

Native American Resources Committee Newsletter

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MESSAGE FROM THE CHAIR

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As reflected by the wealth of articles in this newsletter, the past few months have brought a number of developments to the field of federal Indian law. For example, in April the Supreme Court issued its decision in *United States v. Lara*, holding that Congress maintains the authority vis-à-vis the Supreme Court to define the scope of a tribe's inherent authority. This newsletter provides an overview of that decision and its potential impact on tribal environmental programs. At the end of its term this year, the Supreme Court granted review of *City of Sherrill v. Oneida Indian Nation of New York*, a case concerning the tax status of treaty-reserved lands that were unlawfully acquired by the state and later reacquired through purchase by the Oneida. This case appears to be the only Indian law case scheduled to be heard by the Court in the next term.

The Committee is in the process of planning a number of activities in the coming months. Oct. 6-10, the Section will hold its 12th Section Fall Meeting in San Antonio. The Section's conference will present a number of panels, such as the water law panel, that will provide

insight particularly relevant for federal Indian law practitioners. Also, on Sept. 29 the Committee will co-sponsor a conference in Minneapolis on the use of Alternative Dispute Resolution for conflicts involving tribal natural resources and the environment.

This issue of the newsletter contains a number of valuable articles for Indian law practitioners. The first article, by Dean Suagee, concerns the Supreme Court's recent decision in *Lara* and its potential implications for tribes in the field of environmental, natural resources and energy law. Also in this issue, Michael Schoessler provides an overview of the Ninth Circuit's decision in *Krystal Energy Co. v. Navajo Nation* – which ruled that Congress abrogated tribal sovereign immunity for certain provisions of the Bankruptcy Code even though tribes were never explicitly mentioned. Barbara Wester contributes an article discussing a recent challenge to EPA's authority to issue a clean water act permit for a facility on tribal trust lands. Janet Moran provides an informative update of recent actions by the FCC concerning the siting of telecommunications towers on tribal lands, amendments to the FCC's universal service rules, and a recent fine levied by the FCC for a telephone company's failure to advertise the availability of discounted telephone installation on the Kalispel Reservation. Finally, Maria Wiseman contributes an article on a recent

**Native American Resources
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Tim Vollmann, Editor**

In this issue:

Message from the Chair
Larry Roberts..... 1

Decision in *U.S. v. Lara* Upholds Congressional
Power to Overrule Supreme Court on
Divestiture of Inherent Tribal Sovereignty
Dean Suagee..... 2

Ninth Circuit Holds that Congress Abrogated
Tribal Sovereign Immunity for Certain
Provisions of the Bankruptcy Code
Michael Schoessler..... 5

In Re Mille Lacs Wastewater Treatment Facility,
NPDES Appeal 03-08
Barbara L. Wester 7

FCC Takes Steps to Facilitate Tribal
Notification of Tower Construction; Improve
Lifeline and Linkup Service
Janet Fitzpatrick Moran 8

Court Stops Trust Land Acquisition of Land for
a Casino on NEPA Grounds
Maria Wiseman 10

Ninth Circuit Won't Enforce Peabody
Arbitration Settlement 11

New Section Committees: Hydro Power and
Energy Facilities and Siting
Cherise M. Oram and Angela R. Morrison .. 12

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challenge to Interior's decision to take land into trust for gaming purposes.

My thanks to Tim Vollmann and all who contributed to this newsletter. I also want to welcome our new members to the Committee and encourage members to submit articles for the upcoming fall newsletter.

**DECISION IN U.S. V. LARA UPHOLDS
CONGRESSIONAL POWER TO OVERRULE
SUPREME COURT ON DIVESTITURE OF
INHERENT TRIBAL SOVEREIGNTY**

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On April 19, 2004, the U.S. Supreme Court issued its decision in *United States v. Lara*, ___ U.S. ___, 124 S.Ct. 1628 (2004), a case which, in effect, challenged the authority of Congress to enact a statute overruling a decision of the Supreme Court concerning the scope of inherent tribal sovereignty. In the earlier case, *Duro v. Reina*, 495 U.S. 676 (1990), the Court had ruled that the scope of a tribe's inherent sovereignty does not include the power to prosecute and punish an Indian who is a member of a different tribe. Congress responded to this holding by amending the Indian Civil Rights Act (ICRA) to explicitly state that the term "powers of self-government" includes "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2).

In *Lara*, the Eighth Circuit had held that, despite this explicit statutory language, the amendment to the ICRA was in effect a delegation of federal power to tribes, and that, as such, federal prosecution after tribal prosecution for a criminal offense based on

the same conduct was barred by double jeopardy. 324 F.3d 635 (8th Cir. 2003). (The Ninth Circuit had reached the opposite conclusion in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001), *cert. denied*, 534 U.S. 1115 (2002).) The Supreme Court reversed the Eighth Circuit's decision, holding that Congress meant what it said and that it "does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do." 124 S.Ct. at 1633.

While it arose in the context of criminal law, the decision in *Lara* has does have implications for environmental, natural resources and energy law. Some background is necessary to shed light on these implications.

The decision in *Duro* relied on the rationale that the Court had applied in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which the Court ruled that inherent tribal sovereignty does not include the power to prosecute and punish non-Indians for misdemeanors committed on a tribe's reservation. In order to reach its result in *Oliphant*, the Court applied a new rule, which has since become known as "implicit divestiture" or "judicial divestiture." At the time of the Court's decision in *Oliphant*, the leading treatise in the subject matter had posited that, while Indian tribes are subject to the legislative power of the United States and no longer have the power to enter into treaty relations with other nations, the tribes retain all other aspects of their original sovereignty except as expressly limited by treaties or acts of Congress. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 123 (1941). No statute had taken away tribal criminal jurisdiction over non-Indians (although the Indian Civil Rights Act had limited the penalties that tribes can impose to those commonly associated with misdemeanors, 25 U.S.C. §1302(7)), and the treaty at issue in the *Oliphant* case did not

contain language that could be construed as having taken away this aspect of inherent tribal sovereignty. To hold that the Suquamish Tribe had lost criminal jurisdiction over non-Indians, the Court announced that this had happened by implication because such power would be inconsistent with the overriding sovereignty of the United States. *Oliphant*, 435 U.S. at 210.

The Court's use of implicit divestiture as a means for limiting the scope of inherent tribal sovereignty has received much criticism from legal scholars. See generally N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. IND. L. REV. 353 (1994); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L. J. 1 (1999). While acknowledging that the notion of implicit divestiture had been employed by Chief Justice John Marshall in ruling that tribes had been implicitly divested of two aspects of inherent sovereignty during the colonial era (the power to alienate land to any person other than one acting with authority of the European sovereign claiming the right of discovery, *Johnson v. McIntosh*, 21 U.S. 543, 574, 587-88 (1823), and the power to enter into treaty relations with any European sovereign other than the discoverer, *Worcester v. Georgia*, 31 U.S. 515, 559-61 (1832)), Professor Frickey notes that *Oliphant* was "the first time in 150 years [that] the Court took it upon itself to impose new limitations on tribal sovereignty." Frickey, *supra*, at 36.

In the same term that it decided *Oliphant*, the Court also decided *United States v. Wheeler*, 435 U.S. 313 (1978), explicitly holding that tribal prosecution against a tribal member is based on inherent tribal sovereignty, and thus subsequent federal prosecution is not barred

by double jeopardy. In *Duro*, the Court had held that an Indian who is alleged to have committed a crime on the reservation of a tribe other than the tribe in which that person is enrolled is not like a tribal member for purposes of criminal jurisdiction but rather is like a non-Indian. This decision created major problems for law enforcement within Indian country, and, within a few months, Congress enacted legislation to “fix” these problems. Act of Nov. 5, 1990, Pub. L. No. 101-511, §8077, 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. §1301(2), (4)). See Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN. L. REV. 109 (1992).

One of the issues addressed in the *Lara* decision is whether the Court’s holdings in *Oliphant* and *Duro* are federal common law or whether they reflect constitutional limits on tribal authority over nonmembers. The Court held that these earlier decisions are common law, saying, “*Oliphant* and *Duro* make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches’ own determinations.” 124 S.Ct at 1636.

The ruling in *Lara* has implications for environmental, energy and natural resources law, although a thorough exploration of these implications is beyond the scope of this newsletter article. In 1981, in *Montana v. United States*, 450 U.S. 544 (1981), the Court extended the implicit divestiture rule to the realm of civil regulatory authority. In *Montana*, drawing on *Oliphant*, the Court announced a “general proposition that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” 450 U.S. at 565. Since the facts of the case concerned only non-member conduct on reservation land that had passed out of Indian possession as a result of the allotment era, to the extent that this “general proposition”

purports to apply to trust land, it was *dictum*. Moreover, the Court had to acknowledge that there was a body of case-law at odds with this proposition, and so it formulated two exceptions: (1) tribes may have authority over nonmembers “who enter into consensual relations”; and (2) tribes may have authority to regulate conduct by “non-Indians on fee lands ... when that conduct threatens or has some direct on the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S. at 565-66. This general proposition and the exceptions have drawn much criticism from legal scholars as being at odds with the foundational principles of federal Indian law. See, e.g., Duthu, Getches, Frickey, *supra*.

As a step in its logic to arrive at its “general proposition,” the *Montana* Court set out the following premise: “[The] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” 450 U.S. at 564. As with the general proposition, this underlying premise is also at odds with foundational principles of federal Indian law, and is not supported by the case law that the Court cites. See Dean B. Suagee, *The Supreme Court’s “Whack-a-Mole” Game Theory in Federal Indian Law, a Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES. J. 90, 98, 119 n. 127 (2002). The Court has frequently cited this underlying premise in a line of cases holding that tribes have been divested of various aspects of their inherent civil regulatory and adjudicatory jurisdiction. See Suagee, *supra*, at 100-08.

The judicial divestiture of inherent tribal sovereignty has contributed to the challenges that tribal governments face in developing and carrying out environmental protection programs and otherwise regulating the use of natural resources. Although several of the

major federal environmental laws have been amended to authorize the Environmental Protection Agency to treat tribes like states, tribes have nevertheless faced legal challenges when they have asserted regulatory jurisdiction over fee lands. It has been clear, even with the case law of judicial divestiture, that Congress can delegate federal power to tribes, and so delegation of federal authority to tribes offers a practical solution to filling some of the environmental regulatory gaps in Indian country. Delegated federal power in the in the civil regulatory context does not implicate double jeopardy (or other issues that may arise in the criminal context), and the framework of federal environmental law provides many procedural safeguards to ensure that tribes treat all persons with basic fairness. But federal environmental laws are premised on the notion that, in addition to carrying out delegated federal power, states also exercise their own sovereignty, including the authority to do more than federal law requires and to regulate activities that federal laws do not reach. For tribes to truly be treated like states, they need recognition of their inherent sovereign power to protect the environments of their reservations, including lands that have passed out of trust status. One of the basic implications of the Court's recent decision in *Lara* is that, to the extent that the Court's decisions undercut this aspect of tribal sovereignty, Congress has the power to recognize and affirm that protection of the reservation environment is, in fact, within the scope of inherent tribal sovereignty.

COMMITTEE ONLINE!

Native American Resources Committee Web page:

[http://www.abanet.org/environ/
committees/endangered/home.html](http://www.abanet.org/environ/committees/endangered/home.html)

NINTH CIRCUIT HOLDS THAT CONGRESS ABROGATED TRIBAL SOVEREIGN IMMUNITY FOR CERTAIN PROVISIONS OF THE BANKRUPTCY CODE

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The sovereign immunity of Indian tribes from suit, unless such immunity has been explicitly abrogated by Congress or waived by an Indian tribe, is a doctrine with a long history in American jurisprudence. This doctrine was last articulated and upheld by the Supreme Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) (“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”). While purporting to follow the tribal sovereign immunity doctrine enunciated in *Kiowa Tribe* and other Supreme Court cases, the Ninth Circuit recently found that Congress had abrogated tribal sovereign immunity for certain provisions of the Bankruptcy Code (Code) – even though Congress never explicitly mentioned Indian tribes in the statute. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *amended and petition for reh’g en banc denied*, 2004 U.S. App. LEXIS 6502 (Apr. 6, 2004). This decision could possibly have wide-ranging implications for the tribal sovereign immunity doctrine, as well as impacting bankruptcy practice within the Ninth Circuit.

Krystal Energy filed for bankruptcy under Chapter 11 and then proceeded to file an adversary proceeding against the Navajo Nation (Nation) under 11 U.S.C. §§ 505 & 542. Congress has stated that for several provisions of the Code (including §§ 505 and 542), “Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit” for several matters, including the issuing of orders

and judgments under the Code against the governmental unit.” 11 U.S.C. § 106(a). The Code defines a “governmental unit” as the “United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.” *Id.* § 101(27).

The Nation never filed claims as a creditor in the bankruptcy. In such instances, the Ninth Circuit had previously held that an Indian tribe’s decision to not appear in the proceeding meant that it had not “consented” to suit. *In re Greene*, 980 F.2d 590 (9th Cir. 1992). The converse was also true – if an Indian tribe did appear or file claims in a bankruptcy proceeding, then the tribe had consented to suit and waived its sovereign immunity. *In re White*, 139 F.3d 1268 (9th Cir. 1998); 11 U.S.C. § 106(b) (filing of proof of claim is deemed to be waiver of sovereign immunity). The bankruptcy court agreed with the Nation, holding that the language in the Code did not amount to an express abrogation of tribal sovereign immunity by Congress. Krystal Energy appealed to the District Court of Arizona, which upheld the bankruptcy court’s decision. Krystal Energy then appealed to the Ninth Circuit.

The Ninth Circuit began its analysis by acknowledging the tribal sovereign immunity doctrine and that an abrogation of such immunity by Congress must be unequivocally expressed in explicit legislation and is not to be implied. *Krystal Energy*, 357 F.3d at 1056 (citing *Kiowa Tribe and Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). The Ninth Circuit focused on the “catch-all phrase ‘or other foreign or domestic governments’” in § 101(27), stating that “Indian tribes are certainly governments, whether considered foreign or domestic (and, logically, there is no other form of government outside the foreign/domestic

dichotomy, unless one entertains the possibility of extra-terrestrial states).” *Id.* at 1057. Pointing to the Supreme Court’s historical treatment of Indian tribes as “domestic dependent nations,” the court held that Indian tribes are domestic governments and “[t]herefore, Congress expressly abrogated the immunity of Indian tribes” for certain provisions of the Code. *Id.* at 1057-58. The court believed that Congress’ broad language in the statute evinced an intent to abrogate the sovereign immunity of all possible entities that might fall within the language in § 101(27) – including Indian tribes, even though Indian tribes are not mentioned by name.

The Ninth Circuit closed its opinion as follows:

We are well aware of the Supreme Court’s admonitions to “tread lightly” in the area of abrogation of tribal sovereign immunity. . . . But the Supreme Court’s decisions do not require Congress to utter the magic words “Indian tribes” when abrogating tribal sovereign immunity. Congress speaks “unequivocally” when it abrogates the sovereign immunity of “foreign and domestic governments.” Because Indian tribes are domestic governments, Congress abrogated their sovereign immunity in 11 U.S.C. § 106(a)

Id. at 1060-61 (citations omitted). The Ninth Circuit stated that the issue of whether these provisions in the Code abrogated the sovereign immunity of Indian tribes has not been determined by the Supreme Court or any circuit. *Id.* at 1057. The Tenth Circuit’s bankruptcy panel squarely addressed the same issue and found no abrogation of tribal sovereign immunity. *In re Mayes*, 294 B.R. 145, 2003 Bankr. LEXIS 578 (10th Cir. 2003). The Nation has 90 days from the date of the amended decision (Apr. 6, 2004) to file a petition for certiorari with the Supreme Court.

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**IN RE MILLE LACS WASTEWATER
TREATMENT FACILITY,
NPDES APPEAL 03-08**

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In a decision issued April 6, 2004 the U.S. Environmental Protection Agency's Environmental Appeals Board (EAB) denied a petition from Mille Lacs County, Minnesota, to challenge EPA's issuance of a federal permit for a wastewater treatment plant built by the Mille Lacs Band of Ojibwe Indians on trust lands within the boundaries of the Mille Lacs Indian Reservation in Minnesota (*In re Mille Lacs Wastewater Treatment Facility*, NPDES Appeal 03-08, Apr. 6, 2004). The EAB decision upheld EPA's jurisdiction to issue the permit based upon the agency's authority for implementing federal Clean Water Act authorities in Indian country in Minnesota.

In 1999, the Mille Lacs Band applied to EPA for an National Pollutant Discharge Elimination System (NPDES) discharge permit for a proposed wastewater treatment plant to be built on their reservation and which would service both on- and off-reservation communities. EPA has the authority to implement federal environmental programs in Indian country where neither a tribe nor a state has been expressly authorized to do so. In this case, neither the Mille Lacs Band nor the state of Minnesota had been authorized to

implement the NPDES program within the Mille Lacs Reservation. At the time of the application, the proposed treatment plant was to be located on Band-owned fee lands within the boundary of the Mille Lacs reservation as established in an 1855 treaty, although the Department of the Interior and the Band were in the process of transferring the land from fee to trust status.

EPA issued a draft permit for the plant in 2000, and received comments, from among others, a Mille Lacs County commissioner, who argued that EPA lacked authority to issue the permit because the facility was not located within the boundaries of a federally recognized Indian reservation. The county argued that the reservation had been diminished despite a determination in the record from the Department of the Interior's Solicitor's Office that found the boundaries of the reservation had not been diminished. After EPA issued the final permit in 2001, the county sought review of the permit with the Environmental Appeals Board. During the review by the EAB, however, the Interior Department completed the transfer from fee to trust status of the plant property. EPA and the Mille Lacs Band, which sought and obtained intervenor status in the appeal, brought to the EAB's attention that the trust status of the property created a new and additional basis for EPA's jurisdiction in this case. The EAB subsequently remanded the permit to allow the Region to reissue the permit on this additional basis.

In December 2002, EPA reissued a draft NPDES permit and held a new public comment period. The county filed comments on the new permit, arguing that if the reservation boundary had been diminished, then the trust land status of the land at issue was irrelevant and EPA would not have jurisdiction to issue the permit. EPA responded that Supreme Court precedents, including *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498

U.S. 505 (1991) and *United States v. John*, 437 U.S. 634 (1978), support the position that tribal trust lands constitute Indian country whether or not they are within the formally proclaimed boundaries of a reservation. EPA reissued the permit in May 2003, and the county appealed.

The EAB examined the statutory and regulatory history of EPA's authority to implement the NPDES program in Indian country, stating that "EPA has consistently articulated its interpretation that EPA considers trust land formally set apart for the use of Indians to be 'within a reservation' for the purposes of section 518(e)(2), even if the trust land has not been formally designated as a 'reservation.'" The EAB rejected the county's argument that dicta in *U.S. v. Stands*, 105 F.3d 1565 (8th Cir. 1997), stood for the proposition that trust lands were not necessarily within the definition of Indian country. On the contrary, the EAB found that the *Stands* case recognized that tribal trust lands may be considered Indian country in appropriate cases. Moreover, the EAB concurred with EPA's position that the Supreme Court has explained in numerous cases, including *Citizens Band* and *John*, cited above, what circumstances are appropriate for trust lands to be considered Indian country: When land is validly set apart for the use of the tribe, under the superintendence of the government.

The EAB also noted that the record in this case reflected that EPA had made a site- and fact-specific determination regarding the circumstances surrounding the trust status of the parcel of land at issue, including EPA's analysis of the fee-to-trust transfer and its bases, as well as the Region's independent findings regarding the Band's use of the land to provide valuable benefits for the Band's members. The EAB concluded by upholding EPA's jurisdiction to issue the permit for the plant.

The views expressed in this article are those of the author alone and do not represent the official position of the U.S. Environmental Protection Agency.

FCC TAKES STEPS TO FACILITATE TRIBAL NOTIFICATION OF TOWER CONSTRUCTION; IMPROVE LIFELINE AND LINKUP SERVICE

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On Feb. 3, 2004, the Federal Communications Commission and the United South and Eastern Tribes, Inc. (USET) signed a Memorandum of Understanding regarding the development of a "best practices" manual for the siting of telecommunications towers. The FCC also unveiled a voluntary Tower Construction Notification System (TCNS) to facilitate early notification of tower construction to federally recognized tribes, Native Hawaiian organizations, and State Historic Preservation Officers (SHPOs).

Federal agencies must consider the effects of their undertakings on historic properties that are on, or eligible to be on, the National Register of Historic Places. The category includes properties that have "traditional religious and cultural importance" to tribes. Federal agencies must consult with tribes if a facility is planned on or near an area to which the tribe attaches cultural or religious significance.

The TCNS provides a secure, Internet-based notification system where proposed construction of towers can be registered. The system is not meant to replace the "Section 106" consultation process (so named because of the requirements under Section 106 of the National Historic Preservation Act), but rather

to enable the FCC to consult on a government-to-government basis with tribes early in the construction process. Tribes that want early notification of proposed construction can use TCNS to update their contact information, to register whether they prefer notification by mail or electronically, and their geographic area of interest. The FCC will provide weekly electronic notification and monthly mail notification of new tower construction. The TCNS also allows tribes and SHPOs to file comments to proposed construction electronically or by mail.

The agreement regarding tower siting is one of several FCC initiatives undertaken to improve telecommunications services in Indian country. In other actions, the FCC initiated reviews of its rules to improve universal service fund support for low income customers, increase participation in auctions to promote service on tribal lands, and is negotiating a nationwide programmatic agreement regarding tower siting.

Universal Service Changes

In April the FCC amended its Universal Service rules to expand the default eligibility criteria for Lifeline and Linkup, the programs that provide discounted telephone installation fees and monthly service fees for eligible customers. Now, customers whose income is at or below 135 percent of the Federal Poverty Guidelines, or who participate in the Temporary Assistance to Needy Families (TANF) or National School Lunch's free lunch program (NSL) are eligible for Lifeline and Linkup discounts. The FCC also adopted procedures for notifying customers when they are no longer eligible for discounted services. Their phone companies must notify them in a letter, and the customer has sixty days to dispute termination of the discount. The changes to the Universal Service rules apply in states without their own universal service program and in states that have adopted

federal default criteria. The FCC also asked for comments on whether the income eligibility should be raised to 150 percent of the Federal Poverty Guidelines, and whether additional rules governing the advertising of Lifeline and Linkup should be adopted.

In a separate action, the FCC fined Pend Oreille Telephone Company \$25,000 for failing to publicize the availability of discounted telephone installation (Lifeline) and discounted monthly service fees (Linkup) to eligible low-income residents on the Kalispel reservation in Usk, Washington. FCC rules require telephone companies that receive Universal Service funds to advertise the availability of Lifeline and Linkup services in a way "reasonably designed to reach those likely to qualify" for discounts. The FCC found Pend Oreille's failure to advertise the discounts a violation of the Communications Act and the Commission's rules.



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
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COURT STOPS TRUST LAND ACQUISITION OF LAND FOR A CASINO ON NEPA GROUNDS

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In August 2002, the group Citizens Exposing the Truth About Casinos (CETAC) filed suit against the Department of the Interior seeking to stop the acquisition in trust of a 79-acre site near Battle Creek, Michigan, for the Nottawaseppi Huron Band of Potawatomi Indians for gaming purposes. See *CETAC v. Norton*, Civil Action No. 02-1754 (TPJ) (D.D.C. 2004). Plaintiff cited violations of the Indian Gaming Regulatory Act (IGRA), the United States Constitution, and the National Environmental Policy Act (NEPA). On April 23, 2004, the district court upheld the Secretary's determination under IGRA that the site to be acquired would be considered the Tribe's "initial reservation" under section 20 of IGRA, making it eligible for gaming, and dismissed plaintiff's claim that section 465 of the Indian Reorganization Act is an unconstitutional delegation of authority to the Department from Congress. The court found however, that the Environmental Assessment (EA) failed to support the Secretary's conclusion that the project would result in no significant environmental impacts. The court temporarily enjoined the Secretary from taking the land in trust, and remanded the action for further elaboration of the EA, or in the alternative, preparation of an EIS.

The district court found that the EA prepared for the Huron Band's trust application, "fails to support the Secretary's conclusion that the project entails no significant environmental impact in several respects." Decision at 11. First, the court questioned the selection of alternatives in the EA, and implied that the EA should have analyzed additional alternatives that included casinos of different sizes, and

perhaps even non-gaming types of economic development. The court concluded its brief discussion of alternatives by stating that "a casino, somewhere, of precisely the dimensions the Tribe desires, appears to be a foregone conclusion from the inception." Decision at 12.

Second, the court found that while the EA fully documented proposed impacts from the casino, it failed to explain why those impacts were not significant. Decision at 13. The court stated that what it found the most troubling was "the absence of any convincing explanation or 'evidence and analysis' for why these impacts [in the EA] are not to be regarded as significant." *Id.* While this statement appears to refer to all direct impact analysis in the Huron EA, the court focuses most of its criticism on the EA's reliance on the Emmet Township Master Plan in its discussion of land use impacts.

The court further faulted the EA for relying "almost exclusively" on the Master Plan to conclude that the casino's cumulative impacts will not be significant. *Id.* The court stated that the EA "glossed over" cumulative impacts by claiming that they will be rendered inconspicuous over time by development anticipated to occur naturally. Decision at 14. The court also found that the Huron EA did not adequately examine the transformative effect the casino might have on conditions that follow after the casino is in operation, but before the expected other commercial development begins. Decision at 15.

In its opinion, the court concludes that the Huron's large casino facility located in a rural location with low population will result in significant impacts. Decision at 12-13. In doing so, the court appears to believe that a large casino will necessarily result in significant impacts in a rural area. This is the second recent case in which a court appears to rely on the same notion. See *TOMAC v. Norton*, 240 F. Supp. 2d 45 (D.D.C.

2003)(noting that there is a “common sense appeal” to plaintiff’s argument that a large casino cannot help but have a significant impact on a small community).

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NINTH CIRCUIT WON’T ENFORCE PEABODY ARBITRATION SETTLEMENT

In the latest round of royalty litigation between the Navajo Nation and Peabody Coal Company, the U.S. Court of Appeals for the Ninth Circuit ruled on June 15, 2004, that the Arizona federal court did not have subject matter jurisdiction to entertain Peabody’s attempt to enforce a 1998 arbitration settlement entered with the Navajo Nation. *Peabody Coal Co. v. Navajo Nation*, ___ F.3d ___ (Docket No. 03-15272.)

Peabody filed this suit in 2002, and moved successfully to have the Complaint sealed. Peabody then tried unsuccessfully to consolidate the case with a suit filed by the Navajo Nation against Peabody in the District of Columbia, alleging RICO and fraud claims. See *Navajo Nation v. Peabody Holding Co.*, 209 F.Supp.2d 269 (D.D.C. 2002), *aff’d*, 64 Fed. Appx. 783 (D.C.Cir. 2003). This case evidently involves a claim by Peabody that the Navajo Nation has breached the 1998 arbitration agreement, although the Ninth Circuit Opinion states curiously that “the company has not alleged that either party is failing to comply with the award.”

The 1998 agreement settled a dispute over a 1987 amendment to Peabody’s lease. Since 1993 the Navajo Nation has pursued a breach

of trust claim against the United States for events surrounding the Interior Department’s approval of that 1987 amendment. See *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *on remand*, 347 F.3d 1327 (Fed.Cir. 2003).

In this case the appellate court held that there was no basis for federal question jurisdiction over Peabody’s attempt to enforce or “confirm” the arbitration award in 1998. The arbitration settlement did not require the approval of the Secretary of the Interior, and in the view of the appellate panel, Peabody’s claim does not require the resolution of a substantial question of federal law. In a final footnote, however, the Opinion states, “we do not decide whether the existence of a federal question in an arbitrated dispute would confer subject matter jurisdiction under 28 U.S.C. § 1331 (the federal question statute) to confirm or enforce the resulting arbitration award”

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

ABA Annual Meeting

Aug. 5-10, 2004
Atlanta, Georgia

12th Section Fall Meeting

Oct. 6-10, 2004
San Antonio, Texas

23rd Annual Water Law Conference

Feb. 24-25, 2005
San Diego, California

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

**NEW SECTION COMMITTEES:
HYDRO POWER AND
ENERGY FACILITIES AND SITING**

**Cherise M. Oram
Angela R. Morrison**

ATTENTION Environmental, Resource and Energy practitioners! The ABA's Section of Environment, Energy, and Resources (Section) has created two new energy-related committees to best serve its members: the Hydro Power Committee and the Energy Facilities and Siting Committee. Practitioners in these areas should consider getting involved because this is where *energy* meets the *environment* and *resources*.

We encourage you to visit the new committee Web sites and find out how your practice can benefit from joining one or both of these committees. Through both formal and telephone conferences, articles and newsletters, and other communications, we will address important developments and emerging issues and provide opportunities to contribute to this dialogue through speaking and writing on subjects of interest.

The Hydro Power Committee was created to serve the interests of hydro practitioners across the country. The Committee focuses on licensing and relicensing issues before FERC, as well as environmental and other resource compliance issues. It serves as a forum for sharing information and appraising members of new developments in the law through conferences, brown bags and telephonic programs, list serve announcements, and newsletters that highlight legal developments of national and regional importance. For more information on the Hydro Power Committee, please visit <http://www.abanet.org/environ/committees/hydropower>.

The Energy Facilities and Siting Committee was formed to provide a forum in which practitioners, policymakers, and academics can exchange legal analyses and practical experiences and can develop professional best practices and standards. The Committee seeks to identify and balance the many competing interests in the energy facilities siting and permitting processes, both in the United States and abroad. Our focus includes the production, transportation, and distribution of electricity, natural gas, coal, oil and petroleum products and other energy sources, and the environmental and energy security implications of these additions to infrastructure (e.g., power plants, transmission, natural gas pipelines, liquefied natural gas terminals, petroleum infrastructure, nuclear, hydro, renewable energy facilities). The wide range of issues currently under consideration include: the "Energy Bill," siting renewable energy projects, trans-border energy projects, CO₂ mitigation for power plant, smart growth and energy, siting and permitting transmission grids on wildlands, environmental justice, FERC vs. State in LNG siting, streamlining siting process through consolidation of licensing and improving agency coordination, siting on Indian lands and "energy security." Check out our Web site at <http://www.abanet.org/environ/committees/energyfacilities/home.html>

The Hydro Power Committee and the Energy Facilities and Siting Committee welcome your membership and participation. Indeed, our success depends upon it. Please go to <https://www.abanet.org/environ/committees/signup.html> to sign up today.

Remember, if you are a Section member, you may join up to five committees as part of your membership. We hope you'll join us!