

CALIFORNIA INDIAN LAW ASSOCIATION / SUMMER 2020

Legal Journal

EXCLUSIVE

#METOO

Are We Doing Enough to
Stop Sexual Harassment
in Indian Country?

**IN-HOUSE
FEATURE**

Q&A with California's
top in-house
tribal counsel

PATHWAY TO LAW

CILA welcomes the 2020 Cohort of
prospective Native law students to UC Davis

CELEBRATING 20 YEARS

2020 marks CILA's 20th annual
California Indian Law Conference



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PRESIDENT'S NOTE



Haminat! Greetings!

I'm pleased to welcome you to the Second Edition of the California Indian Law Association (CILA) Legal Journal. The Board deeply appreciates each of the authors for their time and amazing contributions to our Legal Journal. CILA has worked on many exciting things this year and we are looking towards the future with optimism and resiliency. With such uncertainty in the world, it is important to remain focused on our mission and the important work each and every one of our members is doing.

We are proud to announce that we were able to distribute over \$18,000 in scholarships to current and future law students and recent graduates this past year in partnership with the San Manuel Band of Mission Indians, California ChangeLawyers, and the National Native American Bar Association. CILA is honored to help maintain and promote the pathway into the legal profession for Native American students and professionals.

CILA continues to offer various educational opportunities to Indian law practitioners, tribal justice personnel, law students and the public. This last year, we offered CLE's on ICWA, Tribal law and policy, ethical considerations for lay advocates, advancing native representation in the judiciary, and provided a litigation and legislation update to our members at our 19th Annual Indian Law Conference and via Webinar.

Finally, in light of COVID-19 (coronavirus), the CILA Board of Directors has decided to take our annual conference online this year. California Indian Law Association is pleased to announce that the 20th Annual California Indian Law Conference and Awards Celebration will be held virtually October 15-16, 2020. Please see calindianlaw.org for more information.

We hope you enjoy this Edition and we urge you to reach out to us with feedback at: calindianlaw@gmail.com.

Loretta Miranda,
President of the CILA Board
Morongo Band of Mission Indians



19th Annual California Indian Law Conference & Gala



The 19th Annual CILA Indian Law Conference & Gala was graciously hosted at Graton Resort & Casino by the presenting sponsor, the Federated Indians of Graton Rancheria on October 3-4, 2019. The Conference and Gala were the largest to date and many attorneys, law students, tribal leaders, and tribal staff were in attendance.

At the Gala on Thursday evening, two outstanding individuals were recognized for their achievements: George Forman (Founding Partner - Forman & Associates) received the 2019 Outstanding Achievement in Indian Law Award and Christina Snider (Tribal Advisor to Governor Gavin Newsom and Executive Secretary of the Native American Heritage Commission) received the inaugural 2019 Outstanding Young Attorney Award. CILA scholarship recipients were also honored at the Gala.

Friday featured a full day of diverse and engaging panels and a Keynote address by Honorable Greg Sarris, Chairman Federated Indians of the Graton Rancheria. The panels and speakers were as follows: 1) Legislative & Litigation Update with Robert Odawi Porter, Founder & Principal, Odawi Law PLLC and Angela Riley, Professor of Law, UCLA Law; 2) ICWA: Constitutional Challenges & Advanced Topics with Delia Sharpe, Executive Director, California Tribal Families Coalition and Kimberly A. Cluff, In-House General Counsel, Morongo Band of Mission Indians; 3) Tribal Law & Policy: How Tribal Law Can Advance Government & Business with Michelle LaPena, Partner, Rosette, LLP, Fatima Abbas, Director of Policy and Legislative Counsel, National Congress of American Indians, and Sara Dutschke Setshwaelo, Chairperson, Lone Band of Miwok Indians/ Partner, Kaplan Kirsch Rockwell; and 4) Ethics: Lay Advocates, Tribal Bar Associations, and the California Rules of Professional Conduct - Conflict & Opportunity with Lauren van Schilfgaarde, San Manuel Band of Mission Indians Director, UCLA Tribal Legal Development Clinic and Hon. Christine Williams, Director, Tribal Justice Project, UC Davis School of Law. Panel material is available on the CILA website.

CILA thanks all of our sponsors, presenters, and attendees for making the 19th Annual CILA Indian Law Conference & Gala are largest to date. We look forward to virtually seeing you at the 20th Annual CILA Conference and Gala this year.

19th Annual California Indian Law Conference & Gala



19th Annual California Indian Law Conference

Editor's Note: The following article was originally published by the Promise Institute for Human Rights at UCLA School of Law on February 17, 2020. The article is republished with permission. Pictures courtesy of Ryann Garcia.



In October of 2019, the Promise Institute for Human Rights helped send four UCLA Law students from the Native American Law Student Association (NALSA) to Sonoma County to attend the 19th Annual California Indian Law Association (CILA) Conference. The conference was held at the Graton Resort & Casino in Rohnert Park, California. In the interview below, 1L Grace Carson, 2L Alexis Ixtlahuac, 2L Ryann Garcia, and 3L Rick Frye reflect on this year's conference, their work with NALSA, and supporting Native and Indigenous students at law schools.

What is the California Indian Law Association Annual Conference?

The California Indian Law Association ("CILA") was formed with the purpose of serving as the representative of the Indian law legal profession in California (see more here). The Annual Conference is an important two-day event for Native law students and those who anticipate practicing Federal Indian Law. The first day consists of an evening Gala and silent auction. The Gala was opened with a performance by the Sonoma County Pomo Dancers. The following day consisted of a full itinerary of panel presentations from tribal leaders, tribal justice personnel, and Indian Law professors and practitioners. UCLA Law Professor of Federal Indian Law, and NALSA's own Faculty Mentor, Professor Angela Riley, was chosen to give an update on the Legislation & Litigation panel. Further, Professor Lauren Van Schilfgaarde, San Manuel Band of Mission Indians Director, UCLA Tribal Legal Development Clinic, was also chosen to give a presentation on the Ethics panel: "Lay Advocates, Tribal Bar Associations, and the California Rules of Professional Conduct - Conflict & Opportunity."

What was your favorite part about this CILA conference?

RG: The most impactful moment of this conference for me was the keynote speaker's address during lunch.

Honorable Greg Sarris, Chairman of the Federated Indians of the Graton Rancheria, spoke at length about what it means to him to advocate for Native communities, especially in California. He shared stories of how significant it was that his tribe, formerly known as the Federated Coast Miwok, were able to survive to the present day. He also detailed the work that the tribe has done to better the lives of its members and also the greater Rohnert Park community. He asserted, "We owe them a good example." Finally, finding out that Honorable Greg Harris was a UCLA alum made the experience even more impactful for me! AI: The most impactful moment for me was also Chairman Sarris' keynote speech. I have so much respect for the directness with which he admonished advocates to stop fueling conflicts within and between tribes for their own monetary gain and to start being part of the solutions for inter-tribal unity. Another highlight was my conversation with an attorney about the intersections of labor and employment law and federal Indian law. He encouraged me to continue to pursue my interest in labor and employment law but provided me with a number of resources so that I can learn more about how lawyers with this expertise can serve tribal communities. For example, attorneys who understand both Federal Indian Law and employment law are working with tribes to determine how the Title VII "Indian Exception" provision applies to businesses on reservation land and tribal members living on and near the reservation. In addition, attorneys with this intersection specialty can work with tribal councils to develop a tribe's own employment laws and policies to ensure that tribal members are protected if they are employed by private employers on tribal land.

GC: As a 1L, this was my first experience in the Indian Law community here in California. It was a great opportunity to get to make connections in our community, and to be exposed to the legal issues that tribes in California and beyond are battling. It inspired me as a future lawyer who hopes to advocate for our communities in the future.

What do you wish more people understood about Indian Law?

RF: While many consider Indian Law to be a niche field, the issues confronted by practicing lawyers cover many fields of law and are uniquely conceptually difficult. Tribal sovereignty adds another layer of analysis to legal issues which may otherwise normally only involve two jurisdictions (a state and the federal government). As Indian Law permeates so many other areas of law, I think it is a shame that it does not make more of an appearance in the traditional 1L curriculum.

RG: First, you don't have to be Native American to pursue Indian Law or advocate for Native issues. Most of NALSA's membership, including myself, identify as Indigenous

or Indigenous descendants who are not tribally enrolled in the U.S.A. Many prominent advocates in Indian law come from all backgrounds. Additionally, Indian law should not only be relevant in the context of property rights, but rather should be conceptualized as a relevant matter in all areas of study and practice. Indian Law is a complex field, and UCLA's NALSA is fortunate to have members that are interested in overlapping areas like labor and employment law, immigration, international human rights, environmental law, business law, etc.

How can law schools better support Native students and students pursuing Federal Indian Law or Tribal Law?

RF: The National Native American Law Student Association (NNALSA) recently published a petition regarding how law schools may more meaningfully support Native students at law schools across the country. Increased Native student and faculty representation will result in more robust and authentic Federal Indian Law/Tribal Law programs (in addition to benefits to entire law programs stemming from an increased diversity in worldview and opinion), which benefits all students! You can find the petition [here](#). RG: Programs and organizations like the UCLA American Indian Studies Center (AISC), the Native Nations Law & Policy Center, the Promise Institute, the International & Comparative Law Program, and the Critical Race Studies Program, have been extremely helpful in creating a supported community of Native/Indigenous students as well as a collaborative environment for us here at UCLA Law. In addition to the courses, funding, and general support of these programs, it is without question that our legacy of amazing faculty in Indian Law has built a solid foundation for both Native/Indigenous students and students pursuing Indian Law. Law schools need to continue supporting and funding these types of programs and faculty, along with providing resources like the Tribal Legal Development Clinic. Finally, law school admissions offices need to take up the responsibility of more adequate representation for Native students in legal field. The Native American Law Student Association at UCLA acknowledges the Tongva peoples as the traditional land caretakers of Tovaangar (Los Angeles basin, So. Channel Islands) and are grateful to have the opportunity to work for the taraanatom (indigenous peoples) in this place. As a land grant institution, we pay our respects to Honuukvetam (Ancestors), 'Ahihirom (Elders), and 'eyoohiinkem (our relatives/relations) past, present and emerging. We would like to especially thank the Federated Indians of Graton Rancheria for holding this space this year.

UCLA NALSA would like to thank Rosette, LLP, for inviting NALSA members in attendance to join them for the CILA Gala & Silent Auction event, hosted the night before the CILA Conference.



CILA would like to acknowledge and congratulate the University of Los Angeles School of Law NALSA chapter, which was awarded "2020 Chapter of the Year" by National NALSA for its work and involvement this year. Additionally, CILA congratulates Ryann Garcia, UCLA NALSA's President, for being awarded National NALSA's 2020 2L of the Year Award.

Pictured above (l-r): Grace Carson (UCLA Law J.D. 2022), Rick Frye (former NALSA Co-President, UCLA Law J.D. 2020, and a CILA 2019 Scholarship recipient), Carole Goldberg, Angela Riley, Ryann Garcia (NALSA President, UCLA Law J.D. 2021), Alexis Ixtlahuac (NALSA Co-President, UCLA Law J.D. 2021) at the 19th Annual California Indian Law Conference, hosted by the Federated Indians of Graton Rancheria. Photo courtesy Ryann Garcia.

HOW TRIBAL CASINOS ARE PREPARING FOR REOPENING AFTER THE CORONAVIRUS

BY ANNA HOHAG AND
PATRICK BERGIN

The coronavirus (COVID-19) has now infected people from every continent except Antarctica, and the number of known coronavirus cases has reached nearly 4 million worldwide.[1] This includes almost 1.3 million confirmed cases in the U.S. with over 77,000 deaths.[2] Pandemics do not discriminate and as a result, effects of the coronavirus are being felt across the globe, across the United States, and within Indian Country.

The coronavirus has had a devastating impact on the U.S. economy as businesses across the country have been forced to close. With 20.5 million jobs lost and about 23 million people unemployed in the month of April alone, the national unemployment rate has soared to almost 15% -- a figure so devastating, it is topped only by the great depression. [3] However, the Department of Treasury recently remarked that it believes the unemployment rate could actually be as high as 25%.[4]



In California, Governor Newsom issued an emergency proclamation and implemented drastic measures to halt the spread of coronavirus immediately after the state's first confirmed death. [5] Many tribes, also in an effort to protect their tribal citizens and employees, issued emergency declarations, implemented social distancing measures, and voluntarily closed their businesses and government centers.

With roughly 70 tribal gaming venues across California, the economic impact of casino closures has been profound. Tribal gaming is a powerful economic engine, generating \$7.8 billion for the state's economy, creating over 63,000 jobs and \$3.3 billion in income for state residents. (CNIGA Study). In addition to gaming venues, many other tribal business enterprises have been forced to close or otherwise impacted by the coronavirus pandemic. Despite this loss in revenue, many tribes continued to keep their employees on payroll—providing employee pay and benefits during the length of the emergency.

San Manuel and Pechanga were some of the first tribes to take action to help slow the spread of COVID-19, opting to close their casinos even prior to the governor's issuance of the statewide shelter-in-place directive. According to the CDC, employers play a key role in protecting employees' health and safety in a pandemic and being prepared can help limit any negative impact on the economy and society.

Now as tribes are considering reopening their reservation-based economies and business enterprises, [6] tribes are determining what safety measures, modifications, and guidelines can be implemented to protect their employees and guests from further spread of the virus.

Some tribes are taking note of safety measures put in place by casinos in Macau, the world's richest gaming hub, where casinos reopened with mandatory body temperature-checks. Similarly, Chumash Casino will be equipped with temperature-

checking kiosks where each person will approach the kiosk for a mandatory temperature screening and access will be denied to anyone who exceeds the threshold temperature recommended by local and/or federal public health agencies.[7]

As for asymptomatic potential carriers, casinos will be implementing additional safety measures and protocols including:

- Providing mandatory masks and PPE;
- Enhanced cleaning standards, including increased frequency of cleanings;
- Modified gaming floors and enhanced social distancing standards (spacing out slot machines);
- Plastic partitions between slot machines;
- Limit the number of people at card tables;
- Continued closure of hotels, spa, and or restaurant facilities;
- No poker, sports betting, keno, or bingo due to both crowding and staffing concerns; and
- Prohibit players from touching cards for games like black jack.

In their complicated roles as employers, hosts, and sovereign nations, many tribes are also enacting tribal laws and making necessary amendments to existing policies and procedures. For example, tribal governments should consider adopting the following policies:

- (1) Providing the coverage or flexibility that employers and employees might need in the event of a significant outbreak, including revisions to their personnel policy requiring employees to stay home who are symptomatic;
- (2) A Quarantined Workers and Job Protection Policy that would protect employees from retaliation if they are required to stay home during public health emergencies;
- (3) A Pandemic Preparedness Ordinance to establish a protocol for preparedness, prescribe a plan for responding to emergencies or hazards, and require periodic evaluations and drills for employees;

- (4) Providing a PPE protocol and liability waiver for employees and/or guests to sign ensuring they understand their obligation to properly use PPE and waive any liability if they contract the virus;
- (5) A Food Safety Ordinance to ensure the safety and security of the tribal food supply;
- (6) Increased Casino Sanitation Procedures;
- (7) Public postings of all requirements to put guests on notice of measures and procedures they must follow if they enter the casino.

Implementing necessary policies will require additional resources. However, the CARES Act relief package included a set aside of \$8 billion for tribal governments intended for tribes to prepare for and respond to the coronavirus, and these funds can be used to assist tribes in implementing some of these necessary measures and policy changes. Additionally, numerous tribal casinos and tribal health clinics in California were able to obtain forgivable federal loans through the second round of the Paycheck Protection Program, allowing tribes to continue to keep employees on payroll and receive benefits. For the foreseeable future, tribes should continue to reach out to their congressional representatives and stay informed of additional Coronavirus relief legislation intended for tribal governments and tribal businesses.

[1] <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

[2] <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

[3] <https://www.cnn.com/2020/05/08/economy/april-jobs-report-2020-coronavirus/index.html>;
<https://www.bls.gov/>

[4] <https://www.cnbc.com/2020/05/10/coronavirus-mnuchin-says-unemployment-will-rate-get-worse-before-they-get-better.html>

[5] <https://www.usatoday.com/story/news/health/2020/03/03/coronavirus-live-updates-covid-19-california-cdc-numbers-deaths/4929223002/>

[6] Just this week, eight tribes in San Diego County have indicated to Governor Newsom that they intend to reopen their gaming facilities on May 18.

[7] www.casino.org/news/california-tribal-casino-acquires-body-temperature-kiosks/.

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#METOO IN INDIAN COUNTRY

SUBMITTED BY GHOSTWRITERS

In the Wake of #MeToo,
Are We Doing Enough to
Stop Sexual Harassment
in Indian Country?



DISCLAIMER: These stories have been revised to remove any identifiable references. All authors submitted these stories on the condition of anonymity. The intimate personal accounts, views, thoughts, and opinions expressed in this journal belong solely to the author(s). CILA does not condone any form of harassment in Native communities and in our legal profession. The purpose of this journal article is to provide a medium for these important stories.

As Native women, working in Indian Country during the #MeToo Movement has been a struggle. Despite the Movement, the statistics for sexual harassment and assault for Native American communities have remained unchanged. As we work to bring attention to the Missing and Murdered Indigenous Women (#MMIW) movement we must appreciate that this movement must start at home, in our own Nations and communities. A lot of progress has been made in a relatively short amount of time. There are many examples of the amazing work being done in our communities. It is necessary and important. With that, the purpose of this article is to merely ask the simple (or not so simple) question, “Are we doing enough to stop sexual harassment in Indian Country?”

Most women who have experienced sexual harassment or assault face the harsh reality of going through the internal struggle of answering the following questions: “Should I say something?”, “Was it really that bad?”, “Was it something that I did?”, or even, “If I do

report this, will there be repercussions?” Once a woman is finally able to get through that internal struggle of answering those questions and makes the decisions to report it, she has to navigate the process and procedure of reporting as well as the uncertain aftermath.

It is difficult to say that we are doing enough to address sexual harassment and assault in the workplace, because it seems like as soon as a story breaks in our community, it’s almost immediately followed by whispers of all the stories that would indicate that many people knew but did nothing, or worse, other that women who had suffered the same fate and spoke up but were not been believed or supported.

Here are three real-life stories that exemplify the struggle of Native women dealing with sexual harassment in Indian Country. Our intention in telling these women’s stories is to empower Native women who have suffered or will suffer sexual harassment in silence and to move bystanders from commiserating with sexually harassed Native women to speaking up and taking action.

STORY #1

I was a single mother that had recently graduated law school when I was offered my first job as in-house counsel working for a rural tribe. In the face of deciding how I was going to support my children after graduation, I did not question the 500+ mile move. Financially, it was the best decision for my little family.

I made the move and left my extended family and friends behind. I was lucky enough to secure housing on the reservation and starting working within a week of the move. However, before I had even started working, I was reminded of how little our community is. The very first day of arriving on the reservation I was introduced to the Chairman and a few council members. I was told, “I knew you were

here because I know you were at the Clinic today.” I was shocked and surprised to be told that but laughed it off. I did not know that this council member was known for having a reputation for being a “walking lawsuit.” There were multiple inappropriate comments that this council member would make to me or others that no one seemed to address because, “That’s just how he is.” I would go home and think about the comments he made, and it got to the point where my family told me that I would have to start looking for another job. The tipping point was when he made an extremely inappropriate comment, wrapped his arm around my shoulder, and laughed. After that, I dreaded going to work and having to face this council member who had become my

supervisor. After months of this, I began to formally document everything that I experienced through memoranda to myself. I was told by another staff member that if I did not report the situation to human resources in writing that I would face discipline for “not following the personnel policy,” even though so many other employees refused to make a written report. As a new attorney, I was struggling with having to deal with this type of harassment as a professional and facing discipline for not reporting it. I felt like I was singled out when so many other people had been harassed by this council member, and I was upset that I had to make a written report when human resources knew of so many other stories.

Eventually, I made a written complaint and just crossed my fingers that this would not make things worse. I cited that personnel policy, noted that I was told that if I did not report my situation to human resources I would face discipline, and then reported the most recent incident. I signed the written complaint and found out that human resources redacted my signature and other identifying information. Thinking back, I was lucky that the Chairman and the rest of the council members knew that this council member was doing this to a lot of people (not just

employees). However, this did not stop some council members from demanding human resources to produce the person who submitted the complaint for questioning in front of the council and the accused council member. I was lucky that I had the trust of the Chairman and the human resources director that that never happened. If this council member had more political support, I am sure that it would have happened. I could have lost my dream job or earned a bad reputation for allowing this to happen for so long and never telling him to stop. Things that, as a young attorney in Indian Country, I constantly think about. Immediately after I submitted a formal written complaint, the Chairman and the rest of the council members convened in executive session. The council eventually directed human resources to launch a formal investigation using an outside company. I was told that dozens of employees, including myself, were interviewed and that a formal written report was provided to the Chairman and the rest of council. I never got to read the report or know who else was interviewed. After the findings of the report were presented to the Chairman and the rest of council, the council member involved was given a chance to address each finding. He refused and was removed from council for gross misconduct.

STORY #2

I met the man in this story years before this incident. He was one of the first people I met when I started my career in Indian Country. While we never officially worked together, he was always a big supporter of me and my work. I respected his work and his position within the Tribe he worked for. I was always happy to see him at various meetings or conferences. This conference was no different. Following day one of the conference, I and a bunch of attendees met at the hotel bar for a drink. As it got late, I said I was going to head

up to my room. A few people, including him, followed my lead. When the elevator stopped at my floor, he said that it was his floor as well and exited the elevator with me. When we arrived at my hotel room door, I said good night and that I'd see him in the morning for day two. As I put my keycard in the lock, he asked if he could use my restroom. I thought it was weird since his room was on the same floor. However, I didn't want to be rude, so I agreed, but I immediately had an uneasy feeling. With that, I sent a text to a friend who I

knew would be up and asked him to call me in five minutes.

When he exited the bathroom, I again wished him a good night and said that I'd see him downstairs in the morning. He then said he could just stay in my room tonight. I told him that wasn't a good idea. He disagreed. This back and forth went on for a few minutes with his assurance that no one would need to know and that we could get so many positive things done for Indian Country if we worked together. I finally walked over to the door, opened it, and told him that he needed to leave because he was making me uncomfortable and that my "boyfriend" was about to call. When my phone finally started to ring, he said he could just wait outside until I was off the phone. I again declined, he walked out, and I shut the door. He then proceeded to call and text me repeatedly throughout the night asking me to come down to his room. I did not respond and went to bed.

As day two of the conference started, I kept recounting the events of the night before. Many problematic thoughts ran through my mind, "Did I do something to make him think I was interested in him? Did he think I drank more than I did? What did I do wrong?" When he arrived for the second day of the conference, he came over and sat right next to me. I instantly felt a little bit of relief because I was truly worried that he would be mad at me. Every bone in my feminist body told me to stop these thoughts, but I couldn't help it. He sat next to me all day and never made any mention of the previous night's events. I left the conference unsure of my next steps. On one hand, I respected him, he was very powerful, and he didn't actually break any laws. On the other, I knew that he had crossed so many lines. I also knew that if he was comfortable crossing those lines with me, someone established in my career, he was

comfortable crossing them with other Native women who might not have the power to challenge his behavior and prevent him from doing this to them. It was that second thought that really stuck with me. While I figured out my next step, I took a moment to record the events of the prior evening while it was fresh in my memory and saved our text conversation for my records.

The following day, I decided that I needed to tell someone about what happened. I reached out to the Tribal Council for which he worked for and had represented at the conference. Council took swift action. Since then, more than a dozen women came forward to tell their stories about their interactions with this same man. Some had filed complaints, but many were too afraid of the consequences to have spoken up earlier.

My story was immediately and consistently trusted. I have never had to substantiate the events of that night. I am very aware that this is a privilege that is not afforded to most women. I received a long apology from the man after he was initially reprimanded by his Council. I never responded.

I haven't had any contact with him since leaving the conference, but if I could say one thing to him, it would be that he should treat women with the same respect with which he would want his daughter to be treated. I would ask him and other men to hold, not only themselves, but each other accountable for their interactions with women. When they see something inappropriate, speak up and call out that behavior. That simple action is so important, showing the victim that she has an ally and to let the abuser know that someone is watching.

STORY #3

I had just graduated from college and was excited to land a job with a large Tribal non-profit. The culture of the organization was amazing, and I felt lucky to be surrounded by so many great people. I was warned by a higher up to “stay away” from a specific board member as he had a “reputation.” After a night of drinks with coworkers and board members, a few of us were invited back to the room of the board member whom I had been warned about. Not much time had passed and I suddenly found myself alone in his room. He started to make inappropriate comments and advances. I told him I had to get home and left the room without any issue.

In the days that would follow that incident, two men in the office began to making uncomfortable comments. This would go on for weeks before one of them finally confessed to me they were “surprised that I had slept with” the board member with the “reputation.”

He went on to note that while many employees slept with him, he hadn’t profiled me for being “the type.”

A wave of embarrassment, rage, and betrayal hit me like a ton of bricks. I wanted to go to every person in the office and tell all of them it was all lies. But I was scared. I was scared no one would believe me, I was scared my boyfriend would be upset, I was scared I could lose my job. I couldn’t bring myself to do anything. If the high level staff member knew this kind of behavior was happening and they hadn’t done anything, what would make my situation different?

What happened to me in the most formative years of my career still haunts me. Over 10 years later, I actively work to ensure I am providing a safe work environment for all of my employees and that I do not feed a culture that allows predatory men to victimize women without consequence or account.

Being removed from council or asked to resign from a position is significant on any reservation or in any community. It very rarely happens. More often than not, the Native woman who has been sexually harassed in Indian Country is the one worrying about losing a job, losing her reputation, or facing retaliation in some form. So, when answering the question, “Are we doing enough to stop sexual harassment in Indian Country?”, stories like these show that progress is being made but there is still much work left to be done.

We need to work to create a safe environment for victims of sexual harassment in Indian Country to come forward and have proper policies and procedures in place to protect them as they share their stories. We also need to hold ourselves and the people around us accountable

for inappropriate interactions or being complicit bystanders to those inappropriate interactions.

Protecting these perpetrators because of beliefs like, “That’s just how he is. He doesn’t mean any harm,” is dangerous and wrong. We all deserve better. As we move forward in this new era in Indian Country and the rest of the world, we must be aware that the respect and protection of Indigenous people must begin in our own communities and with some of our most vulnerable members – Indigenous women.



2020 PATHWAY TO LAW INITIAIVE

The 2nd Annual Pathway to Law Program occurred March 6-7, 2020 and was hosted by the Tribal Justice Project at U.C. Davis School of Law. The Program was co-sponsored by the National Native American Bar Association ("NNABA") Foundation, California ChangeLawyers, and the Santa Rosa Rancheria Tachi Yokut Tribe.

The Program was a two-day law school application workshop for Native undergraduate students and professionals committed to taking the LSAT and applying to law school. The goal of the Program was to effectively increase the participation of Native Americans in the legal profession by, but not limited to: (1) assisting Native American college students achieve the index required to gain admission to competitive law school and improving their position when they enter the job market, (2) increasing the number of Native American students applying to law school, and (3) ensuring new Native American attorneys grow and progress in the legal profession.

Program participants had the opportunity to sit in on a law school class, speak to law school admissions counselors, received personalized feedback on their draft law school applications, were paired with a Native attorney mentor, and will receive an LSAT test prep scholarship. The Program was offered at no cost to participants, including travel to the Program.

CILA received overwhelming positive feedback from Program participants. The most memorable success story came from the participants' "Overall Program Evaluations."

Every Pathway to Law participant said that they were leaving the Program with more knowledge and confidence about the law school application process than they had when they arrived. One of the main goals of the Program was to "demystify" the law school application process, and that the Program participants would take the LSAT and apply to law school with confidence. CILA will continue to check in and support our 2020 Program participants to ensure they continue to have the resources, confidence and support they need to be successful.

CILA would like to congratulate the following prospective Native law students for being a part of the 2020 Pathway to Law Cohort: OliviaRose Williams (Karuk), Matthew Brady (Navajo), Cameron Vela (Chukchansi), Mark Cervantes (Penelakut First Nations), Nathalie Guillen (Quechua), Tatiana Ybarra (Western Temoak Shoshone), Audrey Campbell (Round Valley), Katelyn Meylor (Osage, Shawnee, Cherokee) and Bryana Clark (Hopland).

CILA would like to thank the following entities for their generous support of the 2020 Pathway to Law Program: UC Davis School of Law, the Tribal Justice Project, National Native American Bar Association Foundation, California ChangeLawyers, Golden Gate University School of Law, and Testmasters.

CILA would like to extend a special thank you to the Santa Rosa Rancheria Tachi Yokut Tribe for sponsoring LSAT preparatory scholarships for 2020 cohort members.

Challenging NEPA Documents with TEK: *Indigenous perspectives are vital to a reasoned choice among alternatives*

BY CURTIS VANDERMOLEN

There exists a body of scientific knowledge about our interconnected ecosystem that spans thousands of years, and which continues to evolve with the daily struggles and modern trends that place pressure on endangered species and result in climate change. Traditional ecological knowledge (TEK) has been acknowledged by western scientists as legitimate scientific evidence since at least the days of Jane Goodall.[1] Despite knowing that this ecological information exists, federal agencies are rarely tapping it as a source when preparing environmental documents under the National Environmental Policy Act (NEPA). And when agencies do seek TEK, it becomes more of a check-box on a list than an integrated part of the environmental analysis.

Since its beginning, NEPA has required review of environmental impacts to be thorough, searching and scientifically supportable investigations into project



alternatives. NEPA does not require outcomes -- it is an act aimed at providing complete information to decision-makers and fostering public participation. To these ends, NEPA requires agencies to acquire environmental information and respond to opposing points of view in a manner that maintains scientific integrity. As a known source of relevant scientific information on holistic ecological systems, it is necessary for an agency to analyze TEK in order to present complete information to decision-makers. This article finds support in the NEPA statutes for the proposition that federal agencies must seek TEK, and fully incorporate it into all NEPA documents.

Agencies Must Obtain and Analyze Traditional Ecological Knowledge, Unless the Evidence is Duplicative

NEPA requires all documents to have scientific integrity and complete information.[2] Scientific integrity involves the dual lenses of individual integrity and confirmed research findings.[3] The agency must have a “full and fair”[4] holistic[5] discussion of the research that “foster[s] both informed decision-making and informed public participation.”[6] Moreover, evaluating cumulative effects is an integral part of ensuring a full and fair, holistic discussion of the research.[7] TEK is a collection of continuous ecological science over thousands of years.[8] In order for an agency to produce a full and fair evaluation of alternatives, as required by NEPA, it must include this holistic ecology and cumulative impacts information. The following sections discuss why agencies must seek TEK when preparing a NEPA document, and why those documents are vulnerable to challenge if agencies do not fully incorporate TEK into their discussion of alternatives.

Traditional ecological knowledge is scientific evidence

An Environmental Impact Statement (EIS) is required for every major federal action that may have a significant effect on the quality of the

human environment.[9] Federal regulations define “effect” to include direct and indirect effects which are “ecological, aesthetic, historic, cultural, economic, social, or health,” and which occur over time.[10] Whether using an agency definition of TEK, or exploring more deeply the indigenous definitions, there is no dispute that TEK is knowledge obtained through centuries of observation and practice. Because these practices are replicated throughout the culture, TEK meets the two accepted methods to ensure scientific integrity.

U.S. agencies like the Environmental Protection Agency,[11] National Institutes for Health,[12] and National Parks Service[13] are engaged in incorporating TEK into their decisions. The National Parks Service policies state, “[t]he Service will regularly and actively consult with American Indian tribal governments and other traditionally associated groups regarding planning, management, and operational decisions that affect subsistence activities, sacred materials or places, or other resources with which they are historically associated.”[14] Not only has TEK been accepted by the western science community, government agencies have also validated it as an accepted source of scientific evidence.

Traditional ecological knowledge is essential to a reasoned choice among alternatives, because without TEK the document lacks scientific integrity

Under NEPA, an EIS must contain both the environmental impact of the proposed action, and alternatives to the proposed action.[15] Although an agency is not required to consider all possible alternatives, courts determine “whether an EIS’s selection and discussion of alternatives fosters informed decision-making and informed public participation.”[16] Plaintiffs often challenge NEPA documents as being incomplete -- either an incomplete assessment of potential significant impacts, or an incomplete discussion of those impacts which were identified.

TEK is the best opportunity to resolve both of these issues, which can help streamline NEPA review and improve outcomes. By measuring the agency's discussion of significant environmental consequences against a discussion based on TEK, the agency can be reasonably certain that it has taken a hard look at the available evidence and filled information gaps.[17] Better yet, by integrating TEK into the agency's discussion of significant environmental consequences, agencies will be more able to overcome challenges to their NEPA documents, because systemic, holistic, and historic information about the ecosystem will underpin each analytical point. In this way, agencies can preserve time and improve project delivery while maintaining quality environmental analysis.[18]

TEK should be an integral tool used to help agencies meet their statutory duty to identify where there is incomplete information, and to explain why the information was not obtained.[19] But the agency must only seek information that is related to reasonably foreseeable environmental consequences of the action.[20] Applying TEK to NEPA analysis brings centuries of ecological data to bear on determining whether the consequences to be evaluated are reasonably foreseeable. For example, in *Oceana*, the agency identified eleven resources for which it had incomplete information and that were relevant to reasonably foreseeable adverse environmental impacts.[21] In that case, the agency reasoned that there were ongoing studies which would provide the scientific information it was lacking, but that the research would not be available for years.[22] The court accepted the agency's reasoning as adequate satisfaction that the information was unobtainable.[23] However, there was undoubtedly TEK describing the ecosystem along the Gulf of Mexico which would have filled at least some of the gaps in knowledge that the agency identified. Thus, the court should have found that the agency's failure to seek TEK undermined its

reasoning that the information was unobtainable. This argument was not presented to the court by the plaintiffs.

It is the responsibility of the agency to obtain and explain scientific information relevant to a reasoned choice amongst alternatives, including TEK.[24] The overarching purpose of NEPA documents is to provide essential information for the agency and the public to make a reasoned choice among alternatives.[25] The agency cannot gloss over a potential source of scientific information and hope that no advocate presents it for consideration.[26] An agency should not be allowed to assert that information relevant to a reasoned choice amongst alternatives does not exist if it has failed to seek TEK.[27] More importantly, an agency has not obtained all information relevant to a reasoned choice amongst alternatives if it has not sought TEK, because TEK reveals holistic ecological knowledge that is not available to western science. The agency cannot "wait and see" if indigenous nations offer TEK for consideration any less than it could intentionally avoid seeking and analyzing other known sources of relevant environmental science. An agency, therefore, knowing that TEK is an available source of relevant information must seek out TEK and include it directly and openly in the analysis of alternatives. TEK is especially relevant to the NEPA analysis of cumulative impacts for each proposed alternative, because at its core TEK is a living history of scientific ecological knowledge.

Challenges in Obtaining and Using TEK

TEK is held by the people and governments of indigenous nations, which are domestic dependent nations within the territory of the United States.[28] In seeking to obtain TEK, agencies must recognize that their engagement with indigenous nations are on a government-to-government level. TEK may contain sensitive and confidential matters related to the indigenous nation's deeply-held cultural and spiritual beliefs.

Throughout the history of the United States, the federal government has been oppressive and genocidal toward the indigenous peoples of North America.[29] Thus, it is reasonable to expect indigenous elders to be suspicious when the government asks for information about sensitive environments, cultural resources, and practices. Respecting the confidentiality of TEK can create barriers to agencies obtaining complete scientific information about environmental impacts for disclosure and discussion in NEPA documents. When historic trauma causes an indigenous nation to withhold TEK which is relevant to the environmental review of an agency action, the NEPA documents are ultimately incomplete. Under NEPA, the agency must identify where it knows that it has incomplete information; however, identification of the missing information does not cure the underlying defect. Thus, it is incumbent upon the federal government and its agencies to develop positive working relationships demonstrating mutual respect for indigenous nations, to foster opportunities for filling in gaps in ecological knowledge with TEK.

Conclusion

NEPA requires environmental documents to have scientific integrity, rigorously explore alternatives, and obtain complete information for decision-makers and the public to make a reasoned choice among alternatives. TEK is continuously evolving holistic environmental knowledge acquired through direct contact with the environment and transmitted between generations. Agencies have acknowledged TEK as legitimate scientific evidence, standing alongside western science, which provides decision-makers and the public with important information. In order for the agency to demonstrate that there is individual integrity in its science which will withstand peer review, it cannot exclude TEK as a legitimate source of scientific evidence. There should be a strong presumption that thousands of years of cumulative and holistic ecological

knowledge will always reveal some scientific information which is relevant to reasonably foreseeable adverse environmental effects. Therefore, courts should find that a NEPA document which does not contain a discussion and analysis of TEK violates NEPA.

[1] See, e.g., The Jane Goodall Institute, Conservation Science, <https://www.janegoodall.org/our-work/our-approach/conservation-science/> (last visited Mar. 3, 2020); About Jane, <https://www.janegoodall.org/our-story/about-jane/> (last visited Mar. 3, 2020).

[2] 40 C.F.R. § 1502.24; 40 C.F.R. § 1502.22.

[3] Domenico Franco Merlo, Kirsi Vahakangas, & Lisbeth E Knudsen, Scientific Integrity: Critical issues in environmental health research, *Envtl. Health*, 7 Suppl 1:S9 at 1, 2-3 (2008); Scientific Integrity, 74 Fed. Reg. 10,671, 10,671 (Mar. 11, 2009); Science Advisor Programs, U.S. EPA, Basic Information About Scientific Integrity, <https://www.epa.gov/osa/basic-information-about-scientific-integrity> (last visited Feb. 8, 2020); EPA, Scientific Integrity Policy, https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf (last visited Feb. 8, 2020).

[4] See *Natl. Parks & Conservation Ass'n v. Bureau of Land Mgt.*, 606 F.3d 1058, 1073 (9th Cir. 2010).

[5] *Seattle Audubon Soc. v Espy*, 998 F.2d 699 (9th Cir. 1993)

[6] *Nat'l Parks*, 606 F.3d at 1072; See also, 40 C.F.R. 1502.14(a) ("rigorously explore and objectively evaluate all reasonable alternatives"); *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978); 40 C.F.R. § 1502.1 ("shall provide full and fair discussion of significant environmental impacts"); *Baltimore Gas and Elec. Co. v. Nat'l Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983); 40 C.F.R. § 1502.1 ("shall inform decisionmakers and the public of the reasonable alternatives"); *Cabinet Res. Grp. v. U.S. Fish and Wildlife Serv.*, 465 F. Supp. 2d 1067, 1098 (D. Mont. 2006). Cf. *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 528 (7th Cir. 2012) ("We take care to distinguish between claimed deficiencies in an EIS that are merely flyspecks and those that are significant enough to defeat the goals of informed decisionmaking and informed public comment.") (quotations omitted).

[7] 40 C.F.R. 1508.27(b)(7); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1128

(9th Cir. 2004) ("[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.") (citing 40 C.F.R. 1508.27(b)(7)); *Neighbors of Cuddy Mt. v. U.S. Forest Serv.*, 137 F.3d 1372, 1378 (9th Cir. 1998) ("[c]umulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions"); *Montana Wilderness Ass'n v. McAllister*, 666 F.3d 549,

559 (9th Cir. 2011) (“failure to appreciate the relevance of the historical increase in volume. . . resulted in a failure to comply with NEPA regulations requiring acknowledgment that relevant data are unavailable or incomplete.”); but see, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 1708 (proposed revisions to NEPA guidelines do not require cumulative effects analysis)..

[8] See U.S. Fish and Wildlife Service, Traditional Ecological Knowledge: for Application by Service Scientists, 1, 1 (Feb. 2011), <https://www.fws.gov/nativeamerican/pdf/tek-fact-sheet.pdf> (last visited February 10, 2020); Kathleen Sloan & Joe Hostler, Utilizing Yurok Traditional Ecological Knowledge to Inform Climate Change Priorities, Yurok Tribe (June 2014), http://mmheller.github.io/GNLCC_PTS4_NPLCC/prj_report.html?PRJ_ID=25 (last visited Feb. 13, 2020); Advisory Committee on Climate Change and Natural Resource Science, U.S. Department of the Interior, Climate Change and Indigenous Peoples: A Primer, 1, 12 (May 2014), https://climatetkw.files.wordpress.com/2014/09/primer_may_2014.pdf (last visited Feb. 15, 2020).

[9] See, e.g., U.S. Environmental Protection Agency, National Environmental Policy Act Review Process, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Feb. 13, 2020).

[10] 40 C.F.R. 1508.8.

[11] U.S. Environmental Protection Agency, Tribal Science Council, Integration of Traditional Ecological Knowledge (TEK) in Environmental Science, Policy and Decision-Making (June 2011), <https://archive.epa.gov/region9/tribal/web/pdf/tribal-ecological-knowledge-env-sci-policy-dm.pdf> (last visited Feb. 13, 2020).

[12] National Institute for Environmental Health Sciences, Tribal Ecological Knowledge (TEK) and Its Value for Environmental Health Sciences, <https://www.niehs.nih.gov/research/supported/translational/peph/webinars/tribal/index.cfm> (June 2015) (last visited Feb. 13, 2020).

[13] National Parks Service, Management Policies 2006: 8.5 (Aug. 2006), https://www.nps.gov/policy/mp/policies.html#_Toc157232938 (last visited Feb. 13, 2020).

[14] Management Policies 2006, *supra*.

[15] 43 C.F.R. §§ 46.415(a)(3), (6).

[16] *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 872 (9th Cir. 2004).

[17] *Cabinet Res. Grp.*, 465 F. Supp. 2d at 1099.

[18] Time and cost savings overall can be realized when the incorporation of TEK prevents challenges to EIS documents, or makes defense to those challenges more effective. See, e.g., *Id.* at 1085–86, 98–99, 1101 (order requiring FWS EIS be set aside as contrary to law)..

[19] 40 C.F.R. § 1502.22.

[20] National Environmental Policy Act Regulations: Incomplete or Unavailable Information, 51 Fed. Reg. at 15621.

[21] *Oceana*, 37 F.Supp.3d at 155.

[22] *Id.* at 156.

[23] *Id.* at 158.

[24] See 40 C.F.R. § 1502.22.

[25] *Friends of Animals v. Romero*, 948 F.3d 579, 586–87 (2d Cir. 2020).

[26] See, e.g., *Ocean Advocates*, 361 F.3d at 1128; *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgt.*, 387 F.3d 989, 993–94 (9th Cir. 2004) (The analysis “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.”)

[27] National Environmental Policy Act Regulations: Incomplete or Unavailable Information, 51 Fed. Reg. at 15622.

[28] *Michigan v. Bay Mills Indian Comty.*, 572 U.S. 782, 788 (2014) (In the absence of Congressional action, tribes retain their historic sovereign authority which pre-exists the Constitution).

[29] See, e.g., Alexia Fernandez Campbell, How America's Past Shapes Native Americans' Present, *The Atlantic*, <https://www.theatlantic.com/business/archive/2016/10/native-americans-minneapolis/503441/> (Oct. 2016) (last visited Feb. 23, 2020); Discrimination in America: Experiences and Views of Native Americans, Harvard School of Public Health and National Public Radio, <https://www.npr.org/documents/2017/nov/NPR-discrimination-native-americans-final.pdf> (Nov. 2017) (last visited Feb. 23, 2020); Gov.

Newsom, Executive Order N-15-19 (June 2019).

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A.B. 5

SHOULD TRIBAL
EMPLOYERS PAY
ATTENTION?

BY BEN MYERS

Disclaimer: This article provides an update on AB 5, including an overview of associated issues Tribal employers may wish to consider. It does not constitute legal advice.

Introduction

State laws regulating employment generally do not apply to California Tribes. Nevertheless, Tribes should be aware of California Assembly Bill 5 (“AB 5”), which became law on January 1, 2020. AB 5, a response to so-called “gig

workers,” including Uber and Lyft drivers, may have impacts on California employers for years to come. In California, many employees receive benefits that independent contractors do not. AB 5 shifts the burden to employers to demonstrate that workers are not employees – making it more difficult to classify workers as independent contractors. In most instances, AB 5 should not apply to Tribes because it is a civil

regulatory law. However, Tribal employers should be aware of this trend towards classifying workers as employees.

What is AB 5?

History

AB 5 codifies the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal.5th 903 (2018). In *Dynamex*, the court found that workers were being misclassified as independent contractors, which increased the wage gap in California and cost the state significant revenue from unpaid payroll taxes, Social Security, unemployment, disability insurance, and workers' compensation. *Id.* Lawmakers then moved to codify this decision. The law was predicted to have a significant impact on large ridesharing and delivery service companies like Uber, Lyft, and DoorDash, who employ thousands of independent contractors, often called "gig workers." Governor Gavin Newsom signed AB 5 into law on September 18, 2019 and it went into effect on January 1, 2020. Since then, the law has faced several legal challenges.

Reclassifying Workers and the "ABC" Test

AB 5 codifies the test from *Dynamex*, often called the "ABC" test, to classify workers as either employees or independent contractors. Cal. Lab. Code §2750. An individual is an employee, rather than an independent contractor, unless the hiring entity can prove all of the following criteria: The new test departs from the previous test established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, which was more subjective, relying on courts to apply thirteen non-dispositive factors to classify workers. 48 Cal.3d 341 (1989). The new test removes the subjective nature of the *Borello* test by requiring each of its factors be satisfied, rather than balancing factors on a case-by-case basis.

Exceptions

AB 5 has exceptions for specific occupations. The test from *Borello* still applies to individuals who provide certain "professional services," including doctors, lawyers, architects, state and federally licensed investment advisors, freelance writers, graphic designers, and grant writers. Cal. Lab.



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Code §2750(b). Several other professions and business relationships are exempt from the “ABC” test, including real estate licensees, bona fide business-to-business contracting relationships, relationships between contractors and subcontractors in the construction field, and relationships between referral agencies and service providers. Cal. Lab. Code §2750(d-g).

Does AB 5 Apply to Tribal Employers?

Generally, states do not have civil regulatory authority over Tribes and tribal lands, even in Public Law (“PL 280”) states like California. See *Bryan v. Itasca County*, 426 U.S. 373 (1976); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987); 25 U.S.C. §1326. In *Bryan v. Itasca County*, the Supreme Court found that PL 280’s delegation of civil jurisdiction to states is confined to providing a state forum for private lawsuits to which Indians are parties. 426 U.S. 373, 384-385 (1976). In *California v. Cabazon Band of Mission Indians*, the Supreme Court determined that, pursuant to a state’s PL 280 jurisdiction, a state law applies to Tribes if the law’s intent is to prohibit conduct; the court described these laws as criminal prohibitory in nature. 480 U.S. 202, 209 (1987). However, if the state law’s intent is to allow – but regulate – certain conduct, then the law is civil regulatory in nature and does not fall within the state’s PL 280 jurisdiction. *Id.* The Court noted that each state law at issue should be “examined in detail” to determine whether it is civil regulatory or criminal prohibitory. *Id.* at 211. AB 5 should be considered civil regulatory in nature. AB 5 changes the test that is used to determine who is an independent contractor. While the new test limits who can be considered an independent contractor, it does not prohibit employers from classifying workers as independent contractors. The conduct at issue (classifying workers) is: (1) regulated (limits who can be classified as an independent contractor); and, (2) not prohibited

(does not prevent workers from being classified as independent contractors). Therefore, AB 5 should not apply to California Tribes as a civil regulatory law. Of course, there is always a possibility that a court may disagree. Therefore, there is a risk of legal claims related to AB 5, even if those claims are ultimately rejected.

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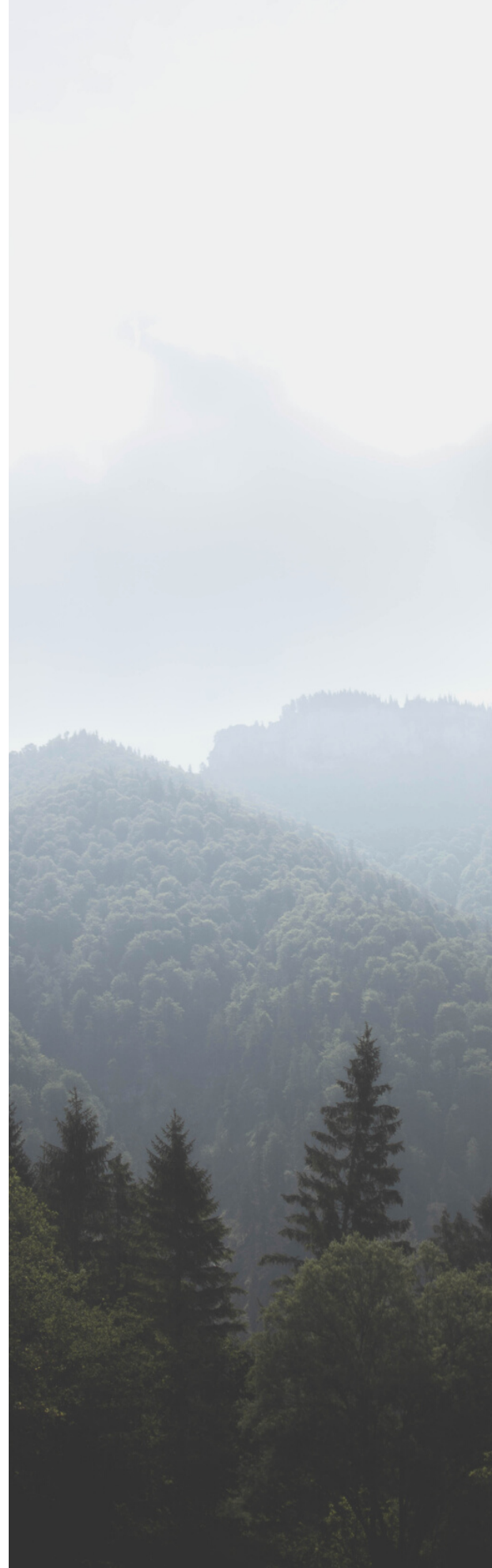


History of Cultural Resource Protection in California

BY MICHELLE LAPENA

Some people are surprised to find out that there are 110 federally recognized tribes in California, and over 100 separate reservations or Rancherias. California's Indigenous tribes have lived in their traditional territories since before recorded history and they have deep connections to the areas they inhabit. Archaeological data has confirmed that California Indians have lived in California for at least 15,000 years. But tribal people believe that they were created here and never migrated here from across a land bridge.

Historically, the US government and the California state government have not respected Native American tribal sovereignty, which is the idea that indigenous tribes have inherent authority to govern themselves within the border of the United States. Tribes have sued government entities, held protests, and garnered media attention when unwanted



development has encroached on their land or sacred sites.

In recent years, California has made some progress toward protecting and respecting tribal cultural resources. Exemptions and protections are now woven into various California laws and allow Native Americans the opportunity to safeguard their tribal cultural resources.

In 2018, I noticed a law that was passed in 2017 SB 35 (Senator Scott Wiener was the author), which fast-tracked approval processes for low-income housing projects. Under existing law, a number of lands are exempted from this streamlined development process, including historic structures, wetlands, and hazardous waste sites. However, tribal cultural resources were not included in the original bill's list of exemptions, and therefore, are not protected. I reached out to Assemblywoman Cecelia Aguilar-Curry to carry a bill to fix this apparent oversight and she sponsored AB 168.

Tribal cultural resources are sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe. Sacred sites may be burial grounds, important archaeological areas, or religious objects.^[1] This article will briefly describe the history of cultural resource protection in California and explain why the amendments contained in AB 168 are so important to Indian Country.

1976 AB 4239 - Creation of the NAHC

In 1976, AB 4239 established the Native American Heritage Commission (NAHC) as the primary government agency responsible for identifying and cataloging Native American cultural resources.

NAHC's primary duties were to include the following:

- Prevent irreparable damage to designated sacred sites, as well as to prevent interference with the expression of Native American religion in California.
- Take action to prevent damage to and insure Native American access to sacred sites. (under new definition).
- Request a court to issue an injunction to protect a site, unless there is evidence that public interest and necessity required otherwise.
- Prepare an inventory of Native American sacred sites located on public lands and required the commission to review current administrative and statutory protections accorded to such sites (the Sacred Lands Database).

Although this was a beginning, the NAHC was never provided an adequate budget and with insufficient site protections since 1979, the focused of tribes later shifted toward early consultation and better definitions.

SB 18 (Burton, 2004) - General Planning

Senate Bill 18 was signed into law in September of 2004 with the main provisions taking effect on March 1, 2005. SB 18 did three main things: 1) it added 3 new sections to the State planning laws to require tribal consultation during the general planning process; 2) it amended 5 sections of the Government Code to require notice to California Native American Tribes (as defined in the law) during the general planning process and established a process for tribal consultation; and 3) it amended the Civil Code to authorize California Native American Tribes to hold conservation easements under state law.

SB 18 requires cities and counties to contact, and consult with, “California Native American Tribes before adopting or amending a General Plan, or when designating land as Open-Space, for the purpose of protecting Native American Cultural Places. Importantly, it established a new definition of “Consultation” in state law.

“Consultation means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values, and, where feasible, seeking agreement. Consultation between government agencies and Tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty. Consultation shall also recognize the tribes’ potential needs for confidentiality with respect to places that have traditional tribal cultural significance.” Cal. Gov’t Code 65352.4.

Governor Brown Executive Order B-10-11 (2011)- State Agency Consultations

In September 2011 Edmund G. Brown, Jr. signed Executive Order B-10-11, declaring that the “State of California recognizes and reaffirms the inherent right of these Tribes to exercise sovereign authority over their members and territory” and that the “State is committed to strengthening and sustaining effective government-to-government relationships between the State and Tribes by identifying areas of mutual concern and working to develop partnerships and consensus.”

The EO also established a new cabinet position in the Governor’s Office called the Tribal Advisor”. The Governor’s Tribal Advisor meets regularly with the elected officials of California Indian Tribes to discuss state policies that may affect California tribal communities, serve as a direct link between the Tribes and the Governor

of the State of California, facilitate communication and consultations between the Tribes, the Office of the Governor, state agencies, and agency tribal liaisons, and review state legislation and regulations affecting Tribes and make recommendations on these proposals.

With the enactment of Executive Order B-10-11, California Indian Tribes finally had a new way to address the state regarding issues within each of their tribal communities and the ability to change outdated regulations for the betterment of their tribal communities.

AB 52 (Gatto, 2014) – CEQA

With a Tribal Advisor in place and increased funding being made available to the NAHC, tribes sought to fill the gaps left with SB 18. AB 52 made the following improvements to California law:

- Included consultation with all lead agencies
- May apply to projects on state and/or private property
- May include Special Districts, School Districts, Water Districts...
- Is part of CEQA statute or process.
- May involve inadvertent discoveries, MLDs, monitor, etc.

While AB 52 went a long way to closing gaps in protection for traditional tribal cultural places, it still needs improvement. However, new low-income housing streamlining bills, such as SB 35, completely ignore the protections of AB 52 and will allow low-income housing project approvals to be streamlined and could result in the destruction of burial grounds, sacred sites, village sites and other places of traditional importance to California’s indigenous people.

AB 168 is intended to close the loophole in SB 135

and to allow for the protections in AB 52 to be followed if a proposed development could impact traditional tribal cultural places. For those who have a hard time understanding what this means, I like to remind them of the movie *Poltergeist*. While it is a fictional story, the fact remains that many suburban and urban housing developments have been dug into Native American burial grounds because there was so little protection in the law as the state grew in population density after colonization. I ask you to support AB 168 so that we can hopefully prevent this from happening ever again.

AB 168- Fast Facts

- AB 168 adds tribal cultural resources (as defined in the Section 21074 of the Public Resources Code) to the list of exemptions that were originally included in SB 35. This law passed last year and outlines what types of housing development projects can qualify for a streamlined approval process.
- AB 168 is consistent with California laws, which protect tribal lands. Without this bill, tribal sacred sites may be subject to unwanted destruction and desecration in favor of housing developments.
- AB 168 ensures that “tribal cultural resources,” which are sometimes referred to as “sacred sites,” will not be the target of streamlined housing development in our goals to create more affordable housing.

[1] CA Public Resource Code Section 5097.9 Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine.
Public Resource Code Section 5097.995 Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1, including any historic or prehistoric ruins, any burial ground, any archaeological or historic site.

Michelle LaPena is experienced in a wide variety of tribal legal matters including cultural resource protection, Indian child welfare, tribal taxation, tribal gaming regulation, tribal governance, the fee to trust process and real estate transactions, and general civil litigation involving tribal governments. Michelle is a member of the Pit River Tribe and Partner at Rosette, LLP. She can be reached at mlapena@rosettelaaw.com.



McCoy v. Salish Kootenai College: Tribal Entities and Sovereign Immunity

BY MARK D. MYERS

In an unassuming memorandum disposition last November, *McCoy v. Salish Kootenai College, Inc.*, 785 Fed. App'x. 414 (9th Cir. 2019), the Ninth Circuit affirmed the District of Montana's determination that Salish Kootenai College was entitled to tribal sovereign immunity. In doing so, it briefly applied a four-factor test the Circuit had adopted a few years earlier in *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014), and which it in turn borrowed from the Tenth Circuit's decision in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010).

The underlying dispute was an employment discrimination claim against the College under both Title VII of the Civil Rights Act of 1964 and the Montana Human Rights Act. Indian tribes are excluded from the definition of "Employer" under Title VII. But as to the Montana state law claim, the College raised the defense of sovereign immunity.



The sovereign immunity doctrine predates the United States, but has changed and developed over time. See William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587, 1610–23 (2013) (giving historical overview of the doctrine). In brief, it prevents sovereigns not only from being sued, but even from being haled into court without their consent. *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011). Sovereigns include the U.S., states, foreign nations, and Indian tribes, though the specifics of the doctrine varies as to each of them. See Wood, *supra*.

The United States has plenary authority to abrogate a tribe's sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But abrogation must be unequivocally expressed, and is construed narrowly. *Id.* And of course the tribe itself can waive its immunity. *C & L Enters., Inc. v. Citizen Band Pottawatomie Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

While the memorandum disposition in *McCoy* is perfectly serviceable, the deeper analysis is found in Chief Judge Dana Christensen's decision, 334 F. Supp. 3d 1116 (D. Mont. 2018), which the panel apparently thought worthy of a fairly brief affirmance.

Other entities may share tribal sovereign immunity, if they are acting as an "arm" of a tribe. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). Relying on this, the College moved to dismiss *McCoy*'s claims on the basis of sovereign immunity, arguing that it was an arm of the Confederated Salish Kootenai Tribes of the Flathead Reservation ("Tribes"). This triggered what might be called a series of burden-shifting inquiries. Sovereign immunity is said to be quasi-jurisdictional, meaning it can be forfeited in a particular case if not raised. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015). But if it is raised, the plaintiff bears the burden of proving that

immunity does not bar the suit. *Id.* That being said, a party asserting it is an arm of a tribe bears the burden of showing by a preponderance of evidence that it is one. *McCoy*, 334 F. Supp. 3d at 1120.

When deciding whether an entity is an arm of a tribe, a court is required to consider (1) the method of creation of the entity; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has over the it; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entity. *White*, 765 F.3d at 1025. An entity that amounts to a "mere business," however, does not enjoy exemption from Title VII as a tribe. See *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998). This article focuses on Judge Christensen's discussion of the first three factors, which are more complex. The last two are more straightforward. In particular, the "intent" analysis was made significantly easier by the Tribes' filing of an amicus brief in support of the College's assertion of sovereign immunity.

Method of Creation The College was dually-incorporated, first under tribal law, then under Montana law, which Judge Christensen treated as a dual incorporation of a single entity. Even if the College had been solely state-incorporated, he reasoned, it could still be a tribal entity, and was not necessarily a separate entity from the tribe as *McCoy* argued. 334 F. Supp. 3d at 1121. Other facts nudged this factor towards the tribal side, however. The Tribes chartered it under their government authority, it sits on land on their reservation, and the federal government recognized it as a "tribally controlled college." *Id.*

Purpose

While most of the College's enrollment (about 72%) did not come from the Tribes, enrolled

members received full tuition scholarships for the first year, and in later years if they maintained good grades. While the articles of incorporation did not point to the College's being created to support the Tribes' self-government or financial goals, the Colleges primary purposes as listed in the charter all pertained to advancing the Tribe's interests — i.e., “for the Tribes to become completely self-sufficient and educate their own people.” *Id.* at 1121.

In reaching this conclusion, Judge Christensen read the Tribes' interests broadly, as would be consistent with the interests of a government. These include promoting the Tribes' own views and interests, and educating both residents on the reservation and tribal employees. McCoy's rejected argument can fairly be described as contending that the Tribes' interests were limited to the education of their own enrolled members, and excluded any benefit to the reservation community more generally, or to other tribes or their members. (Mot. to Dismiss at 12.)

Structure, Ownership, and Management

The College is accredited by the Northwest Commission on Colleges and Universities, whose standards prevent the Tribes from exercising direct oversight. The College's Board, not the Tribes' Council, governed day-to-day operations, and the articles of incorporation reserved no control to the Tribes. 334 F. Supp. 3d at 1121–22. While separate governance is sometimes either required or desirable, it does not necessarily speak to this factor because tribes — like other governments — are permitted to create entities to help them carry out governmental functions. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1133 (9th Cir. 2006) (“Tribes may govern themselves through entities other than formal tribal leadership.”) And as Judge Christensen pointed out, to be effective in their mission, tribal colleges need to seek

accreditation, and this requires tribal councils to delegate authority in order to provide sufficient autonomy. Here, though the Board and the Council are separate entities, the Council retains indirect control over the Board. It appoints and removes Board members, who are required to be enrolled members of the Tribes, and it reviews the Board's actions. Compare *Pink*, 157 F.3d at 1188 (entity whose board members were representatives of two tribal governments was an “arm” of the tribes). The Tribes also require the Board's policies to be consistent with their own. The Tribes also refer to the College as one of their subdivisions, components, or departments. And they treat it as such, both by advocating for it, and by permitting it to carry out certain public functions. 334 F. Supp. 3d at 1122.

Having found that all five factors weighed in favor of the College's being an arm of the Tribes, Judge Christensen had no difficulty concluding that it was one, and dismissing the claims.

Since courts in the Ninth Circuit began applying the White factors to make “arm of the tribe”, only a couple of dozen cases have done so. McCoy is unique in that it involved a Ninth Circuit panel applying the White factors itself (as opposed to directing a district court to do so).

Mark D. Myers is law clerk to the Hon. Larry A. Burns, Chief Judge 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.

Indian Child Welfare Act Update 2020

BY DELIA SHARPE

The Indian Child Welfare Act is a robust and vibrant federal law which applies to state child custody proceedings involving Indian children. Despite being in place for over 40 years, the United States Supreme Court's decision in *Adoptive Couple v. Baby Girl* emboldened conservative special interest groups, including the Goldwater Institute and the Pacific Legal Foundation, to bring legal challenges to the ICWA. *Adoptive Couple* served as a springboard for these groups to file 11 separate cases in a five-year span, in both state and federal courts across the country, seeking to have the law declared unconstitutional. Moreover, they have a targeted objective to bring it back before the Supreme Court for review. These groups misrepresent the ICWA as a race-based statute, glossing over the fact that it was enacted pursuant to the United State Constitution and the political relationship between federally-recognized tribes and the United States. Ignoring its purpose is to protect Indian children and families, but also to preserve and protect the continued existence of

Indian tribes. This ongoing attack is organized and well-funded, and with the filing of *Brackeen v. Bernhardt* (formerly *Texas v. Zinke*) has the support of three state attorneys general. (*Brackeen et al. v. Zinke*, 388 F. Supp.3d 514 (N.D. Texas, Oct. 4, 2018) *Brackeen v. Bernhardt*, 937 F.3d 406 (Aug. 9, 2019) (rehearing granted in *Brackeen v. Bernhardt*, 942 F.3d 287 (Nov. 7, 2019).)

In 2018, Judge Reed O'Connor of the Northern District of Texas held the ICWA was unconstitutional on several grounds, including equal protection, substantive due process, anticommandeering, and the nondelegation doctrine. Because of the decision is fundamentally based on equal protection grounds, it has broad implications that could run far beyond the ICWA itself. Tribes across the country have a legitimate and heightened concern that this decision threatens the well-established authority of Congress to legislate with respect to Indian affairs. Thus, because one judge held that one law is race-based and therefore unconstitutional, others may argue



***Protect Indian Kids* is a coalition of four federally-recognized sovereign Indian tribes committed to protecting and preserving ICWA, and ensuring that all Indian children are safe, cared for and remain within their families and tribes. Visit protectindiankids.com, for more information and links to additional resources**

that all federal Indian law is race-based and unconstitutional, in stark conflict with centuries of settled law.

Five tribes intervened in the Brackeen litigation: Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinault Nation, and Navajo Nation. A stay of the District Court decision was granted by the Fifth Circuit Court of Appeals, which for now remains in place, shielding Indian children, families and their tribes from any immediate impacts of Judge O'Connor's ruling. In early 2019, a three-judge panel of the Fifth Circuit reversed the lower court decision. However, the Fifth Circuit then, on its own motion, granted en banc review, vacating the earlier Fifth Circuit decision reversing the District Court. Oral argument was heard by the en banc panel on January 23, 2020. Those watching this case closely estimate they will issue an opinion in three to ten months. (Fort, Kate; Reflections on Oral Arguments in *Brackeen v. Bernhardt*, Turtle Talk (January 24, 2020).) Regardless of the outcome, most expect Supreme Court review will be requested.

Demonstrating the importance of the ICWA to tribes, 107 of the 109 federally-recognized tribes in California joined a tribal amicus brief to the Fifth Circuit supporting the law. Additionally, the California Attorney General's Office led a group of 27 Attorneys General in defending Indian rights with a separate amicus brief. "ICWA is a time-tested law that protects the welfare of children and the sovereignty of Native American tribes," said Attorney General Becerra. "No child should forcibly lose the opportunity to grow up with their own culture, history, and traditions."

The survival of Native American tribes depends on children maintaining these critical ties. Together with a bipartisan coalition from across the country, we're proud to lead the way in defending the rights of Native American children and families." On behalf of its member tribes, the California Tribal Families Coalition has been working to update state laws to ensure the protections guaranteed by the ICWA and its implementing regulations are embedded in state statute.

The following are some examples of successful CTFC legislative efforts intended to strengthen the implementation of the ICWA in California and protect against a potential fallout nationally:-

- AB 3176 - In 2018, Assemblymember Marie Waldron, sponsored a bill to bring the California Welfare & Institutions Code into conformance with the new federal ICWA regulations. Strengthening compliance with federal regulations will benefit Indian children and families and reduce the burden of unnecessary litigation on state courts.
- AB 3047 - Assemblymember Tom Daly authored a bill to waive fees for out-of-state attorneys who pro hac vice to represent tribes in ICWA matters. Prior to this bill, an out-of-state attorney would have to pay \$500 to file a pro hac vice application and associate with a local attorney, further increasing costs borne by tribes.
- AB 686 - In 2020, Assemblymembers Ramos and Waldron introduced a bill to clarify placement approval standards and provide funding for tribal home approvals. AB 686 was co-authored by Assemblymember Reyes and also provides tribes with full access to hearings through telephonic or other computerized or remote access options, waiving associated costs.

These efforts were possible because of the united effort of CTFC member tribes as they engage with the state legislators and state agency partners. CTFC's current legislative effort is AB 685, authored by Assemblymember Eloise Reyes and co-authored by Assemblymember James Ramos and Assemblymember Waldron, which would provide attorneys for tribes in ICWA cases.

Currently, a tribe is the only party who does not have access to a court-appointed attorney but is instead required to pay for its own. Often, to reduce the expense of appearing in their children's cases, tribes use tribal social workers as their advocates in ICWA proceedings. This can create a conflict with the worker and the family he or she is simultaneously trying to assist. AB 685 provides tribes with legal access and allows a tribe's full participation in cases impacting its children. Opponents claiming the ICWA is a race-based statute deliberately fail to recognize it is a remedial statute, based on political status rather than race. A decision in their favor could have detrimental effects on a multitude of levels throughout Indian country. It is imperative that tribes and tribal advocates remain united and vigilant in their protection.

Delia M. Sharpe is the Executive Director at the California Tribal Families Coalition, a non-profit organization dedicated to protecting the health, safety and welfare of tribal children and families, with a focus on increasing compliance with the Indian Child Welfare Act.



L - Dawn Bawm (photo credit: Kori Cordero), R - Alexandra Mojado

IN-HOUSE FEATURE

Being in-house counsel for a Tribe is a challenging yet rewarding and unique opportunity to work on a wide array of legal issues for the Tribe. Not all tribes have the ability to employ a full time attorney in-house, but those that do are able to benefit from having an attorney available to ensure compliance with tribal, federal, and sometimes state laws and regulations. Further, an in-house attorney is generally not just a legal advisor to the Tribe, they are often included in the decision making process and provide constant feedback and advice to the tribe.

Depending on the size of the legal department, some in-house attorneys are exposed to a

wide range of legal issues and must quickly adapt and learn new areas of law in order to provide accurate and timely legal advice. Other in-house legal departments have the ability to create different sections within the legal department depending on the area(s) of law.

CILA recognizes that in-house attorneys offer a unique perspective and we'd like to highlight two CILA members that serve as in-house counsel to Tribes in California. CILA thanks these two native women for their willingness to speak about their career paths and provide insights to the life of an in-house attorney.

DAWN'S PATH TO AN IN-HOUSE CAREER

I came to my position with 16 years of legal experience working for tribes, the State of Wisconsin, the Native American Rights Fund and the federal government, as well as part-time law school teaching experience. I moved to the North Coast of California after eleven years in Washington, D.C. My variety of legal experience in Indian law and government service have been key to being able to help tackle the broad range of legal work completed by our Office of the Tribal Attorney.

YUOK TRIBE

Yurok Tribe is the largest tribe in California, located along the Klamath River and surrounded by stands of redwood forest and the Pacific Ocean. The Tribe has seven in house attorney positions.

WHAT SKILLS HAVE BEEN MOST CRUCIAL TO YOUR SUCCESS AS AN IN-HOUSE ATTORNEY?

The ability to learn new areas of law quickly and remain flexible and resilient is a big part of being successful in house with a Tribe. Also very important to success, however, has been learning about the cultural, religion, language, history, and traditions of Yurok Tribe. This affects everything from how to prioritize my work, to how run a meeting or deal with conflict, to being aware of topics that are taboo or very sensitive issues to tribal members. Finally, working in-house for a Tribe means you are often in a position to educate the tribal staff and community you work with about both tribal law and law generally and ultimately participate in building the capacity of tribal nation you work for. I strive to provide explanations for my advice that will strengthen the understanding of tribal staff and leadership instead of providing a simple yes or no answer.

WHAT IS ONE WAY IN WHICH THE WORKING ENVIRONMENT AT THE TRIBE HAS BEEN DIFFERENT FROM YOUR OTHER LEGAL EXPERIENCES?

One of the exciting things about working for the Yurok Tribe in particular is that it only organized a more "mainstream" form of government pretty recently--in the early 1990s. This means there are still new tribal departments to be created as well as new tribal codes and policies to be written. Legal professionals do not always have the luxury of being able to work on such foundational pieces of law which sometimes get at the heart of what it means to be Yurok, and I consider it my honor and privilege to do so.

Dawn Sturdevant Baum (Mole Lake Chippewa, Menominee), Deputy General Counsel, Yurok Tribe, Klamath, California

DAWN'S ADVICE FOR OTHER LAWYERS THINKING ABOUT WORKING IN-HOUSE AT A CALIFORNIA TRIBE

My advice to those considering working in-house for a California tribe is to be assured the work will be challenging, interesting, and meaningful. With the support of those in your office or within the CILA community, you can absolutely make a lasting difference in Indian Country. Finally, you will be rewarded for your efforts by seeing the positive results of your work within your own community.

WHAT SKILLS HAVE BEEN MOST CRUCIAL TO YOUR SUCCESS AS AN IN-HOUSE ATTORNEY?

The ability to learn new areas of law quickly and remain flexible and resilient is a big part of being successful in house with a Tribe. Also very important to success, however, has been learning about the cultural, religion, language, history, and traditions of Yurok Tribe. This affects everything from how to prioritize my work, to how run a meeting or deal with conflict, to being aware of topics that are taboo or very sensitive issues to tribal members.



Dawn with her colleagues from the Yurok Office of the Tribal Attorney, enjoying time together on the Klamath River, located on the Yurok Reservation.

ALEX'S PATH TO AN IN-HOUSE CAREER

I went to law school knowing that I wanted to work as in-house counsel for a California Tribe. I graduated from the University of Arizona and had applied for the position of associate attorney at Hoopa. One day I got a call to interview and I sat on my bed, feeding my one month old daughter, and interviewed for the position. I was called back within ten minutes and told that the interview panel was impressed with my background and focus in Indian law and asked when I could start.

HOOPA VALLEY TRIBE

The Hoopa Valley Tribe has the largest reservation (about 90,000 acre +/-) and is the second largest Tribe in California. Approximately 4,000 people live on the reservation.

WHAT DO YOU LIKE MOST ABOUT YOUR WORK?

I like that every day is different, especially when you advise Council and over fifty different departments and Tribal entities. I like how passionate the Hoopa people are about their culture. I also like how much the community I serve reminds me of my family and home.

WHAT KIND OF ISSUES DO YOU DEAL WITH AT WORK?

My office's biggest priority are employment issues. My day might consist of meetings with Tribal Council or department managers, preparing for Tribal court or state court, drafting legislation, reviewing and negotiating contracts, and conduct legal research on various topics. Our office is tasked with handling the day to day legal issues of the Tribe, so every day is different and exciting.

WHAT SKILLS HAVE BEEN MOST CRUCIAL TO YOUR SUCCESS AS AN IN-HOUSE ATTORNEY?

The most crucial skills have been the ability to learn quickly, plan, and communicate effectively to a wide range of people. I work with a Council of eight individuals who all have different backgrounds and I advise over 50 departments and entities. The ability to see a legal issue arising and plan for it is one thing but if you cannot communicate that to people who learn in different ways, you may be unsuccessful. I think another thing that has been crucial is the willingness and ability to work with other people to find a solution that works for everyone. Humor is helpful when navigating any cultural considerations. I have learned that hard and difficult conversations can be had after you get people laughing or relaxing and feeling comfortable.

Alexandra Mojado (Pala Band of Mission Indians, Cherokee Nation), Associate Attorney, Hoopa Valley Tribe, Hoopa, California

ALEX'S ADVICE FOR OTHER LAWYERS THINKING ABOUT WORKING IN-HOUSE AT A CALIFORNIA TRIBE

Every day is a new day! Some days are going to be emotionally hard or mentally exhausting but every day is going to be worth it because working in-house at a California Tribe is a dream and opportunity that did not exist for some of our parents or grandparents. Every day you show up and do the work is one more day that protects the future of someone's culture, language, resources, or self-determination. That is important any where but to me, as Kuupangaxwichem, it is extremely important because I understand the repercussions when a Tribe does not have legal representation.



Chief Judge (Leona Colegrove) of Hoopa swore Alex in to the California Bar. As a California Native woman it was a unique honor for Alex to be sworn in by another California Native woman. Photo credit: Manuel Mattz.



Federal Courts, Tribal Sovereign Immunity, & Tribally Owned Businesses

BY NAZUNE MENKA

Inherent sovereignty, by definition, cannot be given or taken away. Rather it is inextricably linked to a sovereign's right to self-govern and is political in nature. The ways in which different sovereigns wield such rights, however, vary greatly.

For example, the doctrines of discovery, manifest destiny, and aboriginal title are all rooted in an imperialistic, colonizing country's belief it had a divine or God given right to conquer, in the name of the Crown, all "newly discovered" lands, and the indigenous peoples located therein. The belief in these doctrines and divine rights were, in the colonizers view, their sovereign right.

Conversely, inherent tribal sovereignty might be thought of by some as being rooted in a property doctrine of first in time first in right, or rooted in an environmental framework and tribal stewardship of traditional homelands, but it is really rooted in the inherent human right to self-

govern one's own community free from the terrorism and oppression of outsiders. The United States government would certainly agree with such a definition.

Framing the historical perspective on inherent sovereignty is important to understanding the contemporary ways in which judicially or congressionally created doctrines currently frame tribally sovereign immunity. The Supreme Court, when authoring the Marshall trilogy, recognized a tribe's inherent right to self-govern while concurrently recognizing Congressional plenary power to give and take away tribal rights. Thus, it is not only Congress that wields a sword and a shield. The judiciary too, is well versed in donning such weaponry as it has been protecting and taking away tribal rights for the last two centuries. And thus, it continues.

Tribal sovereign immunity is vastly important to

maintain. It bolsters a tribe's ability to engage in otherwise unavailable economic development opportunities such as gaming and energy development. Many tribal lands can't be used for commercial leverage to raise the capital and tribal governments often have no taxable land base, both of which are necessary to fund governmental infrastructure needed to support its tribal citizens. These are just a few reasons the preservation of tribal sovereign immunity for tribally owned businesses remains of paramount importance.

Regardless of the evident need for tribal immunity doctrines to be maintained, federal courts continue to interpret whether tribally owned businesses are entitled to share in a tribes' inherent sovereign immunity, i.e. whether the business is an arm of the tribe, in various ways. In 2010 the Tenth Circuit upheld a broad interpretation of tribal sovereign immunity in *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, tracing its origins to the contemporary Congressional policy of tribal self-governance. 629 F.3d 1173, 1191. In furtherance of this policy, and after analysis of several court decisions, the Breakthrough court opined that courts should "look to a variety of factors when examining the relationship between the economic entities and the tribe, including but not limited to" five factors including: (1) the method of creation of the economic entities; (2) the entities purpose; (3) the entities structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent to share its sovereign immunity with the entity; and (5) the financial relationship between the tribe and the entity.[1]

Although the Breakthrough the court explicitly stated the factors shouldn't be limited and should be "looked to" i.e. not strictly adhered to; some courts tend to place an undue

amount of focus on the financial factor, aligning tribal sovereign immunity with the Eleventh Amendment immunity of a state where "the most salient factor" in determining sovereign immunity is "the vulnerability of the [s]tate's purse." [2] Nevertheless, recently in *Williams v. Big Picture Loans, LLC*, the Fourth Circuit overturned the lower court's ruling finding tribal financial liability was not "a threshold requirement for immunity nor a predominant factor in the overall analysis." [3] 929 F.3d 170, 184 (4th Cir. 2019). The court further specified if a "judgment would significantly impact the tribal treasury" the factor weighs in favor of immunity. At issue is what a court determines will be a significant impact to a tribal treasury. The *Williams* court found that although only ten percent of the tribe's general fund came from the tribal business a judgment against the business would still be a significant impact to the tribes' treasury.

The American Law Institute ("ALI"), which provides judicial and legislative guidance on complex common law issues updated the Restatement on the Law of American Indians tribal economic development chapter in 2019. Tribal Economic Dev. § 59 (Am. Law Inst. 2019). [4]. The chapter addresses the various court strategies on determining whether a tribal business is an arm of the tribe with relevant comments on what a "substantial" financial portion of revenue might look like. The Restatement provided three factors to use, if the connection between a tribe and a business is "not plain[.]" in order to determine when a business is an arm of the tribe : 1) whether the entity is controlled by the governing body of the tribe; 2) whether the tribe owns the entity; and 3) whether a substantial portion of the net revenues earned by the entity inure to the tribe.

The ALI recognized that determining what is substantial would continue to be an issue the

courts grapple with and looked to the Indian Gaming Regulatory Act (“IGRA”) for guidance. But IGRA requires tribes who engage in outside management contracts not receive less than sixty percent of net revenues. While the ALI is also not providing a hard and fast number, by looking to IGRA as guidance, a tribe with smaller direct net revenues might be held to the ALI guidance on how to define substantial net revenue and fail to meet such a factor.

To retain tribal sovereign immunity, tribally owned businesses should ensure they are aware of the various factors of the arm of the tribe analyses, paying special attention to the state, district, and circuit court case law that is binding in their jurisdiction. Under the ALI arm of the tribe analysis a tribal business needs to be sure that at least two of the three factors are met to ensure the factors weigh in their favor. Under the Breakthrough analysis at least three of the five would need to weigh in their favor. Regardless of which arm of the tribe analysis the judiciary selects, courts will continue to retain their sword and shield status. At least until Congress wields theirs and enacts tribal sovereign immunity legislation.

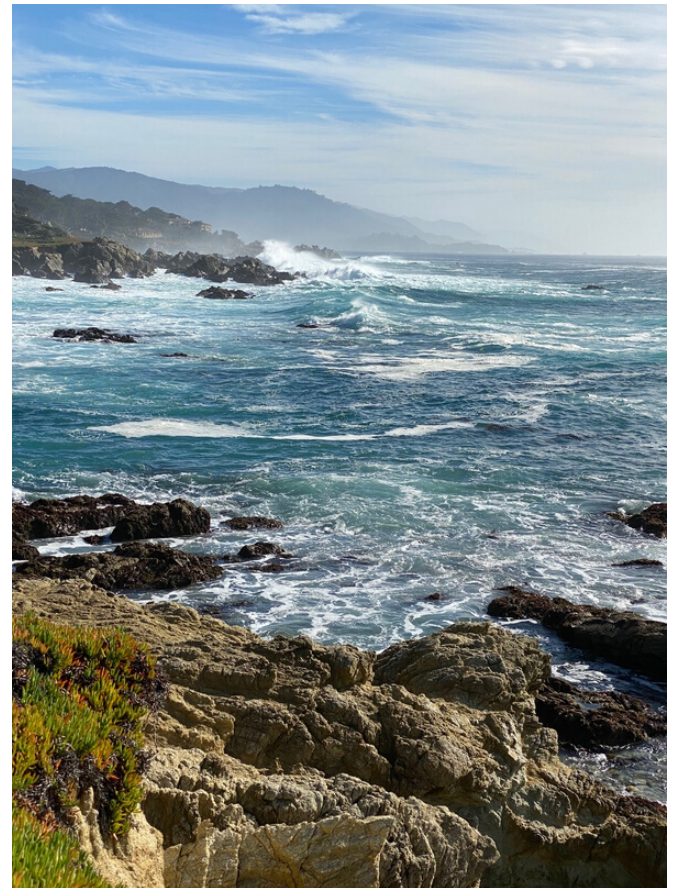
[1] *Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1191 (10th Cir. 2010).

[2] *Hunter v. Redhawk Network Sec., LLC*, 6:17-CV-0962-JR, 2018 WL 4171612, at *4–5 (D. Or. Apr. 26, 2018), report and recommendation adopted, 6:17-CV-0962-JR, 2018 WL 4169019 (D. Or. Aug. 30, 2018) quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994).

[3] *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 184 (4th Cir. 2019) (holding that Big Picture and Ascension are arms of the Tribe that promote commercial dealings between Indians and non-Indians in service to “the Tribes self-determination through revenue generation and the funding of diversified economic development”).

[4] *Restatement of the Law of Am. Indians: Tribal Economic Dev.* § 59 (Am. Law Inst. 2019).

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