



INDIAN LAW TIMES

A MESSAGE FROM THE CHAIR

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SAVE THE DATE!

INDIAN LAW SECTION MIXER

Date: Thursday, June 7, 2007
 Time: 6:00 pm – 8:30 pm
 Place: Sandia Resort & Casino

Please join the Indian Law Section for an evening of socializing, appetizers, non-alcoholic drinks and door prizes! A cash bar will also be available.

Free to Indian Law Section Members; \$20 for non-Indian Law Section Members or free with membership purchase! This is the first of two Mixers that the Indian Law Section Outreach Committee plans to host for 2007.

This event is sponsored by the Indian Law Section of the N.M. State Bar and the Pueblo of Sandia. Please contact Georgene Louis at gl@chestnutlaw.com, if you have any questions.



Welcome to the Spring 2007 issue of **Indian Law Times**, the newsletter of the Indian Law Section of the State Bar of New Mexico. To kick off this issue, I want to share a few highlights of the Section’s recent accomplishments.

First, the Section’s board of directors recently created an Outreach Committee, chaired by Georgene Louis of Chestnut Law Offices, to encourage your involvement in Section’s activities. Watch for e-mail announcements, Bar Bulletin notices and postings on the Section’s page of the State Bar website (www.nmbar.org) for chances to network with your Indian Law colleagues. Also, join us if you can for the bi-monthly meetings of the Section’s board of directors, on the third Friday of every other month, 9 – 10:30 am, at the State Bar Center. Our next meeting is May 18.

Second, you may want to visit the Section’s webpage for a link to the 2007 update of the 2001 Tribal Court Handbook, which contains valuable information about the courts and governments of the Tribes and Pueblos located in New Mexico. Many thanks to Professor Christine Zuni Cruz and the students, faculty and staff of the Tribal Law Journal at the UNM School of Law for their work on this project.

Third, the Section will host two annual continuing legal education seminars this year, one at the State Bar’s annual meeting program (at the Inn of the Mountain Gods in Mescalero, July 12-15), and the other in conjunction with the Section’s annual meeting on November 8. The seminars are organized by the CLE Committee, chaired by Melanie Patten Fritzsche, CEO of Aurora Publishing, and Helen Padilla, tax administrator for the Pueblo of Tesuque.

Fourth, this past year, the Section implemented a scholarship program for third year students at the University of New Mexico School of Law. The scholarships assist with the bar exam application and preparation expenses for students who intend to take the New Mexico bar exam and practice Indian Law. Following a successful

fund raising effort, the Section awarded its first two scholarships of \$2,000 each to Casey Douma and Suzanne Martinez.

If you would like to help with this year’s scholarships, please send your tax-deductible contribution to the Indian Law Section at the State Bar of New Mexico, PO Box 92860, Albuquerque NM 87199-2860. For more information, contact the chair of the Section’s Scholarship Committee, Mark Baker with Long, Pound & Komer in Santa Fe, (505) 982-8405 or at mbaker@nm.net.

Ultimately, all of this fine work is made possible through the commitment of the Section’s board of directors and the outstanding support of the State Bar staff. We welcome this year’s two new directors, Pablo Padilla with the Nordhaus Law Firm in Santa Fe and Maggie Coffey-Pilcher, general counsel of the New Mexico Department of Cultural Affairs; returning director and chair-elect, Ms. Louis; and returning Young Lawyers Division representative, Mr. Baker. We thank the Section’s Media Committee, chaired by Aaron Frankland of the Navajo Nation Department of Justice and Cynthia Aragon Stanaland, who manage the Section’s newsletters and webpage, and also the State Bar’s great staff: executive director Joe Conte, CLE director Rob Koonce, webmaster Veronica Cordova, Membership & Communications director Christine Morganti, and membership coordinator Tony Horvat.

Finally, we sadly note the passing last year of one of our directors, Lucy Fivekiller Beals. She gave generously of her time and contributed much to the Indian Law Section. We miss her greatly.

On behalf of the board of directors, I hope you enjoy this issue and that we will see you soon at one of the Section’s functions. If you have questions or comments about the Section, please contact me in Albuquerque at Luebben Johnson & Barnhouse LLP, (505) 842-6123, ext. 403, or by email at kjohnson@luebbenlaw.org.

Karl E. Johnson, Chair
 State Bar of New Mexico Indian Law Section

ASK LARRY

QUESTION: "IS THERE A WAY FAMILY MEMBERS WHO COLLECTIVELY OWN THE BENEFICIAL INTEREST IN AN INDIAN ALLOTMENT CAN CREATE AN ENTITY WHICH WILL ELIMINATE OR AT LEAST SUBSTANTIALLY REDUCE THE CHANCE THAT INTERESTS IN THE ALLOTMENT WILL BE LOST UPON THE DEATH OF ONE OR MORE OF THE ALLOTTEES?"

ANSWER: If the Allottees (or the owners of the percentage of ownership set forth in 25 U.S.C. Sec. 2210 (b)) agree, they *should* be able to lease the use of the allotment (at least its surface use) to an entity such as a corporation which the Allottees form under the corporation laws of the Indian Nation or Pueblo (or if there are no such corporation laws, under the laws of the State of New Mexico). Assuming such a lease is approved by the Department of the Interior, it should survive the death of any of the Allottees, whether or not such Allottees die testate or intestate. Given the post-*Cobell* world, the entity should expect to pay fair market value for the lease, but the monies paid would end up going to the owners of the Allotment. Thus to some extent and for some limited time, since the owners of the corporation would likely be the same as the owners of the corporation, the payments would be a "wash."

Ask Larry is authored by **Lawrence Ruzow**. Mr. Ruzow is in private practice in Window Rock, Arizona (Navajo Nation). 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.

RECAP: November 9, 2006 CLE, Santa Clara Pueblo v. Martinez, a Success!

On November 9, 2006, the Indian Law Section (ILS) co-sponsored, with the State Bar of New Mexico, a half-day CLE - entitled Santa Clara Pueblo v. Martinez: Past and Present Day Consequences. *Martinez* was decided over twenty-five years ago and is one of the most cited cases in Indian law today.

The CLE focused on how the Martinez affirmation of self governance for tribes and pueblos has developed in contemporary Indian law practice and, specifically, the impact of the important principles from Martinez on tribal sovereignty, sovereign immunity, and when federal law and federal court review are appropriate for internal law.

The Martinez case was briefly reviewed, leading into a panel discussion on *Tribal Sovereignty and the Enrollment Dispute, Then and Now*. Current issues relating to the Martinez principles, including (1) Tribal, State and Federal Jurisdictional Conflicts; (2) Due Process Claims of Non-Indians; and (3) Recent Case Law Interpreting Sovereign Immunity under Tribal-State Gaming Compacts, were presented by Indian law attorneys practicing in New Mexico who work on behalf of Pueblo clients.

The panel included ILS Board Member and University of New Mexico School of Law Professor, Gloria Valencia-Weber, attorney Tim Vollmann, and Santa Clara Pueblo member and scholar, Rina Swentzell. The attorney presenters included Helen Padilla, Stephanie Cochran and Joe M. Tenorio. Governor Michael Chavarria of Santa Clara Pueblo (pictured at right) honored the ILS with his presence at the CLE.



The CLE was followed by lunch comprised of Native American cuisine provided by Redwing Catering of Santa Ana Pueblo. After lunch, the ILS conducted its annual meeting where it presented its first annual bar preparation scholarship to two University of New Mexico School of Law Students.

Authored by **Georgene Louis**, who is an attorney with Chestnut Law Offices and a Director of the Indian Law Section Board of Directors, and **Gloria Valencia-Weber**, who is a law professor at the University of New Mexico School of Law and a Director of the Indian Law Section Board of Directors.



[From left to right: Gloria Valencia-Weber, Rina Swentzell, and Tim Vollmann.]

N.M. Tribal Gasoline Tax Issues After *Wagon v. Prairie Band Potawatomi Nation*

By Helen. B. Padilla, Esq.*

Many New Mexico attorneys have asked whether the decision in *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), will have a detrimental effect on Tribes within the State of New Mexico that own and operate tribal gasoline stations and collect tribal taxes on fuel sold at those stations. A brief discussion of the case and the current situation here in New Mexico will provide a practical answer.

The Prairie Band Potawatomi Nation (Nation), a federally-recognized Indian tribe, sued the Secretary of the Kansas Department of Revenue (Secretary), to avoid a state fuel tax on the grounds that it is preempted by federal law. The Nation built a casino on its reservation, which increased the traffic on the reservation's roads. To accommodate this increase in traffic, the Nation built a gas station next to the casino. The Nation imposed its own tax on the gas revenues to fund maintenance of the reservation's roads because Kansas provides no financial assistance for these roadways. Kansas, however, argued that its state fuel tax should apply to revenues from the gas station. (The Kansas motor fuel tax applies to the receipt of fuel by off-reservation non-Indian distributors who subsequently deliver it to the gas station owned by and located on the Nation's reservation.) The district court granted the Secretary's motion for summary judgment.

The Tenth Circuit Court of Appeals reversed, applying the interest-balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The Court of Appeals found the interests of the Nation and the federal government in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments outweigh Kansas' interest in raising revenue by collecting taxes.

However, in the U.S. Supreme Court decision, the Court rejected the Nation's argument that it is entitled to prevail under the categorical bar set forth in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), because the tax's incidence is expressly imposed on the distributor that first receives the fuel. Such "dispositive language" from the state legislature is determinative of who bears a state excise tax's legal incidence. Further, the Court also rejected the Nation's argument that the *Bracker* test must be applied irrespective of who bears the Kansas tax's legal incidence because the tax arises as a result of the on-reservation sale and delivery of fuel. The Court held that the *Bracker* interest-balancing test does not apply to a nondiscriminatory tax that results from an off-reservation transaction between non-Indians. Hence, the tax is valid and poses no affront to the Nation's sovereignty.

Although the reasoning and holding of the case could be infinitely argued and disputed, the practical implications of this case for N.M. tribes has a much clearer picture.

After the U.S. Supreme Court's decision in the earlier *Chickasaw Nation*, numerous bills were introduced in the New Mexico legislature that attempted to address the "legal incidence" issue. Tribes presented testimony regarding the impacts on tribal economic development and problems with double taxation. The gasoline tax issue was addressed by seven consecutive sessions of the New Mexico legislature, and by the Interim Revenue Stabilization and Tax Policy Committee between each of those sessions. Through extensive and vigorous debate, a compromise between the Tribes and the state was reached.

The compromise is quite practical and properly recognizes New Mexico's Tribes' sovereign authority to impose tribal taxes. The N.M. statute, NMSA 1978, § 7-13-4 E, relating to gasoline tax, allows a deduction from state tax under certain conditions. If gasoline is sold at retail on Indian land, and if the tribe collects a 17 cent gasoline tax on the fuel, the state does not tax the fuel. This result is the same whether the seller is Indian or non-Indian, or whether the consumer is Indian or non-Indian. The New Mexico Legislature, consulting and working with N.M. Tribes on a government-to-government basis, had the foresight to resolve the issues during the late 1990's that Kansas and the Nation disputed in the *Wagon* case. In 1999, the New Mexico Legislature imposed its tax on the distributor of the gasoline, just like Kansas. But the difference is that New Mexico allows a deduction from the state tax if the fuel is sold at retail on tribal lands and the tribe imposes and collects its tribal tax on the gasoline. The approach handled the gasoline tax situation at the state level based on N.M. State and Tribal governments' needs and concerns. New Mexico was well ahead of the curve on state-tribal gas tax issues.

The current state tax laws, after the 1999 amendments, level the economic playing field by eliminating tax-free retail sales. It also prevents double taxation by Tribes and the State and provides broader gasoline retail options to consumers on and off-reservation. This compromise has worked well for New Mexico since 1999 and the *Wagon* decision does not have an effect on the Indian gasoline tax situation in New Mexico.

**Special thanks to the New Mexico Native American Petroleum Coalition (NM NAPC) for providing information and literature regarding the current situation in N.M.*

Helen Padilla is the tax administrator for the Pueblo of Tesuque and a Director of the Indian Law Section Board of Directors. Ms. Padilla's opinions are her own and do not necessarily reflect those of the State Bar of New Mexico or the Indian Law Section.

THE EFFECT OF REGULATORY WAIVERS IN LEASE PROVISIONS

Letter from the Editor: An issue currently being reviewed by the Navajo Nation Supreme Court concerns the validity of a waiver of regulatory jurisdiction by the Navajo Nation in a lease agreement. The following two pages reflect two competing schools of thought on the matter. The Court's decision remains pending.

Aaron C. Frankland, Editor

THE NAVAJO NATION'S WORDS ARE SACRED, EVEN WHEN WAIVING JURISDICTION

Larry Ruzow, Esq.

It is probably fair to say that Indian Nations have held the moral high ground since the first contact with Europeans more than 500 years ago. This position arose not only from the fact that Native Americans were here first, but because Europeans and their descendants (like the United States) regularly made and broke promises (treaties) to the Indian Nations and their people.

While I am not knowledgeable about the importance of kept promises in Indian Nations generally, I know from many years of working with Navajos, and from repeated statements by the Navajo Nation Supreme Court, that keeping promises and commitments is looked upon as critically important in Navajo culture.¹

Recently the Supreme Court of the Navajo Nation was confronted with a case in which the central question is whether a promise made by the Navajo Nation in a 1969 lease agreement should remain honored. Specifically, the Navajo Nation entered into a lease with the Salt River Project (and other lessees), for what has become the Navajo Generating Station at LeChee (near Page, Arizona). In so doing, and among many other terms of agreement, the Navajo Nation agreed that it would not seek to regulate the lessees or their contractors and suppliers in the construction, maintenance and operation of the power plant. In effect, concerning the case at hand, the appellees contend that the waiver precludes efforts by Navajo Nation administrative agencies to regulate the employment practices of the Salt River Project and one of its contractors as concerning employee terminations.

The issue in the current case is virtually identical with an issue decided over ten years ago by the Ninth Circuit Court of Appeals in *Arizona Public Service Company v. Aspaas*, 77 F. 3d 1128 (1996). In *Aspaas*, the Court of Appeals held that the effect of lease language rendered a waiver of regulatory jurisdiction. The lease language of issue is very similar to the language in the current case.

With respect to *Aspaas*, the matter concerned the Four Corners Power Plant, located in the Nenanezad Chapter of the Navajo Nation in Arizona, and the effort of the Office of Navajo Labor Relations to preclude the application of an anti-nepotism policy of the plant operator to Navajo employees at the Four Corners Power Plant. The Office of Navajo Labor Relations was acting

under the authority of the Navajo Preference in Employment Act, 15 N.N.C. Sec. 601 et seq.

Ultimately, the *Aspaas* Court deemed the matter a Federal Question. And since Indian Nation jurisdiction over non-Indians is a Federal Question (see *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, (1985)), if the Navajo Nation had waived jurisdiction over the operator of the Four Corners Power Plant in the 1960 plant lease, and if the waiver were valid, then the Navajo Nation would lack jurisdiction over the plant operator. If the Navajo Nation lacked jurisdiction, then the Federal Court could enjoin Navajo Nation officials from acting in excess of their jurisdiction. This is what the *Aspaas* Court held—the waiver of regulatory jurisdiction in the Four Corners Lease was clear and unmistakable and since, as a result of the waiver, the Navajo Nation lacked regulatory jurisdiction over the plant operator, it would be enjoined from seeking to assert such jurisdiction.

It is no doubt true that the Navajo Nation institutions of today are far more sophisticated than those of 1960 and 1969. The Navajo Nation government operates a three branch government which, in most respects, functions very well. In fact, those with experience in dealing with the government of the State of New Mexico might well think the Navajo Nation government is a better run government in many ways. It may also be true that from the perspective of a potential lessee—even one planning to invest hundreds of millions of dollars in Navajo land—that such a potential lessee would be willing to make its an investment without seeking any waiver of Navajo regulatory authority.²

Nevertheless, the issue before the Navajo Nation Supreme Court is whether past promises should be kept—even if such promises would clearly not be made today and probably not even sought by the non-Navajo company seeking a lease from the Navajo Nation.

Lawrence Ruzow is in private practice in Window Rock, Arizona (Navajo Nation). 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. For full disclosure, Mr. Ruzow also represents Headwaters Resource, one defendant-appellee in the matter at issue. Mr. Ruzow's views do not reflect those of Headwaters Resources.

FN:

1. See, for example, *Ben v. Burbank*, 7 Nav. R. 222, 224-225 (Nav. Sup. Ct. 1996): "Appellant admits there was an oral agreement and Navajo policy dictates that she had a duty to fulfill her promise to Appellee. "Certainly the Navajo Nation's policy is not to encourage people to breach oral contracts or written contracts. It is against Navajo policy for people to literally breach their contracts." *Anderson Petroleum Serv. Inc. v. Chuska Energy & Petroleum Co.*, 4 Nav. R. 187, 191 (W.R. Dist. Ct. 1983). This sets forth the Navajo traditional concept that when people make promises between one another, oral or written, they should honor those promises.
2. Though they probably would want an effective waiver of Navajo sovereign immunity to insure that "promises made are promises kept."

THE EFFECT OF REGULATORY WAIVERS IN LEASE PROVISIONS CONT.

THE NAVAJO NATION, AS A SOVEREIGN GOVERNMENT, CAN VOID LEASE PROVISIONS

David Jordan, Esq.

Can a sovereign government change its mind? The Navajo Supreme Court is taking up this issue in a pair of cases coming out of the Navajo Labor Commission. (*Thinn v. Navajo Generating Station, Salt River Project* and *Gonnie v. Headwaters Resource*) In 1969, Raymond Nakai, Chairman of the Navajo Nation, signed a lease with Arizona Public Service which led to the construction of the Navajo Generating Station near Page, Arizona. In the lease, the Navajo Nation agreed not to regulate A.P.S. and its subcontractors, other than for certain regulatory provisions contained within the lease. Thinn and Gonnie are asking the Navajo Supreme Court to void the provision for public policy as a matter of law. At issue are two concepts that flow to the heart of the sovereignty of the Navajo Nation itself.

The first concept is how much deference the Navajo Supreme Court should give to the Federal Appeals Court for the Ninth Circuit. This is particularly relevant as the Ninth Circuit previously enforced a similar provision in a different lease. *A.P.S. v. Aspaas*. 77 F.3d 1128 (9th Cir. 1996). Namely, when reviewing a different lease with a similar position, the Ninth Circuit in *Aspaas* held that the Navajo Nation “waived” its right to regulate by entering into the lease.

Regardless of how one views the merits of *Aspaas*, the Navajo courts are judicial bodies of a separate sovereign from the United States government. Since the Navajos are a treaty tribe, the sovereignty of the Navajos pre-existed the arrival of the United States government. When the treaty was signed in 1868, the Navajos retained all sovereignty not formally given up in the treaty. Since the Navajos did not agree that their courts would be subject to appellate review by federal courts, the Navajo Supreme Court may extend comity to the Ninth Circuit, but it is not obliged to obey its precedents.

The comity issue cannot be easily discarded, however. If the Navajo courts are aware that, for some reason, their judgments would fall victim to an injunction by federal courts, extending comity may carry a certain level of practicality. Still, the decision is for the Navajo courts to resolve. Federal precedents are persuasive, but not controlling.

The second issue is facial challenge to the validity of the lease provision. Here, S.R.P. and its subcontractors have asserted that the “no regulation” clause must be followed due to the Navajo tradition of “sacred words”. That is, Navajo tradition is implicated because the Navajos have long believed that words are sacred. Promises made, whether by contract or otherwise, should be honored by the promise givers.

To this effect, the Navajo Supreme Court has previously ruled

that sacred words must be honored absent a compelling reason otherwise. Thinn and Gonnie argue that such a compelling reason is presented in this case. The Navajo Nation Council has declared that there is an employment crisis on the Navajo Nation. If that is not a “compelling reason,” then what is?

More so, Navajo tradition is essentially being argued against Navajo sovereignty. As a sovereign, the Navajo people certainly have a compelling interest to protect themselves. The Navajo Nation Council announced such a compelling interest when it enacted the Navajo Preference in Employment Act. Did Chairman Nakai’s act of entering into a “no regulation” provision in a lease almost forty years ago forever preclude the Navajos from entering into any new protective regulation?

The issue begs comparison to other eras when policy considerations changed for sovereign governments. For example, if the United States entered into a lease permitting slavery in 1850, would it be powerless to ban such slavery when it enacted the Thirteenth Amendment? Or would a “no regulation” clause leave the United States powerless to stop illegal dumping occurring decades after a lease was signed?

Few would seriously argue that the U.S. government is powerless to stop slavery or illegal dumping, even if that same government entered into “no regulation” clauses in leases. Those who now argue that the Navajo Nation does not similarly have such power may only do so by attacking the very sovereignty of the Navajo Nation. Put simply, if sovereignty does not mean that a government can protect its people, then sovereignty means very little.

Ultimately, the question in these cases is not one of a contractual “waiver”, or the Navajo doctrine of “sacred words,” it is the power of the Navajo government to protect its people from harm. When one enters into a contract with a sovereign government, whether that sovereignty is the United States, the Navajo Nation, or anyone else, they are on notice that the other party is a unique entity, a collection of people who have the right and power to enact new laws to protect themselves. The Navajos have such a government, and they have enacted such laws. If it is to be a contest between Chairman Nakai’s sacred words in 1969 or the sacred livelihood of the Navajo people in 2007, it is the livelihood of the people now that must be protected.

We now await direction from the Navajo Supreme Court, as to whether the real issue at stake is a contractual waiver, the Navajo doctrine of “sacred words”, or the very sovereignty of the Navajo Nation itself.

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. For full disclosure, Mr. Jordan also represents both Thinn and Gonnie

LAST WORD: Indian Law Section Bar Preparation Scholarship Program Enters Second Year

The Indian Law Section launched the Bar Preparation Scholarship Program last year to help defray the substantial cost of preparing for and taking the New Mexico bar exam for University of New Mexico law school graduates with a strong interest in practicing Indian Law. Casey Douma and Suzanne Martinez both received \$2,000 scholarships in the program's first year.

Those scholarships were funded by generous contributions from the following donors:

- Pueblo of Sandia
- Chestnut Law Offices
- Cuddy, Kennedy, Albetta, & Ives, LLP
- Luebben, Johnson, & Barnhouse, LLP
- Modrall, Sperling, Roehl, Harris, & Sisk, PA
- Nordhaus, Haltom, Taylor, Taradash, & Bladh, LLP
- Rothstein, Donatelli, Hughes, Dahlstrom, Schoenberg, & Bienvenu, LLP

The Section thanks each of our donors again for helping get the program started and for ensuring these graduates are in a position to focus their undivided attention on studying for the bar exam.

Fundraising is underway for scholarships that the Section will award later this year for the 2008 bar exam. If you would like to help with the fundraising effort or make a donation, please contact Mark Baker at (505) 982-8405, or by e-mail at mbaker@nm.net.



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A MESSAGE FROM THE EDITOR

The Newsletter serves 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 Section members may share information. We welcome and encourage 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 me at af Frankland@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, Editor