

# Native American Resources Committee Newsletter

Vol. 3, No. 1

February 2004

## MESSAGE FROM THE CHAIR

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**Larry Roberts**  
**Patton Boggs, LLP**  
**Washington, D.C.**

As we begin the new year, I'd like to take this opportunity to thank those of you that made the Committee a success over the past year and welcome those that have recently joined the Committee. This past year the Committee, under the leadership of Tim Vollmann, sponsored a number of programs highlighting current legal issues important to Indian country. The Committee sponsored a Web cast of a panel of Supreme Court practitioners that discussed the oral arguments presented in the *Navajo* and *White Mountain Apache* cases that were pending before the Supreme Court. Another highlight of this past year was the diverse panel hosted by the Committee that discussed the impacts of *Navajo* and *White Mountain Apache* on the parameters of the U.S.'s trust responsibility to tribes. Panelists from Interior, Congress, private industry, and tribes provided thoughtful perspectives on how those cases impacted the common understanding of the trust responsibility and how the application of the trust responsibility effects development in Indian country. My thanks to Tim Vollmann, Vice-Chair Maria Wiseman, and the many others that made these programs a great success.

During the 12th Section Fall Meeting in October, the Committee also hosted a reception honoring the Smithsonian Museum of the American Indian. The museum's director, W. Richard West, provided a wonderful overview of the development of the museum and its planned opening in September 2004. The reception included the display of beautiful Indian art and a model of Museum of the American Indian. My thanks to Sharon Blackwell for making this reception an outstanding success.

This issue of the Committee Newsletter includes insightful articles on unique provisions contained in the proposed Indian Energy Bill that failed to pass this in 2003, recent Ninth Circuit decisions concerning the McCarran Amendment and tribal authority over non-members on fee land within reservations, and recent guidance from Interior on the application of the amendments to 25 U.S.C. § 81. My thanks to the contributing authors of these timely and valuable articles, who include Louis Leonard of Latham & Watkins in San Francisco, formerly an attorney specializing in water rights at the Department of the Interior in Washington, D.C., and Elizabeth Rodke who moved to Minneapolis last year after serving on the Washington staff of Sen. Jeff Bingaman.

**Native American Resources  
Committee Newsletter  
Vol.3 , No. 1, February 2004  
Tim Vollmann, Editor**

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We have a number of interesting activities planned for the coming year, including coverage of the Supreme Court's decisions in *United States v. Lara*, which concerns Congress' authority to reaffirm the inherent authority of tribes, and *South Florida Water Management District v. Miccosukee Tribe*, which will address whether polluted water diverted into the Everglades is subject to the Clean Water Act. The Committee is also interested in co-sponsoring a number of exciting Indian law programs. It was a co-sponsor of the California Indian Energy Symposium, held Jan. 30-31 in San Francisco and would like to be a co-sponsor of the Annual Conference on Indian Tribes, Natural Resource Conflicts, and Alternative Dispute Resolution. I encourage all members to become involved in the Committee's programs. For example, members may want to consider contributing an article for the next Committee Newsletter, scheduled for this Spring. Please contact Vice-Chair Tim Vollmann if you would like to do so.

I'm honored to be serving as chair of the Committee for 2003-2004 and will strive to carry on the success of past committees. In many respects, my job is made easier by the wonderful and dedicated vice-chairs of this year's Committee. They are: Eric Shepard (Membership), Lynn Slade (Public Service), Dean Suagee (Year in Review), Hilary Tompkins (Technology), Tim Vollmann (Newsletter) and Maria Wiseman (Programs). I encourage members to contact me or the vice-chairs with any questions or suggestions concerning how they can contribute to the Committee.

## INDIAN ENERGY TITLE OFFERS PROVOCATIVE SCHEMES FOR TRIBAL DEVELOPMENT

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**Tim Vollmann**  
*Albuquerque, New Mexico*

Among the numerous provisions of the omnibus (and notorious) Energy Bill, H.R. 6, which fell short of enactment in 2003, is Title V, Indian Energy. Of course, whether the bill, or any of its constituent parts, will be enacted during the Second Session of the 108th Congress is anyone's guess. By itself the Indian Energy Title has engendered controversy, acquiring both outspoken proponents and opponents in Indian Country. The legislation, whose sponsor is Colorado Sen. Ben Nighthorse Campbell, would authorize a new scheme for tribal energy development, professedly more streamlined than the existing process, which requires the approval of the Department of the Interior for any development or right-of-way agreement that encumbers tribal lands for more than seven years. The legislation also contains new authorizations for programs funding tribal energy resource development. Thus, this legislation, whatever its fate, deserves examination.

Its genesis may be found in an earlier Energy Bill, H.R. 4, which failed passage in the 107th Congress. The language from that bill was revised and renegotiated with tribal organizations during hearings in the Spring of 2003 in both the Senate Energy and Indian Affairs Committees. What emerged in June was Title III of S. 14, the Senate version of the Energy Policy Act of 2003. That Title, and Title V of H.R. 6 (Conference Report), would replace Title XXVI of the Energy Policy Act of 1992, 25 U.S.C. §§ 3501, *et seq.* The central policy initiative is found in Section 2604, which establishes a voluntary process for Indian Tribes to enter into "tribal energy resource agreements" (TERAs) with the Secretary of

the Interior. A TERA may authorize future leases, rights-of-way, and other business agreements for the purpose of energy development, without the approval of the Secretary of the Interior. This provision alone would potentially revolutionize energy development in Indian Country.

There is little argument that major, job-producing, energy development in Indian Country is beset with considerable federal red tape. The source of this burdensome process is the longstanding statutory requirement of approval of agreements by the Secretary of the Interior, normally delegated to officials in the Bureau of Indian Affairs. At conference, Sen. Pete Domenici, chairman of the Energy Committee, characterized that approval requirement as "paternalistic." An important concern is that such an approval is considered a federal action for purposes of triggering a variety of reviews and assessments, including environmental impact statements (EISs) or assessments pursuant to the National Environmental Policy Act (NEPA). Tribal leaders have argued that tribal lands are private lands, not publicly owned, though they are usually held in trust by the United States, and that they should not carry bureaucratic burdens not imposed on other private lands. Although modern federal Indian policy has fostered tribal decision-making with regard to development of tribal lands, *e.g.*, the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101, *et seq.*, the pervasive agency approval requirement has arguably made Indian lands less competitive than private lands, or even many public lands, depriving tribal communities of needed income opportunities. On the other hand, many Indian people have contended that the agency approval requirement and environmental reviews provide protection and information necessary to protect tribal homelands. Sen. Jeff Bingaman of New Mexico criticized the proposed scheme for TERAs, commenting that major projects like refineries would not be

subject to environmental review. Sen. Campbell said a failed Bingaman amendment to require Tribes to conduct environmental studies would have been “a big step backward.”

Three principal questions have been raised by tribal representatives in connection with the TERA process which would be authorized by Section 2604(e): (1) Whether securing approval of a TERA is so burdensome in and of itself that few Tribes will want to invoke the process; (2) Whether the Secretary’s approval of a TERA will nullify any remaining federal trust responsibility for the tribal lands subject to the TERA; and (3) Whether the public petition process, which enables an “interested party” to challenge tribal compliance with a TERA, is an offensive intrusion on tribal sovereignty over tribal lands.

Upon enactment of this authorizing legislation the Secretary must promulgate implementing regulations within 180 days, which shall include “criteria to be used in determining the capacity of an Indian tribe” to manage the natural resources and the financial and administrative resources necessary to implement and comply with a TERA. These regulations are also required to prescribe the process whereby a Tribe may withdraw from a TERA. Upon the Secretary’s completion of that rulemaking task, which may itself be challenged, a Tribe may submit a proposed TERA, and the Secretary must decide whether to approve or disapprove it within 180 days. The TERA must be approved if the Secretary determines that the Tribe has sufficient management capacity, and if the proposed agreement meets somewhat detailed statutory criteria, including provisions for an annual federal “review and evaluation to monitor the performance of the Indian tribe’s activities” under the TERA, the establishment of environmental requirements for subsequent tribal agreements, and “a process for ensuring that the public is informed of and has an

opportunity to comment on environmental impacts” of such agreements. The Secretary’s approval of a TERA is itself a federal action requiring NEPA compliance and other reviews, although the provision states that NEPA review “shall be limited to the direct effects of [Secretarial] approval.” In any event, an EIS will make the expected 180-day timeframe unattainable.

Once a TERA is approved, a Tribe may enter into leases, business agreements and rights-of-way not to exceed 30 years (or, for oil and gas production, 10 years and as long thereafter as petroleum is produced in paying quantities), for the purpose of energy development, without seeking agency approval. Rights-of-way for pipelines or electric lines must serve a facility on tribal land. In all cases such agreements must be within the scope of the TERA and in compliance with the terms of the TERA. Although no approval will be required, the Tribe must provide copies of those individual agreements to the Secretary, plus “documentation of those payments [to be made to the Tribe] sufficient to enable the Secretary to discharge the trust responsibility of the United States to enforce the terms of, and protect the Indian tribe’s rights under, the lease, business agreement, or right-of-way.”

On the specific topic of the trust responsibility, Section 2604(e)(6) was the subject of much contention, and regular amendments. As the bill emerged from conference, it stated: “The Secretary shall continue to have a trust obligation to ensure that the rights of an Indian tribe are protected in the event of a violation of the terms of any lease, business agreement or right-of-way by any other party to the lease, agreement or right-of-way.” This language replaced language pushed by the Bush administration which said, “The United States shall not be liable for losses sustained by any party to a lease executed pursuant to tribal regulations under this subsection, including



the Indian tribe.” In the wake of the Supreme Court’s decision in *United States v. Navajo Nation*, 123 S.Ct. 1079 (2003), the question lingered whether, even after the amendment of the offending Administration language, there remains any enforceable federal duty for which a Tribe might later seek damages from the United States. Some tribal leaders, including Navajo President Joe Shirley, Jr., continued to express misgivings or outright opposition to the legislation for that reason.

Under Section 2604(e)(7), after a Tribe has entered into a lease, business agreement or right-of-way pursuant to a TERA, “interested parties,” defined as those who “have sustained or will sustain a significant adverse environmental impact as a result of the failure of an Indian tribe to comply with a [TERA]”, may petition the Secretary to review a Tribe’s compliance, but only “[a]fter exhaustion of tribal remedies.” The affected Tribe is given the opportunity for a hearing, and a chance to correct any alleged non-compliance. The Secretary is given 120 days to determine whether a Tribe is in compliance, and if there is non-compliance, the Secretary may temporarily suspend activities under the lease, business agreement, or right-of-way agreement, or rescind all or part of the approval of the TERA. This process would appear to allow some form of judicial review of tribal environmental compliance, though in a very roundabout way. The mere pendency of the petition may nevertheless cast a cloud over the future of the tribal energy development agreement.

The Indian Energy Title also creates an Office of Indian Energy Policy and Programs in the Department of Energy, which would make competitive grants and guarantee loans for tribal enterprises to carry out energy conservation programs, and to plan development of tribal generation, transmission and distribution facilities. It would authorize appropriations of up to \$20 million per year for

these programs, plus \$2 billion for loan guarantees. The Interior Department would also be authorized to run a grant and loan program to assist Tribes to obtain managerial and technical ability to develop energy resources, and for related needs.

The bill would also authorize several studies and reports on energy and mineral development on Indian lands, including the use of wind power and hydropower, and review of activities under the Indian Mineral Development Act of 1982.



**Native American Resources  
Committee Newsletter**

**LIKE TO WRITE?**

The Native American Resources Committee welcomes the participation of members who are interested in preparing this Newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor  
Tim Vollman at 505/792-9168 or  
Tim\_Vollmann@hotmail.com.

**BACK ISSUES**

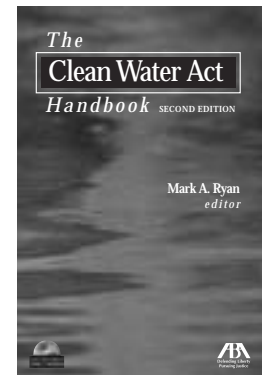
Back issues of the Native American Resources Committee Newsletter can be found at <http://www.abanet.org/enviro/committees/nativeamerican/newsletter/archive.html>.

# New From ABA Publishing and The Section of Environment, Energy, and Resources

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## **The Clean Water Act Handbook, Second Edition** **Mark A. Ryan, editor**

This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc.*, *Talent Irrigation*, and *Forsgren*, among others.



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- Enforcement options under Section 309
- Judicial review

Chapters begin with a section on applicability and scope. Within each fully annotated chapter, clear explanations of specific statutory and regulatory provisions and court decisions applicable to the issue are presented in the order needed for full and accurate analysis – a virtual checklist of requirements and considerations. Making this new edition more useful than ever, the authors reference URL addresses for quick, up-to-the-minute information on government documents that are often difficult to locate.

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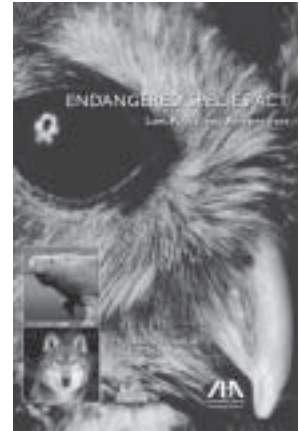
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## **Endangered Species Act: Law, Policy, and Perspectives**

**Donald C. Baur and Wm. Robert Irvin, editors**

Focusing on what may be the most ambitious, stringent, comprehensive, and controversial of all the landmark environmental laws, "Endangered Species Act: Law, Policy, and Perspectives" provides practitioners with a comprehensive guide to current legal practice in this area. Thirty-two experts representing a variety of perspectives contribute chapters to this comprehensive and thoughtful guide.



Designed to assist both the novice and experienced practitioner, "Endangered Species Act" begins with a broad overview that examines the act's historical background and the key issues that have evolved since it was passed in 1973. Subsequent chapters address the many provisions and implementing procedures that make this such a unique and complex statute.

Topics examined include:

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## **SOME CLARITY ON THE MCCARRAN AMENDMENT?**

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**Louis G. Leonard, III**  
**Latham & Watkins, LLP**  
**San Francisco, California**

Since the McCarran Amendment was enacted in 1952, the United States has urged the federal courts to limit its scope. These attempts have consistently failed. That streak continued last summer with *State Engineer of Nevada v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians*, 339 F.3d 804 (9th Cir. 2003).

In the most important appellate case interpreting the McCarran Amendment in over a decade, the Ninth Circuit found that the doctrine of prior exclusive jurisdiction deprived a federal court of subject matter jurisdiction over contempt proceedings against the United States arising under the administration of a state court water rights decree. But the court's ruling was couched in even more sweeping terms: once a state or federal court has initiated a McCarran adjudication, the other court has no jurisdiction to hear any matters arising from the adjudication or administration of the river system.

The case centered on water rights to the Humboldt River held by the United States in trust for the South Fork Band of the Te-Moak Tribe. The waters of the Humboldt River were adjudicated by a Nevada state court, which entered a final decree in 1935. After the decree was entered, the United States purchased five ranches with decreed water rights for the South Fork Band. For decades, the federal government and the Band acquiesced in the Nevada court's administration of the Humboldt Decree. The Bureau of Indian Affairs (BIA) paid the state-levied special assessments and the Band allowed the state water commissioner onto the reservation to ensure compliance with the Decree.

When BIA no longer had money in its budget to pay the assessments, the Band refused to pay and excluded the state authorities from the reservation. In response, the Nevada State Engineer brought contempt proceedings against the Band, later joining the United States as an indispensable party. The United States removed the contempt proceeding to U.S. District Court under 28 U.S.C. § 1442. The proceedings soon took on a surreal tone as the state court issued an injunction against the federal court, which in turn enjoined further state court proceedings. On a motion to reconsider, the federal court remanded the proceedings to the state court under the Colorado River abstention doctrine. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Both sides appealed.

The United States argued that provisions of the recently amended federal removal statute, 42 U.S.C. § 1442, gave the federal court jurisdiction to hear the contempt proceedings and the policy underlying the statute argued in favor of the court exercising that jurisdiction. The Nevada State Engineer argued that the doctrine of prior exclusive jurisdiction stripped the federal court of even concurrent jurisdiction under *Colorado River Water Conservation Dist.*

The Ninth Circuit, in an opinion by Judge Kozinski, endorsed Nevada's view. The court began its inquiry with the removal statute, conceding the government's point that the new removal statute, Section 1442, operates as a supplemental source of federal jurisdiction. 339 F.3d at 809. It held, however, that § 1442 "is not a trump," but rather is subject to "specific jurisdictional bars." *Id.*

The court found such a bar in the "ancient and oft-repeated" doctrine of prior exclusive jurisdiction. Under the doctrine, "when a court of competent jurisdiction has obtained possession, custody or control of particular

property, that possession may not be disturbed by any other court.” 339 F.3d at 809 (internal quotations omitted). The government and Band argued that a contempt action was not the type of *in rem* proceeding necessary to trigger prior exclusive jurisdiction. The court disagreed finding the contempt proceedings to be *quasi in rem* because the parties’ interests in the *res* – the water rights – formed the basis of the action. *Id.* at 811.

Before applying the doctrine to the McCarran Amendment, the Ninth Circuit first determined that the McCarran Amendment retroactively applied to the Humboldt Decree, entered almost 20 years before its enactment. 339 F.3d at 812. It held that

the McCarran Amendment waives the United States’ immunity from suit, not only for the administration of water rights acquired after the statute’s enactment but also for the administration of water rights acquired before the law came into effect.

*Id.* at 813. The McCarran Amendment waives U.S. sovereign immunity for both (1) the adjudication of a river system and (2) the administration of the rights so adjudicated. 43 U.S.C. § 666(a). The amendment further states that the United States “shall be subject to the judgments, orders, and decrees of the court having jurisdiction.” *Id.* Turning to the substance of the McCarran Amendment, the court rejected the United States’ argument that under *Colorado River Water Conservation Dist.* federal and state courts have concurrent jurisdiction over the administration of water rights decrees. 339 F.3d at 813-14. The court found that *Colorado River* merely addressed the jurisdiction to *initially* adjudicate the water rights in a system and did not address the administration of those rights. *Id.*

Reading common law principles into McCarran, the Ninth Circuit found that once a court has taken jurisdiction over the *res* – the

water – by initiating an adjudication, the doctrine of prior exclusive jurisdiction strips the other court system of any power to adjudicate or administer those rights. Consequently, the court reasoned, the phrase “court having jurisdiction” in the McCarran Amendment had to refer only to the court that originally adjudicated the rights. 339 F.3d at 814. In this case, the state court. So finding, the court affirmed the district court’s order, but on the ground that it lacked all jurisdiction to hear the contempt actions at issue.

The Ninth Circuit’s decision provides some long-missing clarity concerning the administration cases under McCarran. The issue now is not one of comity or judicial prudence, but rather an all or nothing question of subject matter jurisdiction.

### ***BURLINGTON NORTHERN DECISION SUGGESTS BASIS FOR TRIBAL CIVIL JURISDICTION OVER NON-INDIANS***

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**Elizabeth Rodke  
Minneapolis, Minnesota**

The extent to which Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians has been the topic of much debate in recent years. In the landmark case of *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court set forth a general proposition that, absent congressional delegation, Indian tribes lack civil authority over non-Indians within Indian reservations. However, the Court also enunciated two broad exceptions to that rule: first, “a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements;” and second, “a tribe may also retain inherent power to

exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

Though *Montana* was decided more than two decades ago and it has been cited in hundreds of decisions and academic articles, the limits of the rule have remained undefined and the reach, particularly of its exceptions, remains enigmatic. In case after case, Indians and non-Indians who live or do business on Indian lands have disputed the scope of the exceptions to *Montana*'s general rule that tribes lack jurisdiction over non-Indians. Major battlegrounds have been fee lands and rights-of-way across reservations. In these disputes, tribal hopes for broad authority under the second *Montana* exception (for activities that threaten or have a direct effect on the tribe) have generally not borne out. Courts have only rarely found the requirements met for application of the second exception. See *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998). However, a clear understanding of the scope of that exception has not emerged.

A recent Ninth Circuit decision however, provides an opportunity for further development of the second exception. In *Burlington Northern R.R. v. Assiniboine & Sioux Tribes of the Ft. Peck Reservation*, 323 F.3d 767 (9th Cir. 2003), the Ninth Circuit assumed that the Fort Peck Tribes in Montana might be able to prove, with adequate discovery against the railroad, that the rail line running through the reservation threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Ft. Peck Tribes, thereby meeting the second *Montana* exception. The *Burlington Northern* case thus has the potential to provide further clarity as to the appropriate application of *Montana*'s second exception.

The Burlington Northern Santa Fe Railroad Company operates a rail line that passes over the Fort Peck Indian Reservation for more than 80 miles. The rail line is built on a right-of-way awarded by Congress in 1887 to Burlington Northern's predecessor-in-interest and the company now runs approximately 26 trains per day across the reservation. In 1987, the Tribes levied an ad valorem tax on the value of "all utility property," defined as including "any publicly or privately owned railroad." The company challenged the tax when it was first imposed on this rail line and the Ninth Circuit found the tax lawful. See *Burlington N. R.R. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899 (9th Cir. 1991) (*Burlington I*), cert. denied, 505 U.S. 1212 (1992).

But five years later the Supreme Court held in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that a federal right-of-way for a state highway passing over Indian trust land should be considered the equivalent of non-Indian fee land for purposes of tribal jurisdiction. The Ninth Circuit subsequently held that *Burlington I* was overruled by *Strate*. *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000).

Burlington Northern then stopped paying the tribal ad valorem tax to the Fort Peck Tribes. On Feb. 1, 2001, the Tribes brought suit in Fort Peck Tribal Court, seeking a declaration that the tax remained valid. Soon thereafter, Burlington Northern filed suit in federal district court and sought summary judgment. The district court granted Burlington Northern's motion for summary judgment over tribal objections that they needed additional discovery to present their case. On the basis of these objections, the tribe appealed to the Ninth Circuit.

The Ninth Circuit ultimately vacated and remanded the portion of the case regarding the second *Montana* exception, finding that it

was an abuse of discretion for the district court to rule on summary judgment before allowing the Tribes discovery with respect to issue of the railroad's threats to tribal political integrity, economic security, health, or welfare. In reaching this position, the Ninth Circuit recognized that the Supreme Court's decision in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), somewhat refined the *Montana* rule. The court held that *Montana's* second exception "is only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government. Thus, unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually imperils the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands." *Id.* at 657, n. 12.

The Ninth Circuit found that the Tribes are not able to easily ascertain the possible hazards created by Burlington Northern's use of its right-of-way. The court stated that it is difficult for the Tribes to show that there is a genuine issue of material fact concerning whether their political integrity, economic security, health, or welfare is directly threatened in a serious and substantial manner if they are not allowed discovery on the nature of the threat posed by the railroad. In particular, the court noted that that in the year 2000, more than 1,695 freight cars crossed the Reservation each day. The court found that while the Tribes knew about hazardous materials being carried on railroad cars and derailment incidents and had gathered evidence of fires and accidents with associated property damage and fatalities, discovery of Burlington's own files was essential for a complete record on the applicability of *Montana's* second exception. The court held that because the tribes showed some basis for believing that Burlington Northern's use of its right-of-way threatens serious harm to the Reservation and had no fair opportunity to develop the record

concerning the extent of the potential harm, it was an abuse of discretion for the district court to grant the summary judgment motion. The Ninth Circuit thus remanded the case to the United States District Court for the District of Montana where discovery is ongoing.

In reaching this decision, the Ninth Circuit acknowledged that the *Montana* case "set a critical boundary line between the sovereignty of Indian nations and the non-Indian populace that lives, works or interacts with tribes on their territory." 323 F.3d at 775. The court noted that after two decades of case law governing the scope of the second *Montana* exception, the law as to this exception remains "in its infancy." The court recognized that fuller understanding of the second exception is crucial if there are to be amicable and lasting relations between tribes and non-Indians.

*Burlington Northern* offers promise that, though it has been a long time coming, the courts will develop greater clarity as to the scope of *Montana's* second exception. *Montana* is, however, a creation of the Supreme Court and thus is a creature of federal common law. The development of common law often proceeds in a gradual and incremental fashion and not in one fell swoop. It is likely that the edges of *Montana's* second exception will remain fuzzy for some time.

## COMMITTEE ONLINE!

### Native American Resources Committee Web page:

<http://www.abanet.org/environ/committees/endangered/home.html>

### Native American Resources Committee list serve:

[environ-native\\_amer@mail.abanet.org](mailto:environ-native_amer@mail.abanet.org)

## **INTERIOR SAYS TRIBAL OPTION CONTRACTS MAY NOT EXCEED TOTAL OF 7 YEARS**

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An amendment rewriting 25 U.S.C. § 81 in 2000 did away with the most anachronistic and confusing aspects of the 1871 statute, which required government approval of any tribal contract “relative to lands.” The modern statute states, “no agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior,” ostensibly opening the way for a wide variety of short-term commercial transactions with Indian tribes, requiring no approvals by the Bureau of Indian Affairs (BIA).

This new statutory authority was clarified in a June 2003 decision by Acting Assistant Secretary for Indian Affairs Aurene Martin. The decision involved a 2001 management agreement between the Pueblo of Nambé and Gasplus, a New Mexico company, regarding the operation of a gasoline distribution business at the Pueblo. She ruled that the 5-year agreement, which contained two options for Gasplus to extend the term for two additional 5-year periods, took the entire agreement out from under statute’s implicit exemption for tribal agreements under seven years.

Gasplus had entered into the agreement with the Pueblo in January 2001, but the Pueblo reportedly withdrew from the agreement when the state Legislature offered the Pueblo \$2 million per year to get out of the gasoline distribution business because it was undercutting non-Indian suppliers. The BIA regional director then ruled in February 2002 that the agreement was invalid as a matter of law without secretarial approval. The administrative appeal then made its way to the acting assistant secretary’s desk in Washington, D.C.

Gasplus argued that, notwithstanding the term of the agreement, it did not “encumber Indian lands” within the meaning of Section 81. The acting assistant secretary pointed to the regulations in 25 CFR Part 84 and the legislative history of the 2000 amendment for the proposition that, although Gasplus may not have acquired a proprietary interest in the tribal land, such as under a lease, it gained nearly exclusive control over the land for purposes of conducting its business, and that this was sufficient to trigger the statute. The assistant secretary’s decision emphasized that the regulations state that a determination whether a contract encumbers tribal land needs to be “conducted on case-to-case basis.”

In September 2003 Gasplus filed suit against the Department of the Interior in the U.S. District Court in Washington, D.C., challenging the agency final decision. *Gasplus v. U.S. Dept. of the Interior*, Cause No. 05:0706.

### **AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES**

#### ***Calendar of Section Events***

#### **22nd Annual Water Law Conference**

February 19-20, 2004  
San Diego, California

#### **Eastern Water Resources: Law, Policy and Technology**

May 6-7, 2004  
Hollywood, Florida

#### **12th Section Fall Meeting**

October 6-10, 2004  
San Antonio, Texas

***For more information,  
see the Section Web site at  
<http://www.abanet.org/environ>***