Legislative and Litigation Update
Arizona State Bar Convention
Indian Law Seminar 2006
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Federal Legislation

Public Law 109-18

Patient Navigator Outreach and Chronic Disease Prevention Act of 2005 (H.R. 1812). This Act makes the Indian Health Service and tribal health programs eligible recipients under a five-year grant program to help low-income patients find and access all health care resources available to them.

Public Law 109-47

Colorado River Indian Reservation Boundary Correction Act (H.R. 794). This Act restores the La Paz lands, 15,375 acres, to the Colorado River Indian Reservation by correcting the southern boundary of the Reservation. The Act provides for continued public recreation use on the land and specifies that the land is not taken into trust for gaming purposes. The restored lands do not include any federal reserved water rights.

Public Law 109-58

Energy Policy Act of 2005 (H.R. 6). This comprehensive Act is over five hundred pages. Titles II, V, XV, and XVIII directly impact tribes.

Title V, the "Indian Tribal Energy Development and Self-Determination Act of 2005" amends the Department of Energy Organization Act and the Energy Policy Act of 1992 to establish the Office of Indian Energy Policy and Programs to promote Indian energy activities and tribal energy resource development through a program of grants and loans. The following are the key provisions in Title V:

- Establishes a comprehensive Indian energy program in the Department of Energy.
- Authorizes a broad variety of resources for tribes and tribal organizations to access for energy development purposes.
- Establishes a framework to permit tribes to assume primary authority for approvals of leases, rights-of-way, and other business agreements relating to energy development.

Title V provides a specific set of criteria that tribes must follow to enter into Tribal Energy Resource Agreements (TERA) with the Secretary of the Interior, which is intended to govern the manner in which a tribe considers, reviews and approves energy-related leases, rights-of-way, and other business agreements. Once the Secretary of the Interior approves a Tribe's TERA, the federal government will not have a direct role in approving any energy related leases, rights-of-way and/or other business agreements. A tribe's administration of such processes will prevent a tribe from suing the federal government from problems resulting from the agreements.

Section 505 specifically makes the Dine Power Authority, a Navajo Nation Enterprise, eligible to receive grants and other assistance for development of a transmission line from the Four Corners Area to southern Nevada.

Another important tribal provision in the Act is **Section 1813**, which requires the Department of Interior and Department of Energy to conduct a study concerning energy rights-of-way on tribal land and to report the findings to Congress by August 7, 2006. Both Departments issued notices in the Federal Register seeking public comments on how to carry out the implementation of the one-year study.

Section 1529 instructs the EPA Administrator, in coordination with Indian tribes, to develop and implement a strategy to take necessary corrective action in response to releases from leaking underground storage tanks on tribal lands.

Public Law 109-126

To direct the Secretary of Interior to convey certain land held in trust for the Paiute Indian Tribe of Utah to the City of Richfield, Utah, and for other purposes (H.R. 680). The Act directs the Secretary of Interior to take land out of federal trust and transfer it to the City of Richfield. The Act also provides that land taken into trust after 1984 shall be considered part of the Tribe's reservation.

Public Law 109-133

Senator Pete Domenici (R-NM) introduced this legislation (S. 279) to clarify criminal jurisdiction on Pueblo lands. This Act amends the Pueblo Lands Act of 1924 to designate jurisdiction over offenses committed within the exterior boundaries New Mexico Pueblo tribal land granted to such Pueblo by a prior sovereign to: (1) the Pueblo for any offense committed by a member of the Pueblo, an Indian, or any Indian-owned entity; (2) the United States for any specified federal offense that is committed by or against an Indian or any Indian-owned entity, or that involves any Indian property or interest; and (3) the state of New Mexico for any offense committed by a non-Indian, if the offense is not subject to U.S. jurisdiction.

Public Law 109-136

Native American Housing Enhancement Act of 2005 (H.R. 797). Representative Rick Renzi (R-AZ) introduced this measure to amend the Native American Housing Assistance and Self-Determination Act of 1996 and other Acts to improve housing programs for Indians. Pursuant to the Act, the Secretary of Housing and Urban Development is prohibited from restricting access to housing grants for any Indian tribe based solely on: (1) whether the recipient for the tribe retains program income; (2) the amount of any such program income retained; (3) whether the recipient retains certain reserve amounts; or (4) whether the recipient has expended retained program income for housing-related activities.

The Act exempts federally recognized Indian Tribes from Title VI of the Civil Rights Act of 1964 (nondiscrimination under federally assisted programs) and Title VIII of the Civil Rights Act of 1968 (Fair Housing). The Act also amends the Cranston-Gonzales National Affordable Housing Act to make Indian tribes, tribally designated housing entities, or other agencies primarily serving Indians eligible for Youthbuild grants.

Public Law 109-147

Representative Raul Grijalva (D-AZ) introduced H.R. 327 to allow binding arbitration clauses to be included in all contracts, including leases, affecting land within the Gila River Indian Community Reservation.

Public Law 109-157

Indian Land Probate Reform Technical Corrections Act of 2005 (S. 1481). This Act makes technical corrections to the Indian Land Consolidation Act.

Public Law 109-158

Senator John McCain (R-AZ) introduced S.1892 to amend Public Law 107-153 to modify a certain date extending the statute of limitations in which to file for settlement of tribal trust fund claims. Public Law 107-153 provided that for purposes of determining the date on which an Indian tribe received a certain reconciliation report for purposes of applying a statute of limitations, any such report provided to or received by an Indian tribe in response to specified requirements under the American Indian Trust Fund Management Reform Act of 1994 shall be deemed to have been received no earlier than December 31, 1999. This Act extends the date of December 31, 1999, to December 31, 2000, the earliest date on which the Indian tribe shall be deemed to have received the reconciliation report.

Proposed Federal Legislation

H.R. 4322 and S.1439, Indian Trust Reform Act of 2005.

Two bills have been introduced to tackle Indian Trust Reform; similar bills were introduced by Representative Pombo (R-CA) and Senator McCain (R-AZ). The Indian Trust Reform Act of 2005 provides for Indian trust asset management reform, the resolution of historical accounting claims, and for other purposes. The bill establishes the "Individual Indian Accounting Claim Settlement Fund" in the general fund of the Treasury. The Fund shall be administered by a Special Master appointed by the Secretary of the Treasury. The bill requires the Special Master to distribute at least 80% of amounts in the Fund to individual claimants.

The Indian Trust Asset Management Review Commission is established to assess federal laws and regulations, and the practices of the Department of the Interior relating to the management and administration of Indian trust assets. The bill directs the Secretary of the Interior to establish an eight-year Indian Trust Asset Management Demonstration Project Act among other things.

The Senate Committee on Indian Affairs has held several hearings on the bills.

H.R. 4766, Native American Languages Preservation Act of 2006.

Representative Heather Wilson (R-NM) introduced this bill on February 15, 2006 to amend the Native American Languages Preservation Act; Representative Hayworth (R-AZ) is a cosponsor. This bill has been referred to the Subcommittee on Education Reform. The bill seeks to revitalize Native American languages through education by creating Native American language nests (site-based educational programs for families) and Native American Survival Schools (site-based educational programs in which a Native American language is dominant). The Secretary of Education is required to make grants to, or enter into contracts with tribal organizations, tribal governments, and Native American language colleges that demonstrate the potential to become Native American language educational organizations in order to establish Native American nests that meet special requirements for students under the age of seven and families of the students. The bill also requires the Secretary of Education to make grants to or enter into contracts with organizations to operate, expand and increase the number of Native American language survival schools. Under this bill, one demonstration program shall be established at a Carnegie Research-Extensive University to provide assistance to Native American language survival schools and Native American language nests. The bill directs that adequate funds be appropriated to carry out the purposes of this bill for fiscal years 2007-2012. The term Native American includes Indians, Native American Pacific Islanders, Native Hawaiians, and Alaska Natives.

S. 2674, Native American Languages Amendments Act of 2006.

Similar to H.R. 4766. Senator Akaka (D-HI) introduced this bill on April 27, 2006. Cosponsors include Senator Max Baucus (D-MT), Senator Tim Johnson (D-SD), Senator Byron Dorgan (D-ND), and Senator Inouye (D-HI). This bill has been referred to the Committee on Indian Affairs. The significant differences between this bill and H.R. 4766 are:

- Establishes at least 4 demonstration programs in geographically diverse locations to provide assistance to Nests and Survival Schools and participate in a national study on the linguistic, cultural, and academic effects of Nests and Survival Schools.
- Provides Nests and Survival Schools with alternative methods of achieving national education standards with respect to Native American Language education.
- Establishes criteria to certify and designate eligible professionals at Nests and Survival Schools for the Secretary's approval.

H.R. 5222, Native American Languages Amendments Act of 2006.

Representative Ed Case (D-HI) introduced H.R. 5222 on April 27, 2006. This bill has been referred to the House Committee on Education and the Workforce. The bill provisions are similar to S. 2674.

S. 2245, Indian Youth Telemental Health Demonstration Project Act of 2006.

This legislation authorizes the Secretary of Health and Human Services to carry out a demonstration project to award up to five grants to Indian tribes or tribal organizations for the provision of telemental health services to Indian youth who have expressed suicidal ideas, have attempted suicide, or have mental health conditions that increase or could increase the risk of suicide. The bill indicates that suicide rates for Native Americans and Alaska Natives is two and half times higher than the national average.

Senator Byron Dorgan (D-ND) is the bill sponsor; Senator John McCain (R-AZ) is one of the cosponsors. The bill is accompanied by Senate Report 109-250. The Senate passed S. 2245 on May 11, 2006 by unanimous consent; the House or Representatives is currently considering this bill.

S. 1057, Indian Health Care Improvement Act Amendments of 2005.

This legislation amends the Indian Health Care Improvement Act to declare a new national Indian health policy in order to: (1) raise the health status of Indians by 2010 to at least the levels set forth in the goals contained within the Healthy People 2010 or successor objectives; and (2) allow Indians, to the greatest extent possible, to set their own health care priorities and establish goals that reflect their unmet needs. Among other things, the legislation extends the designation of Arizona as a contract health service delivery area through FY2015.

Senator McCain (R-AZ) introduced S. 1057 on May 15, 2005. It was reported out of the Senate Committee on Indian Affairs on March 16, 2006. Representative Don Young (R-AK) is planning to introduce a separate bill in the House of Representatives.

S. 2464, Fort McDowell Indian Community Water Rights Settlement Revision Act of 2006.

On March 28, 2006, Senator McCain (R-AZ) introduced this legislation to cancel the Fort McDowell Yavapai Nation's obligation to repay the loan made under section 408(e) of the Fort McDowell Water Rights Settlement Act (104 Stat. 4489).

H.R. 5386, Interior Appropriations.

Representative Charles Taylor (R-NC) introduced the FY2007 appropriations bill for the Department of the Interior, environment, and related agencies on May 15, 2006. The House of Representatives passed the legislation on May 19, 2006. The legislation is accompanied by House Report No. 109-465.

H.R. 5386 funds the Department of Interior at higher levels than requested by the Bush Administration. The legislation funds Indian programs at a total of $5.9 billion, $204 million above current levels, and $62 million above the amount the White House requested in February. The White House sought to eliminate the entire urban Indian health program and all Johnson O'Malley education grants. The House bill restores funds for urban health and the Johnson O'Malley Indian Education Program. The bill funds IHS at $2.83 billion for 2007, a $138 million increase over current levels and $7.6 million above the Bush administration's request. BIA programs are included at $2 billion, an increase of $11.2 million increase over current levels and $6.8 million above the Bush administration's request. The Office of Special Trustee is funded at $150 million, a reduction of $35 million.

S. 1291, Pascua Yaqui Mineral Rights Act of 2005.

Senator McCain introduced S. 1291 on June 23, 2005. It was reported out of the Senate Committee on Indian Affairs on July 29, 2005. This legislation directs the Secretary of the Interior, in coordination with the Attorney General and with the consent of the State of Arizona, to acquire all subsurface rights, title, and interests held by the state in specified tribally-owned parcels and in specified parcels held in trust for the benefit of the Tribe. The Secretary is required to pay the state an amount equal to their market value. The Secretary is then directed to take the subsurface rights, title, and interests, formerly reserved to the United States into trust for the benefit of the Tribe.

H.R. 4975, Lobbying Accountability and Transparency Act of 2006 or 527 Reform Act of 2006.

On May 3, 2006, the House of Representatives passed H.R. 4975 in response to ethics and lobbying scandals on Capitol Hill. The bill requires members of Congress to obtain pre-approval from the House Ethics Committee for privately financed travel, subjects the secretive earmark appropriations to public disclosure, and requires lobbyists to post quarterly internet reports on their campaign contributions and gifts to lawmakers and staff. The bill also limits individual contributions to Section 527 nonprofit advocacy measures.

S. 2349, Legislative Transparency and Accountability Act of 2006.

Similar to H.R. 4975, this bill was introduced to provide greater transparency in the legislative process. This bill passed the Senate on March 30, 2006.

S. 2128, Lobbying Transparency and Accountability Act of 2005.

Senator McCain (R-AZ) introduced S. 2128. This bill is similar to the other lobbying reform bills; it was placed on the Senate calendar on March 3, 2006.

S. 477, Tribal Government Amendments to the Homeland Security Act of 2002.
Senator Dorgan (D-ND) introduced this legislation to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security. No action has been taken on this bill since it was introduced in March 2005.

S. 1003, Navajo-Hopi Land Settlement Amendments of 2005.
Senator McCain (R-AZ) introduced S. 1003 in May 2005. The bill has passed the Senate and is now in the House of Representatives. The House Committee on Resources has requested comments from Interior. Among other things, the legislation (1) repeals authority and requirements for appointment of Navajo and Hopi relocation negotiating teams because all such requirements have been fulfilled; (2) revises requirements for the partition of the Navajo and Hopi Joint Use Area of the 1882 Reservation; (3) revises requirements for the exchange of land, at the discretion of the Secretary of the Interior, between the United States and the Navajo Nation; (4) terminates the authority of the Commissioner of the Office of Navajo and Hopi Indian Relocation (ONHIR) to select lands to be transferred to or acquired by the Navajo Tribe on September 20, 2008; (5) authorizes the Commissioner to grant a homesite lease on land acquired under such Act to a member of the extended family of a Navajo Indian eligible to receive benefits under such Act but prohibits the Commissioner from using any available funds to provide housing to such an extended family member; (6) terminates ONHIR on September 30, 2008; (7) establishes an Office of Relocation in the Department of the Interior to replace ONHIR; (8) directs the Commissioner to notify the Secretary of any head of household eligible to receive benefits who has not received a replacement home; (9) requires the Commissioner to notify each eligible head of household who has not entered into a lease with the Hopi Tribe to reside on land partitioned to the Tribe; and (10) authorizes the Commissioner to begin construction of a replacement home on acquired land within 90 days after receiving notice of the imminent removal of a relocatee from land provided to the Hopi Tribe.

S. 1312, Reducing Conflicts of Interests in the Representation of Indian Tribes Act of 2005.
Senator McCain introduced this legislation on June 27, 2005 to amend the Indian Self-Determination and Education Assistance Act. The Act defines "tribal employee" as an individual acting under the day-to-day control or supervision of the Indian tribal government, unaffected by the control or supervision of any independent contractor, agency or organization, or intervening sovereignty. This bill has passed the Senate by unanimous consent and is now in the House of Representatives.

S. 1295, National Indian Gaming Commission Accountability Act.
Senator McCain introduced this legislation to amend the Indian Gaming Regulatory Act to provide for accountability and funding of the National Indian Gaming Commission. S. 1295 subjects the National Indian Gaming Commission to the Government Performance and Results Act of 1993. This legislation passed the Senate by unanimous consent on December 12, 2005 and referred to the House of Representatives.

S. 1374, Tribal Border Preparedness Pilot Program.
Senator McCain introduced this bill to amend the Homeland Security Act of 2002 to provide for a border preparedness pilot program on Indian land. No action has been taken on this bill since it was introduced in July 2005.

H.R. 4893, To amend section 20 of the Indian Gaming Regulatory Act to restrict off-reservation gaming.
Representative Richard Pombo (R-CA) introduced H.R. 4893 on March 7, 2006. The legislation amends Section 20 of the Indian Gaming Regulatory Act to revise requirements for gaming on lands taken in trust for the benefit of a newly recognized, restored, or landless Indian tribe.

S. 2078, Indian Gaming Regulatory Act Amendments of 2005.
In November 2005, Senator John McCain (R-AZ) introduced S. 2078 to amend the Indian Gaming Regulatory Act. Senator McCain seeks clarify the authority of the National Indian Gaming Commission to regulate class III gaming and to limit the lands eligible for gaming. The Senate Committee on Indian Affairs held hearings on March 8, 2006.

S. 1899, Indian Child Protection and Family Violence Prevention Act Amendments of 2005.
Senator McCain (R-AZ) introduced S. 1899 to reauthorize and amend the Indian Child Protection and Family Violence Prevention Act. This bill includes a four-year appropriations' reauthorization. The Secretary of the Interior is required to gather data. The bill provides for inter-agency coordination between the Indian Health Service and public and private medical or treatment organizations in the treatment and examination of children through the use of telemedicine. This bill also seeks to conform the Act to other federal child abuse reporting and confidentiality laws. This bill was reported out of the Senate Committee on Indian Affairs on May 18, 2006.

H.R. 9 and S. 2703, Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.
Two identical bills have been introduced to renew the expiring provisions of the Voting Rights Act ("VRA"). The legislation reauthorizes the expiring provisions of the VRA for an additional twenty-five years. It also restores the original intent of the Section 5 preclearance provisions, which was weakened by the Supreme Court's decisions in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). The expiring provisions include (1) Section 5 preclearance which requires states with a documented history of discriminatory voting practices to obtain approval from federal officials before they change election laws; (2) Section 203 which requires that election materials are translated for citizens with limited English proficiency; and (3) Sections 6-9 which grants the Attorney General the authority to send federal examiners and observers to monitor elections in order to prevent efforts to intimidate minority voters at the polls. The legislation does not reauthorize federal examiners, but it maintains observers. It also includes a provision for expert fees and other reasonable litigation expenses.

S. 147, Native Hawaiian Government Reorganization Act of 2005.
Senator Akaka introduced this legislation to recognize a Native Hawaiian government entity. The bill, among other things:

- Establishes the U.S. Office for Native Hawaiian Relations within the Office of the Secretary of the Interior.
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- Establishes the Native Hawaiian Interagency Coordinating Group.
- Recognizes the right of the Native Hawaiian people to reorganize the Native Hawaiian governing entity to provide for their common welfare and to adopt appropriate organic governing documents.
- Establishes a Commission to prepare and maintain a roll of the adult members of the Native Hawaiian community who elect to participate in such reorganization.
- Outlines the process for the reorganization, which includes forming a Native Hawaiian Governing Council.

The U.S. Civil Rights Commission recommended that senators reject the legislation. A draft of the commission's report said the measure "would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege."

The Civil Rights Commission Briefing is located at:
http://the.honoluluadvertiser.com/dailypix/2006/May/17/akakabill_briefreport.pdf
Governor Lingle's letter to Republican Senators is located at:
http://the.honoluluadvertiser.com/dailypix/2006/May/17/akakabill_lingleletter.pdf
State's Response to Civil Rights Commission Briefing is located at:
http://the.honoluluadvertiser.com/dailypix/2006/May/17/akakabill_stateresponse.pdf

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Arizona Legislation and Policy

Chapter 114, Laws 2006, Arizona Water Rights Settlements Act

Authorizes the Arizona Water Bank Authority ("AWBA") to act as the agent of the State of Arizona for purposes of implementing and meeting the state's obligations relating to firming the Indian settlement water supplies, and allows the AWBA to (1) deliver water directly to Indian communities; (2) store additional sources of water, including effluent and surface water other than Colorado River water; (3) distribute long-term storage credits to meet tribal water needs as required by the Indian firming program; (4) establish an account within the Arizona Water Banking Fund to implement the Indian Firming Program; (5) enter into leasing agreements or contracts with various, specified entities to store, recover, lease and deliver water. Creates language to ensure the implementation of the Arizona Water Rights Settlements Act and amends current state law to ensure compliance with the Indian firming obligations.

H.B. 2727, White Mountain Apache Tribe License Plates

Establishes a special license plate for the White Mountain Apache Tribe, and creates special license plates for professional baseball clubs, and families of fallen police officers. This bill successfully passed the Legislature and was transmitted to the Governor for her signature on May 17, 2006.

HB 2689, Reservation Telecommunications Study Bill

Establishes a legislative study committee to identify methods to track tribal contributions to the state transaction privilege tax. The study committee will develop legislation to be introduced during the next session. This bill successfully passed the Legislature and was transmitted to the Governor for her signature on May 15, 2006.

HCM 2002, Navajo Indian Health Service

The Resolution requests Congress to reallocate funds to the Navajo Area Indian Health Service in order to fulfill the PL 93-638 contract with the Navajo Health Foundation/Sage Memorial Hospital. The State Legislature adopted the Resolution and transmitted it to the Secretary of State on May 8, 2006.

Proposition 200

On November 2, 2004, Arizona voters passed Proposition 200, the "Arizona Taxpayer and Citizen Protection Act." There are two election components to Proposition 200: (1) identification requirements for voter registration, and (2) identification requirements for in-person voting.

Proposition 200 amends the state statute to require that each elector provide either (1) a form of identification that bears the name, address, and photograph of the elector, or (2) two different forms of identification that bear the name and address of the elector to obtain a ballot when voting in-person on election day.

The Secretary of State identified the acceptable forms of identification in the "Procedure for Proof of Identification at the Polls." The following forms of identification with the photograph, name, and address of the elector are acceptable: valid Arizona driver license, valid Arizona nonoperating identification license, tribal enrollment card or other form of tribal identification, or valid United States federal, state, or local government issued identification.

If a photo identification cannot be provided, **two** of the following forms of identification containing the name and address of the elector are acceptable: utility bill dated within ninety days of the election date; bank or credit union statement dated within ninety days of the election date; valid Arizona vehicle registration; Indian census number; property tax statement of the elector's residence; tribal enrollment card or other form of tribal identification; vehicle insurance card; recorder's certificate; valid United States federal, state, or local government issued identification, including a voter registration card issued by the county recorder. The name and address on these two documents must "reasonably" appear to be the same.

If an Indian elector does not provide proper identification, the elector will receive a provisional ballot. The individual has until 5:00 P.M. on the fifth business day following a "general election that includes an election for a federal office" or three business days for any other election to present proof of identification to the county recorder's office.

MALDEF has filed an action challenging the implementation of the voter registration and voter identification requirements. The Lawyers Committee and ACLU also seek to file a lawsuit in federal court. A TRO on the voter registration requirements is scheduled for June 9, 2006 in the District of Arizona.

Application for Subdivision Public Report, Rule Changes

The Department of Real Estate revised the Application for Subdivision Public Report ("Report") to include tribal provisions effective January 1, 2006. The provisions include language to require developers to provide notice to a tribe that a development is being built next to the tribe's reservation and to provide notice to the homebuyers that the subdivision is located adjacent to an Indian reservation. The language also clarifies that tribal lands should be disclosed to potential homebuyers, including land uses such as agricultural operations, and that tribes are sovereign entities with a separate set of laws.

A summary of the proposed changes follow:

Amends the Report to require developers to include "current zoning codes and their definitions for adjacent lands, including American Indian Reservation lands." 6(h).

Amends the Report to include reservation lands in describing existing and proposed land uses adjacent to and in the vicinity of the development such as schools, parks, churches, and commercial development. It also includes disclosing unusual safety factors that may cause a nuisance such as the use of pesticides, cultivation and related dust, unusual and or unpleasant odors, noises, pollutants, agricultural burning, irrigation and drainage, etc. 6(i).

Amends the Report to include a separate subsection on Indian lands. Under this subsection, developers are required to include whether the subdivision is located within five miles of an Indian reservation, the name of the reservation, and the contact information. The developers are also required to include the following statement in bold, all capital print in the public disclosure report:

> **THIS SUBDIVISION IS LOCATED WITHIN FIVE MILES OF AN AMERICAN INDIAN RESERVATION. ACTIVITIES ON THE RESERVATION INCLUDE OR MAY INCLUDE OPEN RANGE, AGRICULTURAL OPERATIONS, AIRCRAFT OPERATIONS, INDUSTRIAL OPERATIONS AND DAIRY FARMS. A RESERVATION HAS ITS OWN LAWS GOVERNING THE LAND WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION. THESE MAY INCLUDE TRESPASSING, DUMPING, ARCHAEOLOGY, HUNTING, FISHING, ETC. IN ADDITION, CERTAIN AREAS OF THE RESERVATION MAY BE NONPUBLIC-CLOSED AREAS WHICH REQUIRE SPECIAL PERMISSION TO ENTER. THOROUGHFARES AND ROADS ON THE RESERVATION MAY NOT BE AVAILABLE FOR PUBLIC USE.**

6(L).

Amends the airport section to require the developer to provide notice if the development is located in the vicinity of an airport located on an Indian reservation. 7(c).

U.S. Supreme Court Decisions

Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal (No. 04-1084)

On February 21, 2006, the Supreme Court issued a unanimous decision in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 126 S.Ct. 1211 (2006). Chief Justice Roberts issued the decision. O Centro Espirita Beneficiente Uniao Do Vegetal ("UDV") is a religious organization that is an outgrowth of a church in Brazil. Members of UDV receive communion by drinking *hoasca*, a tea brewed from plants unique to the Amazon Rainforest that contains DMT, a hallucinogen regulated under Schedule I of the Controlled Substances Act, *see* 21 U.S.C. § 812(c), Schedule I(c). After U.S. Customs inspectors seized a *hoasca* shipment to the UDV and threatened prosecution, UDV filed suit against the Attorney General for declaratory and injunctive relief, alleging that applying the Controlled Substances Act ("CSA") to UDV's sacramental *hoasca* use violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA").

Congress passed RFRA in 1993 in response to the Supreme Court's decision in *Oregon v. Smith*, 449 U.S. 872 (1990). In *Smith*, two members of the Native American Church were fired from their jobs because they used peyote, a mild hallucinogenic drug derived from mescaline cactus, in a religious ceremony. Oregon state law did not exclude peyote was from the state-law prohibition on the use of controlled substances. The Supreme Court held that the free exercise clause permits Oregon to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use. *Id.* at 876-890. In enacting RFRA, Congress restored the compelling interest test to evaluate whether the free exercise of religion is substantially burdened by government action.

The Supreme Court rejected the government's argument that need for uniform enforcement of CSA bars individual exception for the UDV's sacramental use of *hoasca* and that such an exception would compromise its ability to administer and enforce the CSA. The Court also rejected the government's argument that the CSA is a "closed system" whose ban on all uses of dangerous controlled substances does not allow individualized exceptions.

The Court relied on the well-established peyote exception for members of the Native American Church to find that an exception should also exist for *hoasca* use by members of the UDV. Relying on the peyote exception, Chief Justice Roberts noted: "If such use is permitted . . . for hundreds of thousands of Native Americans practicing their faith, it is difficult to . . . preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs." In dismissing the government's response that there is a "unique relationship" between the U.S. and Indian tribes justifying the peyote exception, the Court stated that the government failed to explain how "if any Schedule I substance is in fact *always* highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks [of peyote], nor insulates [the peyote] from the alleged risk of diversion."

Wagnon (formerly Richards) v. Prairie Band Potawatomi Nation (No. 04-631)

On December 6, 2005, the Supreme Court issued a 7-2 decision in *Wagnon v. Prairie Band Potawatomi Nation*, 126 S.Ct. 676 (2005). The Tenth Circuit had held that state taxation of motor fuel is precluded where the Nation charges a tax equal to the state tax and builds and maintains the roads on its reservation. The Tenth Circuit found that the Prairie Band is not "marketing a tax exemption" but instead the tax revenues from the gas station are "reservation generated value" used for reservation infrastructure. On petition for writ of certiorari, the Supreme Court reversed the Tenth Circuit.

In the majority opinion written by Justice Thomas, the Supreme Court held that because the Kansas tax is a non-discriminatory tax imposed on the off-reservation receipt of motor fuel by a non-Indian fuel distributor, the tax does not implicate tribal sovereignty and is a valid tax. Justice Thomas began his analysis by noting that "under our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences." The decision upheld the Kansas tax because the state law places the duty to pay the tax on the fuel distributor, a non-Indian located off-reservation, and because the tax was imposed on the distributor's receipt of fuel off the reservation. The Court rejected the argument that it should apply the *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), balancing test, reasoning that this was a purely off-reservation tax that does not implicate tribal sovereignty. The Court declined to look beyond formal statutory placement of the tax at the actual consequences of dual taxation, finding this was "ultimately a complaint about the downstream consequences of the Kansas tax." Finally, the Court rejected the argument that the tax was discriminatory because it exempted from taxation fuel delivered to other sovereigns, concluding that Kansas provides road services to the Nation that it does not provide to those other sovereigns.

Justice Ginsburg wrote a lengthy dissent joined by Justice Kennedy. In her view, even if the legal incidence of the tax was on the off-reservation distributor, the relevant taxable event was the sale and delivery of the fuel to the reservation. Because that sale and delivery clearly occurred on the reservation, the validity of the tax should be determined by balancing the federal, state, and tribal interests at stake. Justice Ginsburg would have struck that balance in favor of the Nation because the Nation was not marketing a tax exemption, but was instead collecting a tax to meet important transportation needs not addressed by the State. She noted that the Court's holding was particularly troubling because it would reduce the likelihood of states and tribes resolving tax disputes through the use of state-tribal tax agreements, which she recognized as "the most beneficial means to resolve conflicts of this order."

Wagnon v. Prairie Band Potawatomi Nation (No. 04-1740)

On December 12, 2005, the Supreme Court granted certiorari, vacated the favorable ruling of the Tenth Circuit, and remanded the case for further consideration in light of its recent decision in *Wagnon (formerly Richards) v. Prairie Band Potawatomi Nation*, No. 04-631 (motor fuel tax case). The issue in this case is whether federal law bars Kansas from refusing to permit the use of motor vehicle registrations and titles issued by an Indian tribe located within the State, when Kansas permits the use of registrations and titles issued by other states, foreign countries and even out-of-state Indian tribes. The Tenth Circuit held oral argument on May 9, 2006.

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Ninth Circuit Cases

Means v. Navajo Nation, 432 F.3d 924 (2005)

Russell Means, an enrolled member of the Oglala-Sioux Indian Tribe, sought to prevent the Navajo Nation from criminally prosecuting him in Navajo Nation tribal court for misdemeanor offenses that occurred on the Navajo Reservation. From 1987-1997, Means lived on the Navajo Reservation with his wife, a half-Navajo/half-Omaha Indian woman. Means moved to the Pine Ridge Sioux Reservation in 1997. Later that year, Means allegedly threatened and battered his then father-in-law, an Omaha Indian, and allegedly threatened another man, a Navajo Indian. The Nation charged Means with misdemeanor offenses under the Navajo Code, with potential maximum penalties of 90 days in jail and a $50 fine for each threat, and 180 days in jail and a $500 fine for the battery. *Id.* at 927. Means filed a petition for writ of habeas corpus in federal district court challenging tribal court jurisdiction over non-members. The District of Arizona, Judge Earl Carroll presiding, denied his claims. Means appealed.

The Ninth Circuit Court of Appeals affirmed Judge Carroll's decision relying on the 1990 amendments to the Indian Civil Rights Act, aka the *Duro* amendments. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303. In response to *Duro*, Congress amended the Indian Civil Rights Act to clarify that the "powers of self-government" of Indian tribes "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over **all Indians**." 25 U.S.C. § 1301(2) (emphasis added). "'All Indians' plainly includes Indians who are not enrolled members of the particular tribe exercising jurisdiction." *Means*, 432 F.3d at 930. Thus, the Court held that under the 1990 amendments to the Indian Civil Rights Act, the Navajo Nation may exercise misdemeanor criminal jurisdiction over a person who is not a member of the tribe, but who is an enrolled member of another Indian tribe.

Means argued that the 1990 amendments violated the equal protection clause because it allows tribes to prosecute nonmember Indians but not members of other races such as Asians Caucasians, or African Americans. Relying on *Morton v. Mancari* for the notion that Indian tribal identity is political rather than racial, the Court rejected the equal protection claim. The Court further explained that "unlike states, when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution." *Means*, 432 F.3d at 932. The Court noted that the 1990 Amendments do not cover all persons who may be ethnically Indian, but uses the same definition of "Indian" as set forth in the Major Crimes Act. *Id*. at 930.

The Court also found that the "facial due process challenge has no force" in light of the fact that the Indian Civil Rights Act confers all the protections Means would receive under the United States Constitution except the right to grand jury indictment and the right to appointed counsel.

Morris v. Tanner (03-35922)

On December 22, 2005, the Ninth Circuit issued an unpublished memorandum decision in *Morris v. Tanner* affirming the jurisdiction of the Confederated Salish and Kootenai Tribal Court over a nonmember Indian charged with criminal speeding charges occurring on the Flathead Reservation, the home of the Confederated Salish and Kootenai Tribes of Montana. Morris, an enrolled member of the Minnesota Chippewa Tribe from the Leech Lake Reservation in Minnesota challenges the constitutionality of the 1990 amendments to the Indian Civil Rights

Act, 28 U.S.C. § 1301(2). The Ninth Circuit relied on its decision in *Means v. Navajo Nation*, to affirm tribal jurisdiction.

Morris filed a petition for writ of certiorari on April 6, 2006. The petitioner sets forth the following issues in his brief: (1) Does the Indian Civil Rights Act, 25 U.S.C. § 1301(2), as amended, violate the fundamental constitutional right of American Indians, who are citizens of the United States, to equal protection guaranteed by Fifth Amendment by subjecting nonmember Indians, but no other similarly situated nonmembers of different races, to criminal prosecution and punishment by Indian tribes whose judicial proceedings are not constrained by Constitution? (2) Does the Indian Civil Rights Act violate the fundamental right of due process guaranteed by the Fifth Amendment by subjecting nonmember Indians to criminal prosecution and punishment by extra-constitutional sovereigns, Indian tribes, within the United States but not required to comply with the Constitutional guarantees? A response to the petition is due by June 9, 2006.

Smith v. Salish Kootenai College, 434 F.3d 1127 (2006)

In an *en banc* decision issued January 10, 2006, the Ninth Circuit Court of Appeals held "that a nonmember who knowingly enters tribal court for the purpose of filing suit against a tribal member, has by the act of filing his claims, entered into a 'consensual relationship' with the tribe within the meaning" of *Montana v. United States*, 450 U.S. 544 (1981). *Smith v. Salish Kootenai College*, 434 F.3d at 1140. Smith, a nonmember Indian enrolled at the tribal college, was driving a tribal college vehicle as part of his vocational program at the college when he was involved in a traffic accident on a public highway within the Reservation. The injured passenger and the estate of the deceased passenger brought claims against SKC and Smith in tribal court. In one action Smith filed a cross-claim against SKC, and in the other action SKC filed a cross-claim against Smith. All actions were settled before trial except for Smith's cross-claim against SKC. Smith proceeded with his action in tribal court, and the tribal court realigned Smith as the plaintiff and SKC as the defendant. A jury returned a verdict in favor of SKC. Smith was dissatisfied with the result and sought relief claiming that the tribal court lacked jurisdiction.

The Ninth Circuit clarified that a tribal court has jurisdiction under *Montana* to adjudicate a tort dispute brought by a nonmember against a tribal entity or tribal member when the cause of action bears some direct connection to tribal lands.

Smith filed a petition for writ of certiorari on April 10, 2006. Smith raises the following issue in his petition: "Does an Indian tribe have civil subject matter jurisdiction over a tribal nonmember in a tort dispute arising from a traffic accident on a public highway, and if not, does a tribal nonmember nevertheless consent to the jurisdiction of the tribal court by filing a cross-claim after being named a defendant in the tort action?" A response to the petition was filed on May 15, 2006.

Skokomish Indian Tribe v. Tacoma Public Utilities, 410 F.3d 506 (2005)

The Skokomish Indian Tribe filed suit for damages for treaty fishing violations against non-signatory parties. The Tribe claimed that the city knowingly and without authorization took nearly one-half of water flowing through the reservation, resulting in destruction of a substantial portion of the off-reservation and on-reservation treaty-protected fisheries. The Ninth Circuit held that the Tribe's claims against the city and a public utility were not cognizable under the treaty, which lacks language to support damages claims against nonparties and may not be

brought by the Tribe or its members under 24 U.S.C. § 1983. The Tribe filed a petition for certiorari on October 3, 2005. The Supreme Court denied the petition on January 9, 2006.

Doe v. Mann, 415 F.3d 1038 (2005)

Doe challenged the State of California's jurisdiction to terminate her parental rights over her Indian child who was domiciled on the Elem Indian Colony reservation at the time she was removed from her custody by the Lake County Department of Social Services. The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-19, provides that tribes will have exclusive jurisdiction over child custody proceedings involving Indian children domiciled or residing on the reservation "except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a). Under Public Law 280, 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a), California is vested with broad criminal and certain civil jurisdiction over Indians. In this case of first impression, the Ninth Circuit held that tribes that fall under Public Law 280 do not have the "exclusive jurisdiction" to adjudicate cases as provided by ICWA Section 1911(a)

A petition for certiorari was filed on December 19, 2005. The Supreme Court denied the petition on May 1, 2006.

EEOC v. Peabody Western Coal Company, 400 F.3d 774 (2005)

The Ninth Circuit held that the Equal Employment Opportunity Commission ("EEOC") may involuntarily join the Navajo Nation as a defendant under Fed.R.Civ.P. 19 as a necessary party, despite the EEOC's inability to bring direct suit against the Navajo Nation pursuant to Title VII of 1964 Civil Rights Act. The EEOC is prosecuting a claim against Peabody Western Coal for complying with the terms of its mining lease with the Navajo Nation. The lease requires the company to extend a preference in employment to members of the Navajo Nation. This tribal preference in employment is also a requirement under the Navajo Preference in Employment Act. The Court held that there is no requirement that there be a direct cause of action against a party to be joined if joinder is for sole purpose of effecting complete relief between the parties.

Petition for certiorari was filed; the Supreme Court denied review on January 23, 2006.

Wilbur v. Locke, 423 F.3d 1101 (9th Cir. 2005)

Three members of the Swinomish Tribe, who owned and operated retail stores on the Swinomish Reservation, sought relief from an anticipated contract between the State of Washington and the Swinomish Indian Tribe regarding taxation of cigarette sales by Indian retailers. They alleged that the statutes governing cigarette tax contracts and the proposed agreement violated the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the Sherman Antitrust Act, 15 U.S.C. §§ 7-276, the Treaty of Point Elliot, 12 Stat. 927 (Jan. 22, 1855), and a host of other constitutional and statutory provisions. The Tribe was not named as a defendant.

The Ninth Circuit held that the Swinomish Tribe is a necessary party and affirmed the District Court's dismissal of the suit. The Ninth Circuit held that in a lawsuit against state officials seeking to invalidate a compact between the state and an Indian tribe relating to taxation of cigarette sales on a tribe's reservation, a tribe has an interest in retaining valuable benefits granted by the compact. Because the state cannot represent the tribe's interests, the suit was dismissed for lack of joining an indispensable party under Fed.R.Civ.P. 19(b).

The Supreme Court denied the petition for writ of certiorari on February 22, 2006.

Arakaki v. Lingle, 423 F.3d 954 (9th Cir. 2005)

The United States District Court for the District of Hawaii found that Hawaiian residents lacked standing or raised a nonjusticiable political question, dismissed claims against defendants, the Department of Hawaiian Home Lands (DHHL), the Hawaiian Homes Commission (HHC), the Office of Hawaiian Affairs (OHA), and the United States that challenged state programs benefiting "native Hawaiians" or "Hawaiians" under the Equal Protection Clause of the United States Constitution.

The public trust lands under the Hawaii Statehood Admission Act were held in trust by the State of Hawaii, not the United States, even though the United States had to consent to lessee qualification changes. The Court found that the residents lacked standing to sue the United States. Because the United States was an indispensable party to that challenge, it failed. Tax revenues appropriated to DHHL/HHC resulted from decisions by the Hawaii Legislature. Nothing required state fund expenditures, much less state tax revenue expenditures. The Court found that Article XII of the Hawaii Constitution could not be declared unconstitutional without holding Section 4 of the Admissions Act unconstitutional, and the United States must be a party to an Admission Act challenge. While the claim against OHA could proceed without declaring the Admissions Act unconstitutional because the United States was not required on that claim, as state taxpayers, the residents had no standing to challenge non-tax revenue expenditures.

The Ninth Circuit affirmed the dismissal of all claims to which the United States was a named party or an indispensable party. The finding that the residents had standing to claim that OHA programs that were funded by state tax revenue violated the Equal Protection Clause was affirmed, but the dismissal of that claim on political question grounds was reversed.

The Governor of Hawaii filed a petition for certiorari on February 2, 2006.

Harrison v. Emerald Outdoor Adver., LLC (No. 04-35647)

On April 13, 2006, the Ninth Circuit issued a decision on the implementation of 25 U.S.C. § 483a(a) regarding mortgages and deeds of trust on the Puyallup Reservation. In 1994, a deed of trust securing Indian trust land was recorded in the Office of the Auditor of Pierce County, Washington, the county in which the land is located. In 1995, a commercial lease of the land was recorded in the BIA Title Plant in Portland, Oregon.

To protect mortgagees that loan money to holders of Indian trust lands, § 483a(a) subjects the holder to foreclosure "in accordance with the laws of the tribe which has jurisdiction over such land or, in the case where no tribal foreclosure law exists, in accordance with the laws of the State . . . in which the land is located."

The Puyallup Tribe had no laws governing the foreclosure of mortgaged land and thus, Washington law governed the foreclosure of the land. The Court held that federal law directs that state law to determine priority, and under Washington's race-notice statute, priority is obtained by recording in the county in which the land is located. Therefore, the deed of trust has priority over the lease.

Although recording at the BIA title plants does not ensure priority, the Court explained that the BIA's regulations regarding recording obligations at the BIA title plants under 25 C.F.R. § 150.6 "is an internal obligation that falls on the shoulders of the BIA, not the party acquiring an interest in Indian land. Title documents are recorded 'immediately after final approval,' and it is the approving officials who are responsible 'for prompt compliance with the recording requirement.'" 25 C.F.R. § 150.6. Recording at the Title Plant ensures that the records are in the BIA system.

United States v. Truckee-Carson Irrigation Equity Dist., 429 F.3d 902 (9th Cir. 2005)

The Pyramid Lake Paiute Tribe of Indians sought to make temporary changes to the water rights provided by the 1944 Orr Ditch Decree. The Tribe sought to change the use of water from the Truckee River formerly used for irrigation of Indian lands to allow the water to flow unimpeded into Pyramid Lake where it would help preserve the Tribe's fishery. The Nevada State Engineer relied on the Decree's "no injury" provision in finding that the transportation loss--the amount of water lost in the process of transporting the water from the river to the irrigated land--could not be included in the change of use. The Tribe appealed the engineer's ruling, and the district court affirmed the ruling on a different ground, noting that the amount allocated to transportation loss was only an "estimated" one that could be increased or decreased as conditions demanded. The district court held that the Tribe was only entitled to divert the maximum amount of water that it was permitted to apply to the land. The Ninth Circuit affirmed holding that the Tribe's right to temporarily change place and manner of use was limited to the maximum amount of water allocated for prior use; and if the new use entails no transportation loss, the water allocated to transportation loss for irrigation use may not be transferred to that new use.

Lewis v. Norton, 424 F.3d 959 (2005)

The Ninth Circuit rejected the claims of three siblings (plaintiffs) seeking relief in federal court to direct federal agencies to order the Table Mountain Rancheria to include plaintiffs as tribal members. The district court dismissed for lack of subject matter jurisdiction, and the Appeals Court affirmed. The siblings claim that the Tribe never acted on its membership application and that they were entitled to share in the Tribe's gaming revenues. The members claimed that the Tribe waived sovereign immunity in when it sought relief in federal court on its federal recognition claim. In 1983, United States District Court for the Northern District of California issued a judgment ordering the Secretary of the Interior to list the Table Mountain Band of Indians as an Indian Tribal Entity pursuant to federal law. The Court rejected this argument. Further, the Court held that the siblings have not exhausted their tribal remedies.

Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs., 424 F.3d 931 (9th Cir. 2005)

The Alaska Department of Health and Social Services petitioned for review of a final determination by the Administrator of the Centers for Medicare and Medicaid Services disapproving a proposed Medicaid state plan amendment that would alter the rate at which the federal government reimburses State expenditures on behalf of patients at Indian tribal health facilities. The Administrator rejected the proposed amendment on two alternative grounds: (1) that it was inconsistent with the statutory requirement of efficiency, economy, and quality of care; and (2) that it failed to comply with a regulation governing payment ceilings. The State challenges the Administrator's decision as arbitrary and capricious under the Administrative

Procedure Act. The Ninth Circuit held that the Administrator's interpretations of the statute and regulation were permissible under *Chevron v. NRDC*, 467 U.S. 837 (1984).

San Carlos Apache Tribe v. United States, 417 F.3d 1091 (9th Cir. 2005)

The San Carlos Apache Tribe sued under the National Historic Preservation Act, 16 U.S.C. § 470 *et seq*., seeking to maintain certain water levels in a reservoir. Section 106 of the National Historic Preservation Act requires federal agencies to "take into account the effect of their undertaking[s] on any district, sitebuilding, structure, or object that is included in or eligible for inclusion in the National Register." The Tribe argues that its suit is properly brought as a private right of action directly under NHPA rather than under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. The question before the Court was whether NHPA provides a private right of action by implication. Section 106 of the Act does not expressly provide that private individuals may sue to enforce its provisions nor does the statute specify a remedy for violations of Section 106. The Ninth Circuit held that no private right of action exists under the NHPA against the federal government, and that any aggrieved party must seek relief under the Administrative Procedures Act.

Doe v. Kamehameha Schools/Bishop Estate (04-15044)

Since 1887, the Kamehameha Schools have operated as the charitable legacy of Princess Bernice Pauahi Bishop, the last direct descendant of King Kamehameha I. Private and non-sectarian, the Kamehameha Schools give preference to students who are of native Hawaiian ancestry. As a result of this policy, attendance at the Kamehameha Schools is effectively limited to those descended from the Hawaiian race. Doe challenged this policy alleging that he was denied entry to the Kamehameha Schools because of his race in violation of 42 U.S.C. § 1981, which forbids racial discrimination in the making and enforcement of contracts.

The issue presented is whether "a private, nonsectarian, commercially operated school, which receives no federal funds, purposefully exclude a student qualified for admission solely because he is not of pure or part aboriginal blood."

The district court granted summary judgment in favor of the Kamehameha Schools. A Ninth Circuit panel **reversed** in an opinion located at 416 F.3d 1025. The Ninth Circuit vacated this opinion and will rehear the case *en banc*.

Warsoldier v Woodford, 418 F.3d 989 (9th Cir. 2005)

Warsoldier, a Cahuilla Indian, sought a preliminary injunction in federal district court in California challenging the California Department of Corrections ("CDC") hair grooming policy, which requires that all male inmates maintain their hair no longer than three inches. Warsoldier refused to adhere to the grooming policy because of his sincere religious belief that he may cut his hair only upon the death of a loved one.

Warsoldier's suit challenges the CDC's hair grooming regulation as violating his right to religious freedom under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). He sought preliminary and permanent injunctive relief prohibiting CDC from punishing him for exercising his religious beliefs and compelling CDC to lift all disciplinary sanctions that have been imposed upon him as a consequence of his refusal to adhere to the grooming policy. The district court denied his request. The Ninth Circuit reversed and

remanded, holding that RLUIPA requires the facility to use the least restrictive means necessary to achieve its compelling interest in prison safety and security. 42 U.S.C. § 2000cc-1(a).

Hoopa Valley Indian Tribe v. Ryan, 415 F.3d 986 (2005)

In an effort to address ongoing declines in salmon and steelhead populations in the Trinity River basin, the Bureau of Reclamation adopted a multifaceted restoration program. The Hoopa Valley Indian Tribe sought funding to implement many of the proposed restoration projects under the mandatory contracting provisions of the Indian Self-Determination and Education Assistance Act. After the Bureau refused to execute mandatory contracts for the Tribe's proposals, the Tribe brought suit. The district court held that the programs at issue are not "for the benefit of Indians because of their status as Indians," and thus are not eligible for mandatory contracts. The Ninth Circuit affirmed.

Cases From Other Circuits

Cayuga and Seneca Cayuga v. New York (Nos. 05-982 AND 978)

On February 3, 2006, the Cayuga Indian Nation of New York and the Seneca Cayuga Tribe of Oklahoma filed a petition for cert in *Cayuga Indian Nation v. Pataki*, and the United States filed a separate petition for cert in *U.S. v. Pataki*, seeking review of the Second Circuit's decision dismissing the longstanding land claims of the Cayuga Nation and Seneca Cayuga Nation against the State of New York. In the decision, the Second Circuit relied on an extremely broad reading of the Supreme Court's decision in *City of Sherrill v. Oneida Nation* to hold that the doctrine of laches can be used to bar tribal claims that are "disruptive."

The Supreme Court denied certiorari on May 15, 2006.

Mattaponi Indian Tribe v. Virginia (05-1141)

On March 6, 2006, the Mattaponi Indian Tribe filed a petition for certiorari to seek review of the Virginia Supreme Court decision which held that their treaty arises under state law, not federal law, because it was signed before the American Revolution and not created "under the authority of the United States." Therefore, in applying state common law, the court held that the State of Virginia is immune from suit. In 1677, representatives of colonial Virginia, on behalf of the British Crown, signed a peace treaty with Indian tribes, including the Mattaponi Indian Tribe. In the litigation below, the Mattaponi asserted that the State of Virginia violated the terms of the treaty by authorizing the construction of a reservoir that would encroach on the Tribe's lands and interfere with the Tribe's fishing rights. The question presented to the Court is whether the obligations imposed by an Indian treaty with a prior sovereign should be enforceable as a matter of federal law under the Supremacy Clause.

Utah v. Shivwitz Band of Paiute Indians, 428 F.3d 966 (10th Cir. 2005)

On March 9, 2006, the State of Utah filed its petition for certiorari to seek review of the Tenth Circuit decision which upheld the Secretary of the Interior's authority to take land into trust pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. The Tenth Circuit rejected the state's argument that Section 5 is an unconstitutional delegation of the legislative power. Section 5 authorizes the Secretary of the Interior "to acquire ... any interest in lands ... for the purpose of providing land for Indians," such land to be held "in trust" for tribe or individual "for which the land is acquired." The Tenth Circuit held that Section 5 provides standards for exercise of secretary's discretion and thus is not an unconstitutionally standardless delegation of legislative power. Other Circuits have rejected similar arguments. *See Carcieri v. Norton* (1st Cir. 03-2647); *South Dakota v. United States Department of the Interior* (8th Cir. 04-2309).

Salinas v. LaMere (05-1189)

On March 15, 2006, former members of the Temecula Band of Luiseno Mission Indians of the Pechanga Reservation (Pechanga Band) filed their petition for certiorari challenging the decision of the California Court of Appeals which reversed the decision of the California Superior Court and held that Public Law 280 does not grant state courts jurisdiction in civil suits that implicate an Indian tribe's sovereignty. Former members of the Pechanga Band had sought an injunction

in the state court to prevent them from being disenrolled from the Tribe. Petition for certiorari was denied on May 22, 2006.

San Manuel Indian Bingo and Casino and Hotel Employees and Restaurant Employees International Union et. al. (No. 05-1392)

On September 30, 2005, the National Labor Relations Board issued a decision and order finalizing its earlier May 2004 holding that the National Labor Relations Act (NLRA) applies to tribal businesses on tribal lands. The NLRA generally exempts governmental employers from the provisions of the NLRA on collective bargaining, etc. The Board departed from longstanding precedent and created a new doctrine not found in the statute—that tribal government "commercial" activities are subject to the NLRA, while "traditional" governmental activities are not.

The San Manuel Band of Mission Indians filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit on October 6, 2005. The Tribe's opening brief was filed on March 21, 2006.

Carcieri v. Norton, 423 F.3d 45 (2005)

On September 13, 2005, the First Circuit announced its decision in response to the State of Rhode Island's petition for rehearing or rehearing en banc. The court directed the parties to provide supplemental briefing on two issues: (1) whether the provisions of the Indian Reorganization Act ("IRA") apply to the Narragansett Tribe, a tribe recognized in 1983; and (2) if additional land were taken into trust on behalf of the Narragansetts, whether the trust must be restricted to preserve Rhode Island's civil and criminal laws and jurisdiction.

The First Circuit granted the petition for rehearing and issued a new panel opinion in which the court, once again, rejected the state's argument that the IRA does not apply to any tribe that was not "now under federal jurisdiction" in 1934. Second, the court rejected the broad arguments that Section 5 is an unconstitutional delegation of legislative authority and that taking land into trust diminishes state sovereignty in violation of the Tenth Amendment, the Enclave Clause, and the Admissions Clause, and exceeds the authority of Congress under the Indian Commerce Clause of the U.S. Constitution.