without an approved compact. The Tribe has stated that it feels caught in the middle of a dispute between the federal government and the State.

Finally, in the recent certiorari petition, the State has presented the questions of whether a proposal for revenue sharing for a state’s general fund constitutes impermissible direct taxation under IGRA, and whether the Ninth Circuit exceeded its jurisdiction in weighing the relative value of concessions offered by parties in compact negotiations. Like the Ninth Circuit dissent, the State on certiorari contends that these are urgent, important, and recurring issues. A ruling on the certiorari petition is not expected until late this year. Supreme Court review of the *Rincon* case could have substantial impacts for future compact negotiations across the country. Moreover, pending a Supreme

*Rincon* from page 9.

Court decision on the merits if certiorari is granted, or if the certiorari petition is denied, future California gaming compact negotiations could be affected substantially by both the recent Habematolel decision as well as the result of the upcoming California gubernatorial election. With these subsequent and pending developments, only time will tell whether the Ninth Circuit *Rincon* decision will truly reset the balance regarding California gaming compact negotiations.

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*Max Mazzetti* from page 11.

Max is survived by his two sons Ed (spouse of Suzanna) and Bo (spouse of Mary), sister Alberta McNeal, brother George (spouse of Jody) Mazzetti, numerous grandchildren, great grandchildren, nieces and nephews. He was preceded in his death by his wife, Clarinne, and brother, Frank Mazzetti, Jr.

Max Mazzetti's remains were buried at the Rincon Cemetery on the Rincon Indian Reservation on April 3, 2010.

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*A.G. Opinion* from page 7.

further urges the Department and the tribes to continue to work together to address any disagreements regarding highway projects on tribal lands "with mutual respect and appreciation for the respective sovereign interests involved." (*Id.* at p. 18, n. 63.) Should the State and its agencies in fact deal with Tribes on a "government-to-government" basis - with "respect and appreciation" for tribal sovereignty - TERO payments to help further tribal employment and tribal self-government would be the logical result. Tribes should continue to pursue TERO payments from the California Department of Transportation (and other state agencies) pursuant to voluntary agreements such as Memoranda of Understanding (MOU).

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<sup>1</sup> Given the Supreme Court's own reluctance to uphold tribal jurisdiction under *Montana*, the Attorney General's failure to conclude that the *Montana* exceptions apply here is, while disappointing, in line with a concerning judicial trend limiting tribal jurisdiction. (See, e.g., *Plains Commerce Bank v. Long Family Land and Cattle Co.* (2008) 128 S.Ct. 2709 [holding that the Tribal Court did not have jurisdiction to hear a case regarding discriminatory lending practices asserted by Indian lessees and their family farming corporation, and finding that neither *Montana* exception applied]. But see *Merrion v. Jicarilla Apache Tribe*, (1982) 455 U.S. 130, 137 ["The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."]; *Kerr-McGee Corp. v. Navajo Tribe* (1985) 471 U.S. 195, 198 [upholding business activity and possessory interest taxes on non-Indian lessees].)

CILA is extremely grateful to the San Manuel Band of Mission Indians for sponsoring its 10<sup>th</sup> Annual Indian Law Conference at the Pala Resort & Casino on October 8, 2010, and to the following additional donors: Nordhaus Law Firm, LLP; Thomas Jefferson School of Law; and Alexander, Berkey, William & Weathers, LLP.

## Remembering Max Mazzetti: Early California Indian Law Advocate

*The following obituary and tribute to the late Max Mazzetti was written by, and reprinted with the permission of, his son, Bo Mazzetti.*

Max Mazzetti, 88, beloved husband, father, grandfather, uncle and friend, passed away March 25, 2010. Max was the son of Georgia Calac and Frank Mazzetti, and father of Rincon Tribal Chairman, Bo Mazzetti.

Max graduated from Sherman Indian Institute in Riverside, California, where he was quarterback for the varsity football team. He later served as President of the alumni association for many years. After graduating, Max joined the U.S. Navy and served in World War II. He met his wife of 64 years, Clarinne, who was a member of the U.S. Marine Corps, at a dance. She preceded Max in death, passing away August 14, 2009.

After the war, he returned to the Rincon Reservation where he served as Tribal Chairman and Council member during the tumultuous "termination years." Max started working on the Indian lands and Indian water rights claims in 1947. He worked hard as a carpenter at Camp Pendleton and farming on the reservation, as well as working nights on Indian rights issues. But he knew how to have a good time. In the 1940s, his band would play at the Rincon Springs General Store and Café and surrounding reservations.

Max had many titles: secretary/treasurer, director and chairman of the Tribal Councils of California, formed to challenge termination; "Mr. PL 280" because of his knowledge and experience of the years when criminal law enforcement of California Indians was given to the state; "Indian Correspondent" because he kept local newspapers informed of tribal affairs; and "the Senator" for years of meetings and letter-writing to state and local officials on behalf of Indian people. Max was one of the founders of the National Congress of American Indians, the Inter-Tribal Council of California and many other Indian rights organizations.

But he is best remembered for his leadership and commitment to stopping the takeover of Indian lands by the state of California, dissolution of tribal governments, removal of 117 California tribes from federal trust, and ending all federal funding and tribal support programs. Known as "termination," the federal Legislation HR 7473 and P.L. 83-280 called for the termination of Indian governments and trust lands in 10 states. In 1950, Max and other tribal leaders discovered that the Bureau of Indian Affairs (BIA)

appropriations for tribes had been cut off, leaving no funds for education, water, health care and other services that the tribes needed.

Max and friends organized the Tribal Councils of California, which enlisted a number of Congress members and state representatives to help get the funds temporarily restored and a resolution (Resolution No. 4) passed by the State, opposing termination. This act saved the majority of California tribes from termination. It also gave them back their sovereign right to govern their lands, as well as ensuring that the federal government would continue to meet its trust responsibility to tribes. Max served as the first secretary/treasurer of the organization and a variety of other prominent posts as chairman and director.

Termination and Public Law 280 created confusion over jurisdictions between the State and tribes. An example was the stopping of tribal fiestas because they didn't meet county health codes, and Indian arrests for fishing and hunting on their reservations. Max worked to reinstate these rights too. Another issue that Max took to heart was the refusal to grant GI loans to Indians, and, as Chairman of the Tribal Councils, Max turned to officials in Washington D.C, when five Indian patients were prematurely released from the San Diego County Hospital in one week and died. Max also fought against San Diego County placing liens on Indian land in violation of federal law and won.

After securing World War II temporary housing units that were offered as salvage for three counties in California, Max led a lawsuit against Riverside County, which would not allow the homes to be rebuilt on reservations because they were "red-tagged" and substandard by county ordinances. The suit was decided in favor of the Indians, reconfirming that counties have no authority to enforce their ordinances on tribal land.

Also serving on a tribal organization to restore water to four North San Diego County reservations, Max was able to see legislation signed by then President Reagan, which began the process of returning water that was illegally routed to cities back to the reservations. Max leaves a legacy as a leader, mentor and friend. He will be dearly missed, not just for the passion he showed, or the time and resources he gave to defending Indian people, but for the many kindnesses and generosity of heart he shared with all who knew him.

See *Max Mazzetti* on page 10.

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