

CALIFORNIA INDIAN LAW NEWSLETTER



California Indian Law Association
Joanne Willis Newton, Editor

Message from the President

Wachiiya!

I am very honored to be writing to you as the new President of California Indian Law Association. Having served on the Board of Directors for over three years, I look forward to continuing to work with our dedicated Directors and interested members to further the goals of California Indian Law Association.

This past year has been a time of significant change and development for CILA. With the help of many of our Board members and other volunteers, we published our first newsletter in August 2007. In October 2008, we also had our most successful annual Indian law conference to date, which enjoyed a record turnout and generated a significant increase in our membership. We also added several new members to our Board last fall, namely, David Clifford, Michele Fahley and Angela Medrano, who have already demonstrated a real commitment to their roles.

The year 2008 promises to be a year of continued growth for CILA as an organization. If you have an interest in Indian law matters, I encourage you to join CILA. If you are already a member, I urge you to become involved in our activities. The following committees are in place and welcome your input: Conference Planning Committee, Scholarship

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Committee, Public Relations/Website Committee, Newsletter Committee, Youth Outreach Committee, and State Bar Committee.

In closing, I would like to express our deep gratitude to our outgoing Board members -- Carole Goldberg, Chad Gordon and Pat Sekequeptewa -- for their years of dedicated service to CILA.

Megwetch,

Joanne Willis Newton
President



Bill S. 1956 Aims to Address Foster Care Funding Inequities

By Joanne Willis Newton

Federal funding for foster care services is provided principally through Title IV-E of the Social Security Act. Currently, tribes are not eligible to receive Title IV-E funding and must negotiate with the state to receive such funds. At present, the only California tribe to successfully negotiate a Title IV-E funding agreement with the State of California is the Karuk Tribe of California.

The Pew Commission on Children in Foster Care recommended that tribes receive direct Title IV-E funding in its 2004 report, "Pew Commission on Children in Foster Care, Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care." While bills to achieve this end have been

introduced in the past, none has been enacted into law.

The Tribal Foster Care and Adoption Access Act of 2007, or S. 1956, was introduced in the Senate by Senator Max Baucus (MT) and referred to the Committee on Finance. This bill would amend Title IV-E of the Social Security Act to provide direct access to federal funding for tribes, tribal organizations and tribal consortia operating foster care programs.

Support for S. 1956 is needed to resolve inequities between tribes and states in foster care funding and facilitate more complete services for Indian children under tribal foster care programs. For information on how you can support S. 1956, see <http://nicwa.org/legislation/S1956/>.

California Voters Approve Propositions 94–97

By Michelle LaPena and Lisa M. Kaplan

While a variety of tribal measures were considered during the 2007 legislative year, great attention was given to the ratification of four tribal-state gaming compacts.¹ At the end of 2006, compacts for Agua Caliente, Morongo, Pechanga and Sycuan were submitted to the legislature for ratification. However, these compacts were not ratified by the end of the 2006 legislative session because the UNITE HERE labor union (HERE) opposed them. HERE demanded a card check organizing provision in the compacts because it did not want to follow the Tribal Labor Relations Ordinance that was established in the 1999 compacts.²

After ratification by the legislature in June 2007,³ racetrack owners, cardrooms, the United Auburn Indian Community and the Pala Band of Mission Indians came together to bank roll and gather signatures to get the compacts on the ballot as a referendum to overturn their legislative approval. Those opposing the compacts chose the referendum process, claiming that by overturning the legislature's approval of the compacts they would not be valid under state and federal laws.⁴ The compacts qualified for the February 5th ballot with the opposition gathering over 2 million valid signatures.

In September, Secretary of State Debra Bowen sent the ratified compacts to the Secretary of Interior for approval. Amid some controversy over their disappearance at the BIA for nearly three months, the compacts were published on December 19, 2007.⁵ Thus, all requirements under the Indian Gaming Regulatory Act (IGRA)⁶ and the California Constitution were met to have the compacts take effect.

Efforts in the Courts

Legal fights surrounded the referendum drive from the beginning. After the referenda on the four compacts qualified for the Feb. 5th ballot, three of the compacted tribes filed suit on different grounds, hoping to invalidate the referenda.

Lawsuits filed by the Morongo Band of Mission Indians and the Pechanga Band of Luiseño Mission Indians, both seeking to block the referenda on technical grounds, were turned down in the Sacramento Superior Court. Morongo and Pechanga argued the opponents failed to meet the 90-day deadline to submit the required number of valid voter signatures and that the referenda failed to meet the legal timeline to qualify the measures for the ballot.

Agua Caliente argued in a separate suit that the referenda should be barred from the ballot because the few paragraphs in the petitions did not provide the full text of the agreements and the compacts were contracts between two sovereign powers and therefore not subject to the referendum process as a legislative act. On November 28, 2007 Sacramento Superior Court Judge Lloyd Connelly rejected Agua Caliente's arguments. Judge Connelly opined that ratification of a compact "takes on the character of a legislative act," therefore the compacts were appropriate to go before the voters during the February 5th presidential primary election.

A Divisive campaign

While the tribes were fighting the referenda in the legal system, they were also defending their compacts politically. The election was one of the most expensive initiative campaigns in state history costing nearly \$150 million. Culminating almost 18 months of bruising legislative battles, ballot referendum drives, and heavy TV advertising, the February 5th vote upheld the four compacts.

"[T]he propositions were 'a direct assault on the sovereign right of all tribal governments ... to negotiate gaming compacts on a government-to-government basis.'"

Under the compacts approved by the Governor, legislature, and published by the BIA, the four tribes would increase the minimum combined amount they pay annually to the state from approximately \$76 million to more than approximately \$131 million. They agreed to pay the State 15 to 25 percent of their profits on most new machines. In exchange, the Agua Caliente and Sycuan tribes would be allowed to increase the number of slot machines they operate from 2,000 to 5,000. The Morongo and Pechanga tribes would be allowed to more than triple their number of slots, to 7,500.

Impact of the February 5th Win

At the end of the night on February 5th, with more than 3.8 million ballots cast, Propositions 94-97 containing the tribal compacts were ratified, passing with 55.7 - 55.8%

See *California Voters* on page 15.

Will UC Berkeley Ever Be Compelled to Release Our Ancestors?

By Christine Williams



I do not think, as a Native American, I will ever understand how human remains can constitute a museum collection. The concept of scientific knowledge gained through research on unconsenting deceased Native Americans is at conflict with everything I know about Native concepts of knowledge and our cultural values as they pertain to our ancestors. There is no example that better illustrates this conflict than the continuing battle that Native people face with various institutions and agencies in California over the treatment and disposition of cultural resources including, human remains. The recent, and not so recent, actions of the University of California at Berkeley exemplify the institutional theft of our past and the ongoing imprisonment of our cultural values via refusing to repatriate Native human remains and cultural items.

According to recent news reports, the UC Berkeley Phoebe A. Hearst Museum of Anthropology has the second largest collection of human remains in the nation -- the first largest collection being in the Smithsonian Institute in Washington D.C.¹ The museum's web page boasts, "The Hearst *collections*

were formed through the efforts of well-known researchers including Alfred Kroeber, George Reisner, Max Uhle and William R. Bascom. Major collections include Egypt, Africa, Peru, North America — especially California — the Mediterranean, and Oceania."² Berkeley contends that they have followed the law, and that they continue to follow the law, as it pertains to repatriation of human remains.³ Is it legal in California that our ancestors remain part of a museum collection?

Most likely you have some familiarity with NAGPRA, the Native American Graves Protection and Repatriation Act, and you may be wondering how Berkeley could be in compliance with this law and still have native human remains as part of their "collection"?⁴ NAGPRA requires that museums, like Berkeley's Hearst Museum, must return Native American remains and funerary objects upon request.⁵ The catch seems to be that before anything can be repatriated, the cultural affiliation of remains and other cultural items with a particular Indian tribe must be established.⁶ Berkeley claims that "the majority of its collection cannot be linked to modern tribes" thus

See *UC Berkeley* on page 5.

Setting the Record Straight: Judicial Independence and *Worcester v. Georgia*

By Mark Myers



Judicial independence, the rule of law, and the influence of the courts being the hot topics they are, you have likely heard someone quote Andrew Jackson's apocryphal response to the Supreme Court's decision in *Worcester v. Georgia*: "John Marshall has made his decision; now let him enforce it!"

Although Jackson may never have said this, it fairly captures his policy towards the Cherokees in Georgia. Jackson was swayed by the demand of white citizens of Georgia for Cherokee land to be opened to white settlement and did not intend to be dissuaded by political or legal pressure.

Justice Breyer quoted Jackson's rejoinder in his dissent in *Bush v. Gore* (2000) 531 U.S. 98, 158, alluding to the dangers brought on by erosion of public confidence in the courts. The power of the courts, after all, extends only so far as the executive is willing to enforce their

decisions. Since then, this anecdotal remark, has repeatedly been brought out, in a reconstructed context, to illustrate the importance of public and political support for the courts.

Insofar as the point of this story concerns Jackson's willingness to back his political supporters rather than the Court or the Cherokees, it is accurate. The recent retellings of this incident, however, as well-intentioned as they appear to be, are slowly distorting history. In this reworked version of this story, the Court's holding in *Worcester* was that the Cherokees could not be sent west to Oklahoma on the Trail of Tears, but Jackson defied the Court's order and sent troops to remove them anyway.

For example, during Justice Breyer's address at the ABA's annual meeting in San Francisco last year, he described the holding of *Worcester* as relating directly

See *Worcester v. Georgia* on page 8.

New Developments Relating to the Indian Child Welfare Act

By Joanne Willis Newton

This article highlights legal developments in 2008 relating to the application of the Indian Child Welfare Act, 25 U.S.C. section 1901 *et seq.* ("ICWA"), in California.

Readers who practice in this area of law will be familiar with SB 678, which took effect on January 1, 2007, and amended the three state codes dealing with child custody proceedings, i.e., the Family Code, the Probate Code and the Welfare and Institutions Code, to incorporate the requirements of the ICWA and promote its spirit and intent. Many of this year's legal developments relating to the ICWA are in response to SB 678.

New Rules of Court:

On October 26, 2007, the Judicial Council adopted a number of amendments to the California Rules of Court designed to bring the rules into conformity with SB 678. These amendments took effect on January 1, 2008.

The former Rule of Court implementing the ICWA in juvenile proceedings was rule 5.664 (formerly rule 1439, before 2007). Rule 5.664 was revoked as part of these new amendments. In its place is a series of rules applicable to all Indian child custody proceedings, not just juvenile court proceedings. These are rules 5.480 through 5.487. In addition, rule 7.1015 applies to certain probate guardianship and conservatorship proceedings involving Indian children.

These rule amendments can be viewed at <http://www.courtinfo.ca.gov/rules/amendments/jan2008-2.pdf>.

Judicial Council Forms:

The Judicial Council also introduced a number of new court forms to be used in Indian child custody proceedings, effective January 1, 2008. These forms are designed to be used regardless of whether the proceedings are initiated in juvenile court or under the Probate Code or Family Code. The following is a list of the new forms and their names:

- ICWA-005-INFO: Information Sheet on Indian Child Inquiry Attachment and Notice of Child Custody Proceeding for Indian Child

- ICWA-010(A)*: Indian Child Inquiry Attachment
- ICWA-020*: Parental Notification of Indian Status
- ICWA-030*: Notice of Child Custody Proceeding for Indian Child
- ICWA-030(A): Attachment to Notice of Child Custody Proceeding for Indian Child
- ICWA-040: Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child
- ICWA-050: Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction
- ICWA-060: Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction

Those forms marked with an asterisk (*) are mandatory; the remainder are for optional use. All but ICWA-040, -050 and -060 are available in Spanish as well as English.

The following court forms were revoked effective January 1, 2008:

- ADOPT-226: Notice of Adoption for a Possible Indian Child
- JV-130: Parental Notification of Indian Status
- JV-135: Notice of Involuntary Child Custody Proceedings for an Indian Child (Juvenile Court)

The new court forms may be viewed at: <http://www.courtinfo.ca.gov/forms/latest.htm>.

All-County Letter:

The California Department of Social Services issued All County Letter No. 08-02 on January 30, 2008, "to provide information and resources on SB 678." This publication can be viewed at www.cdss.ca.gov/lettersnotices/entres/getinfo/ac108/08-02.pdf.

New Cases (2008):

The California Court of Appeal continues to focus on issues relating to the duty to inquire into a Child's Indian status and notice. The Court's trend is to continue to order limited reversals for defective notice but to require a showing of prejudice before reversing for defective inquiry or for procedural notice errors.

See *New ICWA Developments* on page 6.

UC Berkeley from page 3.

classifying these remains as “culturally unidentifiable”.⁷ For anyone who remembers Ishi, this may be starting to sound familiar.

Some people, myself included, allege Berkeley is using the “culturally unidentifiable” loophole in order to avoid repatriating items they see as containing “valuable” scientific information.⁸ In October of 2007, the Secretary of the Interior proposed regulations to deal specifically with the issue of “Culturally Unidentifiable Human Remains”. The public comment period on these regulations closed in January of 2008.⁹ These proposed regulations would require museums like Berkeley to provide consultation with tribes who claim any of these “culturally unaffiliated” remains.¹⁰

My fear is that while the regulations will change the law, Berkeley’s historic reluctance to consult with tribes and descendants who pose a perceived threat to their “collection” will be slow to change. In 1999, Berkeley created a five-member unit of the Hearst Museum to oversee the NAGPRA Department of the museum to help facilitate the return of human remains.¹¹ This action came in response to the federal NAGPRA Review Committee’s expressed concern over Berkeley’s lack of consultation with Native Americans regarding repatriation of human remains.¹² On February 26, 2008, “the Senate Committee on Governmental Organization [heard] testimony from a coalition of California tribal members and activists regarding the University’s refusal to consult with tribes prior to a summer reorganization that disbanded the NAGPRA department. Officials based their decision on a review made by two non-Native archeologists.”¹³ What these hearings uncovered is that despite the mandates of NAGPRA and CalNAGPRA,¹⁴ and noted concerns from the NAGPRA Review Committee, Berkeley unapologetically continues to detain 12,000 of our ancestors’ remains.¹⁵ The law can change but who will compel Berkeley’s compliance?

While my cultural beliefs assure me that the people responsible for this continuing desecration will suffer in this life and the next, that is of little compensation to the descendants who bear the pain of knowing that they have not, after all these years been able to bring healing to their ancestors who must be returned to their families, their tribes, for culturally appropriate disposition. They must go home.

Nominations are currently being accepted until June 12, 2008, for three members of the NAGPRA Review Committee. I encourage you or your client to consider nominating someone who will ensure that California tribal interests in Berkeley’s “collection” of our ancestors’ remains be addressed. For more information

on nominations for the NAGPRA Review Committee please visit the following link online: <http://www.nps.gov/history/nagpra/REVIEW/Notices%20for%20Nominations/FR%20Notice%20%2002-13-08%20Nominations%20for%20RC.pdf>

I cannot say whether or not strengthening this committee will finally bring our communities some peace in this area of concern but I have hope. Wokhlew.

Christine Williams maintains a private Indian law practice in the Bay area of California and is a part-time professor of American Indian Studies at Mills College. Ms. Williams is a Yurok tribal member and Acting Presiding Judge of the Yurok Tribe’s Supreme Court. For more information you may contact her at christineawilliams@yahoo.com or (925) 963-0629.

¹ Heredia & Fagan, *Native Americans Ask UC Berkeley to Return Museum Artifacts*, S.F. Chronicle (Oct. 6, 2007) p. B-1.

² <http://hearstmuseum.berkeley.edu/>, (emphasis added).

³ Paddock, *Remains of 12,000 American Indian Stored Under UC Berkeley Gym* (Jan. 14, 2008)

<http://www.insidebayarea.com/localnews/ci_7966803>.

⁴ 25 U.S.C. §§ 3001 – 3013.

⁵ 25 U.S.C. § 3005(a).

⁶ *Ibid.*

⁷ Rahimi, *Senators Accuse UC – Berkeley of Discrimination and Secrecy Over Ancestral Remains*, Indian Country Today (Feb. 29, 2008) <indiancountry.com>

⁸ *Ibid.* (I have come to regard the abuse of the term “culturally unidentifiable” in order to retain cultural items and native remains as “pulling a Berkeley”).

⁹ To view proposed regulations and public comments go to: <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=DOI-2007-0032>

¹⁰ Native American Graves Protection and Repatriation Act Regulation – Disposition of Culturally Unidentifiable Human Remains, 72 Fed. Reg. 58582, 58588 (2007) (to be codified at 43 C.F.R. § 10).

¹¹ *Supra*, n. 7.

¹² *Ibid.*

¹³ Rahimi, *State Hearing on UC-Berkeley’s NAGPRA Compliance* (Feb. 26, 2008)

<<http://www.kumeyaay.com/?p=456>>

¹⁴ Cal. Health & Safety Code § 8011. (CalNAGPRA was designed to provide a state policy to ensure that California Indian human remains and cultural items be treated respectfully, to comply with NAGPRA, to allow tribes to gain assistance in the repatriation process from the Repatriation Oversight Commission, and to allow unrecognized tribes access to the repatriation process at least as to museums and institutions in California that receive state funds).

¹⁵ *Supra*, n. 3.

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The Court has issued several ICWA-related decisions this year, all involving juvenile dependency cases.

In *In re G.S.R.* (Jan. 8, 2008, B197000) ___Cal.Rptr.3d___ [2008 WL 73646], the Second District affirmed that ICWA notice requirements must be strictly construed and held that these requirements were not satisfied in a case where the mother had indicated she had Indian heritage from several tribes and the notices sent were "defective and confusing" because they failed to mention all four tribes or bands with which she might be affiliated and contained contradictory information. (*Id.* at pp. 8-9.)

In *In re N.E.* (Feb. 29, 2008, G039168) ___Cal.Rptr.3d___ [2008 WL 542192], the Fourth District, Division 3 considered a father's appeal from an order terminating his parental rights. The father argued that the order should be reversed because the juvenile court and child welfare agency failed to comply with their duties to inquire if he had Indian ancestry. The child's mother had informed the agency that the father had no Indian ancestry, and the father's court appointed counsel had stipulated ICWA did not apply. The Court of Appeal held that in the absence of some assertion on appeal that he has some Indian ancestry, any error respecting inquiry was harmless. The Court of Appeal followed *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430 (inquiry error does not require reversal where parent made no claim of Indian heritage on appeal), and declined to follow *In re J.N.* (2006) 138 Cal.App.4th 450, 461-462 (inquiry error requires reversal despite lack of any information that parent has Indian ancestry).

In *In re Miracle M.* (Feb. 14, 2008 [pub. order March 4, 2008], B200319, B200756) ___Cal.Rptr.3d___ [2008 WL 568139], the Second District, Division 7, considered a case where notices had been sent to the Cherokee tribes and the BIA but only with respect to one of two children involved. The Court ordered a limited reversal of the order terminating parental rights as to the child whose name had not been included in the notices previously sent. However, with respect to the appellant parent's claim that the juvenile court erred in finding that ICWA did not apply because the parents were not provided with copies of the ICWA notice forms (JV-135), the Court followed *In re Rebecca R.*, *supra*, finding that any defect in notice to the parents was harmless because the appellant had not demonstrated how a reversal would produce any additional information that the child was an Indian child. The Court also held that the parents forfeited the right to object to not being served with copies of

the ICWA notice forms by not raising the objection in the juvenile court proceedings or filing a timely appeal from the finding that ICWA did not apply.

At the time of this writing (March 8, 2008), there were no published ICWA cases issued by the 9th Circuit Federal Court of Appeals or the Supreme Courts of the United States or California in 2008.

New Legislation:

On the legislative front, SB 703, concerning the placement of children, was approved by the Governor on October 13, 2007, and took effect on January 1, 2008. This bill requires the Attorney General to release state summary criminal history information to tribes or tribal consortiums that have entered into tribal child welfare agreements with the state, when such information is needed in the course of their duties. It also requires the Department of Justice to make available, to the tribal court or tribal child welfare agency of a tribe or tribal consortium with a tribal-state child welfare agreement, information regarding a known or suspected child abuser maintained in the Department's child abuse central index.

AB 298, which was approved by the Governor on October 12, 2007, should also be of interest to tribal representatives and Indian families involved in juvenile court proceedings. Although its provisions are not specific to Indian child custody proceedings, AB 298 is consistent with the commonly held view among tribes and Indian families that guardianship with a relative caregiver is generally the most appropriate permanent plan for Indian children.

AB 298 was designed to fix the problem of relative caregivers being coerced into adoption through the explicit or implicit threat of having a child removed if they do not agree to termination of parental rights and adoption. AB 298 affirms that a relative caregiver's preference for legal guardianship rather than adoption may not constitute the sole basis for recommending removal of the child from the caregiver for the purpose of adoption. It also requires that relative caregivers be given information regarding the options of legal guardianship and adoption.

Most significantly, AB 298 revises the limited exceptions to termination of parental rights found at section 366.26, subdivision (1)(c) of the Welfare and Institutions Code, by making a new exception when a child is with a relative who is unable or unwilling to adopt due to circumstances that do not include an unwillingness to accept legal or financial responsibility

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for a child. While a similar exception existed prior to 2008, AB 298 creates a less onerous exception for relative caregivers to meet. Now, a relative caregiver need not demonstrate “exceptional” circumstances for being unable or unwilling to adopt. Moreover, the juvenile court is no longer required to find “a compelling reason for determining that termination would be detrimental to the child” before applying the relative caregiver exception.

Thus, AB 298 provides an additional basis for tribes to advocate against termination of parental rights when an Indian child is placed with a relative caregiver who is willing to commit to a permanent plan of guardianship. This tool compliments the exception to termination of parental rights unique to Indian child

custody proceedings introduced by SB 678 in 2007, which is now found at section 366.26, subdivision (c)(1)(B)(vi).

Joanne Willis Newton has her own Indian law practice, the Law Offices of Joanne Willis Newton, a Professional Corporation. In San Diego. Before going out on her own in 2005, she worked at California Indian Legal Services for over seven years and was the lead attorney responsible for drafting SB 678 and moving it forward through the Senate Judiciary Committee in the 2004-2005 legislative session. She is a member of the Cree Nation of Chisasibi, located in northern Quebec, Canada. For more information see www.willisnewtonlaw.com

ANNOUNCEMENTS

The Sacramento office of **Hobbs, Straus, Dean & Walker, LLP**, is actively recruiting for an experienced attorney, who possesses knowledge of Indian law and familiarity with the issues facing Indian tribes and tribal organizations. We are dedicated to providing high quality legal services to Indian and Alaska Native tribes and tribal organizations throughout the United States. Please respond to: Hobbs, Straus, Dean & Walker, 400 Capitol Mall, 11th floor, Sacramento, CA 95814, tseward@hswdca.com.

Nordhaus Law Firm, LLP, one of the oldest and largest law firms in the country that specializes in representing American Indian tribes and organizations, is currently hiring for a junior associate with one to three years of experience in its Albuquerque office, for work on several large breach of trust cases against the United States in the U.S. Court of Federal Claims. Experience and/or demonstrated interest in Indian law is preferred but not required. Interested applicants should submit a cover letter describing their interest and qualifications, a resume, a legal writing sample, a list of references, and a law school transcript. Application materials should be sent to: Hiring Partner, 1239 Paseo De Peralta, Santa Fe, NM 87501 or by email to hiringpartner@nordhauslaw.com.

California Indian Legal Services is a statewide, tribally controlled, non-profit corporation that provides legal services to Indians, Indian tribes, and Indian organizations on issues involving Federal Indian Law. Staff attorneys work with Indian individuals, families, organizations and tribal governments in all areas of Federal Indian law, including but not limited to issues involving jurisdiction, tax, estate planning, trust assets, environmental law, natural resource development, tribal governance, employment and the Indian Child Welfare Act. Minimum Qualifications include: J.D. with exceptional academic achievement; licensed to practice in California ; demonstrated knowledge of Federal Indian law with a minimum of three years experience practicing law. Salary depends on experience. Please submit resume, cover letter, and writing sample to Patricia De La Cruz-Lynas, Director of Administration, California Indian Legal Services, 609 S. Escondido Blvd., Escondido , CA 92025. Email: hiring@calindian.org. Please see www.calindian.org for the full job announcement and list of qualifications.

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to Cherokee removal on the Trail of Tears. The *San Francisco Chronicle* summarized: "When the Supreme Court ruled in the 1830s that the state of Georgia had no power to seize land from the Cherokees, Breyer noted, President Andrew Jackson defied the ruling and ordered in federal troops, ultimately sending the Indians on the Trail of Tears to Oklahoma."¹

In his testimony before Congress, Justice Breyer recently summarized the *Worcester* incident: "President Jackson then sent troops to Georgia, not to enforce the Court's decision, but to evict the Indians, who traveled the Trail of Tears to Oklahoma where the descendants of the few who survived live to this day."² Elsewhere, he describes it more bluntly: ". . . Jackson sent the troops to throw the Indians out, not to enforce the law."³

The inaccurate retellings are far more widespread than Breyer's speeches, and it would be unfair to identify Breyer particularly as their source. Judicial independence and the rule of law are favorite subjects of his and he speaks publicly more than most of the other justices, so it is natural he often recounts this story during his speeches. He is in good company, however. Justice O'Connor, participating in a roundtable discussion on judicial independence at the Stanford alumni weekend on October 13, 2007, described *Worcester* and its aftermath in similar terms. And PBS' recent special *The Supreme Court*, delivered a similar account, suggesting that, in *Worcester*, Marshall "took on the entire political system — President, Congress and a state government."⁴

The anecdotal version of this story is being inaccurately depicted as a single cause-and-effect incident: it is a two-dimensional cautionary tale with Marshall as its hero and Jackson and the white Georgians as its sole villains. While this tale has some limited application for today, it mainly relates past abuses that are unlikely to recur. The truth is more complex, with implications for Indian law today. In no way does the truth excuse Jackson and the white Georgians who seized Cherokee land, but it also reflects poorly also on other political figures, the populace generally, and potentially to an extent even on the Court.

Cherokee Nation v. Georgia

After Georgia engaged in some disastrous land deals in the late 18th century, the federal government, in the Compact of 1802, promised to help Georgia recover land by someday relocating the Indians and giving

Georgia control of their land. Decades later, when gold was discovered on Cherokee land, Georgians began to press the federal government. Georgia, in response, enacted laws designed to strip the Cherokee government of its power, harass the Cherokees living within Georgia's territory and permit white settlement on Cherokee land. President Jackson did not, as claimed, then send federal troops to Georgia to evict the Cherokees. Rather, troops were initially sent to Georgia to protect the Cherokees, but were withdrawn at Georgia's insistence.⁵

As a result, the Cherokees living in Georgia soon found themselves at the mercy of rapacious intruders. Some fled to Cherokee territory in other states, and the Cherokee government moved the seat of its government across the border to Red Clay, Tennessee. The Cherokee nation also brought an action in the Supreme Court.

Cherokee Nation v. Georgia (1831) 30 U.S. 1 was the Cherokee government's effort to protect its sovereignty and property against usurpation and seizure by Georgia. In its ruling, the Supreme Court pointed out the Cherokee nation was correct in its argument that the land, and sovereignty over it, belonged to the Cherokees under federal treaty. However, because the action was brought under the Court's original jurisdiction over actions between a state and citizens of a foreign state, the Court held it lacked jurisdiction. Indian tribes, the Court held, were not foreign nations but "domestic dependent nations." 30 U.S. at 17.

Cherokee Nation did not foreclose the possibility the Court might review Georgia's laws on a writ of error, but it did make clear the Court would not take on the legality of these laws in the first instance.

Worcester v. Georgia

Following the decision in *Cherokee Nation*, Georgia stepped up its efforts to take Cherokee land. Two white Christian missionaries, Samuel Worcester and Elizur Butler, found themselves on the wrong side of a Georgia law designed to insure that the only non-Cherokees in Georgia's Cherokee lands were white allotees. They held a federal license to live and work among the Cherokees, where they served as advocates for the Cherokees. Predictably, Georgia arrested and imprisoned them.

Rev. Worcester and his assistant Butler brought suit.⁶ This time, the Court had jurisdiction, and it held for Worcester. The laws of Georgia, the Court said, could have no effect within the Cherokee nation, whose

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sovereignty was guaranteed by federal treaty. It is at this point Jackson is said to have uttered his famous statement of defiance. At the same time, Georgia stepped up its harassment.

The decision itself required no immediate action, but was followed two days later by the Court's mandate requiring the Georgia court to reverse its decision and release the missionaries.⁷ Because of limitations in the Judiciary Act of 1789, before a federal marshal could be ordered to free them, the Court would need official notification of the Georgia court's refusal to carry out the mandate.⁸ The Court adjourned shortly after issuing its mandate, however, preventing notification from reaching it until the following term. After making a show of defiance, Georgia's governor pardoned the two missionaries.

The case's caption, *Worcester v. Georgia*, explains that this was an action against a state, not the federal government. *Worcester* did not, as is now claimed, purport to restrain the federal government, nor did it require Georgia to do anything other than free the two missionaries. Furthermore, *Worcester* in no sense limited federal power; rather, it was based on the supremacy of federal law, the federal treaty with the Cherokees, and the federal prerogative of regulating commerce with the Cherokees. 31 U.S. at 531, 561-63.

Georgia did not, and could not effect the Cherokee removal by itself. For one thing, Cherokee territory was spread across three other states as well, Alabama, Tennessee, and North Carolina, and these other states were not actively attempting to remove Cherokees. Georgia's laws did, however, indirectly lead to the Cherokees' removal.

Removal

The federal government in 1830 enacted the Indian Resettlement Act, which empowered the federal President to negotiate removal treaties with the Eastern tribes. *Worcester* was decided in January, 1832. After it became clear Jackson would provide no help and Georgia's depredations would continue, a minority of Cherokees led by Major Ridge, John Ridge, and Elias Boudinot, reconsidered their earlier opposition to removal and signed the Treaty of New Echota in 1835, agreeing to move west to what is now Oklahoma. The treaty was immediately criticized, however, because the twenty-one signatories were not members of the tribal government, and the tribal government itself repudiated the treaty.

Contrary to the revised version of the story, the issue of whether the removal treaty could be enforced was never litigated. The tribal government's response to the treaty was political, not legal.

In spite of political pressure organized by Cherokees and their advocates, the treaty was ratified by a single vote. Thereafter, the Cherokee government and thousands of individual Cherokees petitioned Congress to void the treaty. Beginning in May, 1838, however, federal troops at the direction of President Van Buren begin moving through Cherokee territory, rounding up Cherokees in preparation for removal on what would become the Trail of Tears. Cherokees were taken by surprise and put into stockades, and thus in practical terms deprived of any opportunity to litigate their impending removal.

Worcester, decided over six years earlier, provided the Cherokees with no legal protection against removal. If Jackson had enforced *Worcester*, it is debatable whether Georgia would have been so emboldened as to step up its harassment and, consequently, whether the Treaty of New Echota would have been signed. This is mere speculation, however. During the Nullification Crisis of 1832 and 1833 when South Carolina attempted to nullify federal tariff laws, the federal government had threatened to use military force. However, the crisis was averted by compromise under which South Carolina got changes to the tariff laws it had sought. Even if it had come to the point that Jackson intervened and freed Worcester and Butler, he clearly had no intention of using military force against white Georgians to protect the Cherokees.

Worcester held that federal law shielded the Cherokees from the depredations of state law; federal law was, after all, the supreme law of the land, and the federal government was specifically granted the power to enter into treaties with the Indian tribes. The problem with the Treaty of New Echota, however, was that it was federal law. Even if the Court had reviewed the treaty, it would almost certainly have passed Constitutional muster under the jurisprudence of the time. *See, e.g., Beecher v. Wetherby* (1877) 95 U.S. 517, 525 ("[T]he propriety or justice of [the U.S.'s] action towards the Indians with respect to their lands is a question of government policy . . .").

The treaty's Achilles heel, the fact that it had been signed by a small minority of Cherokees, none of them authorized representatives of the tribe, was probably unreviewable. Under what is now known as the

Worcester v. Georgia from page 9.

political question doctrine, determination of which faction validly represents a nation's or tribe's government would probably have been left to the executive's discretion and not reviewed, regardless of how questionable the decision might be. See *Luther v. Borden* (1849) 48 U.S. 1, 46-47.

The political question doctrine continues to shape Indian law today. For example, in a recent opinion, *Williams v. Gover* (9th Cir. 2007) 490 F.3d 785, the Ninth Circuit deferred to the BIA's decision to recognize a tribal government that restricted tribal membership requirements. The Mooretown Rancheria, which was terminated and restored, passed a resolution restricting its membership. The Ninth Circuit, relying on *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, unsurprisingly held that the tribe had the power to define its own membership.

The court went on, however, to reject an argument that the BIA, by choosing to recognize the tribe as defined in the resolution rather than the tribe as it might be more broadly defined, was responsible for the resolution. 490 F.3d at 791. Although the court did not mention or specifically rely on the political question doctrine, the executive's unreviewable prerogative looms in the background. Implicit in the court's holding is the understanding that the BIA, in recognizing the tribe as defined in the resolution rather than as urged by the plaintiffs, was making an

essentially diplomatic decision. See *Baker v. Carr* (1962) 369 U.S. 186, 212-13 (pointing out, in the context of foreign relations, the President has sole authority to decide questions of recognition of governments and of their representatives).

Jackson's refusal struck a major blow to the Court's prestige, and no doubt contributed to the misery of Cherokees, persuading some of them to enter into a removal treaty. Contrary to the story now being put forward, however, it did not directly cause the Cherokee removal. Furthermore, the Court itself apparently foresaw Jackson's reaction and therefore made less of an effort than it might have to give teeth to *Worcester*. The Supreme Court never forbade the federal government from removing the Cherokees on the Trail of Tears, and probably would not have done so even if asked. The Treaty of New Echota and subsequent removal were political decisions largely beyond the Court's power to review.

Mark D. Myers is law clerk to the Hon. Larry A. Burns of the U.S. District Court for the Southern District of California. Mr. Myers' ancestors were removed from their homeland under the Treaty of New Echota and settled in what is now Oklahoma.

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Endnotes from *Worcester v. Georgia* from page 2.

¹ Bob Egelko, *Breyer: Public Support Key to Judiciary Future*, SAN FRANCISCO CHRONICLE, Aug. 12, 2007, at B8.

² Testimony, April 19, 2007, 2007 WLNR 7395708.

³ *The News Hour with Jim Lehrer* (September 26, 2006 Interview of Justice Breyer and Justice O'Connor).

⁴ The transcript of this portion of the documentary is available online at http://www.pbs.org/wnet/supremecourt/about/pop_transcript1.html.

⁵ Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D. L. REV. 73, 96 and n.126 (1988) (citing GRANT FOREMAN, INDIAN REMOVAL: THE IMMIGRATION OF THE FIVE CIVILIZED TRIBES 229-30 (1972)).

⁶ Butler brought suit separately, but the cases were decided at the same time and with the same result. 31 U.S. at 597.

⁷ Joseph Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 524 and n.141 (1969).

⁸ *Id.* at 525-26 and n.144.

Recent California Indian Law Cases

By Meredith Drent



The following is a sampling of Indian law cases arising out of California since October 2007.

United States v. Lowry (9th Cir. 2008) 512 F.3d 1194.

In this matter, the Ninth Circuit Court of Appeals held that a member of the Karuk Tribe of California who claimed aboriginal title in a national forest has the burden of establishing individual aboriginal title to United States Forest Service land. The United States charged Karen Lowry with trespassing in the Klamath National Forest, arguing that she did not possess a special-use authorization and did not receive an Indian allotment for the property she was occupying. As part of her defense, Lowry claimed individual aboriginal title, stating that her parents and grandparents had lived in the same area of the forest since the late 1800s, and that the Karuk people have occupied the same area for thousands of years.

Although Lowry argued it was the government's responsibility to prove she did not possess aboriginal title, the Ninth Circuit held the burden was on the defendant. In its decision, the court found "if we were to place the burden on the government, we would create a presumption that Indians have an individual aboriginal claim until the United States proves otherwise. Such a presumption might prove unworkable in a number of ways—not the least being that it might subject some national forest system lands to multiple claims of ownership and leave the United States unable to manage its lands effectively." On the merits of Lowry's claim, the court found that although Lowry's family had occupied nearby parcels of property, that occupation could not be counted towards occupation of the parcel Lowry occupied. Therefore, the court found Lowry had not established individual aboriginal title to the parcel and upheld her conviction.

Alvarado, et al. v. Table Mountain Rancheria (9th Cir. 2007) 509 F.2d 1008.

The Ninth Circuit Court of Appeals affirmed the dismissal of this action brought by several individuals who sought to compel the Table Mountain Rancheria to admit them as members. The court found that the Table Mountain Rancheria's sovereign immunity notwithstanding, the appellants could not identify a federal statute that conferred jurisdiction on the federal district court, rejecting the appellants' attempts to invoke jurisdiction vis-à-vis the Federal

Tort Claims Act and the Administrative Procedures Act, both of which require exhaustion of administrative remedies. In addition, the appellants could not identify any federal agency action that required it to admit them as members into the Tribe. The court rejected the appellants' due process argument for failure to raise it at the district court level. Finally, the court found that the prior litigation on which the appellants based their claims did not invoke federal jurisdiction; the appellants did not allege any violation of the settlement agreement entered into as a result of that litigation, and the court's jurisdiction over the settlement agreement expired one year after its effective date.

Susanville Indian Rancheria v. Leavitt (E.D. Cal. Jan. 3, 2008, No. 2:07-cv-259-GEB-DAD) slip copy 2008 WL 58951.

In this matter, the Susanville Indian Rancheria attempted to enter into a self-governance compact with the U.S. Indian Health Service ("Service") under the Title V of the Indian Self Determination and Education Assistance Act ("ISDEAA"). The Service rejected the Tribe's proposal because it contained a pharmacy policy that charged certain fees to patients who fell within certain income brackets. The Tribe challenged the basis for the Service's rejection, stating it violated the provisions of the ISDEAA.

The district court agreed with the Tribe, finding that the Service failed to demonstrate the tribe could not carry out its pharmacy program in a manner that would not result in significant danger or risk to the public health, stating that the Service cited only speculative risks and failed to show how the program, which charged some beneficiaries who met certain criteria, was a risk to the public health. The court agreed with the Tribe that ISDEAA prohibits the IHS from charging eligible beneficiaries, but that there is no such prohibition on the Tribes. The district court also found that, contrary to the Service's determination, the Tribe's pharmacy policy did not violate or alter federal eligibility criteria for health care services. As a result, the court ordered the Service to accept the Tribe's final offer with respect to pharmacy services, and to provide funding under the compact without imposing any condition that would prevent the Tribe from charging eligible beneficiaries for services.

See *Recent Cases* on page 12.

Recent Cases from page 11.

Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California (E.D. Cal. Jan. 24, 2008, No. 2:07-CV-01069-FCD-KJM) slip copy 2008 WL 205604.

The federal district court granted the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community's request to amend its complaint against the State of California and the California Gambling Control Commission for failure to negotiate with the tribe in good faith regarding amendments its Class III gaming compact. Because the Governor is the designated state officer responsible for negotiating and executing agreements pursuant to the Indian Gaming Regulatory Act, the court determined it could not afford appropriate relief without the Governor as a named defendant in the matter. Accordingly, the court authorized the Tribe to amend its complaint to include the Governor as a defendant in its action.

Unkeowannulack v. Table Mountain Casino (E.D. Cal. Nov. 27, 2007, No. CV-F 07-1341 AWI DLB) slip copy 2007 WL 4210075.

In this matter, the plaintiff, a patron at the casino owned and operated by the Table Mountain Rancheria, accused the casino and the tribe's gaming commission of violating his Fifth and Fourteenth Amendment rights to due process by conducting an unfair investigation of an allegedly malfunctioning machine on which the plaintiff purportedly won a jackpot of around \$750,000. The district court dismissed the lawsuit, finding the defendants, the casino, the Tribe and a tribal official acting in his official capacity were entitled to sovereign immunity, which had not be expressly and unequivocally waived by the Tribe or by an act of Congress.

All Mission Indian Housing Authority v. Magante (S.D. Cal. Nov. 19, 2007) 526 F. Supp. 2d 1112.

In this matter, the federal district court dismissed an unlawful detainer action by an intertribal housing authority against a tenant for failure to pay rent. The plaintiff, which administers housing programs for several federally recognized Indian tribes via the Native American Housing Assistance and Self Determination Act (NAHASDA), asserted the federal court had jurisdiction under federal common law. The court disagreed, finding that landlord-tenant issues were matters of state law, and that Congress' failure to provide a forum for eviction actions in NAHASDA itself was a conscious decision not to grant federal court jurisdiction over eviction actions. Moreover, the court

found that the plaintiff's right to possession of tribal lands was not grounded in any federal legal principles, but rather was a function of a lease agreement. As a result, the court denied the plaintiff's request for a federal marshal to enter tribal lands and physically evict the defendant from the residence.

Rosales v. United States (S.D. Cal. Nov. 28, 2007, No. 07cv0624) 2007 WL 4233060.

The federal district court granted the United States' motion to dismiss a complaint filed by individual Native Americans to enforce the provisions of the Native American Graves Protection and Repatriation Act ("NAGPRA"). In this matter, the plaintiffs sought to halt construction on three properties that allegedly contained human remains and associated funerary objects. In dismissing the claim, the court held that the Jamul Indian Tribe, the entity performing the construction activities, was a necessary and indispensable party entitled to sovereign immunity. In addition, the plaintiffs failed to allege any fiduciary duties under NAGPRA and to identify any specific agency action mandated by law but not acted upon. Furthermore, the United States was entitled to sovereign immunity in the absence of any agency action that fell within the scope of the Administrative Procedures Act. Accordingly, the court dismissed the complaint.

Carls v. Blue Lake Housing Authority (July 17, 2007, C052660) [nonpub. opn.], review denied (Oct. 10, 2007), petition for cert. filed, 76 USLW 3444 (Feb 07, 2008) (No. 07-1037).

In an unpublished split decision, the California Court of Appeal for the Third District affirmed orders granting motions to quash summons based on application of tribal sovereign immunity. The plaintiffs had alleged various claims arising out of the purchase of a home built on non-Indian land in El Dorado County, which plaintiffs had alleged contained construction defects that resulted in water intrusion and toxic mold. Blue Lake Housing Authority ("Blue Lake") is an unincorporated enterprise of the Blue Lake Rancheria, and had acquired the assets and liabilities of the company that had built plaintiffs' house after the house was built but before the lawsuit was filed. The Court of Appeal found that tribal sovereign immunity applied because it extended to commercial activities beyond the reservation. Blue Lake submitted a declaration without challenge by plaintiffs indicating that Blue Lake came within the three factors considered by

Opinion

By Leslie Lohse

Compelling Reasons for Tribes' Rejection of New Tribal-State Compacts

Why did some California Indian tribes oppose amendments to four tribes' tribal-state gaming compacts? In the campaign leading up to the February 5 referendum ballot, many valid arguments to reject the compacts were presented to California voters. But from a tribal perspective, there were even more compelling reasons to reject these harmful deals. Here are three of those reasons.

First, the 2006 compacts are predatory on other gaming tribes in the same market. Second, they came packaged with illegal, coerced side agreements that violate IGRA and start a dangerous new intrusion into tribal sovereignty. Third, they put the future of revenue sharing with non-gaming tribes at severe risk.

The new compacts are predatory. They don't have the restraints on growth that have been in every compact until now. In the 1999 compacts, there is a 2,000 machines-per-casino limit and a statewide cap. The 2004 amendments to five tribes' compacts have a payments schedule - fixed payments that go up steeply as devices are added -- that penalizes the tribes for getting big. Tribes may not necessarily like those provisions, but they have stopped any one tribe with a lot of money and a good casino location from blowing nearby casinos without these advantages out of the market.

When the 2004 compact amendments were being negotiated, this issue of unrestrained growth came up. At that time, Governor Schwarzenegger was very clear that he didn't want mega-casinos. Remember, the idea of the Lytton Band of Pomo Indians having 2,500 to 5,000 machines was deemed "an appalling growth of gaming." By 2006, however, all that the Governor wanted and needed was money, tribal casino money, to fix the state's irresponsible budget actions. A state budget deficit of \$16 billion helped him decide it would be okay for a handful of tribes to corner the market, not caring if it was at the expense of other tribes.

So, the 2006 amended compacts have a very different formula for making payments to the state. They provide that each tribe pays 15 percent of average net win on 3,000 new machines, not a fixed and escalating fee. Those of you in the casino business know that the more machines you have, the lower the net win on all your machines. So, under the 2006 compacts, the more machines you have, the less you pay per machine.

That's why there is no restraint on growth. A 7,500 slots limit is the same as no limit at all because a casino with 7,500 slots would be the biggest in the world.

Small and medium tribal casinos depend on the patron "overflow" from the tribes that signed the new 2006 deals. Until now, when patrons can't get a machine at Pechanga, Morongo or Agua, for instance, they drive down the road to the smaller tribal casinos. When these tribes put in several thousand more machines of every type and denomination, there will be no more reason to "drive down the road" to these small, less fancy casinos. And remember, since their fees to the state come from the slots' profits, there is no reason for them not to add as many machines as their floors will hold.

The so-called "memoranda of agreement" are coerced side bar agreements that violate IGRA and signal a dangerous new state government intrusion into tribal sovereignty. After the four compacts were negotiated and signed by the Governor and the tribes, the Legislature decided it wanted more provisions in the compacts. The Legislature's job in the compacting process is to approve or reject compacts. But in this case, the Legislature put conditions on its approval of the compacts and forced those conditions on the tribes in an MOA.

The Indian Gaming Regulatory Act, which was a sovereignty take-back for tribes, requires that all terms and conditions that the state puts on tribal gaming must be in a compact. Yet these agreements put more terms and condition on tribal gaming *outside* the compact.

With these MOAs as a precedent, what other sidebar agreements will the state force on tribes in return for normal legislative consideration of tribal needs.

These 2006 compacts put the long-term future of the promised \$1.1 million in revenue sharing with non-gaming tribes at severe risk. The dirty little secret about revenue sharing for non-compacted tribes is that the majority of it comes from the Special Distribution Fund (SDF), not from the Revenue Sharing Trust Fund (RSTF).

The RSTF is "backfilled" each year from the SDF - between \$45 and \$50 million per year. Under the terms of the 2006 compacts, five tribes will no longer pay into the SDF, and its annual revenue will drop from \$147 million to \$49 million. Since the state has been spending \$99 million per year from the SDF for RSTF backfill, state regulatory programs, and local government grants, revenue sharing tribes will have to compete for appropriations from the SDF against those programs or seek funding from the General Fund (at the same time as the state enters the budget year with a

See *Opinion* on page 14.

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California courts regarding application of sovereign immunity to tribal business entities, and the homeowners' arbitration agreement with Blue Lake's predecessor in interest did not constitute a sufficiently unequivocal waiver of Blue Lake's immunity where there was no evidence that Blue Lake agreed to be bound by the terms of that contract. The dissent stated that Blue Lake effectively became a party to all the contracts of the predecessor in interest by acquiring its assets and liabilities and so necessarily assumed the contractual burden that the liabilities could be enforced in state court. A response to the certiorari petition to the U.S. Supreme Court is due on March 13, 2008.

Santa Ynez Band of Mission Indians v. Torres (Jan. 22, 2008, B188413) [nonpubl.opn.].

In an unpublished opinion, the California Court of Appeals for the Second District affirmed a \$300,000 judgment against the Santa Ynez Band of Mission Indians, which had contracted with the defendant's construction business. The Tribe paid approximately \$2 million for the construction work, but later claimed it was substandard and sued in state court for damages. The defendant filed a cross complaint for services provided. At the same time, bankruptcy proceedings against the defendant had been initiated in federal court, in which the Tribe filed a \$3 million proof of claim.

The Tribe moved to dismiss the cross-complaint on the grounds of sovereign immunity, but the court found that by filing a proof of claim in federal bankruptcy proceedings, the Tribe had waived its immunity in the state court proceedings, which were transactionally related to the proof of claim filed in bankruptcy court.

The appellate court affirmed: "We hold that where, as here, an Indian tribe files a proof of claim in an adversarial bankruptcy proceeding, the tribe waives its sovereign immunity as to counterclaims or cross complaints that are transactionally related to the proof of claim."

Troilo v. Big Sandy Band of Western Mono Indians (Oct. 11, 2007, F050814) [nonpub. opn.]

In an unpublished opinion, the California Court of Appeals for the Fifth District upheld the lower court's ruling that the defendant Indian tribe's limited waiver of sovereign immunity, which limited relief to "non-fixed assets of the Gaming/Hotel facility" or "the Tribe's share of the profits from the Gaming/Hotel facility," did not include cash located on site in the tribal gaming or hotel facilities. The defendant, a

former employee, secured an arbitration award against the Tribe and sought to execute the award by seizing standard non-fixed assets and all cash onsite. The Tribe argued that the cash reserves were not within the scope of the limited waiver of immunity. Reading the limited waiver as a whole, the lower court agreed.

Because federal law required the casino to maintain a cash reserve at all times, the lower court's interpretation of the limited waiver of sovereign immunity that limited "non fixed assets" to non-cash items was appropriate. The Tribe could not have authorized a waiver of immunity that would result in a violation of federal regulations. Therefore, the scope of the Tribe's waiver of immunity could not have included the authority to seize all cash on the premises in satisfaction of a judgment or award.

Meredith Drent is a Staff Attorney with the San Manuel Band of Serrano Mission Indians and Associate Justice for the Supreme Court of the Osage Nation. She is a member of the Osage Nation and descendant of the native Chamorro people of Guam.

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\$16 billion deficit). This means the revenue sharing tribes would have to compete with schools, colleges, health care, and environmental programs for their annual funding. The only assured funding for tribal revenue sharing would be the RSTF itself, which would be able to fund less than half the promised \$1.1 million annually.

Leslie Lohse has served as Tribal Council Treasurer of the Paskenta Band of Nomlaki Indians since 1998. In 1999, Leslie was elected as Chairperson of the BIA Central California Agency Policy Committee. In 2000, she was elected by her peers to serve as the Pacific Regional Vice-President on the National Congress of American Indians Executive Committee. Since 2000, Leslie has served on the CALFED Bay Delta Advisory Committee. She has co-chaired the Environmental Justice Subcommittee and continues to represent tribal interests in the water projects of California. .

The Paskenta Band of Nomlaki Indians operates a 70,000 square foot casino and has committed over \$1 million to the Tehama County general fund to meet needs of the County as determined by the County Board of Supervisors. The Tribe has contributed fire and safety equipment to local and state agencies along with much needed funding to local women's and children's programs.

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California Voters from page 2.

of the vote. Following the nearly 12-point margin of defeat at the polls, the "No on Unfair Gaming Deals" coalition indicated that no lawsuit will be filed to try to block the implementation of the compacts. On the other side, the Chairman of the California Nations Indian Gaming Association indicated that tribes were "extremely grateful that voters rejected this effort by outside third parties who have their own financial and political agendas," asserting that the propositions were a "direct assault on the sovereign right of all tribal governments ... to negotiate gaming compacts on a government-to-government basis."

Tension will continue to exist long after this vote. Organized labor indicated they will continue to review future compacts and seek very restrictive collective-bargaining provisions. Furthermore, the Chairman to the Assembly Governmental Organization Committee also made comments warning the Governor against using the four compacts as model blueprints for future compacts, specifically mentioning that the Governor should work to avoid the conflicts over labor, audits, horse racing and other issues that contributed to the conflicts leading to the ballot fight.

Michelle L. LaPena founded LaPena Law Corporation in January 2006. She has been representing tribal clients since 1998 on legal matters including tribal gaming, cultural resource protection, Indian child welfare, fee to trust issues, taxation, administrative law and general civil litigation involving tribal governments. Michelle is a member of the Pit River Indian Tribe (Hammawi Band).

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Endnotes from *California Voters* at page 2.

¹ For the purposes of this article, the discussion will pertain only to the four compacts that were subject to the referendum: Agua Caliente, Morongo, Pechanga, and Sycuan.

² Most neutrality agreements contain a provision granting a "card check" election. In a card check election, unions are selected on the basis of signed cards rather than by a secret ballot election.

³ During the 2007 legislative session, in order to ratify the compacts of the four tribes, the Assembly negotiated unprecedented Memorandums of Agreements (MOAs). The MOAs are government-to-government agreements with enforcement provisions that are separate and apart from the 2007 compact amendments. The Assembly stated that the MOAs provided greater clarity on certain procedural issues that were needed to resolve several concerns with the Assembly before the ratification of the compacts.

⁴ In 1987, the United States Supreme Court rejected California's attempt to regulate gaming on Indian reservations. (*California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202.) In response to that decision, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, *et seq.*, which authorized tribal gaming, but allowed states "some role in the regulation of Indian gaming." (*Artichoke Joe's California Grand Casino v. Norton* (9th Cir. 2003) 353 F.3d 712, 715 (*Artichoke Joe's*.) Among other requirements, class III gaming on Indian land is lawful only when located in a state that permits such gaming and only if the Secretary of the Interior has approved a tribal-state compact. (*Ibid.*; 25 U.S.C. § 2710(b)(1)(A).) Because California law prohibited class III gaming at the time the IGRA was enacted, California voters approved Proposition 1A, a constitutional amendment that authorized the Governor to negotiate such gaming compacts. (*Artichoke Joe's v. Norton* (E.D. Cal. 2002) 216 F.Supp.2d 1084, 1095-1096; Cal. Const., art. IV, § 19 subd. (f).)

⁵ The Secretary of the Interior is only given limited jurisdiction to disapprove a compact negotiated by the Governor and ratified by the legislature. To disapprove the compact the Secretary must show that the compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to the Indians. The Secretary has forty-five days after the date on which the compact is submitted for approval. Final approval of the compacts is when the Secretary publishes notices of the compacts in the Federal Register.

⁶ Under IGRA a tribe may engage in Class III gaming only if: (1) the tribe is a federally recognized Indian tribe, possesses powers of self-government, and has land held in trust for the tribe; (2) the tribe has authorized the Class III gaming by a tribal ordinance or resolution that has been approved by the chairman of the National Indian Gaming Commission; (3) the Class III gaming will be "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (4) the Class III gaming is conducted in conformity with a tribal-state compact that is in effect. *See* 25 U.S.C. § 2710(d)(1).

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