



# Indian Law TIMES



STATE BAR OF NEW MEXICO INDIAN LAW SECTION

Fall/Winter 2011

## A MESSAGE FROM THE CHAIR

Welcome to the Fall/Winter 2011 issue of the Indian Law Times, the newsletter of the Indian law Section of the New Mexico State Bar. This issue features articles, announcements, notes of gratitude, and best wishes for our members' end-of-the-year activities.

The Indian Law Section Board was very busy this year. We welcomed two new board members to the section in September. Francine Hatch, Senior Policy Analyst at the American Indian Law Center, was appointed to the board when Dion KILLSBACK accepted a position as Counselor to the Assistant Secretary of Indian Affairs, Larry Echo Hawk, U.S. Department of Interior in Washington D.C. We send our congratulations and best wishes to Dion, and gratefully welcome Francine to the Board. We would also like to welcome LeeAnne Kane, a 2L at the University of New Mexico (UNM) School of Law and new UNM student liaison to the section. Thank you to Kelly Dennis, the UNM student liaison for the 2010-2011 school year, for your service to the section, and best wishes for your third year of law school and new job at Fredericks, Peebles, and Morgan LLP after graduation.

The Indian Law Section's committees continue to be active organizing events for section membership. As you can see, the media committee, chaired by Matthew Campbell, has successfully produced another newsletter this year.

The Outreach and Recruiting Committee, chaired by Mekko Miller, organized three mixers this year with a Halloween themed mixer at the end of October. The Committee organized an additional mixer on October 20, 2011 as part of the section's mentorship program with the UNM Native American Law Student Association (NALSA). This mixer allowed mentors and mentees to meet and get acquainted. The board thanks the section members who volunteered to be mentors.

The CLE committee was also very active this year with 3 separate CLEs. Autumn Monteau, the chair of the CLE committee, organized our final CLE of the year, Indian Preference in Employment and Contracting, which was held on November 3 at the State Bar Center. A traditional meal was served after the CLE and before the Section's annual meeting. The CLE was well-attended and received excellent reviews.

The scholarship committee, chaired by Zackeree Kelin, successfully raised funding for the section's 2011 bar preparation scholarships and awarded them to Natasha Cuylear and JoEtta Toppah, who are both UNM School of Law 3Ls. The scholarship committee thanks all of its donors for supporting one of the section's most important initiatives. The 2011 donors are listed on page 13 of this newsletter.

Please note the Message from a Bar Scholarship Recipient by Veronique Richardson on page 12. As you may recall, Veronique was the 2009-2010 UNM School of Law Student Liaison to the section. She is now a section member and starting her new position at New Mexico Legal Aid in the Santa Ana Pueblo office. Congratulations, Veronique!

As the year comes to end, so does my tenure as the 2011 Chair. The board is proud to welcome Delilah Tenorio Choneska as the 2012 Chair. We look forward to even more section activities in the coming year, and as always, the board invites all section members to participate and share your comments and suggestions.

Sincerely,  
Rodina Cave

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# Tribal Energy in New Mexico and the Southwest: How a Lethal Trinity is Stymying Tribal Energy and Economic Development

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Federal agencies, state governments including the State of New Mexico (“State”), and non-governmental organizations (“NGOs”) (collectively “trinity”) are working in conjunction—both intentionally and unintentionally—to subvert economic development initiatives of Indian Nations, Pueblos, and Tribes (“Tribes”) that rely on the development of Tribal energy resources. This lethal trinity’s actions are stymying Tribes’ improvement of their citizens’ and residents’ intolerable standards of living. Distressingly, this is occurring despite the facts that: the United States’—particularly the State and the southwest region’s (“Region”)—demand for energy exceeds current and projected supply (not capacity);<sup>1</sup> the transmission grid necessary to get energy to consumers is deficient;<sup>2</sup> all economies are lagging;<sup>3</sup> energy has remained a beacon in this deep recession;<sup>4</sup> Tribes—particularly large Tribes—are desperately poor;<sup>5</sup> and many Tribes want, and have the ability, to develop and grow economically with energy development.<sup>6</sup>

## I. BACKGROUND: HOW TRIBAL ENERGY DEVELOPMENT IMPROVES TRIBAL ECONOMIC DEVELOPMENT

### A. TRIBES CAN DIRECTLY BENEFIT FROM ENERGY DEVELOPMENT

Fundamental realities require that conventional and renewable energy resources be packaged together to efficiently meet consumer demands. As Regional and State (as well as national) demand for energy continues to expand, Regional utilities will increasingly turn to a mix of conventional and renewable energy resources to meet consumers’ needs. Some states have instituted renewable energy standards that require a fixed portion of a utilities’ production to come from renewable energy resources. Tribes that have conventional and renewable energy resources are, and will continue to be, best-served by tandem development of these resources. Tribes that engage in tandem development can be at the forefront of dependable energy exporters for decades to come.

However, initial costs for renewable energy facilities and transmission lines are high, and thermal solar energy development is too water-intensive to develop on a large-scale throughout most of the Region.<sup>7</sup> Although, if a renewable project is paired with a large-scale conventional project, the overall initial cost-to-output ratio and water usage of renewable energy sources is

offset by the efficiency and relatively-low water usage per kilowatt hour of conventional energy sources.<sup>8</sup>

Furthermore, renewables have low relative intensity, low capacity factor (or availability), and intermittency problems that must be countered by conventional base-load power-plants.<sup>9</sup> For instance, a coal power-plant can produce approximately 1,500MW from several hundred or a few thousand acres, while solar facilities can only produce approximately 20 MW of electricity per every 240 acres. Furthermore, coal power-plants are capable of producing electricity 95% of the time, while renewables produce electricity about 30% of the time.

Generation and transmission go hand-in-hand, and renewables have damaging intermittency problems. Tandem development necessitates Alternating Current (“AC”) lines instead of Direct Current (“DC”) lines. AC lines, unlike DC lines, have “on-ramps” and “off-ramps” for multiple generation facilities and consumers to tap into along the line. Along with mechanical and technological problems, sometimes the wind doesn’t blow and the sun doesn’t shine. This leads to unpredictable disruptions that throw the electricity grid out of balance. An electricity transmission line is analogous to a pressurized water tube; the amount of electricity going in must be greater or equal to the amount of electricity going out. When this equilibrium is disrupted, a transmission line can become inoperable. However, conventional base-load power-plants counter this problem with stable and consistent electricity production for the grid. Accordingly, at this point in time, renewables are optimally paired with conventional energy generators (*e.g.*, coal or gas) to counter their disruption problems.

Renewable energy, conventional energy, and transmission capacity are all linked. Importantly, all three affect necessary commercial investment into projects. The problems associated with renewables must be countered to incentivize or induce comprehensive investment. No one wants to produce electricity from a renewable energy source just to have it stranded. Furthermore, no one wants to invest in a transmission facility that will be disrupted and not consistently transmitting energy to market for sale to consumers. Consistent electricity generators (*e.g.*, coal and gas base-load power plants) provide consistent transmission that incentivizes investment into transmission lines. Countering problems—namely, intermittency—improves consistency of energy export, which incentiv-



come (“GDI”),<sup>13</sup> which is essential for improvement of any economy. Better Tribal economies translate into better standards of living for Tribal people. Furthermore, because Tribal economies are relatively diminutive and poverty is pervasive, the increase of Tribal GDPs and GDIs have a greater relative impact and improvement of Tribal members’ and residents’ standards of living. Thus, additional capital from energy projects going into a Tribal economy circulates and creates multiplier effects that assist the entire economy’s development and growth. Accordingly, Tribal energy development has wider benefits beyond the energy projects and operations themselves.

izes investment into new lines. Renewables can then feed into these lines to get electricity to consumers. This all incentivizes further commercial investment into additional energy projects and transmission lines.<sup>10</sup> Then the cycle of building additional generation and transmission facilities continues. However, transmission facilities are very unlikely to be built without conventional energy generation facilities to counter the problems associated with renewables.

### **B. ENERGY DEVELOPMENT HAS WIDER ECONOMIC DEVELOPMENT IMPACTS**

Energy development has secondary economic development benefits such as enhanced monetary velocity. Monetary velocity is the frequency that money is spent and circulates in a given economy.<sup>11</sup> Construction of energy projects create several hundreds or thousands of temporary jobs for many years. Generation and transmission facilities then create permanent jobs for operations and maintenance. Furthermore, energy facilities also create jobs in peripheral industries. The industries and enterprises that support energy facilities hire additional workforces. Those employed are paid, and in-turn pay others in the economy for goods and services. In the bigger picture, the more people employed within a Tribal economy and have disposable income, the more goods and services these people collectively consume across that economy. And the more goods and services they purchase from others within that Tribal economy, the more income those good and service providers receive.<sup>12</sup> This cycle repeats itself until money is taken to another economy and spent there.

The cycle of monetary velocity and multiplier effects increase Gross Domestic Product (“GDP”) and Gross Domestic In-

And importantly, the lethal trinity’s destruction of Tribal energy projects does wider damage to Tribal prosperity beyond just the isolated projects and operations themselves.

## **II. THE TRINITY’S ACTIONS SUBVERT TRIBAL ENERGY DEVELOPMENT AND ALL OF THE ASSOCIATED BENEFITS**

### **A. FEDERAL ACTIONS AND FAILURES TO ACT SUBVERT TRIBAL GOALS**

Federal agencies—particularly the U.S. Environmental Protection Agency (“EPA”)—are blocking development and stranding valuable energy supplies with the imposition—and threatened imposition—of new, extremely costly agency rules.<sup>14</sup> Furthermore, federal agencies are intentionally delaying decisions on Environmental Impact Statements and permit applications, which is killing energy development on Tribal lands.<sup>15</sup> Federal agency policies and decisions suffocate poverty-stricken Tribes’ hopes of prosperity.

### **B. STATE ACTIONS SUBVERT TRIBAL ENERGY AND ECONOMIC DEVELOPMENT**

Moreover, the State’s actions exacerbate federal agency damage to Tribal energy. For instance, the New Mexico Attorney General has intervened in federal legal actions to try and kill permits for Tribal energy projects.<sup>16</sup> These were regulatory proceedings that exclusively concerned the federal and Tribal governments and their interests. Unbelievably, the State’s misplaced interference in such proceedings was exclusively devoted to killing energy developments located entirely within Tribal

lands that are desperately needed to ameliorate extreme Tribal poverty. Together, federal and State actions inflict great injuries on Tribes.

### C. NGO ACTIONS NEEDLESSLY AND RECKLESSLY INJURE TRIBES

NGOs, though, are perhaps the most destructive force within the trinity to Tribal development. (This is not to say that NGOs never have positive effects on Tribes, because they do. For example, NGOs have lent critical support to Tribes' anti-uranium, pollution clean-up, and green jobs efforts.) NGOs have a long legacy and continuing commitment to bringing lawsuits against almost any proposed project and federal action that would actually benefit—as opposed to harm—Tribes.<sup>17</sup> NGOs have played a large-part in the projects killed by federal and State actions. NGO legal actions harm Tribal energy projects; projects such as coal mines and conventional power-plants, which are treated as if they are on par with uranium dangers and harms when they are not. Furthermore, NGOs kill, but do not commensurately invest and pursue alternatives that provide adequate replacements to fill the voids they leave.

NGOs also do wider harm than just killing isolated projects. NGO actions create apprehension and dissuade future energy investments and pursuits. In fact, Tribes and commercial entities are often reticent to invest in projects—projects that will improve economic and living conditions—because of the certainty that an outside (usually non-Indian) NGO will sue to kill such projects. So, although NGOs do assist Tribes (*e.g.*, anti-uranium efforts, green jobs initiatives), more often than not, their actions tend to directly hurt Tribes and wider Tribal prosperity beyond just isolated projects.

### D. THE TRINITY'S ACTIONS PRIMARILY TARGET AND HARM TRIBES

Most disturbingly, during the same time the trinity killed many beneficial Tribal energy projects in recent years, other large-scale conventional energy projects were approved and constructed. Not coincidentally, all of these were outside of Indian Country. For instance, while the trinity collaborated to kill comparatively efficient and lucrative Tribal projects slated for construction and operation in Indian Country such as the Desert Rock Energy Project; three coal-fired power-plants were approved for construction and operation across the U.S. These were the Comanche 3 coal power-plant in Colorado, the Seminole coal power-plant in Florida, and the Prairie State coal power-plant in Illinois (as well as their associated transmission facilities). This occurred despite the trinity's knowledge of (and apparent comfort with) the horrendous Indian Country social statistics. And that these statistics are well-known to be highly correlated with Indian Country's dreadful economic statistics and extreme poverty.<sup>18</sup> So it is cruelly odd that desperately

needed energy projects in the absolutely poorest areas of the State and Region were intentionally killed by federal and State policy decisions in conjunction with NGO suits at the same time less necessary facilities were authorized and built in comparatively affluent areas. This is—to put it mildly—obtuse and distressing.

Notably, NGOs do not challenge proposed Tribal energy projects in Tribal administrative and judicial forums. (And the State does not pile onto challenges it has no role in or express any objections whatsoever in Tribal forums.) Furthermore, NGOs do not participate in Tribal systems as elected or appointed officials with democratic legitimacy to help shape or steer Tribal decisions. This would take too much investment into Tribes and Tribal institutions than NGOs are willing to expend. NGOs do not even expend the time and resources to effectively garner internal political influence and shift particular Tribal decisions concerning energy resource development. This would take too much time and resource investment to see all of the sides of the issue, and then understand and evaluate the pros and cons of the possible decisions before acting to kill energy projects. It is just easier to disregard the harms to economic development and standards of living, and ostensibly challenge a federal agency's decision to cancel what is actually a Tribal government's decision.

This means that Tribal governments' decisions concerning their best-interests and best uses of their resources are cancelled or overruled by external bodies and the threat of external force. And for the State, which otherwise has no role in what Tribes decide are their best-interests or what to do with their resources within their own territories, this is a cheap and immediate way to make sure Tribal sovereigns that share territory with the State remain unable to become economically strong enough to meaningfully challenge the State. (More accurately, the State as it acts in conjunction with—or at least in support of—the major businesses and political interests that have perhaps captured regulatory officials and institutions.) So not only do NGOs diminish Tribal sovereignty through imposing limits on Tribal decisions via external bodies. But NGOs also enable the State to subvert Tribal economies and make sure Tribes do not become strong enough to fight or ignore what the State wants to forcibly impose on them to keep them comparatively weak. All of this comprehensively undermines Tribal development and Tribal sovereignty.

Harmful governmental policies and actions, along with damaging NGO actions cripple the ability of Tribes to bring conventional generation and transmission facilities to fruition. This makes it even more difficult for Tribes to develop renewable energy facilities. Government and NGO actions ultimately impede Tribes' participation in the renewable energy market.

Tribes can capitalize on current and projected energy demands through developing their natural resources as the avenue to developing generation and transmission facilities; and then transitioning into primary exporters of renewable energy. However, Tribes will remain destitute and unable to effectively transition into expanded renewable energy portfolios unless the status quo changes. Tribes want to maximize renewable production, but because Tribes are poor, their transition into expanded (or majority) renewable energy portfolios will not occur without substantial commercial investment. And, it will not occur overnight.

Some argue that renewables can be developed on large and medium scales without conventional facilities. This is a wonderful theoretical idea, but renewable energy facilities cannot be the impetus for transmission facilities at this point in time for at least three reasons. One, renewables are extremely expensive and Tribes are extremely poor. Two, many available renewable technologies are too water-intensive for most Tribes in the Region. And three, renewables have intermittency problems that must be countered.<sup>19</sup> Thus, without conventional energy sources, Tribes' probabilities for incentivizing and attracting investment and bringing transmission facilities and enhanced renewable energy production to fruition are close to nil. In other words, Tribes' transition to a more diverse energy portfolio that includes—and is eventually dominated by—renewable energy generation without conventional energy development is extremely unlikely. And if Tribes are forced by governmental and NGO actions to invest exclusively in renewables, Tribes might as well invest in unicorns on giant hamster wheels to engender development.

To court the necessary investment and begin moving toward greater renewable portfolios, Tribes need to develop conventional energy resources now. To do this effectively, Tribes must be freed from the harm the trinity continues to inflict on them. Congress and the State's officials will have to begin making policy decisions that consciously depart from today's status quo. Furthermore, Tribes (not just some, but a grand majority) may very-likely have to begin taking much more aggressive approaches—across the board—to thwarting misplaced State legal interferences and reckless NGO legal actions. More aggressive approaches may likely mean increased litigation, expanded federal and state lobbying efforts, or pairing with new partners in the commercial world—even those who have been adversaries in the past. Although these are not necessarily the optimal or preferred short-term options for many Tribes, the increased long-term marginal benefits such Tribes stand to potentially realize may prove to be worth the costs paid now.

Indian Country has provided several examples of strategic decisions that were extremely difficult and burdensome in the short-term, but taken as a whole have produced greater long-term benefits than Tribes could have reasonably expected to ex-

perience otherwise. Examples from the southwest to compare by analogy include the herculean efforts collectively exercised by the Tribes of New Mexico between 1987 and 2001 concerning Gaming Compacts, and the efforts of Tribes within Arizona in the early 1990s and the early 2000s. Today, as a result of these efforts, the Tribes within New Mexico have an established manner of constructively interfacing with the State on Compact matters and well-performing Class III facilities. And unlike prior to the Fort McDowell Yavapai-Apache Nation's stand-off with Arizona in 1992 and the passage of Proposition 202 in 2002, the Tribes within Arizona do negotiate and agree to Gaming Compacts with that state's government; and this is with the stability of definite rules and continuous gaming in the future.

Southwestern Tribes' efforts were the (purported) impetus for great upheaval in Arizona and New Mexico at those times, and Tribes' heavy expenditures of very limited resources were made without any guaranteed payoffs. In other words, these were costly, risky propositions. But Tribes' relatively aggressive and unsure endeavors then have proven in the long-run to have been worth the initial tumultuousness and sacrifice. The emulation of these and similar examples in the context of energy development might also prove to be commensurate with producing such increased benefits for Tribes.

The long-term benefits that Tribes can realize from increased energy production and transmission are not arguable—they are axiomatic. Optimally, Tribes should receive all (or the vast majority) of the benefits from the development of their resources. This is in Tribes' best-interests; and with prudent investment, this will accelerate Tribes' transitions into renewables. However, if this is not feasible now, Tribes can partner with outside commercial interests to create the optimal situation in the future. However, importantly, during the transitions from joint development to independent control, Tribes must be commensurately compensated for use of their resources in all forms. This has not historically been the case, but it is up to Tribal decision makers and attorneys to work towards such a new reality. However, without Tribal officials and attorneys taking much more aggressive stances and approaches concerning Tribes' relationships with the federal government, state governments, NGOs, and the energy industry; today's status quo will be perpetuated. In that case, it is not likely that Indian Country will capitalize on the demand for energy today to become prominent players in the sustainable energy economy of tomorrow. In short, unacceptable circumstances will remain the daily reality.

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#### Endnotes

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Law at Arizona State University, Indian Law Certificate; M.A., Political Economy/International Relations, Washington State University with honors in both. The views presented herein are the author's individual perspective, and do not represent or reflect the official position of any tribal or state government or other institution the author is affiliated with.

<sup>1</sup> See, e.g., Steven Ferrey, *Power Paradox: The Algorithm of Carbon and International Development*, 19 STAN. L. & POL'Y REV. 510, 546 (2009) (discussing the deficiency of generation and transmission facilities, and that without significant investment "electric power generation and distribution facilities [will] remain unbuilt"); Elise N. Zoli, *Power Plant Siting in a Restructured World: Is There a Light at the End of the Tunnel?*, 16 NAT. RESOURCES & ENV'T 252, 252 (2002) (discussing the failure to site power plants "despite indications that demand is outpacing available electric capacity"); see also, generally, EDISON ELECTRIC INSTITUTE, POTENTIAL IMPACTS OF ENVIRONMENTAL REGULATION ON THE U.S. GENERATION FLEET (2011) (discussing potentially disastrous impact on electricity supply of federal regulation); CHARLES CICHETTI AND SUSAN F. TIERNEY, THE RESULTS IN CONTEXT: A PEER REVIEW OF EEI'S "POTENTIAL IMPACTS OF ENVIRONMENTAL REGULATIONS ON THE U.S. GENERATION FLEET" findings and analysis); JAMES E. MCCARTHY AND CLAUDIA COPELAND, CONG. RESEARCH SERVICE., R41914, EPA'S REGULATION OF COAL-FIRED POWER: IS A "TRAIN WRECK" COMING? 28-42 (2011) (reporting on proposed regulations' potential impacts on future energy supply from coal-fired power-plants); Ezra Klein, guest-post by Brad Plummer, *Getting ready for a wave of coal-plant shutdowns*, THE WASH. POST BUS. BLOG (Aug. 19, 2011, 12:19 PM), [http://www.washingtonpost.com/blogs/ezra-klein/post/getting-ready-for-a-wave-of-coal-plant-shutdowns/2011/08/19/gIQAzkZ0PJ\\_blog.html](http://www.washingtonpost.com/blogs/ezra-klein/post/getting-ready-for-a-wave-of-coal-plant-shutdowns/2011/08/19/gIQAzkZ0PJ_blog.html) (discussing various reports and papers concerning future energy supply).

<sup>2</sup> The energy industry almost universally recognizes that there is a deficit in the transmission necessary for the development of future energy projects. See, e.g., Ferrey at note 1 *supra*. Likewise, the energy industry recognizes that the transmission necessary for the development of major renewable energy projects is also deficient. See, e.g., LOS ALAMOS NAT'L LAB., DEP'T OF ENERGY, NEW MEXICO RENEWABLE DEVELOPMENT FEASIBILITY STUDY LA-UR-10-6319 REV. 1, 1, 35 (2010).

<sup>3</sup> See generally Heidi Shierholz and Nicholas Finlo, *Ten Facts About the Recovery*, 307 ECON. POL'Y INST. (2011); see also Eamon Murphy, *10 Hard Facts About America's Economic Recovery*, DAILY FINANCE, (Jul. 7, 2011) <http://www.dailyfinance.com/2011/07/06/hard-facts-america-economic-recovery/> (discussing Econ. Pol'y Inst. Report).

<sup>4</sup> E.g. Dennis Jacobe, *Energy States Lead in Job Creation, Financial States Struggle*, GALLUP (Aug. 19, 2011) <http://www.gallup.com/poll/149072/Energy-States-Lead-Job-Creation-Financial-States-Struggle.aspx#1> (last visited Aug. 28, 2011).

<sup>5</sup> Although Tribes in the Region share the concerns expressed here, the Navajo Nation ("Nation") provides concrete exam-

ples to illustrate this discussion. The Nation is extremely poor. However, the Nation has the potential and capacity to ameliorate this, if the federal and State governments would get out of the way, and NGOs would stop destroying conventional energy development and transmission enhancement through litigation. Accordingly, several of the notes below concern the Nation's circumstances. See, e.g., *Tribal development of energy resources and the creation of energy jobs on Indian lands: Hearing Before the S. Comm. on Indian and Alaska Native Affairs of the H. Comm. on Natural Resources*, 112th Cong. 25-28 (2011) (statement of Ben Shelly, President, Navajo Nation); see also *Capitalism's last frontier: America's biggest Indian reservation tries to stimulate private enterprise*, ECONOMIST, (Apr. 3, 2008), [http://www.economist.com/business/displaystory.cfm?story\\_id=10966109](http://www.economist.com/business/displaystory.cfm?story_id=10966109) (last visited Jul. 7, 2011) (discussing the Nation's obstacles to attracting investment and engendering economic development); C. Matthew Snipp, *Sociological Perspectives on American Indians*, 18 ANN. REV. SOC. 351 (1992) (discussing severe poverty; demonstrating long-term nature of this serious problem).

<sup>6</sup> E.g. *Tribal development of energy resources and the creation of energy jobs on Indian lands: Hearing Before the S. Comm. on Indian and Alaska Native Affairs of the H. Comm. on Natural Resources*, 112th Cong. 3-63 (2011) (statements of all Members and Witnesses) (demonstrating Tribes' desire and ability to develop economically in energy industry).

<sup>7</sup> See Melissa A. Shilling & Melissa Esmundo, *Technology S-curves in Renewable Energy Alternatives: Analysis and Implications for Industry and Government*, 37 ENERGY POL'Y 1767, 1771 (2009) (discussing the high cost of solar energy, which limits commercial viability); Ferrey notes 1, 2 *supra* at 546 ("Renewable power sources are even more capital-intensive than conventional power sources, and thus require even larger commitments of capital to initiate"); Todd Woody, *Alternative Energy Projects Stumble on a Need for Water*, N.Y. TIMES, Sept. 30, 2009, at B1 (discussing water intensity of solar projects).

<sup>8</sup> Additionally, the cost of coal is projected to decrease, which will make energy generation even more economically viable for Tribes. Tribes with substantial coal reserves will be in strong positions if they have controlling ownership interests in coal power-plants. Because these Tribes will have to pay less for the fuel, such Tribes will be able to realize a higher profit margin on the energy they export to consumers.

<sup>9</sup> See Shilling and Esmundo note 7 *supra* at 1771 (discussing the high cost of solar energy, which limits commercial viability); See Ferrey notes 1, 2, 7 *supra* at 546; see also Woody note 7 *supra* at B1; RENEWABLE ENERGY RESEARCH LAB., UNIV. OF MASSACHUSETTS AT AMHERST, WIND POWER: CAPACITY FACTOR, INTERMITTENCY, AND WHAT HAPPENS WHEN THE WIND DOESN'T BLOW? 2-3 (2010), available at [http://www.ceere.org/rerl/about\\_wind/RERL\\_Fact\\_Sheet\\_2a\\_Capacity\\_Factor.pdf](http://www.ceere.org/rerl/about_wind/RERL_Fact_Sheet_2a_Capacity_Factor.pdf). (discussing intermittency of wind power and diminished capacity factor); see generally Godfrey Boyle, RE-

NEWABLE ELECTRICITY AND THE GRID – THE CHALLENGE OF VARIABILITY (2007).

<sup>10</sup> Moreover, additional transmission facilities will allow Tribes to access and use federal and State green energy grants and loans more effectively. Capitalizing on energy grants and loans would be more viable and lucrative with increased ability to transmit electricity to consumers. See Tribal Infrastructure Act, NMSA 1978, §§ 6-29-1 – 6-29-9 (providing Native Green Loan Fund Tribes may use for renewables); see also Susan Montoya Brian, *Indian Tribe Sees Bright Future in Solar Power*, CHRISTIAN SCI. MONITOR (Jan. 13, 2010), <http://www.csmonitor.com/Environment/2010/0114/Indian-tribe-sees-bright-future-in-solar-power> (last visited on Jul. 7, 2010) (discussing federal Tribal Energy Program, the \$16.5 billion it has provided, and that federal law provides up to \$20 billion for the Program annually); see Ferrey notes 1, 2, 7, 9 *supra* at 546.

<sup>11</sup> Milton Freidman, *Quantity Theory of Money*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 3, 3-20 (John Eatwell et al. eds., 1987).

<sup>12</sup> E.g., note 11 *supra*; see Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187, 211 (1998) (discussing economic principle that successful tribal economic development generally has net positive effect on surrounding economies); see also NICHOLAS B. BEALES & L. AUBREY DREWRY, JR., MONEY, THE MARKET, AND THE STATE 35-44 (1968) (discussing monetary velocity cycles).

<sup>13</sup> GDP is the total market value of all final goods and services produced within a given jurisdiction (e.g., a country, Tribal Nation, state, or territory) during a finite term, usually one year. Furthermore, a jurisdiction's per capita GDP is a common—perhaps the most common—measure used to indicate standards of living. GDI is the total income collected across a jurisdiction's economy, minus subsidies.

<sup>14</sup> See, e.g., Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination, 40 C.F.R. Part

52 (2011); see also, e.g., National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (proposed Jan. 19, 2010) (to be codified at 40 C.F.R. pts. 50, 58); Thomas Pyle, *EPA's Proposed Ozone Regulation Could Cost \$1 Trillion*, U.S. NEWS & WORLD REPORT, Aug. 25, 2011, available at <http://www.usnews.com/opinion/blogs/energy-intelligence/2011/08/25/epas-proposed-ozone-regulation-could-cost-1-trillion>.

<sup>15</sup> See, e.g., Order Remanding PSD Permit to EPA, *In re Desert Rock Energy Company, LLC, PSD Appeal Nos. 08-03, 08-04, 08-05, 08-06* at 1 and 78 (EAB Sept. 24, 2009); Motion of EPA Region 9 for Voluntary Remand, *In re Desert Rock Energy Company, LLC, PSD Permit No. AZP 04-01, PSD Appeal Nos. 08-03, 08-04, 08-05, 08-06* (EAB Apr. 27, 2009).

<sup>16</sup> E.g., Brief for the State of New Mexico in Reply to DPA *et al.*, *In re Desert Rock Energy Company, LLC, PSD Permit No. AZP 04-01, PSD Appeal Nos. 08-03, 08-04, 08-05, 08-06* at 2 (EAB Feb. 19, 2009); see also *Desert Rock Energy Co., LLC, et al. v. U.S. EPA, et al.*, CIV.A. No. 4:08-CV-872, 2008 WL 4399647 (S.D. Tex. Aug. 1, 2008) (providing verdict, agreement, and settlement between parties, as well as Stipulation of Dismissal).

<sup>17</sup> E.g., *Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998) (per curiam); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977); *Dine' C.A.R.E., et al. v. Klein*, 676 F.Supp.2d 1198 (D. Colo. 2009); Petition for Review, *In re Desert Rock Energy Company, LLC, PSD Permit No. AZP 04-01* (EAB Aug. 30, 2008).

<sup>18</sup> See generally STELLA U. OGUNWOLE, U.S. DEP'T OF COM., U.S. CENSUS BUREAU, WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES, CENSUS 2000 SPECIAL REPORTS (Feb. 2006), available at <http://www.census.gov/population/www/socdemo/race/censr-28.pdf>.

<sup>19</sup> See Shilling and Esmundo notes 7, 9 *supra* at 1771; see Ferrey notes 1, 2, 7, 9, 10 *supra* at 546; see also Woody notes 7, 9 *supra* at B1; RENEWABLE ENERGY RESEARCH LAB., UNIV. OF MASSACHUSETTS AT AMHERST, note 9 *supra* at 2-3; see generally Boyle note 9 *supra*.

The Indian Law Section of the State Bar sincerely thanks all of the members that participated and volunteered to mentor the UNM NALSA students. This mentorship provides a much-needed opportunity for the students to network with attorneys involved and interested in Indian law and gain experienced insight into this field of law. Thank you, mentors.

# <sup>1</sup>Dramatically Narrowing RFRA’s Definition of “Substantial Burden” in the Ninth Circuit— The Vestiges of *Lyng v. Northwest Indian Cemetery Protective Association in Navajo Nation et al. v. United States Forest Service et al.*

Zackeree S. Kelin  
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“The Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place. We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred.”



*Navajo Nation et al. v. United States Forest Service et al.*, 479 F.3d 1024, 1048 (9th Cir. 2007) (Fletcher, J.), *rev’d* 535 F.3d 1058 (9th Cir. 2008) (en banc).

“The only effect of the proposed upgrades is on the Plaintiffs’ subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs’ religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a ‘substantial burden’ on the free exercise of religion.”

*Navajo Nation et al. v. United States Forest Service et al.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc).

## I. INTRODUCTION

For the United States Court of Appeals for the Ninth Circuit, the protections afforded under the Religious Freedom Restoration Act are triggered only when the government forces individuals to choose between following the tenets of their religion and receiving a governmental benefit, or coerces them to act contrary to their religious beliefs by the threat of civil or criminal sanctions. No other type of governmental action triggers RFRA’s compelling interest test in the Ninth Circuit.

This test, the most stringent among the federal circuits which are themselves divided on how to properly define a substantial burden under RFRA, was announced in *Navajo Nation et al. v. United States Forest Service et al.*<sup>1</sup> *Navajo* was a sacred lands case brought by several Native American tribes to challenge the United States Forest Service’s approval of a plan for a commercial ski resort to use treated sewage effluent to make artificial snow to form a base for skiing on the San Francisco Peaks—a mountain held sacred by at least thirteen Native American tribes and hundreds of thousands of Native Americans. Just as the Native American religious claims in *Navajo* were cut off at RFRA’s threshold,

this restrictive test appears to cut off many other free exercise claims, raising the question of whether the standard comports with the broad remedial purposes of this legislative effort to protect the free exercise of religion.

The Ninth Circuit’s narrow interpretation of “substantial burden” stems from the overstated policy concerns articulated in the pre-*Smith* case of *Lyng v. Northwest Indian Cemetery Protective Association*<sup>2</sup> and is inconsistent with the religious freedom protections found in *Sherbert v. Verner*<sup>3</sup> and *Wisconsin v. Yoder*<sup>4</sup> that RFRA sought to restore. Furthermore, the case exposes the tension that results when protection of land-based religious beliefs is evaluated in a nation built on an ownership-based Western approach to land. The Ninth Circuit seemed uncomfortable with the proposition of extending RFRA’s protections to the way in which Native Americans worship, *i.e.*, where essential elements needed to practice these religions – land and other natural resources – are controlled by the government. As a result of what appears to be a policy-driven outcome, many more religious freedom claims outside the context of Native American religion will be cut off, as the triggering mechanism for application of the compelling interest test is now far more difficult to satisfy in the Ninth Circuit.

The test has also solidified the entrenched conflict among the federal circuits as to how to define a substantial burden under RFRA.

## II. The Religious Freedom Restoration Act (RFRA)

The Religious Freedom Restoration Act<sup>5</sup> (RFRA) prevents the Government from imposing a substantial burden on a person's exercise of religion unless it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>6</sup> The legislation was passed in 1993 in response to a series of cases brought under the Free Exercise Clause of the First Amendment that excluded whole categories of governmental action from strict scrutiny analysis. This development culminated in the Court's holding in *Employment Division v. Smith*,<sup>7</sup> where the Court observed that, "[i]n recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all."<sup>8</sup> This included refusing to apply the test to prison regulations,<sup>9</sup> the administration of "facially neutral and uniformly applicable" administration of welfare programs,<sup>10</sup> military regulations,<sup>11</sup> and Government land use decisions.<sup>12</sup> In *Smith*, the Court upheld the application of an Oregon law denying unemployment benefits to members of the Native American Church who failed a drug test as a result of taking part in the peyote sacrament. The Court concluded that, unless a case invokes multiple constitutional interests, so-called "hybrid" cases, the Constitution did not require the Government to come forward with a compelling governmental interest to justify generally applicable actions that interfere with religious practices. As the Court noted, however, Congress could impose such a standard through legislation.<sup>13</sup> With RFRA, Congress proposed to do just that.

RFRA aims to strike a "sensible balance[] between religious liberty and competing prior governmental interest[s]"<sup>14</sup> by "restor[ing] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."<sup>15</sup> No categories of governmental action are excluded from RFRA's protections.<sup>16</sup> When passing RFRA, Congress specifically found that *Smith* had "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and that "the compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."<sup>17</sup>

As recognized by the Supreme Court in *City of Boerne v. Flores*,<sup>18</sup> RFRA provides protections beyond those provided under the First Amendment. "Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion."<sup>19</sup> It is designed to protect, for ex-

ample, against "autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, (citations omitted) ... zoning regulations and historic preservation laws" that have, as an incidental effect of their normal operation, "adverse effects on churches and synagogues."<sup>20</sup> The statute was designed so broadly that it was held to go beyond Congress' power under Section 5 of the Fourteenth Amendment and found to be unconstitutional as applied to the states.<sup>21</sup>

In the eighteen years since RFRA was passed, the Supreme Court has never taken the occasion to clarify what the statutory phrase "substantial burden" means. Meanwhile, the circuit courts have become divided over the issue, and at some point, the Court or Congress will have to step in and clarify exactly how the statute's protections are triggered.

## III. Ramifications of the 9<sup>th</sup> Circuit's New Standard on Native American Religions

The Ninth Circuit's stringent standard for substantial burden poses serious problems for the religious freedom of Native Americans as well as many others.

### A. Effect on Native American Religion Claims— The Problem of *Lyng*

The problem for Native American RFRA claimants under the Ninth Circuit's standard is that they never get past the starting gate. By raising the bar for substantial burden so high, land-based religion claims will never be able to see their way beyond a Motion to Dismiss. The government will never have to provide a compelling interest for any actions on its own land. Judge Fletcher in the three-judge panel pointed out this problem so well:

The Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place. We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred.<sup>22</sup>

In dissent to the en banc majority, Judge Fletcher described the "tragic irony" of the majority's justification of its decision based on the fact that "public park land" is land that "belongs to everyone" while such land was taken by force from Native Americans.<sup>23</sup> Then that same taking is used as a justification for desecrating the mountain with treated sewage effluent.<sup>24</sup> In response, Judge Fletcher in essence offers a lament:

RFRA was passed to protect the exercise of all religions, including the religions of American Indians. If Indians' land-based exercise of religion is not protected by RFRA in this

case, I cannot imagine a case in which it will be. I am truly sorry that the majority has effectively read American Indians out of RFRA.<sup>25</sup>

The majority opinion may see Judge Fletcher's statement as hyperbole, but it hits upon the reality that Native American religion faces an uphill battle for protection in a legal system that is based on a Western property rights structure.

The *Navajo Nation* decision had an immediate impact on the religious freedom of Native Americans within the Ninth Circuit's jurisdiction. In *Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission*,<sup>26</sup> the Ninth Circuit applied its restrictive test set out in *Navajo Nation* to a tribe's challenge to the relicensing of a hydroelectric project. The tribe argued that the project would:

prevent[] the Tribe from having necessary religious experiences in three ways: its operation deprives the Tribe of access to the Falls for vision quests and other religious experiences, eliminates the mist necessary for the Tribe's religious experiences, and alters the ancient sacred cycle of water flowing over the Falls.<sup>27</sup>

The tribe filed a petition for review of an order of the Federal Energy Regulatory Commission (FERC), claiming, *inter alia*, that FERC had applied the wrong standard for substantial burden in its RFRA analysis and that its conclusion that the project does not substantially burden the tribe's religious exercise was not supported by substantial evidence.<sup>28</sup> Finding *Navajo Nation's* "narrower definition" of substantial burden to be "dispositive," the Ninth Circuit concluded that FERC had actually applied a definition of substantial burden that was more favorable to the tribe. In applying the test, the court stated:

The Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction.<sup>29</sup>

Because the tribe would not lose a government benefit or face civil or criminal sanctions, the court found no substantial burden.<sup>30</sup>

The land use concerns at the heart of *Lyng* and *Navajo Nation* (e.g. that allowing such claims would give certain religious groups a right to essentially veto of any land use decision) are consistently overstated – they are largely a matter of theory rather than fact. In the *Navajo* case itself, every single recreational activity that is occurring on the Peaks could continue if the project does not go through. The reality is that the government, through negotiations between federal land managers

and religious practitioners, routinely resolves conflicts without overburdening the government's ability to manage land. As Amici National Congress of American Indians pointed out:

[T]he vast majority of land-use conflicts have been resolved long before the need to file legal actions in court. The meaningful accommodation achieved at the Medicine Wheel National Historic Landmark in the Bighorn National Forest in Wyoming provides a specific example of a workable solution between federal land managers and various tribes and American Indian religious practitioners who hold sacred the Medicine Wheel and Medicine Mountain. A 1996 Medicine Wheel/Medicine Mountain Historic Preservation Plan was prepared "to ensure the Medicine Wheel and Medicine Mountain are managed in a manner that protects the integrity of the site as a sacred site and a nationally important traditional cultural property." These accommodations were mutually agreeable to the American Indian religious interests, to the Big Horn County Commissioners who were concerned about access to commodity, recreational, and tourist uses, and to the U.S. Forest Service charged with management of the area. . . . Other success stories include the Devil's Tower National Monument (Wyoming) voluntary climbing ban in June of each year, and the Rainbow Bridge National Monument (Arizona) interpretative signage and road closures for American Indian sacred ceremonies.<sup>31</sup>

Indeed, the federal government, pursuant to Executive Order 13007 on Indian Sacred Sites, has already committed itself to "1) accommodat[ing] access to and ceremonial use of Indian sacred sites by Indian religious practitioners and 2) avoid[ing] adversely affecting the physical integrity of such sites."<sup>32</sup> And it is already supposed to be the policy of the federal government to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rights."<sup>33</sup> As these examples and policies show, the government is able to accommodate Native religious practices without overburdening its ability to use federal land. Thus, the policy fears that cut the tribal claims off at RFRA's threshold are largely unfounded.

This type of religious accommodation is certainly not limited to Native peoples. The truth is that the government is able to manage many religious properties and activities on public land every single day without significant problems. This includes "historic mission churches in the southwest, small churches in the Shenandoah Valley...Arlington National Cemetery, and even historic churches in cities."<sup>34</sup>

This is also not limited to land. Indeed, in other contexts where government controls the essential elements of religious practices – including prisons - they are still able to balance those

interests and protect religious freedom. And the fact remains that, despite the compelling interest test being described as the most demanding of constitutional standards, the government has met the test in *seventy-two* percent of the RFRA and RUIL-PA cases brought before the federal courts.<sup>35</sup> There is little reason to think that outcomes will be different when it comes to land use decisions.

## VII. CONCLUSION

In the end, The Ninth Circuit test does not protect all religious practices as RFRA mandates. It protects religious practices only in two situations: (1) where the practitioner is coerced to violate his/her religious beliefs under the threat of civil or criminal penalties; or (2) where the practitioner would be forced to choose between his/her religious belief and receiving public benefits. If one's religious practice is currently in conformity with the law or welfare qualifications, the government can, according to the Ninth Circuit, stop that practice without triggering RFRA's compelling interest test. In *Navajo Nation*, the government itself controlled the instrumentalities (water, land, plats, etc.) of the plaintiffs' religious practices. However, under the Ninth Circuit's standard, it is not even sufficient to show that the government's action can put an end to a religious exercise because the effect of the government's action is of no legal consequence in the Ninth Circuit. Instead, the focus is on the type of government action involved.

It is difficult to reconcile the Ninth Circuit test with RFRA's language or its remedial purpose. Interestingly, in *Commanche Nation v. United States*,<sup>36</sup> the Tenth Circuit specifically refused to apply the Ninth Circuit's narrower test in a sacred lands context.<sup>37</sup> The Ninth Circuit's narrower test was created based on the hypothetical policy concerns articulated in *Lyng*—a parade of horrors that remains a matter of theory rather than fact. As a result of these overstated land management concerns, the Ninth Circuit has unnecessarily devised a test that has the potential to extinguish many claims at the starting gate, rather than striking the sensible balance between religious liberty and governmental interests that RFRA requires.

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### Endnotes

<sup>†</sup>This article presents excerpts from an article appearing in the South Dakota Law Review, Volume 55, 2010. It has been reprinted with the permission of the law review and the authors. © 2009 by Zackeree Kelin and Kimberly Younce Schooley. Before founding the Kelin Law Firm, P.C. and becoming Of Counsel with the Stetson Law Offices, Zackeree S. Kelin was the managing Attorney at the Fort Defiance, Arizona office of DNA-People's Legal Services, Inc. (hereinafter "DNA"). Kimberly Younce Schooley is an Adjunct Faculty in Philosophy and English at San Juan College. They both served as counsel to the

Hualapai Tribe, Bill "Bucky" Preston, and Norris Nez, Sr. in *Navajo Nation et al. v. United States Forest Service et al.*

<sup>1</sup> 535 F.3d 1058 (9th Cir. 2008) (en banc).

<sup>2</sup> 485 U.S. 439 (1988).

<sup>3</sup> 374 U.S. 398 (1963).

<sup>4</sup> 406 U.S. 205 (1972).

<sup>5</sup> 42 U.S.C. § 2000bb-1(a).

<sup>6</sup> *Id.*

<sup>7</sup> 494 U.S. 872 (1990).

<sup>8</sup> *Id.* at 883.

<sup>9</sup> O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

<sup>10</sup> Bowen v. Roy, 476 U.S. 693, 707 (1986) (Burger, J., for plurality).

<sup>11</sup> Goldman v. Weinberger, 475 U.S. 503, 506-07 (1986).

<sup>12</sup> Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

<sup>13</sup> *Smith*, 494 U.S. at 890.

<sup>14</sup> 42 U.S.C. § 2000bb(a).

<sup>15</sup> 42 U.S.C. § 2000bb(b) (emphasis added).

<sup>16</sup> Although there has been some discussion about RFRA's application to government land use decisions, all courts to consider the issue conclude that the statute does apply to such actions. See *Southfork Band, et al. v. United States Dept. of Inter.*, 643 F.Supp 2d 1192, 1198 (D. Nev. 2009).

<sup>17</sup> 42 U.S.C. § 2000bb(a).

<sup>18</sup> 521 U.S. 507, 532-35 (1997).

<sup>19</sup> *Id.* at 532.

<sup>20</sup> *Id.* at 531 (citing RFRA's legislative history).

<sup>21</sup> *Id.* at 536.

<sup>22</sup> *Navajo Nation et al. v. United States Forest Service et al.*, 479 F.3d 1024, 1048 (panel opinion).

<sup>23</sup> *Navajo Nation*, 535 F.3d at 1113 (Fletcher, J., dissenting).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1113-14.

<sup>26</sup> 545 F.3d 1207 (9th Cir. 2008).

<sup>27</sup> *Id.* at 1213.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1214.

<sup>30</sup> *Id.* at 1214-15.

<sup>31</sup> See Brief of National Congress of American Indians as Amici Curiae Supporting of Petition for a Writ of Certiorari, at 9, *Navajo Nation v. United States Forest Service*, 129 S.Ct. 2763 (2009) (No. 08-846) (internal citations omitted).

<sup>32</sup> Exec. Order No. 13,007, 61 FR 26771 (1996).

<sup>33</sup> American Indian Religious Freedom Act, 42 U.S.C. 1996 (2008).

<sup>34</sup> Eric W. Treene, *Religion, the Public Square, and the Presidency*, 24 HARV. J.L. & PUB. POL'Y, 573, 588 (2001).

<sup>35</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 860 (2006).

<sup>36</sup> No. CIV-08-849-D, 2008 WL 4426621(W.D. Okla. Sept. 23, 2008).

<sup>37</sup> *Id.* at \*3 n.5.

# Message from a Bar Scholarship Recipient

Veronique Richardson

It was always one of my goals to go to law school and become a lawyer. Finally in 2008, I was admitted to the University of New Mexico School of Law (UNMSOL), just forty miles west from my Pueblo, the Pueblo of Laguna.

To my grandparents and parents, obtaining a higher education, especially a graduate level degree, was a special achievement academically, culturally and socially. Thus, the principle source of my academic achievements, going to law school, graduating from law school and passing the New Mexico bar all stem from the support of my family in addition to my new extended “family” consisting of my peers, mentors, and friends in the legal field. Today, they also continue to be the driving force behind my career endeavors to become a successful Native woman lawyer. Most recently, I have reflected on the past three years and realized just how blessed and grateful I am to have had the emotional, physical and monetary support thus far in order to complete my academic career and begin a new legal career.

Prior to coming to law school, I did not personally know a lawyer although I did watch the occasional reruns of Law and Order and criminal investigative based television shows. In the summer of 2008, I was accepted into the Pre-Law Summer Institute for Native Americans, a program directed by the American Indian Law Center and hosted at the UNM School of Law. In the fall of 2008 I began my 1L year. Although I was told that the first year was a law student’s most challenging and vigorous year, I actually found all three years to be demanding. That being said, I found healthy and productive outlets to balance my school workload such as physical activities, educational outreach opportunities as well as networking with other attorneys in various fields of law. I was afforded many opportunities that allowed me to network with numerous legally trained advocates and a growing consortium of Native attorneys, some of who I consider my mentors and personal friends. I found that through my involvement in the Native American Law Student Association, the Women’s Law Caucus, the Tribal Law Journal, the Southwest Indian Law Clinic and finally the Indian Law Section of the State Bar of New Mexico, these activities facilitated the access to academic and professional opportunities in the legal field and legal community that I lacked entering law school.

Equally as fulfilling to me was the value of “giving back” that I learned by serving in each of these capacities. I was able to see that beyond legal advice and representation, part of an attorney’s work is to also spend quality time within the community. Fund raising events, clothing drives, high school student outreach, undergraduate student outreach, social mixers and networking both within and outside the law school and around the larger community are all activities that encompass an aspiring attorney’s practice.

Most of my experiences here helped me understand that although it has been my ultimate goal to provide legal assistance to my tribe and other Natives alike in the many fields of law, it has also reminded me that I too am a part of this same larger community I wish to assist, especially with my own tribe. Not only has it been important for me to maintain the connection to my tribe over the past few semesters, but I made efforts to make it a priority. I often made and still make the drive home to Laguna visiting with my family and friends, making sure I was at the dances both dancing and praying or helping my family prepare and feed; I frequented several village meetings, and even made time to join a recreational Laguna basketball league hosted by the Laguna Education Foundation in spring 2009, 2010 and 2011.

All of these activities that I participated in helped me maintain a balance between being a law student and being a part of a larger Native community not only at school but at home as well. This practice I hope will continue into my professional life. This connection with my home and the relationships that I have built and reinforced with my fellow tribal members and the UNMSOL community at large, make me feel as if I have their support, which in turn means that I have the people’s support to be a successful attorney; in a sense when I succeed so too do they. That being said, I could not have afforded, both literally and figuratively speaking, taking advantage of these opportunities had I not been given the financial support as well as the emotional support from the various networking and peer groups that I became a part of during law school.

This past summer I studied for the New Mexico state bar exam. I fortunate enough to be selected to receive two scholarships in order to study for the bar on a full time basis, one from the Indian Law Section of the NM State Bar and another from the American Indian Graduate Center. Although it was a painful and draining summer full of 8-12 hour days of studying for ten weeks, memorizing, eating, sleeping and thinking criminal law, torts, property, etc. it was worth all the hard work. Now with the bar behind me I can look forward to a professional legal career ideally in the Indian law and tribal law fields of law.

Graduating law school and passing the bar exam could not have been at all possible without the support network of my friends and family. Not only does their support and encouragement make me want to work hard, but also having the support of a close knit community encourages me to think with my head and to lead with what is in my heart. I entered law school personally not knowing a single lawyer and left law school knowing an entire room of attorneys and also becoming a lawyer myself. Being the first in my family to achieve this goal I am always reminded that when the opportunity arises it is my role as a Laguna woman attorney to always give back and to serve the community that has always supported me.

The State Bar of New Mexico Indian Law Section sincerely thanks all of its donors that contributed to its 2011 scholarship fund:

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The Indian Law Section congratulates  
**Natasha Cuylear** and **JoEtta Toppah** on receiving the  
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*Congratulations Natasha and JoEtta!*



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