

INDIAN LAW TIMES

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DISTRICT COURT ISSUES PRELIMINARY INJUNCTION AGAINST BUREAU OF INDIAN EDUCATION

U.S. District Judge Johnson issued an order on September 15, 2006 granting a preliminary injunction to stop the reorganization of the BIA Office of Indian Education Programs ("OIEP") also known as the Bureau of Indian Education ("BIE"). The Order requires the BIE to stop any reorganization activity in the state of New Mexico. The Judge issued the order after finding that the BIA did not comply with federal law when it did not have meaningful consultation with Indian Tribes prior to approving the reorganization. Due to totally inadequate consultation, the BIE reorganization is opposed by most Indian Tribes in the U.S.

The District Court for the Southern District of South Dakota also granted a similar injunction in a challenge to the BIE reorganization brought by the Yankton Sioux and other tribes. Although the two injunctions are applicable only within each court's jurisdiction, the South Dakota injunction affects the proposed BIE Eastern Region and the New Mexico injunction affects the proposed

BIE Western Region and other BIA and BIE Central Office West activities located in the state. The third region in the BIE is the Navajo Nation where another lawsuit has been filed.

Although meetings were held in 2003, 2004 and 2005, the BIA did not come close to complying with federal-tribal consultation requirements. The BIE failed to fully consider Tribal recommendations and inform Tribes of the basis for their rejection. There is an open question to be resolved at trial as to whether funds were diverted from tribal programs to pay for the Reorganization without informing Indian Tribes.

Ann Rodgers is with Chestnut Law Offices, who represents plaintiffs ENIPC and AIPC in this lawsuit. Ms. Rodgers' opinions are her own and do not necessarily reflect those of the State Bar of New Mexico or the Indian Law Section. For more information on the case, refer to *ENIPC and AIPC v. Dirke Kempthorne*, DNM Cause No. CIV-06-0745 WJ/ACT.

A MESSAGE FROM THE EDITOR

Welcome to the Fall 2006 Indian Law Section Newsletter. The Newsletter is meant to serve both as a tool to inform you of various developments in Indian Law within the State of New Mexico and as a medium by which you and your fellow Section members may share similar information.

As such, we welcome you to send contributions for future newsletters, including editorials, summaries of opinions, or other information you deem to be of value to your fellow

Indian Law practitioners. This may even include humorous anecdotes, cartoons, or photographs. Likewise, feel free to forward comments about the newsletter as well.

Submissions should be directed to afrankland@yahoo.com. Please include your name, where you work, and contact information. And though we cannot guarantee that everything we receive will be printed, we nevertheless look forward to hearing from you.

Aaron C. Frankland

ASK LARRY

QUESTION: “SOMETIMES I SEE JOB ADVERTISEMENTS WHICH SAY “INDIAN PREFERENCE.” OTHER TIMES, I SEE REFERENCE TO MEMBERS OF A SPECIFIC TRIBE/ PUEBLO BEING GIVEN PREFERENCE IN EMPLOYMENT. IS THIS “LEGAL”?”

ANSWER: You need to know: **a)** Is it “Tribal” or “Indian Preference?; **b)** Who is the employer?; **c)** If the employment is funded under an Indian Self-Determination Act Contract or Grant (P.L. 93-638) or the Tribally Controlled Schools Act (P.L. 100-297) and if so **d)** does the program primarily benefit just one Indian Nation or Pueblo?; and **e)** Does the Tribe or Pueblo in question have an employment preference act?

If the preference is “**Indian Preference**”, or preference in employment decisions for an enrolled member of a federally recognized Tribe, then preference is permitted if:

1. By the United States in a program for the benefit of Indians. *Morton v. Mancari*, 417 U.S. 535 (1974); or
2. Funding for the program comes from P.L. 93-638 or P.L. 100-297. 25 U.S.C. §450e (b); or
3. The employer is “an Indian tribe,” which in turn is not an “employer” under Title VII. 42 U.S.C. 2000e-(b) (1); or
4. The employment location is “on or near and Indian reservation” and the employer has a publicly announced policy of Indian preference. 42 U.S.C. §2000e-2(i), *Livingston v. Ewing* 601 F.2d 1110 (10th Cir. 1979)

If the preference is preference for a member of a particular Indian tribe, then such preference is permitted if:

1. The employer is “an Indian tribe.” (I.e., an “Indian tribe” is not defined as an “employer” under Title VII. 42 U.S.C. 2000e-(b) (1)); or

2. The particular Indian Nation has an employment preference law which calls for employment preference for tribal members, and

3. The employment is funded under an Indian Self-Determination Act Contract or Grant (P.L. 93-638) or the Tribally Controlled Schools Act (P.L. 100-297), and

4. The program providing the employment primarily benefits just one Indian Nation or Pueblo—the Nation or Pueblo whose members are given the employment preference.

End Note: It is not clear if an Indian Nation or Pueblo can, by provisions in a lease, require an employer who is NOT otherwise authorized by Federal law to give tribal preference give such preference. Take note that in the recent *EEOC v. Peabody* opinion, the Court recognized other Federal statutes may authorize Tribal employment preference, such as the *Navajo-Hopi Rehabilitation Act*.

Ask Larry is authored by **Lawrence Ruzow**. Mr. Ruzow is in private practice in Window Rock, Arizona (Navajo Nation) and a Director of the Indian Law Section Board of Directors. Mr. Ruzow’s opinions are his own and do not necessarily reflect those of the State Bar of New Mexico or the Indian Law Section. If you have questions concerning the law in Indian country within the State of New Mexico, please direct your inquiries to Lawrence Ruzow at laruzow@citlink.net.

“TRIBAL PREFERENCE” NEED NOT CONTRADICT “INDIAN PREFERENCE”

In *EEOC v. Peabody*, slip op., 2006 Westlaw 2816603, the U.S. District Court for the District of Arizona recently granted summary judgment in favor of the Navajo Nation (and Peabody Western), in response to grounds set forth in the Navajo Nation’s Motion to Dismiss. And though the grant of summary judgment was based on a variety of factors, the one issue that some seem to regard as unresolved is the issue of whether tribal preference conflicts with Indian preference. Specifically, some people point to *Davavendewa I*, 154 F.3d 1117(1998) and say that employers must still decide between violating a tribal preference provision or Title VII, which provides for an exception to equal employment via the *Indian* preference exception at 42 U.S.C. 2000e-2(i). This frustration is based on the assumption that the 9th Circuit clearly set forth in its *Davavendewa I* decision that tribal preference is a violation of Indian preference.

This assumption appears to disregard the 9th Circuit’s self-defined narrow reach of the *Davavendewa I* decision. Namely, in *Davavendewa II*, the 9th Circuit explained:

In *Davavendewa I*, we held only that a hiring preference policy based on tribal affiliation, as described in the complaint, stated a claim upon which relief could be granted. 154 F.3d at 1124. [...] [W]e did **not** address the merits of the [Navajo] Nation’s proffered legal justifications in defense of the challenged hiring preference policy. [...] Without the aide of supporting precedent, **we reject Dawavendewa’s invitation to ignore the Nation’s plausible legal defenses.** *Davavendewa II*, 276 F.3d 1150 at 1158, 1159 (2002) [**emphases added.**]

Thus, at the very most, one may argue that the 9th Circuit has yet to clearly rule one way or the other. Regardless, *Davavendewa* is a 9th Circuit decision and is not binding on the State of New Mexico nor the 10th Circuit. Whether the 10th Circuit would agree with the 9th Circuit *Davavendewa I* decision remains unknown.

Aaron C. Frankland is an attorney with Navajo Nation Department of Justice and a Director of the Indian Law Section Board of Directors. Mr. Frankland’s opinions are his own and do not necessarily reflect those of the State Bar of New Mexico, the Indian Law Section, or the Navajo Nation.

The Quagmire Worsens: Navajo Preference vs. Title VII

Probably the most difficult issue in Navajo labor law is the conflict between Navajo Preference laws and Title VII. The Navajo Nation requires all employers to prefer Navajos to all other employment applicants, including applicants that are members of other Indian Tribes. Title VII allows an employer to announce a policy of Indian Preference, but not Tribal Preference. On the Navajo Nation, this places employers in a quagmire – violate Navajo law or federal law?

The quagmire has intensified in a current dispute between the EEOC and Peabody Western Coal Co. Prior to this dispute, the issue was governed by a pair of Ninth Circuit decisions: *Dawavendewa I*, 154 F.3d 1117(1998) and *Dawavendewa II*, 276 F.3d 1150 (2002). From the *Dawavendewa* cases, we learned that (1) Navajo Preference violated Title VII, but (2) an individual claimant could not sue for the violation without joining the Navajo Nation as an indispensable party, and (3) the Navajo Nation had sovereign immunity from being so joined.

In *Peabody Western*, the Ninth Circuit addressed the issue of what would happen if the claim was brought not by a private claimant, but by the EEOC. The Ninth Circuit ruled that the EEOC could join the Navajo Nation, because the Nation could not assert sovereign immunity against the federal government.

Peabody had also asserted that the case was nonjusticiable because it involved a conflict between the two arms of the federal government: the EEOC and the Department of the Interior, which was signing the leases that required Navajo Preference. The Ninth Circuit rejected this argument because the court was not called upon to make an initial policy determination, but could resolve the issue by statutory interpretation.

On remand, the EEOC added the Navajo Nation as a party to the litigation. On September 30, 2006, the U.S. District Court for the District of Arizona granted summary judgment in favor of the Navajo Nation. (slip op., 2006 Westlaw 2816603). The District Court based the judgment on four grounds:

First, the EEOC was seeking *affirmative* relief against the Navajo Nation in the form of injunctive relief enjoining the Navajo Nation from requiring and enforcing its Navajo employment preference provisions. The Court reasoned that this affirmative relief was contrary to Title VII's exemption of Indian tribes from suit.

Second, the Court concluded that because the EEOC was seeking such affirmative relief against the Navajo Nation, the EEOC's suit was contrary to the Rules Enabling Act which

prohibited procedural rules from giving the EEOC expanded substantive rights.

Third, the Court referred to the Navajo Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631-638. This Act expressly authorized the employment preference provisions at issue in the dispute, thus invalidating the EEOC's claims as a matter of law

Finally, the Court concluded that even if the EEOC had properly brought suit against Peabody Coal and the Navajo Nation regarding the current Navajo employment preference, the Secretary of Interior had a sufficient interest in the case to make it an necessary and indispensable party which could not be joined. Thus, the case had to be dismissed under Rule 19 of the Federal Rules of Civil Procedure.

Assuredly, the dispute goes on. The EEOC will likely appeal again to the Ninth Circuit, and we will again await a ruling from that Court on this issue. Meanwhile, employers on the Navajo Nation continue to be caught between the EEOC and the Navajo Nation's employment preference provisions. Ultimately, the problem should be resolved by an act of Congress, by a definitive U.S. Supreme Court case on the issue, or by the Navajo authorities allowing "Navajo Preference" to become "Indian Preference." Since a change in Navajo law appears unlikely, the federal government will hopefully provide employers with some safe harbor to avoid the problem of conflicting regulation.

David Jordan is with Jordan and Rosebrough PC in Gallup, New Mexico. Mr. Jordan's views are his own and do not necessarily reflect those of the State Bar of New Mexico or the Indian Law Section.

NEW MEXICO INDIAN WATER RIGHTS UPDATE

This commentary serves as a brief update on, and not an overview of, Indian water rights. For additional information, there are numerous books and articles on Indian water rights. See JOHN SHURTS INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT. 1880s-1930s, 311-324 (2000) (listing over six pages of Indian water rights articles). Recently, Jane Marx wrote a very good overview of Indian water rights, entitled *They Had Command of the Waters: An Overview of Indian Water Rights*. In *Water Law Issues in New Mexico* (special supplement to the Bar Bulletin), BAR BULLETIN (official publication of the State Bar of New Mexico), October 2, 2003, Volume 42, No. 40.¹

This piece highlights two themes from *They Had Command of the Waters* that are particularly observable today. The first is that “a cloud of uncertainty hangs over water users” until Indian water rights are quantified. *Id.* at 4. The second is that “settlement of Indian water rights claims under established federal policies and procedures offers the best opportunity to solve water conflicts in a collaborative fashion with the least disruption to non-Indian water uses.” *Id.* at 4.

As evidenced by the recent execution of three Indian water rights settlements, the Indian community clearly concurs with Marx that settlements offer the best opportunity to solve water conflicts. These settlements have been executed by the settling tribes and the State of New Mexico;² they are (1) the Navajo Nation San Juan River Settlement, signed April 19, 2005; (2) the Aamodt Settlement,³ signed May 3, 2006; and (3) the Taos Settlement, signed May 30, 2006.⁴ Importantly, the settle-

ments still need Congressional approval and authorization.

All three settlements attempt, among other things, to quantify the water rights of the signatory tribes. As Marx asserts, when Indian water rights are quantified, a cloud of uncertainty will be removed. The removal of the cloud of uncertainty over water is reason for all New Mexicans to support Indian water rights settlements.

FN:

1. The entire supplement can be found on the web at http://www.nmbar.org/Content/NavigationMenu/Publications_Media/Bar_Journal/waterissue.pdf.
2. All three settlements can be found on the New Mexico State Engineer's website, <http://www.ose.state.nm.us/>.
3. Four tribes are signatories to the Aamodt settlement: Nambe Pueblo, Pojoaque Pueblo, Tesuque Pueblo, and San Ildefonso Pueblo. There are also local parties who are signatories.
4. There are also local parties who are signatories to the Taos settlement.

Bidtah Becker is a staff attorney with the Navajo Nation Department of Justice. Ms. Becker's opinions are her own and do not necessarily reflect those of the State Bar of New Mexico, the Indian Law Section, or the Navajo Nation.

INDIAN LAW SECTION CLE UPDATE

On November 9, 2006, the Indian Law Section will co-host the CLE program, *Santa Clara Pueblo v. Martinez: Past and Present Day Consequences*. The CLE program is scheduled for 9 a.m. at the State Bar Center. Afterwards, at 1 p.m., the Indian Law Section will hold its annual meeting.

The CLE program is intended to address the modern-day impact of the *Santa Clara Pueblo v. Martinez*. Specifically, in 1978, the United States Supreme Court decided *Santa Clara Pueblo v. Martinez*, through which the Court affirmed the power of self governance for all federally-recognized Pueblos and Tribes. While the case arose from a dispute about membership qualifications that differentially-treated male and female members, this CLE is not restricted to that topic. Rather, this CLE will address the contemporary impact of the important *Santa Clara* principles: tribal sovereignty, tribal sovereign immunity, and

when federal law and federal court review are appropriate for internal law.

The cost of the CLE program is \$95; and \$90 for section members, government attorneys and paralegals. Attendees will receive 2.7 general CLE credits. Native American cuisine will be provided for lunch. To register, call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, P.O. Box 92860, Albuquerque, NM 87199.

During the annual meeting, two law students will awarded bar preparation scholarships. Each student will receive \$2,000 to defray the costs of the bar exam and preparation courses. Agenda items for the annual meeting should be sent to Chair Levon Henry, lhenry@dnalegalservices.org or (928) 871-4151.

BAR PREPARATION SCHOLARSHIPS AWARDED

Two third year students at the University of New Mexico School of Law were selected to receive the first *Bar Preparation Scholarships* awarded by the Indian Law Section of the State Bar.

Casey Douma and **Suzanne Martinez** will each receive \$2,000 cash scholarships to assist with the costs of preparing for and taking the New Mexico bar examination next year. The scholarships will be awarded at a November 9 luncheon at the State Bar Center, coinciding with the Section's Annual Meeting and Continuing Legal Education Seminar.

"The selection committee received many qualified applications for the Bar preparation scholarship," said Melanie Fritzsche, selection committee chair. "After careful consideration and meetings to discuss the potential recipients, the committee decided that Mr. Douma and Ms. Martinez best demonstrated the Section's purpose in creating the scholarship."

The scholarships are intended to address one of the biggest hurdles facing new law school graduates who want to enter the field of Indian Law. New graduates, most of them already burdened by sizeable student loan debts, face a potential price tag of almost \$3,000 – a \$450 application fee and between \$1,800 and \$2,400 for bar preparation courses – to take the next step in their legal careers.

For many, that means having to find a job during their third year of law school or immediately upon graduation, and going to work when they really need to be studying. Alleviating this financial strain, UNM Law faculty and graduates say, is one of the best ways to give our students their best shot at passing the bar exam.

Mr. Douma and Ms. Martinez were selected based upon their interest and academic background in Indian Law, involvement in Indian communities and issues, academic achievement, and financial need.

Mr. Douma is Laguna Pueblo and Hopi-Tewa. In 2005, he started a moot court program based on Indian law issues for high school juniors and seniors at Santa Fe Indian School. He also co-taught a class at UNM entitled, "Building Native Nations." The class structure modeled a tribal council, and each week students tackled issues common to Indian Nations.

Ms. Martinez is a Native American living in Santa Fe and commuting to law school at UNM. While working on her Master's degree in American Indian Studies at UCLA prior to law school, she started her own company to produce documentary films about social issues facing Native Americans. In the summer of 2005, she received an award from the Institute for American Indian Research to study the role of Indigenous peoples in the United Nations system in Geneva, Switzerland.

This year's scholarships were funded through donations from the Pueblo of Sandia and several of New Mexico's leading Indian Law firms. The Section extends its deep gratitude to the Pueblo of Sandia and to the Chestnut Law Offices; Cuddy, Kennedy, Albetta & Ives, LLP; Luebben Johnson & Barnhouse, LLP; Modrall, Sperling, Roehl, Harris & Sisk, PA; Nordhaus, Haltom, Taylor, Taradash & Bladh, LLP; and, Rothstein, Donatelli, Hughes, Dahlstrom, Schoenberg & Binvenu, LLP.

Report compiled by **Karl Johnson**, Chair-elect of the Indian Law Section, who is in private practice with Luebben Johnson & Barnhouse, LLP.

Visit the Indian Law
Section at www.nmbar.org

Indian Law Section 2006 Nominating Committee Report

The report of the section's nominating committee, consisting of the name and biography of each candidate selected by the section nominating committees were published in the Oct. 9th and Oct. 16th issues of the *Bar Bulletin* and on the State Bar Web site, www.nmbar.org.

In addition to those candidates, nominations may also be made in the form of a petition signed by at least 10 attorneys who have been members of the section for 30 days or more. See nomination petition form on page 14, Oct. 9th issue of the *Bar Bulletin*. A nomination petition form is available on the State Bar Web site. The petition must identify the position and term sought, and state that the member has agreed to the nomination. Nomination petitions for this year's section elections must be received at the State Bar of New Mexico's office no later than 5 p.m., Oct. 31.

If additional nominations are made, a notice of the contested section election will be published in the *Bar Bulletin* and on the Section's web page; ballots will be mailed to all members of the section no later than Nov. 10. If no additional nominations are made, the nominees identified by the nominating committee are elected by acclamation and take office on Jan. 1, 2007.

Position 1: Two-Year Term:

Georgene Louis is an associate at Chestnut Law Offices, an Albuquerque law firm that practices general civil law with an emphasis on Indian affairs and water law. She received her B.A. in English-philosophy from the University of New Mexico in 2000. In 2001, Louis completed the American Indian Law Center, Inc.'s Pre-Law Summer Institute. She graduated from the UNM School of Law where she was involved in the Native American Law Students Association and was co-justice of Phi Alpha Delta, a community service fraternity. Louis is a member of the American Bar Association YLD Choose Law Special Project Committee, which encourages high school students of color to consider law as a career. She is also a member of the board of directors for the Acoma Boys and Girls Club and the

Acoma Business Board. As a current member of the Indian Law Section Board, she serves on the Bar Scholarship Committee and is chair of the CLE Committee.

Position 2: Three-Year Term:

Maggie Coffey-Pilcher is general counsel for the New Mexico Department of Cultural Affairs. Prior to joining the Department of Cultural Affairs, she was in private practice, initially as an associate with Modrall Sperling Law Firm, where she practiced primarily in commercial and employment law, and then as an associate with the Cuddy Law Firm, where she practiced primarily in Indian Law. Ms. Coffey-Pilcher received her bachelor's degree, summa cum laude, from Weber State University, and received her juris doctorate from Stanford Law School. She is a member of the Comanche Nation.

Position 3: Three-Year Term:

Pablo Padilla is an associate attorney at the Santa Fe office of the Nordhaus Law Firm. He graduated from Harvard College in 1997 with a B.A. in government. After five years of working for the Zuni Tribe in various capacities, he attended and graduated from the UNM Mexico School of Law in 2005 with a J.D. and certificates in Indian law and natural resources law. While in law school, he was a student editor for the *Natural Resources Journal* and president of the Native American Law Students Association, UNM Chapter. Padilla spends his time on general counsel matters for various Pueblos and other Indian tribes, with an emphasis in water and natural resources law. He also serves as vice-chair of the Native American Resources Committee of the American Bar Association's Environment, Energy and Resources Section and is a member of the New Mexico Environmental Law Center's board of directors.

Report compiled by **Tony Horvat**, Membership Coordinator, Membership and Communications Department, State Bar of New Mexico.

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* Appointed to Vacancy