



California Indian Law Association Newsletter

COVERING CALIFORNIA AND NATIONAL INDIAN LAW TOPICS

APRIL 2018



Sneak Peek Inside

This edition of the CILA Newsletter covers a wide range of topics including tribal exclusions, consultations, and the Clean Water Act. We also celebrate recent successes of our colleagues in the areas of cultural conservation easements and tribal court development.



Membership Spotlight

Congratulations to CILA member and previous CILA Vice President Christina Snider (Dry Creek Rancheria Band of Pomo Indians) who was appointed Tribal Advisor and Executive Secretary for the Native American Heritage Commission by Gov. Jerry Brown in February.

Save the Date

Join CILA for the 18th Annual California Indian Law Association Conference and Gala October 11-12, 2018 at the recently remodeled Pechanga Resort & Casino located in Temecula, just one hour north of San Diego.

Meet the 2017 Scholarship Winner

In 2017, CILA proudly awarded its first 3L Diversity Scholarship with the California Bar Foundation to Jacklyn Velasquez (Big Pine Paiute).

Welcome from the President

It is with great pleasure that I introduce the revival of the California Indian Law Association (CILA) newsletter. It is the Board's intent that this newsletter will launch a new era of engagement by CILA in publishing informative material that will keep members informed of relevant developments in Indian law and tribal communities in California. We thank the authors for their time and excellent work in producing this original content.

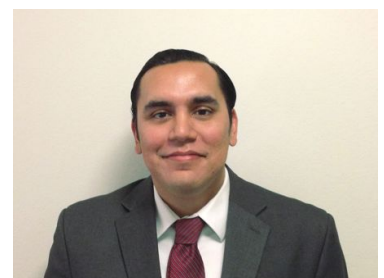
For the past fifteen years, CILA and its members have served as representatives of the Indian law legal profession in California. As legal warriors pursuing the sound administration of justice in Indian Country and the promotion and protection of tribal sovereignty, CILA has worked steadily to create professional and educational opportunities for members of the California Indian law community.

Each year, CILA holds an Annual Conference dedicated to discussion of legal topics of vital interest to California Indian tribes. We are proud to announce that the 2018 Annual Conference will be held at Pechanga Resort & Casino on the Pechanga Indian Reservation on October 11th-12th, 2018. This year's Annual Conference will offer fresh and interactive opportunities to earn Continuing Legal Education credits and engage in enlightening discussion and networking opportunities with Indian Country thought leaders. We will also be expanding our outreach to law school, graduate, and undergraduate communities to provide volunteer options at this year's Annual Conference to facilitate meaningful educational opportunities for students.

CILA is also co-sponsoring – for the second consecutive year – a 3L Diversity Scholarship with the California Bar Foundation to assist with expenses for one graduating law student who plans to take the California Bar Exam in July. Our goal is to encourage more law students to consider a career in the service of tribal governments and communities. By offering this scholarship, we engage students at an early point in their professional development and help produce attorneys interested in serving Indian tribes. Although the application period for this year's scholarship has closed, we encourage students to check back with us at the end of 2018, as we plan to continue offering this opportunity each year going forward.

If you are interested in donating to CILA, please visit our website at www.calindianlaw.org. CILA is a 501(c)(3) non-profit organization and donations are tax-deductible. With your support, we can continue to enhance the professional growth and development of members of the Indian law legal profession and tribal justice system personnel in California. Enjoy this issue, and please feel free to reach out to us with your feedback!

Will Haney
President
California Indian Law Association



Tavares v. Whitehead: The Ninth Circuit Weighs Availability of Habeas in a Tribal Exclusion Case

Written by Mark D. Myers

In 2009, the Ninth Circuit wrestled with difficult disenrollment and civil rights claims in *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2009), a case reviewed in the 2010 CILA newsletter. Recently, the Circuit has addressed similar civil rights claims in *Tavares v. Whitehouse*, 851 F.3d 863 (2017), petition for cert. filed, (No. 17-429), Sept. 21, 2017. Like *Jeffredo*, *Tavares* drew a strong dissent.

Jessica Tavares and three other members of the United Auburn Indian Community disagreed with the tribal council's governance and submitted a recall petition to the tribe's election committee, accusing the tribal council of mishandling tribal finances, dishonesty, and election-rigging. *Tavares*, 851 F.3d at 867. After the petition was rejected, the council sent each of them a notice of discipline accusing them of defaming the tribe and notifying them the council had voted to withhold their per capital distributions and ban them from tribal land and facilities – though not their own homes. *Id.* They were allowed to contest their per capita suspensions at a hearing, but the ban was effective immediately. *Id.* at 868. The tribe's appeals board affirmed the council's actions in a thirty-page written decision. The board did reduce the terms of their per capital withholding, though. *Id.* Unlike the *Jeffredo* petitioners, they did not lose their membership.

Tavares and the other three filed a habeas corpus petition in federal court, asserting rights under the Indian Civil Rights Act, 25 U.S.C. §§ 1301, et seq. The ICRA extended to people subject to tribal jurisdiction a set of rights similar to those guaranteed by the U.S. Constitution.* Under § 1303, the writ of habeas corpus is available to any person in federal court, to “test the legality of his detention by order of an Indian tribe.” In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978), the Supreme Court held that habeas is the only form of relief available under the ICRA. And habeas relief is only available to a petitioner who is “in custody.” *Maleng v. Cook*, 490 U.S. 488, 490 (1989). Tavares focuses on the thorny problem of what “in custody” means.

“Detention” for ICRA purposes, is interpreted similarly to “custody” in other habeas contexts. *Jeffredo*, 599 F.3d at 918. Custody, at a minimum, involves restraints on a person's liberty not shared by the public generally. See *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). Because habeas is an “extraordinary remedy,” it is supposed to be available only in cases of “special urgency,” and not in cases where restraint is neither severe nor immediate. *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973).

The prototypical “custody” is imprisonment or other detention by the government. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (prisoner of war in federal custody at a U.S. naval base). But it also includes many – but not all – situations where a petitioner's



freedom to come and go is restricted. It includes situations where the petitioner must be present at a particular time and place, such as conscription, or required attendance. See *Jones*, 371 U.S. at 240 (noting with approval the use of habeas to challenge military induction); *Dow v. Circuit Court*, 995 F.2d 922, 923 (9th Cir. 1993) (mandatory attendance at alcohol rehabilitation program). It includes arrangements where the petitioner's physical freedom is contingent or conditional, such as bail, probation or parole. *Hensley*, 411 U.S. at 348–49, 351 (release on his own recognizance constituted custody). And it may include the petitioner's exclusion from the country. See *Jones*, 371 U.S. at 240 and n.10. But see *Miranda v. Reno*, 238 F.3d 1156, 1158–59 (9th Cir. 2001) (deported alien who could not legally reenter the country was not “in custody”).

*Tribes are not signatories to the Constitution, and as such are not bound by the same limitations that bind Congress and the states. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

On the other hand, custody does not include deprivation of many other important rights and privileges, even if they are severe and affect a person's ability to travel and relocate. *See, e.g., Henry v. Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999) (registration as a sex offender, including requirement that registration be done in person at police station); *Harts v. Indiana*, 732 F.2d 95, 96–97 (7th Cir. 1984) (suspension of driver's license). It does not include loss of one's livelihood or office. *Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987) (revocation of medical license); *Ginsberg v. Abrams*, 702 F.2d 48, 49 (2d Cir. 1983) (per curiam) (revocation of law license, disqualification as real estate broker and insurance agent, and removal from family court bench). Nor does it include other types of punishments, such as fines. *See Edmunds v. Won Bae Chang*, 509 F.2d 39, 40–41 (9th Cir. 1975) (holding that fine did not amount to custody, even though failure to pay it could be punished with jail time).

In the tribal context, it does not include disenrollment or denial of membership. *Santa Clara*, 436 U.S. at 72 n.32. It likewise does not include other restraints or losses of benefits, including inability to participate in the community, loss of health insurance, loss of access to tribal health and recreation facilities, and loss of money distributions. *Jeffredo*, 599 F.3d at 919.

The ICRA creates rights that may be difficult to enforce. If a right cannot be vindicated by federal habeas relief, the only alternative forum is tribal court or equivalent tribal entities. *See Santa Clara*, 436 U.S. at 65. Of course, tribal forums do not always exist, and those that do cannot always provide meaningful redress. In this case, the petitioners were able to appeal the suspension of their per capita payments to an appeals board, which granted them some relief. But their exclusion was unappealable. *Tavares v. Whitehouse*, 2014 WL 1155798 at *5 (E.D. Cal., Mar. 21, 2014).

Why would Congress create rights, but provide only a relatively narrow enforcement mechanism? According to *Santa Clara*, this was a deliberate choice by Congress, and represents an effort to balance tribal sovereignty with individual liberty. 436 U.S. at 62, 66. The ICRA sought to protect individual rights, of course. But providing for de novo review in federal court of all disputes claiming a violation of rights would both burden and undermine tribal courts, and prevent tribal governments from keeping order. *Id.* at 66–67.

The difference between cases like *Tavares*, *Jeffredo*, and others, often turns on the kind of harm a reviewing court believes the petitioner has suffered.

Being banned from particular facilities, and consequently missing out on the services they provide or the interactions that take place there is not considered custody. *See Jeffredo*, 599 F.3d at 919 (citing *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 714 (2d Cir. 1998)). In *Shenandoah*, for instance, besides losing their tribal citizenship, petitioners alleged they were banned from a variety of businesses and recreational facilities, such as the health center, the casino, Turning Stone park, the gym, and the bingo hall. *Id.* at 714. In *Jeffredo*, petitioners also lost their tribal membership, as well as access to the senior citizens' center and health clinic, and their children were not allowed to attend the tribal school. 599 F.3d at 918–19.

Permanent banishment, on the other hand, is usually treated as custody, even if the banishment is not actually carried out. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 878, 893–95 (2d Cir. 1996) (quoting sentence of banishment from the tribe's 7,500 acre reservation, and describing unsuccessful efforts to carry it out). The dissent in *Jeffredo* took issue with the majority's observation that the petitioners had not been banished, see 599 F.3d at 919, arguing that because they had been disenrolled and because nonmembers had no right of access and could be detained or ejected from the reservation at will, they were in custody. *Id.* at 923–24.

The facts of *Tavares* are on the fence. Petitioners were not disenrolled, but allege they were excluded, which at times is described as a "banished." *Tavares*, 2014 WL 1155798 at *5. Elsewhere, it is referred to merely as being "banned". *Id.* at *4. The petitioners here, unlike those in *Poodry*, were excluded for a definite limited time, rather than permanently. During the pendency of the proceedings, three of the petitioners' terms expired, and their petitions were dismissed as moot, leaving only *Tavares*, who had been excluded for a longer term. 851 F.3d at 870 n.8. Their exclusion applied to the tribe's twelve parcels of land as well as off-Rancheria facilities. *Id.* at 866. Specifically, they alleged they were excluded from tribal offices, the casino, the school, health and wellness facilities, the park, and the senior center. 2014 WL 1155798 at *4. They were not excluded from twenty-one privately owned parcels of land, including their own homes. *Id.*

Judge Wardlaw, in her dissent, agrees that denial of access to particular buildings does not amount to custody. But she goes on to argue that "denying an individual access to certain government facilities is a far cry from denying her access to her homeland." 851 F.3d at 887.

Though neither the majority nor the dissent discusses it, the size of tribal lands is probably a factor in evaluating the meaningfulness of the distinction between banishment from an entire reservation and exclusion from certain buildings. In a case like *Poodry*, which involved a 7,500-acre reservation, the distinction between the reservation as a whole and certain buildings on it would be significant.

The Rancheria here, however, is rather smaller – 40 acres divided up among non-contiguous parcels. Some tribes' lands in California and elsewhere are much smaller still, such that there is almost no difference between a tribe's land and its buildings or facilities.

The type of harm Tavares alleged suggested her claim did not seek primarily physical liberty, but on the right to participate in society. She focused on loss of opportunities to participate in social, political, cultural, and other public events. 2014 WL 1155798 at *4. For example, as a result of the ban she could not participate in tribal ceremonies, the tribe's culture fair, public meetings, her grandchildren's school graduations, or similar events, nor could they go to the senior center. In this respect, her harm appears to be similar in type to the harm in *Jeffredo* and *Shenandoah* that did not amount to custody. The only alleged harm that arguably involved physical restraint was her inability to walk her grandchildren to class.

It is worth noting that *Tavares*, *Jeffredo*, and *Poodry* were all split decisions. None presents a perfectly clear case for or against a finding of custody or detention. Thus far, majorities in the Ninth Circuit have generally applied stricter custody requirements. But it is also clear that a substantial number of judges would conduct habeas review if they could. The dissents in *Tavares* and *Jeffredo* can fairly be described as eager to find a way to review tribal judgments. And even courts that have recognized greater limits on their own authority have expressed frustration at their inability to provide a remedy for situations they see as deeply troubling. See *Jeffredo*, 599 F.3d at 921. In terms of the balance *Santa Clara* concluded that Congress struck in enacting the ICRA, the Ninth Circuit appears thus far to lean somewhat towards the tribal sovereignty side, though future decisions are hard to predict.

As of the time of this writing, the Supreme Court is considering accepting this case for review. If that happens, the Court could clarify what is clearly a contentious issue.

Editor's note: The Supreme Court denied cert for the Tavares case on March 26, 2018.

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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.

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Consultation on Tribal Terms

Written by Sara Clark

The promise of government-to-government consultation for federal government actions that may impact Indian tribes and their members pervades federal Indian law. The theory behind such consultation is process-oriented: if Indian tribes and the federal government have a chance to openly discuss issues of importance to tribes, then the federal government can take these issues into consideration in its decisionmaking process, ultimately leading to better outcomes. But most Indian tribes know that this process is often broken. This article explores one concrete step that Indian tribes can take to start to improve outcomes: adoption of a tribal government-to-government consultation policy.

The Basis of Consultation

Fundamentally, the right to consultation is grounded in both Indian tribes' status as sovereign nations and the trust relationship between the federal government and federally recognized tribes. As sovereign nations, Indian tribes approach the federal government on a government-to-government basis. And as trustee, the federal government is responsible for acting in the best interests of Indian tribes and their trust assets. Government-to-government consultation is necessary to understand these interests.

From this foundation, the right to government-to-government consultation has been codified across federal law. For instance, Section 106 of the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the Archaeological Resources Protection Act all contain consultation provisions, largely related to the protection of cultural resources and burial sites. The executive branch has taken a wider view, issuing executive orders to promote consultation on nearly all activities of the federal government that may impact tribes or their relationship with the federal government. *E.g.*, Executive Order 13175 (requiring consultation on actions that "have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."). And most federal agencies have developed formal and informal policies to guide their tribal consultation activities.

But consultation is no longer confined to federal-tribal relationships. In 2004, California enacted SB 18 to require tribal consultation in the development of general plans to guide land use in local jurisdictions. In 2011, Governor Brown directed state agencies to develop consultation policies to be used in their interactions with tribal governments. And in 2014, the state legislature enshrined consultation obligations in the California Environmental Quality Act, which applies to nearly all discretionary actions taken by state and local entities.



While these policies differ slightly—especially in their application to non-federally recognized tribes—the intent of state consultation is the same: to engage tribal governments in a manner that is intended to lead to better state and local decisions.

The Perils of Consultation

Unfortunately, the theory of consultation—that opening a dialogue between tribes and federal, state, and local decisionmakers will lead to outcomes that are more favorable to tribal interests—is not often borne out in practice. The approval of the Dakota Access Pipeline over the opposition of the Standing Rock Sioux and other Tribes is one recent and very public example of the ineffective and broken consultation system. Less publicized consultation failures occur throughout Indian Country on a regular basis.

These failures were well documented in tribes' responses to the Obama Administration's "consultation-on-consultation" for federal infrastructure decisionmaking. Tribes "spoke with one voice as to the need for improvement in how and when Federal agencies engage tribes" in consultation (Note: U.S. Department of the Interior et al., "Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions" (January 2017), available at: <https://www.bia.gov/as-ia/raca/tribal-input-federal-infrastructure-decisions>). Specifically, tribes are concerned that "agencies neither treat tribes as sovereigns nor afford tribes the respect they would any other governmental entity—let alone treat tribes as those to whom the United States maintains a trust responsibility."

Tribes also raised myriad specific concerns, on everything from timing and a lack of opportunity for providing meaningful input to lack of trained federal staff and the need for litigation to enforce rights. This process culminated in a comprehensive set of recommendations for modifying statutory language, training federal officials, and ensuring that the federal government is conducting consultation in a meaningful and effective way.

Thus far, however, the Trump Administration has shown no intention of working to adopt any of these recommendations or otherwise address tribal consultation.

Taking Matters into Tribal Hands

As recognized by the prior administration and most tribes, substantial changes are needed at the federal level. While waiting for these federal changes, Indian tribes can also focus inward. One option for growing capacity and asserting tribal sovereignty is to adopt a tribal government-to-government consultation policy or ordinance to guide tribal-federal and/or tribal-state relationships.

The purpose of such a policy is to explain—in the tribe’s own words—the process and conditions that constitute adequate government-to-government consultation, rather than leave the definition of consultation to the mix of federal or state statutes, executive orders, policies, and case law. These sources are often vague or inconsistent. A tribal policy can and should draw from them, but can go further in defining and detailing how consultation should be run. It may also incorporate aspects of tribal governance or traditional practices and customs to create a comprehensive consultation policy.

In drafting a tribal consultation policy, Indian tribes may want to consider including provisions that address the following issues:

Timing. The policy should include a discussion of the timeframe for consultation, from initial outreach through the culmination of consultation. This discussion may also address when consultation must be reopened and how consultation fits with other aspects of federal, state, and tribal decisionmaking.

Involved Parties. The policy should include a description of the decisionmakers and staff members from tribal and federal or state entities that should be involved at various points in the consultation process. This discussion can also explain the appropriate involvement of project applicants, other tribes, or other third parties, if any.

Use of Tribal Information. The policy might also address how the federal or state government should use the information gained in consultation. Key aspects to consider include use of information in decisionmaking, responses to written and oral comments, and confidentiality.

Resources. The policy should guide the process of consultation to reduce strain on scarce tribal resources. It may include requirements to host meetings at tribal offices, reduce paperwork, or provide information in a manner that is helpful to the tribes.

Expectations. Finally, the policy should outline the tribes’ expectations for how the policy will be used by government officials. For instance, the policy may require a consulting agency to acknowledge the policy prior to scheduling any government-to-government consultation meeting with tribal decisionmakers.

Why Adopt a Policy?

Once adopted, a tribal consultation policy may offer numerous benefits to Indian tribes, especially in an era of stalled federal action on this issue. First, the policy can set expectations for all decisionmakers. Rather than just expecting federal and state officials to understand how a tribe interprets its right to consultation, a written policy can educate individual officials about tribal expectations. It may also reduce the amount of time the tribe spends on bringing new agencies or officials up to speed. Likewise, the policy can help present a unified tribal understanding of consultation. Tribal decisionmakers and staff can rely on the policy to explain the tribe’s position in a consistent and comprehensive manner. It can also be used to educate new tribal decisionmakers or staff as they are elected or hired.

Second, a tribal consultation policy can be used to assert tribal sovereignty in an area where federal law is pervasive. When asserting a consultation right, tribes often turn to both the statutes and interpretations offered by (mostly) non-Indian lawmakers, federal officials, and judges. A tribal consultation policy shifts some of this interpretive power to the tribes themselves.

Third, a well-crafted policy can help tribes define the narrative about the relationship between tribes and the federal and state government. An adopted policy can be used in comment letters, press releases, and other narratives to explain to non-Indians why adequate consultation is so important.

Finally, a tribal consultation policy may help tribes prevail in consultation litigation under the National Historic Preservation Act and other federal law. In Section 106 litigation, a judge is asked to weigh whether form letter, telephone calls, and informational meetings constitute adequate consultation, when a tribe’s preferences are not taken into account in the final decision. Without a tribal policy, the judge’s interpretive efforts are guided exclusively by federal sources. An adopted tribal policy, especially one that has been acknowledged by the agency, may help bolster the tribe’s position.



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Amah Mutsun Tribal Band Secures Cultural Conservation Easement to Ancestral, Sacred Lands in Ground-Breaking Stewardship Partnership

Written by Rovianne Leigh and Loretta Miranda

In a precedent-setting collaboration between the Amah Mutsun Tribal Band ("Tribe") and the Midpeninsula Regional Open Space District ("District"), the Tribe was granted permanent access to its ancestral, sacred lands on Mt. Umunhum in Santa Clara County, California in December of 2017. "This Cultural Conservation Easement ensures that our Tribe will have access to the mountain of our creation story for tribal gatherings, ceremony, and environmental and cultural resource protection in perpetuity," stated Tribal Chairman, Valentin Lopez.

Mt. Umunhum, whose name comes from the Ohlone word for hummingbird, is central to the Tribe's cultural identity and is revered by many California Indians, including the Mutsun peoples who originally inhabited and owned the lands. "This cultural easement helps our Tribe heal from our historic trauma by allowing us to return to the path of our ancestors and fulfilling our obligation to the Creator," continued Chairman Lopez.

For California Indian nations not recognized by the federal government, opportunities to acquire or steward ancestral Tribal lands are limited. Cultural conservation easements are a unique mechanism to reconnect Tribes to their ancestral lands and enable them to carry out their stewardship responsibilities for such lands. California law authorizes unrecognized Tribes on the contact list maintained by the California Native American Heritage Commission to hold easements where they will "protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place." See Cal. Civ. Code § 815.3.



"The collaborative partnership between the Tribe and District can serve as a model for non-federally recognized California Indian Tribes that are fighting to protect and to reconnect with their sacred sites and ancestral lands.



"We believe this cultural easement sets a precedent for how we can conserve and protect other important cultural and spiritual sites within our territory," stated Chairman Lopez. The easement will promote indigenous land and cultural stewardship through the application and sharing of traditional ecological knowledge related to traditional conservation and sustainable resource management practices. The Easement also authorizes the creation of a Tribal Garden and the use of a Tribal ceremonial space. In return, the Tribe and its non-profit organization, the Amah Mutsun Land Trust ("AMLT"), will provide significant educational, cultural and traditional stewardship services to the District and the public. Since Mt. Umunhum was opened to the public in September of 2017, an estimated 100,000 visitors have taken advantage of its scenic trails and vistas. The AMLT will assist in expanding stewardship opportunities on Mt. Umunhum.

For more information, please visit the Amah Mutsun Land Trust's website: www.amahmutsunlandtrust.org.



Rovianne A. Leigh is a Partner at Berkey Williams LLP and Loretta Miranda is the 2016-2017 Berkey Williams LLP Indian Law Fellow and current CILA Board Secretary.



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UC Davis Law School announces the launch of the Aoki Center Tribal Justice Project

Written by John Miller

The Aoki Center for Critical Race and Nation Studies at King Hall, UC Davis Law School, is delighted to announce the launch of the Aoki Center Tribal Justice Project. A collaborative effort with California tribal judges, lawyers, and leaders, the Tribal Justice Project seeks to enhance the capacity and sovereignty of tribes in California by providing culturally appropriate training for tribal judges and court personnel and establishing an intertribal appellate court at the law school. In providing a variety of curricular offerings in Federal Indian Law and Tribal Justice as well as extra-curricular programs and opportunities for service, King Hall also hopes to encourage Native students to attend law school and to attract students who are interested in providing legal services to California tribes. The Project will be led by Judge Christine Williams, President of the California Tribal Judges Association, with the guidance of Professor Mary Louise Frampton, Director of the Aoki Center, and will be the first of its kind.

In contrast to most other states California is governed by Public Law 280, a federal law that allows the state to assume concurrent jurisdiction over certain criminal and civil matters over Indians on tribal lands. Historically this law has created significant challenges for tribes in California and other Public Law 280 states who wish to establish their own tribal courts. By targeting the needs of tribes in Public Law 280 states the Project will fill an educational gap for tribal justice systems. Training will be provided in areas accessible to tribes throughout the state and at King Hall. The first training is scheduled at the Yurok Tribe, California's largest tribe, in late June.



Interested in submitting
an article and/or making
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If so, please contact
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We welcome submissions
from all interested
contributors on any topic
related to California and/or
National Indian law topics.

The Gap in Clean Water Act Protections for Tribal Waters and Ways to Fill It

Written by Stephanie Safdi and Anthony Moffa

The Federal Water Pollution Control Act, commonly known as the Clean Water Act, provides the foundational architecture for controlling discharges into and maintaining the health of the nation's waters. At the heart of the Act are water quality standards, which set the desired condition of a waterbody and define the levels of particular pollutants that the waterbody can tolerate. Although water quality standards have been promulgated by or for every state in the nation, the waters of only 51 out of 567 federally recognized Indian tribes have such protections. For the remainder of these tribes, a jurisdictional gap exists under the Clean Water Act: while they have sovereign authority to promulgate their own standards within their jurisdictions under tribal law, these standards are not federally enforceable for Clean Water Act purposes and, among other limitations, cannot effectively be used to enjoin upstream dischargers. This article explores the origins and consequences of this jurisdictional gap, recent federal efforts to fill it and the pitfalls of those efforts, and pathways forward for tribes that desire to extend the Clean Water Act's protections into their jurisdictions.

Origins and Consequences of the Tribal Waters Gap

The Clean Water Act is designed to protect the nation's waterways through a system of cooperative federalism with states and tribes. Ultimately, however, the federal government retains oversight and responsibility for achieving the Act's goals. Section 301 of the Clean Water Act prohibits "the discharge of any pollutant by any person" except in accordance with specific requirements. To avoid liability under the Act, a discharger can obtain a permit under the National Pollutant Discharge Elimination System (NPDES) pursuant to Section 401 of the Act. The Environmental Protection Agency (EPA) has primary authority to issue NPDES permits but may authorize states and tribes to issue permits within their jurisdictions.

Water quality standards govern the discharge limits in these NPDES permits. More broadly, the standards define the water quality goals for water bodies by designating their uses and setting criteria to protect those uses. 40 C.F.R. § 131.2.

They also provide a measure to assess whether waters are impaired and to guide restoration efforts. Section 303(a) requires states to adopt water quality standards for all interstate and intrastate waters within their jurisdiction. Where a state fails to do so or EPA finds state standards wanting, Sections 303(b) and (c) require EPA to promulgate standards.



In Indian country, Section 518(e) allows EPA to treat tribes in the same manner as a state—known as "TAS" status—provided that tribes meet certain eligibility criteria, including managing water resources within the borders of an Indian reservation. As of this writing, only 54 tribes have been granted TAS status, and EPA has approved water quality standards for only 44 of those tribes. EPA has also promulgated federal water quality standards for one tribe—the Confederated Tribes of the Colville Reservation in Washington State—and has approved three states (Washington, Maine, and South Carolina) to administer water quality standards within the reservations of six tribes. Meanwhile, EPA has rightly acknowledged in approving state water quality standards that those standards do not apply in Indian country due to the states' lack of jurisdiction there. *See, e.g.,* EPA Approval of the 2003/2006 Revisions to the Washington Water Quality Standards Regulations (Feb. 11, 2008), <https://www.epa.gov/sites/production/files/2017-10/documents/wawqs-letter-02112008.pdf> ("[W]e agree that Washington water quality standards are not applicable to waters on Tribal land since Washington does not have jurisdiction over these waters."). The confluence of these factors has led to a significant gap, as the vast majority of tribal waters lack approved water quality standards.

The absence of these standards does not leave tribal waters entirely without safeguards. Tribal governments can act within their sovereign authority to set and approve their own water quality standards and regulate discharges within their jurisdictions. But the lack of federal approval comes at a cost. Importantly, a downstream tribe with approved standards “has the power to require upstream off-reservation dischargers . . . to make sure that their activities do not result in contamination of the downstream on-reservation waters.” *Wisconsin v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001). Although EPA ultimately controls upstream compliance, a tribe with approved standards should have standing to object to upstream discharges that would impair water quality within the tribe’s jurisdiction.

Federal Efforts to Fill the Gap

In 2001, recognizing the magnitude of this gap, EPA Administrator Carol Browner proposed a rule that would establish “core water quality standards” for all Indian country waters without approved standards. *Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards* (Jan. 18, 2001), https://www.epa.gov/sites/production/files/2016-08/documents/federal_wqs_for_indian_country_proposal_signed_1-18-01.pdf. The rule was not published in the Federal Register and did not go out for public comment. In the proposal, EPA reasoned that “section 303 of the Clean Water Act clearly contemplates water quality standards for all waters of the United States” and determined that it had an obligation to ensure that adequate standards exist “for all Indian country waters.”

Fifteen years later, the proposal was still sitting on a shelf at EPA. In September 2016, at the tail end of the Obama Administration, EPA Administrator Gina McCarthy put out an Advanced Notice of Proposed Rulemaking (ANPR), “Federal Baseline Water Quality Standards for Indian Reservations,” which sought to fill the “long-standing gap in coverage of Clean Water Act (CWA) protections.” 81 Fed. Reg. 66900 (Sept. 29, 2016). Although current EPA Administrator Scott Pruitt promised to consider the ANPR at his Senate confirmation hearing, he has taken no action on the proposal and there is little expectation that he will do so voluntarily.

Alongside the ANPR, the Obama Administration took additional steps to narrow the gap in protections for tribal waters by expanding TAS coverage. Among them, it issued a rule that revised its interpretation of section 518 to eliminate the need for tribes to demonstrate their inherent authority to regulate under the Act, an affront to tribal sovereignty that had dissuaded many tribes from applying for TAS status.

Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30183 (May 16, 2016). It issued regulations establishing a process for tribes to obtain TAS authority to administer water quality restoration provisions of the Act. *Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act*, 81 Fed. Reg. 65901 (Sept. 26, 2016). It also created new tools to simplify the TAS application process and streamline the development of tribal water quality standards. EPA, *Water Quality Standards Tools for Tribes*, <https://www.epa.gov/wqs-tech/water-quality-standards-tools-tribes>. Thus far, however, these efforts have borne little fruit. Only one tribe has obtained TAS status and two have had water quality standards approved since the new rules went into effect.

Though shelved for now, the ANPR played an important role in stimulating discourse over the promises and pitfalls of federal baseline standards for Indian country. Although it garnered only 38 comments, about a dozen tribes and representative organizations wrote in to express their views on the concept. The majority of these comments were in favor of some federal role in closing the gap, particularly if it meant tribes could protect themselves against upstream discharges. At the same time, tribes recognized the many and nuanced obstacles that EPA, in consultation with tribes, would need to overcome to move forward with a rulemaking.

Several tribes voiced concern about the consequences of federal imposition of standards for tribal sovereignty, and many others highlighted the difficulty of adequately tailoring standards to the cultural and traditional practices and unique circumstances of each tribe. For instance, numeric criteria should reflect tribal fish consumption patterns, which vary by tribe and by region. And designated uses should take into account the varied ways in which tribes use and interact with their waters. Tribes also expressed concern with the federal government’s ability to meet government-to-government consultation obligations in establishing standards applicable to all Indian country. Several tribes proposed that baseline standards be either opt-in or opt-out and others proposed creating an adaptable template through which tribes, in collaboration with EPA, could tailor standards to their conditions.

Pathways Forward for Tribes

For those tribes that desire to fill the gap in protections, there are several pathways forward. Tribes can promulgate their own internal standards and enforcement mechanisms. To make such standards effective for Clean Water Act purposes, eligible tribes can apply for TAS status using the new streamlined tools. A tribe could also consider petitioning EPA to promulgate water quality standards for waters in its jurisdiction, as the Colville Confederated Tribes did in 1986. It is unclear how EPA would treat such a petition under the current administration.

Finally, tribes could consider a legal action to force the federal government's hand in working with tribes to close the gap. There are at least three causes of action that might be available to tribes for this purpose. First is a citizen suit under the Clean Water Act to enforce compliance with Section 303 requirements that EPA promulgate water quality standards where they do not otherwise exist. Under Section 303(b), the Administrator is required to promulgate water quality standards upon disapproving a proposed state water quality standard. EPA's acknowledgement, in approval letters and elsewhere, that even approved state water quality standards do not apply in Indian country could be construed as a disapproval as to those tribal waters, triggering EPA's duty to fill that gap. Section 303(c)(4) also requires the Administrator to promulgate standards in any case where the Administrator determines that standards are necessary to meet Clean Water Act requirements. EPA Administrators have arguably twice made that determination in the 2001 proposed rule and 2016 ANPR. A related claim could be brought under the Administrative Procedure Act for unreasonable delay in carrying out the obligations recognized by Administrators Browner and McCarthy.

The third potential cause of action would be a breach of trust claim based on the federal government's trust obligations to tribes. While general breach of trust claims are sometimes looked upon unfavorably due to purported justiciability issues, courts have recognized an enforceable federal fiduciary relationship with respect to certain tribal properties. *See Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 677 (1986). It could be argued that EPA has breached its fiduciary duties to tribes by failing to administer the Clean Water Act in a way that protects waters on reservations and trust lands.

At the end of the day, for tribes that lack approved standards, the decision whether to pursue them is nuanced. Applying for TAS status is costly and difficult, and eligibility requirements will exclude many tribes and deter others. Federal baseline standards may play a crucial role in extending protections to tribes that are not eligible or interested in applying for TAS status, but they must be developed in a way that respects tribal sovereignty, consultation obligations, and the unique circumstances of individual tribes. Even if a suit were successful in forcing federal action to fill the Clean Water Act gap, that would only be the beginning of the journey.



Stephanie Safdi is an attorney at Shute, Mihaly & Weinberger LLP in San Francisco, CA. Ms. Safdi represents tribal clients on environmental, land use, and cultural resource protection issues. Photo by Liza Heider.



Anthony Moffa is a Visiting Associate Professor at the University of Maine School of Law. Professor Moffa teaches and writes about issues of environmental law, natural resources law, and federal Indian law, among others.



Membership Spotlight



Bailey Makes Partner at HSDW

Adam Bailey (Choctaw Nation of Oklahoma), previous CILA President and long-time CILA member, was recently named partner at Hobbs, Straus, Dean & Walker. The firm has represented tribes for 36 years, and has a long tradition of working hard for tribal self-determination and the rights of Native peoples. Congratulations, Adam!



Cal. Tribal Courts Shine Bright

The documentary "Tribal Justice," showcasing the work of Judge White (Quechan) and Judge Abinanti (Yurok), previous recipient of CILA's Outstanding Achievement in California Indian Law award, premiered on PBS to a national audience late last year. Since then, the film has been used as a tool to showcase the power of restorative justice practices to heal our Native communities.



Anaiscourt Presents on Language

CILA Member Glenn Anaiscourt presented during the AICLS Language is Life Conference in Sanger, speaking in Northern Sierra Miwok and English regarding lessons learned about language preservation and revitalization. Anaiscourt was also the keynote speaker for the Concord Historical Society's annual dinner, where they presented on the topic of life near Mount Diablo in 1768 (precontact), speaking in English and Saclan. Anaiscourt also spoke to the Concord Rotary Club in March about language and culture.



Cornell Law Honors Sanders

Cheyenne Sanders (Yurok), current CILA Board Member, was presented with the 2018 Cornell Law School Alumni Exemplary Public Service Rising Star Award for her work in Indian Country. Cheyenne is in-house legal counsel for the Morongo Band of Mission Indians.



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