

Native American Resources Committee Newsletter

Vol. 2, No. 2

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MESSAGE FROM THE CHAIR

Tim Vollmann

March was a memorable month for Federal Indian Law practitioners, as it began with two Supreme Court decisions in the high-visibility *Navajo Nation* and *White Mountain Apache Tribe* federal trust liability cases, and ended with oral argument before the Court in *County of Inyo v. Bishop-Paiute Tribe*, where important tribal immunity issues have arisen around the execution of a state court search warrant for tribal records. Meanwhile, on March 19 the Senate Committee on Indian Affairs held hearings on two bills which could change the way natural resource agreements for tribal lands are approved. This issue of the Committee Newsletter includes a brief summary of the Supreme Court's split decisions on trust liability, compliments of the Indian Law Section of the New Mexico State Bar.

On Dec. 3 the Committee sponsored a very successful Webcast from the Georgetown Law Center of a panel of Supreme Court practitioners who had attended the *Navajo* and *White Mountain* oral arguments the day before. If you watched this free program, you know that the discussion was scintillating, and that the panelists' predictions were very accurate. Committee members can look

forward to the 11th Section Fall Meeting in Washington, D.C. in October, where the Committee is sponsoring a panel presentation on the apparent new parameters of the trust responsibility, and the implications for legislation, rulemaking, jurisprudence and tribal decision-making. You should also be receiving your copy of the Section's useful *2002 The Year in Review*, which again contains a summary of all the important developments in Native American Natural Resources law during 2002. My thanks to Vice-Chair Dean Suagee and many others who contributed to this publication.

This issue of the Committee Newsletter features two valuable articles for practitioners: one by Peter Robertson on new opportunities for Indian Tribes to obtain EPA Brownfields Grants under legislation signed in 2002; the other by Scott Miller on two recent U.S. District Court decisions which have allowed the BIA to decline to disclose government documents pertaining to tribally-owned natural resources. Both decisions distinguished the Supreme Court's decision in *Department of the Interior*

ABA Section of Environment,
Energy, and resources
11th Section Fall Meeting
Washington, D.C.
October 8-12, 2003
Save the Date!

**Native American Resources
Committee Newsletter
Vol. 2, No. 2, May 2003
Eric Shepard, Editor**

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611.



v. Klamath Water Users Protective Assn., 532 U.S. 1 (2001).

Membership of the Native American Resources Committee continues to grow. I invite all members to consider how each of you can contribute to the Committee's programs – by writing articles for the Committee Newsletter, for example. Please contact Vice-Chair Eric Shepard if you have a contribution to make. Also, please consider becoming a part of the leadership of the Committee in the 2003-2004 year.

**EPA'S NEWLY AUTHORIZED
BROWNFIELDS PROGRAM: FEDERAL
GRANTS FOR TRIBAL INITIATIVES**

**Peter D. Robertson
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Introduction

According to a definition adopted last year by Congress, a brownfields site is "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of" contamination." The problem of brownfields sites has, over the past decade, received widespread attention from governments at all levels, but nowhere more so than from the federal government.

The Environmental Protection Agency (EPA) during the Clinton administration recognized that sites existed throughout the country that could not be redeveloped because of the presence of – or even a threat of – contamination by hazardous substances. This contamination did not rise to a level sufficient to include these sites on the Superfund list of the most contaminated sites. Nonetheless, such real or threatened contamination would frequently lead investors or their lenders to

conclude that the risk of investing in such a site was too high.

These sites had become blights within their communities, and EPA Administrator Carol Browner sought a way to reverse that and to speed cleanup and redevelopment so that they could become engines of economic growth in their neighborhoods. She started what turned out to be the highly popular Brownfields Economic Redevelopment Initiative.

Brownfields Legislation in the 107th Congress

Until 2002, EPA had implemented the Brownfields Economic Redevelopment Initiative through its Superfund program, using existing authorities. This effort was not without some controversy, as some suggested that Superfund did not provide authority for a program the primary purpose of which was economic redevelopment. For the most part, however, the program was a popular one and thus a bipartisan majority in Congress was interested in codifying the agency's brownfields program to remove any suggestion that EPA lacked authority to operate it.

Congress did that in 2001 and President Bush signed the bill into law in January 2002. Small Business Liability Relief and Brownfields Revitalization Act, P.L. 107-118, 115 Stat. 2356 (2001). For purposes important to this article, the law established an authorization for a program of site characterization and assessment grants and remediation grants. Entities eligible to receive grants explicitly include tribes. The remediation grants can be used both for capitalization of revolving loan funds and, in certain circumstances, directly for remediation.

Background

The brownfields program started small, but rapidly grew because of the size of the problem (some sources estimate the number of brownfields sites as approaching 600,000 nationwide) and the strong support from mayors, developers, environmentalists and others. Funding grew to nearly \$100 million in FY 2002, and significantly more than that in FY 2003, although not as much as was authorized for the program. Growing deficits may mean no increase or even less money for brownfields funding in FY 2004, but support for the program in Congress remains strong.

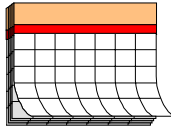
The success of the program has been notable. EPA estimates that it has provided over \$250 million in brownfields funding to states, tribes and local governments. Of that amount, EPA's brownfields office estimates that some \$4 million has been grants to tribes. In turn, grantees report that EPA funding so far has supported over 2600 property assessments and helped leverage more than \$3.4 billion in cleanup and economic redevelopment monies. This, in turn, has created more than 14,000 jobs.

Brownfields Grants to Tribes

Originally, brownfields sites were seen primarily, if not exclusively, as an urban/surburban problem stemming from industrial activity. Because of this urban focus – and because of the lack of resources among tribes to monitor and pursue this source of government funding – tribes did not participate as much as they might have in the brownfields program. As the program evolved, however, everyone came to recognize that brownfields sites could occur anywhere – in rural areas or on tribal lands – and that tribes needed the economic redevelopment assistance that was at the heart of EPA's brownfields program as much, if not more so, than did any other governmental entity. EPA worked successfully

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

Calendar of Section Events



ABA Annual Meeting

August 7-13, 2003
San Francisco, California

**Conference on Federal Lands and
Natural Resources Law**

September 17-19, 2003
Seattle, Washington
(Co-sponsored with ALI-ABA, for
information call 800/253-6397)

11th Section Fall Meeting

October 8-12, 2003
Washington, D.C.

22nd Annual Water Law Conference

February 19-20, 2004
San Diego, California

**33rd Annual Conference on
Environmental Law**

March 11-14, 2004
Keystone, Colorado

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Web site at <http://www.abanet.org/enviro>
or contact the Section at 312/988-5724.***



to include tribes in the Brownfields Economic Redevelopment Initiative.

Two of the many examples of brownfields grants to tribes follow. These two examples were selected entirely at random from EPA's Web site detailing the grants made and projects undertaken to date, but they are good examples of the kinds of efforts undertaken with Brownfields grant funding and the flexibility that this funding gives to the grantee – flexibility that would be important to a tribe.

In July 1998, EPA gave the Turtle Mountain Band of Chippewa in North Dakota a brownfields assessment grant to address the abandoned San Haven facility, a former state mental rehabilitation hospital bought by the Tribe in 1992. The building had asbestos contamination, and even though the state had conducted abatement activities at the facility prior to its sale to the Tribe, the remaining level of contamination was unknown. The Tribe wanted to assess the property for other potential contamination before the planned rehabilitation. The Tribe planned to use the EPA funding to conduct environmental assessments on the San Haven site, create a plan for cleanup, and conduct community outreach activities to share information regarding assessment, cleanup planning and redevelopment of the site.

In May 2000, EPA awarded an assessment grant to the Cherokee Nation of Oklahoma to assist in the redevelopment of a tribal lands including a hog farm and a landfill. The Cherokee planned to use the EPA funding to conduct environmental assessments on the three targeted sites, form a Brownfields Advisory Committee of interested stakeholders, conduct economic redevelopment studies on a site-specific basis to evaluate possible site reuses, and identify additional federal, state, and private funding sources for redeveloping brownfields sites.

Tribes and the New Brownfields Legislation

Tribes may be even more successful in obtaining grants under the new brownfields law. The statutory considerations to be used in determining whether a grant should be available for direct remediation explicitly include issues related to small population and low income, both of which may be of particular significance to tribes. The criteria for ranking grant applications similarly include these factors and others that might be important for tribes, including the extent to which grants would address health threats to minority or low-income populations.

The new law authorizes \$200 million per year through fiscal year 2006, effectively doubling the available funding. As noted above, funding conditions for all domestic discretionary programs has made future funding for brownfields programs uncertain. It is extremely likely that, at the least, funding above the nearly \$100 million seen in previous years will be provided by Congress.

It is important to note that this article touches only on EPA's brownfields program. Other federal government departments and agencies have also provided brownfields-related funding over the years, *e.g.*, the Department of Commerce and the Department of Housing and Urban Development (although HUD's program is proposed for elimination in the administration's FY 2004 budget). A well-constructed and vigorously pursued brownfields effort could be an important source of funding for tribes with joint needs of waste remediation and economic redevelopment.

Peter Robertson is a partner with the Washington, D.C.-based firm of Patton Boggs LLP. He practices in the firm's Public Policy and Environmental groups. Mr. Robertson

served at EPA during the Clinton administration as the agency's chief of staff and as acting deputy administrator.

CONSULTING CONFIDENTIALLY: NAVIGATING THROUGH KLAMATH'S WAKE

Scott Miller

In *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), the Supreme Court addressed whether a number of documents communicated between Klamath basin Tribes and the federal government concerning litigation of the Tribes' water rights could be withheld from the public pursuant to Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). Specifically, at issue were six documents prepared by the Tribes and one memo from a BIA official to two tribal attorneys and two BIA officials. See *Klamath*, 189 F.3d 1034, 1041 (9th Cir. 1999). The Supreme Court held that the Tribes could not qualify as an "agency" under the circumstances and therefore that none of the documents could qualify under Exemption 5, which only protects "inter-agency or intra-agency memorandums or letters." See *Klamath*, 532 U.S. at 11-14; 5 U.S.C. § 552(b)(5). The Court's opinion focused on the documents prepared by the Tribes, leaving some to wonder about the breadth of the Court's ruling regarding government documents that are shared with Tribes. Two recent district court decisions help define the reach of the *Klamath* decision in the context of communications between the BIA and Tribes regarding tribal natural resources.

***Citizens' Progressive Alliance v. Bureau of Indian Affairs* 241 F. Supp. 2d 1342 (D.N.M. 2002)**

In *Citizens' Progressive Alliance*, the Plaintiffs sought four documents prepared by the BIA or its contractors assessing and analyzing the

Southern Ute Tribe's water rights claims in a Colorado general stream adjudication. *See id.* at 1351-52. Three of the documents had been sent from the BIA to the U.S. Department of Justice (DOJ); a DOJ attorney later sent them under separate cover to the Tribe's attorney. *See id.* The Plaintiffs argued that "the outcome in *Klamath* controls the outcome in the instant case," interpreting that opinion to mean that Exemption 5 was inapplicable to any document that had been shared with a Tribe under any circumstances. *Id.* at 1356. But the court ruled that the BIA properly refused to release the documents, setting forth a straightforward analysis for examining whether a federal document that is later shared with a non-"agency" qualifies for Exemption 5's protection.

The first step is to determine whether the documents are "inter-agency or intra-agency communications." *Id.* at 1354-56. In this case – unlike *Klamath* where the BIA memo at issue was *addressed to* the tribal attorneys – the four documents met the test: one was a BIA memo "to file," one was a letter from the BIA to DOJ, and two were from a BIA contractor to the BIA. *See id.* at 1355. The court accordingly rejected an overly-broad interpretation of *Klamath* that would effectively transform the original character of documents into communications with the Tribe simply because they were later shared with the Tribe. *See id.* at 1356. The second step is to determine whether the documents are privileged, and the court had no trouble determining that the documents were protected by the attorney work product, attorney-client, and/or deliberative process privileges. *See id.* at 1356, 1359-62. For the final step of the analysis, the court analyzed whether the disclosure to the Tribe waived the United States' privileges. *See id.* at 1363. The court held that the privileges had not been waived because the United States and the Tribe shared common interests in the Colorado adjudication and that the disclosure

therefore was protected under the common interest doctrine. *See id.* at 1364.

***Starkey v. Bureau of Indian Affairs*
238 F. Supp. 2d 1188 (S.D. Cal. 2002)**

Another recent district court opinion also is significant to practitioners in the field of Indian resources law in the wake of the *Klamath* decision. In *Starkey*, the Plaintiff requested from the BIA archeological and "well and water related information" of importance to the La Posta Band of Mission Indians. The court first ruled that the archeological resources information was properly withheld by the Bureau because FOIA's Exemption 3, 5 U.S.C. § 552(b)(3), recognizes the Archeological Resources Protection Act's provision for keeping some "[i]nformation concerning the nature and location of any archeological resource" confidential. 16 U.S.C. § 470hh; *see also Starkey* at 1192.

The court also ruled that the well and water-related information was protected by Exemption 4 of FOIA, which protects "commercial or financial information obtained from a person [that] is privileged or confidential." 5 U.S.C. § 552(b)(4). The Plaintiff argued that well and water-related information "is not commercial or financial information." *Starkey* at 1195. The court rejected that argument, citing *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982), for the proposition that "water is an article of commerce." *Starkey* at 1195. The court explained that "water is a precious, limited resource and [the information] is commercial or financial because it defines the amount of water on the reservation. Release of the ground water related information would cause competitive harm to the Band because the tribe does not have an adjudicated water right and the release of the withheld information would adversely affect the Band's ability to negotiate its water rights or to litigate that issue." *Id.* (quotation omitted). The court also

rejected the Plaintiff's argument that this ruling "would permit the Government to withhold any information regarding any natural resource under FOIA," simply stating that "the well and water information was provided by persons outside the government," which is the extent of Exemption 4's reach. *Id.*

Finally, the court ruled that information "about ground water inventories, well yield in gallons per minute, and the thickness of the decomposed granite aquifer," *id.* at 1196, was properly withheld pursuant to Exemption 9, which protects "geological and geophysical information and data, including maps, concerning wells," 5 U.S.C. § 552(b)(9).

Conclusion

In *Klamath*, the Court recognized that "[t]he Department [of the Interior] is surely right in saying that confidentiality in communications with tribes is conducive to a proper discharge of its trust obligations." *Klamath*, 121 S.Ct. at 1067. The *Citizen's Progressive Alliance* decision recognizes protection for federal documents that are shared with Tribes under some circumstances, and the *Starkey* decision protects tribal documents that are shared with the BIA under some circumstances. These decisions may permit the BIA to withhold some confidential and privileged information relating to Tribes' resources in furtherance of a proper discharge of its trust obligations despite *Klamath's* limitation of Exemption 5.

Scott Miller is Counsel to the United States Senate Committee on Energy and Natural Resources. The views expressed in this article do not necessarily represent those of the Committee, the Senate, or the United States.

Conference on Federal Lands and
Natural Resources Law
Seattle
Sept. 11-19, 2003
save the Date !

TRIBAL MANAGEMENT PLANS DO NOT EXEMPT RESERVATION LANDS FROM ESA CRITICAL HABITAT DESIGNATION

Tim Vollmann

Exclusion of tribal and federal lands from a designation of critical habitat for the Mexican spotted owl pursuant to the Endangered Species Act (ESA) cannot be justified solely on the basis of the existence of land management plans designed to protect the owls, according to a Jan. 13, 2003, decision of the U.S. District Court for the District of Arizona in *Center for Biological Diversity v. Norton*, CV 01-409-TUC-DCB. The court rejected the rationale used by the U.S. Fish and Wildlife Service (FWS) to exclude millions of acres of Indian reservation and Forest Service lands in Arizona and New Mexico from a final rule designating critical habitat in 2001. The Mexican spotted owl is listed as a threatened species under the ESA. The FWS had declined to designate lands on the Navajo, Mescalero Apache, White Mountain Apache, Jicarilla Apache and San Carlos Apache Reservations as critical habitat for the owl.

District Judge David Bury held that the ESA definition of "critical habitat," which includes lands "which may require special management considerations or protection," cannot be read to allow the exclusion of lands subject to "adequate" management plan protections because additional protections are deemed unnecessary. He viewed the ESA Section 7 consultation requirement, triggered when a federal action may cause adverse modification of critical habitat, as such an additional protection. The FWS was ordered to re-propose a critical habitat rule for the owl within three months, consistent with the court's order.

The court also ruled that, in weighing the impacts of designation of critical habitat to a particular area, the FWS may consider its

working relationship with an Indian tribe as a “relevant impact.” This ruling pertained only to the FWS decision not to include San Carlos Apache lands in the critical habitat designation, based in part on the agency’s finding that the designation would be viewed by the Tribe as “as an unwarranted and unwanted intrusion into tribal natural resource programs.” However, the San Carlos management plan had not been finalized prior to the final rule, and the draft plan had not been made available to the public during the comment period. The court found that the FWS failure to make the draft plan public violated both the ESA and the Administrative Procedure Act.

The judge also held that, because the Forest Service management plan had been held to be inadequate under the ESA in earlier litigation, the FWS could not rely on the plan in its justification for not designating National Forest lands in Arizona and New Mexico as critical habitat. The court did not rule on the adequacy of the tribal management plans.

**SUPREME COURT LETS STAND
8TH CIRCUIT RULING HOLDING A
LESSEE OF TRIBAL LANDS HAS NO
STANDING TO CHALLENGE A BIA
DECISION TO VOID LEASE**

Tim Vollmann

On Feb. 24, 2003, the U.S. Supreme Court denied the petition for certiorari filed in *Sun Prairie v. McCaleb*, where review was sought of the 8th Circuit’s decision in *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (April 5, 2002). The lawsuit was a challenge filed jointly by the Rosebud Sioux Tribe and its lessee, Sun Prairie, against a decision by Assistant Secretary for Indian Affairs Kevin Gover in 2000 to invalidate a lease of tribal land for a multi-site hog production facility on the ground that there had not been adequate compliance with the National Environmental Policy Act. Plaintiffs prevailed in the District Court, *Rosebud Sioux Tribe v. Gover*, 104 F.Supp.2d 1194 (D.S.D. 2000), which enjoined the Department of the Interior from treating the lease as void.

However, after the District Court decision, tribal elections resulted in a newly constituted Tribal Council, which voted not to pursue the hog production project any further and filed a brief in the 8th Circuit supporting the federal government’s position that voiding the lease was lawful. The Court of Appeals ruled that, without the Tribe, Sun Prairie alone lacked standing to pursue the case. Since Sun Prairie, in addition to not being within the zone of interests of the statutes intended to protect Indian interests, was also not within the zone of interests of the environmental statutes that were relied upon in its complaint. The Court vacated the injunction, and remanded the case to the District Court with instructions to dismiss the complaint for lack of jurisdiction.

**NATIVE AMERICAN RESOURCES
COMMITTEE NEWSLETTER
OPPORTUNITIES**

Like to Write? Like to Edit?

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 newsletter editor Eric Shepard at ericnshepard@redrivernet.com or 928/669-1271.