

# Indian Law TIMES



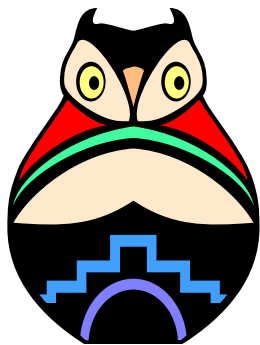
The Newsletter of the  
Indian Law Section of the  
State Bar of New Mexico  
Spring 2003

*Welcome to the Spring 2003 Newsletter of the Indian Law Section of the State Bar of New Mexico! A lot is happening, both in our section and in the world of Indian law, and we hope this will update you on important developments in both realms.*

## A MESSAGE FROM THE CHAIR

### A Good Year Ahead

On behalf of the Indian Law Section Board of Directors, it is my honor to send greetings to all of our members and readers. My sincere appreciation to Lynn Slade for soliciting ideas, gathering information, and bringing together this newsletter for the benefit of our section. I



believe you will find its contents to be informative and timely. We welcome your comments for future publications and will solicit both volunteers and articles on an on-going basis. Please contact either Lynn Slade or any section board member.

As chairperson, I have capitalized on a renewed energy within the board to resume activities of the section, including the publication of this newsletter. I am indebted to my fellow board members for their generous donation of time, creativity and energy that is necessary to ensure that we accomplish our goals for this year. I have asked the board to continue its efforts to focus on foundational activities that meet the stated purposes of the Section. I believe this newsletter helps to serve our obligation to foster and maintain learning, and to provide a forum for the discussion of Indian law by section members. I am grateful to Maggie Gombos and the other staff members of the State Bar who

have advised and encouraged the work of the Board. My best wishes to each of you.

*Steffani A. Cochran*  
Chairperson

## COURT DEVELOPMENTS

### The Supreme Court's Trust Responsibility Cases

On March 4, 2003, the United States Supreme Court issued decisions in two cases argued December 2, 2002, finding a tribal claim for damages for breach of trust against the United States in one case — and rejecting it in the other. In *United States v. White Mountain Apache Tribe*, U.S.S.Ct. No. 01-1067, a 5-4 majority of the Court found the statutes requiring the former Fort Apache Military Reservation to be “held by the United States in trust” for the Tribe to impose sufficiently specific duties on the United States to subject the United States to a damage claim for breach of trust under the Indian Tucker Act, 28 U.S.C. §1505. By contrast, in *United States v. Navajo Nation*, U.S.S.Ct. No. 01-1375, the Court reached the opposite conclusion: it held that the provisions of the Indian Mineral Leasing Act of 1938 that pertain to coal leasing, 25 U.S.C. §396(a), did not impose specific duties on the Government beyond lease approval. Consequently, six Justices declined to imply a claim for money damages, notwithstanding troublesome conduct of officers of the United States.

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## Recent Court Developments

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Both cases relied upon the “pathmarking” precedents of *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). Justices Ginsburg and Breyer were the swing votes, joining Justices Souter, Stevens and O’Connor to form the majority in *White Mountain Apache*. Their concurrence in *White Mountain Apache* draws into focus the distinctions that ultimately were dispositive: they found *White Mountain Apache* to be controlled by *Mitchell II* because a 1960 statute required the Fort Apache properties to be held “in trust” for the Tribe, the statute authorized the government to use and occupy the property, and the United States “availed itself of its option” to exercise daily supervision and enjoy daily occupation of the trust property, “but has done so in a manner irreconcilable with its caretaker obligations.” By contrast, the Ginsburg/Breyer concurrence in *White Mountain Apache* distinguished *Navajo Nation*, concluding that the provisions of the Indian Mineral Leasing Act governing coal leasing “assigned the Secretary of the Interior no managerial role over coal leasing . . .”. Of interest, Justice Ginsburg’s opinion for the majority in *Navajo Nation* is careful to point out that the IMLA provisions addressing oil and gas leasing impose more detailed duties on the government, and the decision does not determine whether a damage action would exist for improper management of oil and gas properties under the IMLA. Section member Paul Frye argued the case for the Navajo Nation.

### **Supreme Court Lets Stand 8th Circuit Ruling Holding a Lessee of Tribal Lands Has No Standing to Challenge a BIA Decision to Void Lease**

On February 24, 2003, the U.S. Supreme Court denied the petition for certiorari filed in *Sun Prairie v. McCaleb*, which sought review of

the 8th Circuit’s decision in *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (April 5, 2002). The lawsuit, filed jointly by the Rosebud Sioux Tribe and its lessee, Sun Prairie, challenged a 2000 decision by Assistant Secretary for Indian Affairs Kevin Gover 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 and to switch sides, and the tribe filed a brief in the court of appeals supporting the United States’ position that the lease was properly cancelled. The court of appeals ruled that, without the tribe, Sun Prairie alone lacked standing to pursue the case, since the lessee’s economic interests were not within the zone of interests of the federal leasing statutes, enacted to protect Indian interests, or NEPA and cultural resource statutes, enacted to protect environmental and Indian cultural interests. The court of appeals vacated the injunction and remanded to the district court with instructions to dismiss the complaint for lack of standing. *Sun Prairie* will present challenges for tribal leaders and businesses when economic development requires assurance that a lessee will have a protectable interest.

### **NRLA Held Not to Pre-empt Tribal Employment Regulation in N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1187 (10th Cir. 2002)**

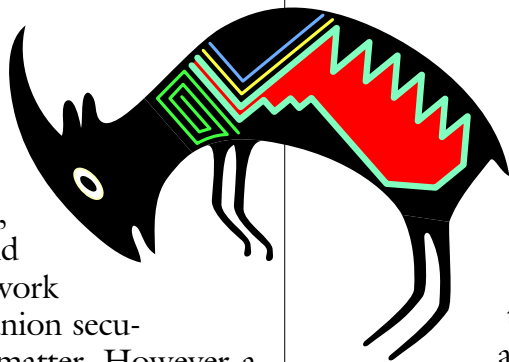
The Pueblo of San Juan enacted a “right-to-work” ordinance prohibiting “union security agreement” contracts, sometimes called “closed shop” or “union shop” agreements. The National Labor Relations Board contended that the

ordinance violated the National Labor Relations Act (“NLRA”) and was therefore preempted. The Pueblo contended that its ordinance did not violate federal law under an exception permitting “States and Territories” to enact right-to-work laws. The Tenth Circuit held initially that the Pueblo could be considered equivalent to a “state or territory” for purposes of the NLRA and that the Pueblo’s ordinance did not violate the NLRA. The Tenth Circuit’s opinion on rehearing *en banc*, which upheld the pueblo’s ordinance over the dissent of Judge Murphy, could impact the extent to which Indian tribes are subject to federal statutes of general application.

The issue in *San Juan* was whether The NLRA, without mentioning tribes, limits the ability of tribes and pueblos to enact right to work laws. The NLRA permits union security agreements as a general matter. However, a separate section of the NLRA provides an exception to the general rule “in any State or Territory in which” union shops are prohibited by state or territorial law. 29 U.S.C. § 164(b). Reading these provisions together, “States or Territories” are specifically permitted to enact right-to-work laws.

The issue in *San Juan* was whether the exception for states and territories also permits tribes or pueblos to enact right to work laws. The court discounted authority holding that federal statutes of general applicability apply to Indians and tribes. *Compare, Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); *Donovan v. Coeur d’Alene Tribal Farm*, 752 F.2d 1113, 1116 (9th Cir. 1985). The Tenth Circuit distinguished these cases as addressing only tribes’ “proprietary” interests, as opposed to tribes’ “sovereign” interests.

The *San Juan* opinion concludes that, “[i]n order to find pre-emption of tribal laws, . . . it is necessary to determine whether Congress intended to divest the [tribe] of its power as a sovereign”. With respect to the NLRA, the *San Juan* court held that the statute’s silence as to tribes was insufficient to impliedly pre-empt tribal authority.



## Navajo Nation Supreme Court and 9<sup>th</sup> Circuit Address Jurisdiction in Employment Cases

In 1990, as part of the Department of the Interior Appropriations Act, the Congress amended the Federal Tort Claims Act (“FTCA”) to provide that, for FTCA purposes, employees of tribally controlled schools and Indian Self Determination Act programs (“638 Programs”) were deemed employees of the BIA (of IHS for contracted programs from the Department of Health and Human Services) and that claims

against such employees and their employers would be “deemed” claims against the United States and subject to the FTCA. In opinions rendered on May 4, 2001 and August 29, 2002, the Supreme Court of the Navajo Nation considered the question whether the FTCA as amended barred a claim

brought by a Navajo educator under the Navajo Preference in Employment Act (“NPEA”) (a law sanctioned by the Indian Self-Determination Act and also applicable to tribally controlled schools) from being heard in the Navajo administrative forum (Navajo Nation Labor Commission) and the Navajo courts (Navajo Nation Supreme Court). After initially holding that all claims against tribally controlled schools could only be heard in a federal forum, on a petition for reconsideration supported by the U.S. Department of Justice, the Supreme Court ruled that a narrowly drawn claim under the NPEA seeking NPEA remedies (directed hiring, back pay and legal fees) rather than tort remedies could be heard in a Navajo Nation forum. Since the case raises questions of federal law—including Indian jurisdiction, review of the Supreme Court’s decision is pending in the United States District Court for the District of Arizona. (*Dr. Lula Mae Stago v. Wide Ruins Community School, Inc.*, No. SC-CV-63-99).

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[www.nmbar.org](http://www.nmbar.org)

## Recent Court Developments

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On December 20, 2002, a divided panel of the Court of Appeals for the 9th Circuit ruled that there was no private right of action in the federal courts for an Indian entitled to employment preference under the Indian Self Determination Act (25 U.S.C. § 450e(b)) who claimed that he was wrongfully denied such preference. *Solomon v. Interior Regional Housing Authority*, 313 F.3d 1194 (9th Cir. 2002).

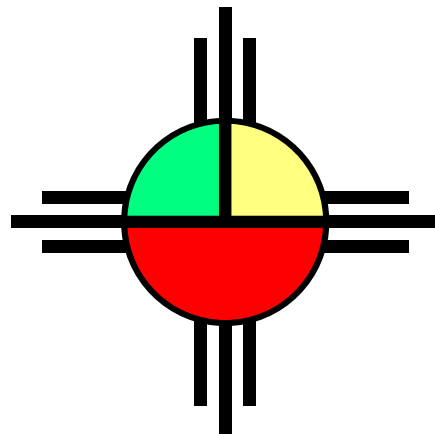
### **New Mexico Files Amicus Brief in Inyo County Case**

*Inyo County v. Paiute-Shoshone Indians*, U.S.S.Ct. No. 02-281, presents the question whether state law enforcement officials acted illegally in the manner in which they executed a search warrant on tribal lands. A Ninth Circuit Court of Appeals panel ruled unanimously that Inyo County violated the sovereign immunity of the tribe when it executed the warrant. The court ruled that P.L. 280 did not justify the actions of Inyo County law enforcement because the statute extends state jurisdiction to individual Indians but not to tribes as a whole. When considering the interests of both parties, the court found that the county's interest in preventing welfare fraud could have been protected in a less intrusive way.

The U.S. Supreme Court accepted review of the case last December, and oral arguments were heard on March 31, 2003. The questions presented are: (1) Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation state law crimes, when the search is pursuant to a search warrant issued upon probable cause; (2) Whether such a search by state law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. 1983; and (3) whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who con-

ducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.

The New Mexico Attorney General, joined by Governor Bill Richardson and the attorneys general of Montana, Arizona and Washington, filed a brief *amicus curiae* in support of the Indian community. The New Mexico brief advocates that states can and do cooperate with tribes and work together in a mutually respectful, government-to-government relationship, rather than taking the forcible and intrusive actions involved in the case on appeal. According to Attorney General Patricia Madrid's February 27, 2003, press release, "In New Mexico, the experience is one of tribes and state and local authorities working together for the mutual benefit of all New Mexicans. The California law enforcement agency in this case raised a specter of Indian reservations becoming havens for criminals. The New Mexico brief informs the United States Supreme Court about the level of cooperation that can be achieved between Indian tribes and the states . . . with respect to law enforcement matters that cross state tribal borders." Governor Richardson has stated further "It is important that the U.S. Supreme Court be told the whole story about tribal-state relations. In New Mexico, we do not use bolt cutters and search warrants against Indian tribes to conduct our criminal investigations."





## SECTION DEVELOPMENTS

### **2003 Annual Meeting Is April 10**

Plan to meet your friends and colleagues at the Indian Law Section's Annual Meeting to be held in conjunction with the Annual Federal Bar Association Indian Law Conference at the Albuquerque Marriott at 4:30 p.m. Thursday, April 10. There will be a brief business meeting followed by a social hour with hors d'oeuvres and refreshments. The Indian Bar Association of New Mexico is cosponsor of the event. Contact board member Joan Kozon for details. We look forward to seeing you at the Marriott!

#### ***Section Sponsors Scholarships for UNM Law Students***

The section reflected its commitment to legal education by contributing \$1,000 to sponsor scholarships for students attending the UNM Law School's Pre-Law Summer Institute for American Indians and Alaska Natives and to the Law School to offset unmet needs of Indian Law students and to purchase Indian Law materials for the law library.

#### ***Section Sponsors Law Student Writing Competition***

The section will award cash prizes totaling \$1,000 for the best law student writing submitted on an Indian law topic. Professor (and board member) Kevin Washburn of the University of Minnesota Law School has lined up a panel of outstanding judges, Paul Spruhan,

Kymn Harp, June Lorenzo and Jim Burson, who will evaluate the 10 papers submitted from law schools around the country. The first prize is \$500, second prize is \$300, and third prize is \$200. Winners will be announced during the spring semester. Thanks to Kevin and our judges for their great work on this important project!

#### ***Web Page is Here —and Growing!***

Board member Pam Ray is spearheading the section's efforts to get our web page up and running on the State Bar's site. The Section page is in an early stage, and we want to expand it to contain more information and become the place to go to get current information and links to key Indian law sites. Volunteers to support this effort with content and suggestions would be welcome!

[www.nmbar.org/template.cfm?Section=Indian\\_Law](http://www.nmbar.org/template.cfm?Section=Indian_Law)

#### ***Non-Lawyer Members***

The bylaws of the section allow membership by nonlawyers, in the capacity of associate members. The board believes the Indian Law Section can serve needs of nonlawyer tribal court personnel, Navajo advocates, and nonlawyer participants in federal administrative agencies. Please forward your thoughts about the best ways for the section to serve nonlawyers in the Indian law field to Section Chair Steffani Cochran.

#### ***Let's Go Digital!***

If you're getting this newsletter by snail mail, it means we don't have your email address. For quicker communications, send an email to [address@nmbar.org](mailto:address@nmbar.org).

## INDIAN LAW LINKS

- United States Supreme Court:  
<http://www.supremecourt.us.gov>
- United States Congress:  
<http://thomas.loc.gov>
- Tribal Law Journal - Univ. of New Mexico:  
<http://tlj.unm.edu>
- National Tribal Justice Resource Center:  
<http://tribalresoucecenter.org>
- National Indian Court Judges Association:  
<http://www.naicja.org/index.htm>
- New Mexico Attorney General's Office:  
<http://www.ago.state.nm.us>
- National Tribal Resource Center, reporting tribal court opinions:  
<http://www.tribalresourcecenter.org/pages/opinions.htm>

File these in your browser and please forward links you find useful to Indian law practitioners to Lynn Slade at [lslade@modrall.com](mailto:lslade@modrall.com) for inclusion in future newsletters.


### ***What Can the Section do to Serve You?***

Please forward your suggestions for CLE topics, information or publication, or services the Section could provide to the people in communities involved with Indian law. We look forward to your comments and suggestions.

## YOUR SECTION LEADERSHIP

Board Member E-Mail	Telephone Term
Steffani Cochran, <i>Chair</i> <a href="mailto:scochran@ago.state.nm.us">scochran@ago.state.nm.us</a>	(505) 827-6907 2001-2003
Pamela Ray, <i>Chair-elect</i> <a href="mailto:pray@state.nm.us">pray@state.nm.us</a>	(505) 986-4600 2001-2003
Joan Kozon, <i>Secretary</i> <a href="mailto:jekozon@hotmail.com">jekozon@hotmail.com</a>	(505) 980-4900 2002-2004
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**We look forward to seeing you at the  
Indian Law Section's Annual Meeting  
4:30 p.m., April 10, 2003 at the Marriott**

# Changing Directions :



**JUDGES AND LAWYERS  
CAN REALLY SET THE COURSE**

**July 9-12, 2003  
Tucson, Arizona**



Tucson and the spectacular Loews Ventana Canyon Resort and the Westin La Paloma Resort and Spa are the venues for the 116th Annual Convention of the State Bar of New Mexico. Visit [www.nmbar.org](http://www.nmbar.org) for hotel accommodations, rental car and airfare discounts.

## 116th Annual Convention

State Bar of New Mexico

**You can make a substantial difference in the practice of law and the system of justice in New Mexico by participating in an unprecedented series of strategic planning sessions at this important meeting.**

**Refer to the April 3rd issue of the *Bar Bulletin* for a special convention preview or visit [www.nmbar.org](http://www.nmbar.org) to find out more about educational programs and special events.**

**Online registration is available!**

**MCLE Credits available include 20.4 hours of General MCLE, 1.2 hours of Ethics, and 2.4 hours of Professionalism.**

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