



Indian Law Newsletter



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Word from the Chair



By Claire Newman

Greetings friends and colleagues,

It has been an honor to serve as the Chair of the Indian Law Section (“ILS”). Thank you to all of our section members and members of the executive committee who contributed their valuable time, resources, and expertise to make this year a success. In this 30th year of ILS, all of the practitioners and members who helped found ILS and more recent executive committee members who continue to offer their leadership and guidance are also due our deepest gratitude. As ILS membership continues to grow over the years, ILS remains the most diverse section within the WSBA. Thus, ILS plays a crucial role in advancing policies that increase support within the Bar for our members. I invite you to get involved with ILS leadership as we continue to shape our priorities for coming years.

This edition of the newsletter offers valuable news, insights and tips from Chief Judge of the Tulalip Tribal Court Ron Whitener and attorneys Lori Guevara and Jeremy Wood as well as volunteer opportunities and upcoming events. I would also like to highlight a few of ILS’s activities that made this a truly stand-out year.

Outreach Work This Year

A focus for the executive committee this year was to expand ILS’s work beyond the annual CLE – a tall order for busy attorneys volunteering their time – but we made significant strides! In particular, one of our priorities was to increase ILS’s outreach in eastern Washington. To that end, in April, ILS members attended the Yakima Valley Youth and Justice Forum hosted by Heritage University

(continued on page 2)

HB-2951: Increasing Services to Report and Investigate Missing Native American Women

By Lori Guevara, Domestic Violence Advocate Attorney, Tulalip Tribes

Native American women experience violence at rates much higher than other populations. The Center for Disease Control and Prevention reported that in 2016, murder was the third-leading cause of death for Native women between the ages of 10 and 24. More than half of Native women are the victims of sexual assault or domestic violence. Many of these crimes go unsolved and unreported. There is currently no comprehensive data collection system for tracking or reporting missing Native American women.

In Washington state, newly signed HB-2951 (sponsored by Rep. Gina McCabe, R-Goldendale) is aimed at coordinat-

“THERE IS CURRENTLY NO COMPREHENSIVE DATA COLLECTION SYSTEM FOR TRACKING OR REPORTING MISSING NATIVE AMERICAN WOMEN.”

ing law enforcement searches at state, tribal, and federal levels. HB-2951 directs the Governor’s Office of Indian Affairs and the Washington State Patrol (WSP) to work with tribes to strengthen relations, and the U.S. Department of Justice to coordinate resources and share information.

Additionally, HB-2951 recognizes the need for the criminal justice system to better serve and protect Native American women. HB-2951 attempts to find ways to connect state, tribal and federal resources to create partnerships in finding ways to solve this crisis facing Native American women in our state. *(continued on page 6)*

In This Issue

Word from the Chair..... 1	Eluding the Proper Scope of Federal Jurisdiction: <i>United States v. Johnny Smith</i> and the Assimilative Crimes Act 4
HB-2951: Increasing Services to Report and Investigate Missing Native American Women 1	American Indian Law Journal..... 5
Exercising Sovereignty Through Tribal Courts 3	

WORD FROM THE CHAIR from page 1

on the Yakama Nation Reservation. We spent the day with middle and high school students as they learned about the justice system from Washington Supreme Court Justice Steven González, learned about the career paths of inspiring Native American attorneys in their community and presented mock closing statements. We look forward to sending additional members to this event next year.

Also in April, ILS partnered with Miller Nash Graham & Dunn LLP in hosting a reception for Native American Law Student Association (“NALSA”) members from the University of Washington and Seattle University Schools of Law. We look forward to growing this event as it provides an excellent opportunity for NALSA members to connect with practicing Indian law attorneys and to forge meaningful mentorship relationships. In February, we supported our sister section, the Spokane Bar Association, Indian Law Section, at its annual CLE. We could not have accomplished any of this without the hard work of our newly-formed committees for mentorship, outreach and CLE.

Action On Proposed State Legislation and Court Rules

In November 2017 the executive committee sent a letter to the Washington Supreme Court in support of a revision to Admission to Practice Rule 8, which waives association of counsel and fee requirements for out-of-state attorneys representing tribes in ICWA cases in Washington state. The Supreme Court joined Oregon and Michigan by adopting the revision.¹ It will become effective September 1, 2018.

As in 2016-2017, the executive committee tracked the progress of and commented on proposed legislation impacting tribes and tribal members. To effect a more meaningful, sustained voice on proposed legislation, we invite a few interested ILS members to assist the executive committee in synthesizing proposed legislation and helping to coordinate comment and response from the executive committee.

Partnership and Philanthropy

ILS continued the tradition of partnering with the Northwest Indian Bar Association for the organizations’ annual Holiday Party, this year hosted by Kilpatrick Townsend & Stockton. Old friends reconnected, young attorneys networked and we all helped raise monetary and in-kind donations to support the crucial work of Chief Seattle Club. In addition, ILS donated \$6,000 to the Northwest Indian Bar Association’s Indian Legal Scholars Program to increase access to law school for Native American and Alaska Native students.

30th Annual Indian Law Seminar, Looking Back, Moving Forward

In May, ILS hosted its 30th Anniversary Indian Law Section Seminar (Seminar) which revolved around the theme “Looking Back, Moving Forward.” ILS welcomed



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Young Lawyer Liaison
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Section logo designed by Scott Sufficool

leading local in-house counsel and nationally-renowned practitioners to the Seminar to tackle pressing issues in Indian country, such as tribal opioid litigation and climate change. Speakers also reflected on how their issue (e.g., tax, tribal courts or ICWA) had developed over time and what challenges and opportunities lie ahead. Tribal leaders Leonard Forsman and Ron Allen and Seattle City Councilmember Debora Juarez shared their valuable insights on tribal sovereignty in Washington state over the past 30 years. In addition, registration for the Seminar doubled to 84 attendees, reflecting an ever-growing interest among practitioners to dig deeply into challenging issues in Indian law together at the ILS CLE. Thanks again to all of the speakers who dedicated their time and energy to this event.

The Seminar also provided a natural gathering space for our first luncheon for past Chairs of the Indian Law Section and the current executive committee. We discussed highlights from past years and began a conversation about future priorities. Some suggestions included forming a list-serve for past Chairs, monthly brown-bag lunches, mentorship for junior attorneys and greater outreach to Native American college students. I was reminded at the luncheon that many of the same motivations for founding

(continued on page 6)

Exercising Sovereignty Through Tribal Courts



By Ron Whitener

For thousands of years, indigenous tribes in North America used systems of justice to resolve disputes and punish individuals who violated the norms of their communities. So much knowledge about these systems has been lost, initially through the violent settler-colonial system set up the federal government. Even in the self-determination era, the federal government severely underfunds tribal justice systems, despite its trust responsibility to federally recognized tribes. Regardless of the role of the federal government, tribal justice systems have evolved and changed over time, though the influx of money from tribes' economic development has led to great changes in these systems over the past 40 years.

Immediately following independence of the United States and the establishment of the reservation system, the federal government was largely unconcerned with the indigenous justice systems the tribes employed for internal matters. This is reflected in the Indian Country Crimes Act of 1817, which amended the General Crimes Act¹ and extended federal criminal jurisdiction over the reservations. The Indian Country Crimes Act excepted:

...offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

From this we see an early exception for both internal disputes between tribal citizens on the reservations, and a deference to the sovereignty of the tribes when an offender who otherwise would be subject to federal jurisdiction had already been punished in the traditional justice system. This deference was reduced following the controversy created by the United States Supreme Court's 1883 holding in *Ex Parte Crow Dog*.² In *Ex Parte Crow Dog*, a tribal member killed another tribal member and was punished according to the laws of the Brule Sioux Tribe. Unsatisfied with the Tribe's punishment, United States attempted to prosecute Crow Dog under the General Crimes Act for murder; however the Supreme Court dismissed the prosecution because of the exceptions quoted above. This prompted Congress to pass the Major Crimes Act³ two years later, extending federal criminal jurisdiction over Indians accused of committing a listed offense in Indian Country, regardless of whether the victim was an Indian or if the defendant had

already been punished by the local law of the tribe. While this created federal authority to prosecute Indian crimes on-reservation, it didn't reduce the inherent authority of the tribes themselves to also administer justice over the reservations.

In fact, there are very few examples of total abrogation of tribal authority to exercise justice on the reservations. The only example of total abrogation was the Curtis Act of 1898.⁴ The Curtis Act, actually titled "An Act for the protection of the people of the Indian Territory, and for other purposes" legislated that:

...all tribal courts in the Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act thereto authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory..."

The Curtis Act brought a halt to the sophisticated tribal courts of the Indian Territory. For instance, the 1839 Constitution of the Cherokee Nation created three branches of government, including its judicial branch. The Cherokee Judicial Branch included district and circuit courts, and a Supreme Court to handle appeals. This was all extinguished by the Curtis Act. In 1988, the United States Court of Appeals for the District of Columbia Circuit held the Oklahoma Indian Welfare Act⁵ repealed the Curtis Act, making the Tribes affected by the Curtis Act eligible for tribal court and law enforcement funding.⁶

This funding, in addition to other federal funds and tribal economic development, drives tribal court development in different ways. In some tribes their justice systems are robust, and the tribe asserts subject matter jurisdiction over a diverse area of issues. In some tribes their systems have largely disappeared, and the state courts provide a vast majority of all justice services to the tribe's citizens. In addition to the level of involvement of the court in the tribe's government, the style of courts vary widely. Some have developed largely in the model of the state courts and use an adversarial process, often involving lawyers representing clients. Other tribal courts are far more traditional, using community lay judges and very few (or no) parties are represented by legal counsel. Finally, many tribal (and state courts, though they call it something different) are slowly becoming a hybrid of adversarial and indigenous traditional courts.

Generally in the United States at both the state and federal level, the court systems are separate from the legislative body, with boundaries artificially created between the judges, advocates, and litigants to avoid the appearance of bias by the decision-makers. These fact-finding courts are also usually presided over by a single judge.

(continued on page 7)

Eluding the Proper Scope of Federal Jurisdiction: *United States v. Johnny Smith* and the Assimilative Crimes Act



By Jeremy Wood

The Ninth Circuit Court of Appeals will soon consider a routine criminal case that bears upon how the federal government prosecutes crimes defined by state law in Indian Country. The court should acknowledge the narrowness of the question presented and not stray from the proper application of the Assimilative Crimes Act (“ACA”). That narrow question is whether the crime at issue was between an Indian defendant and Indian victim.

Johnny Smith, an enrolled member of the Confederated Tribes of Warm Springs, was arrested for fleeing in his car from tribal police on the Warm Springs Reservation. The United States charged him for fleeing or attempting to elude a police officer in violation of an Oregon state statute incorporated as a federal crime under the ACA. He pled guilty as charged but expressly reserved his claim that the government lacked the necessary jurisdiction to prosecute him under the ACA. He now brings that claim on appeal.

The ACA and its Necessary Dependence on the ICCA

The ACA is one cog in the complex machinery of federal criminal jurisdiction in Indian Country. This statute provides that whoever “is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like [federal] offense.”¹ The United States may thus prosecute violations of state law by assimilating the state statute into federal law where Congress has not already sanctioned the relevant conduct or otherwise demonstrated an intent to limit assimilation.² Construing such intent requires consideration of the ACA’s interaction with other statutes.

Although Smith focuses on the interaction between the ACA and the Major Crimes Act (“MCA”), the Ninth Circuit should focus on its interaction with the Indian Country Crimes Act (“ICCA”). In doing so, the court should clarify an unfortunate footnote in its 1977 opinion, *United States v. Marcyes*, and join other appellate circuits that have held the ACA only to extend to Indian Country by virtue of the ICCA with its application qualified by the latter statute’s exceptions.

The ICCA extends the application of the “general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States” to Indian Country.³

The Ninth Circuit has explained that the “general laws” in question are those applicable to federal enclaves.⁴ The court has stated that the ICCA “relates ‘only to federal enclave law – law in which the situs of the offense is an element of the crime.’”⁵ It does not limit prosecution under statutes that delineate federal crimes of nationwide applicability like wire fraud.⁶

The Ninth Circuit recently affirmed that “[t]he ACA is a general law of the United States made applicable to Indian reservations by” the ICCA.⁷ Other circuits agree that the ICCA is necessary to extend the ACA to Indian Country.⁸ These courts have further held that exceptions within the scheme of the ICCA consequently limit application of the ACA.⁹

In 1977, the Ninth Circuit misstated this rule in an unnecessary footnote. *United States v. Marcyes* involved the federal prosecution of Puyallup tribal members for violation of a Washington state

statute prohibiting possession of unmarked and dangerous fireworks.¹⁰ The court accepted the defendant’s concession that “the ACA is a general law of the United States made applicable to Indian reservations by [the ICCA].”¹¹

But in a footnote, the court went on to consider an argument by amicus that the ACA was inapplicable to the conduct at issue.¹² Disagreeing, the court made, in dicta, an unnecessary, unsupported, and conclusory leap to hold that “the ACA was applicable by its own terms to Indian reservations, as well as incorporated by [the ICCA].”¹³ In doing so, it gave no explanation about how or whether the ICCA exceptions would continue to qualify application of the ACA as other circuits have held.

Smith, by arguing too broadly against the ACA’s application, gives opportunity for further mischief. He posits that application of the ACA and the ICCA to allow federal prosecution of assimilated state crimes would be duplicative and render one or the other superfluous. His reading is understandable but improper. Rather, the statutory scheme, properly construed, reflects Congress’s carefully crafted limitation on federal jurisdiction. The United States acknowledged this in responding to Smith’s brief, stating that “[t]he government’s jurisdiction over Indians for assimilated crimes is limited both by the exceptions listed in [the ICCA].”¹⁴

The Ninth Circuit should take this opportunity to clarify that the law is not as stated in the *Marcyes* footnote, and that the ACA only applies by extension of the ICCA, and remains qualified by its exceptions. One of those exceptions may yet provide Smith relief.

(continued on page 9)

AMERICAN INDIAN LAW JOURNAL

Seattle University School of Law

The American Indian Law Journal (AILJ) is an academic collaboration among students, faculty, and practitioners. The AILJ fills a critical gap in the amount of scholarship available to those interested in and affected by the ever-changing field of Indian law. Thus, the AILJ seeks articles digesting legal issues and topics that may help tribes throughout the country. The AILJ publishes a range of Indian law issues, including: civil rights violations, protection of cultural resources, religious freedom, the loss of land and natural resources, the regulation of environmental quality, economic development, legal research in Indian Country, and much more.

Call for Submissions

Volume 7, Issue 2 **Deadline:** January 15, 2019

For More Information:

<https://digitalcommons.law.seattleu.edu/ailj>

Questions: AILJ@seattleu.edu

Call for Mentors

Currently, the AILJ seeks mentors for our incoming Associate Editors. The AILJ is fortunate enough to have an existing list of talented mentors, but we hope to expand our mentorship pool to grow with our students' interests. We are currently seeking mentors in all fields of law including without limitation: Indian Law, Environmental Law, Family Law, Tax Law, Administrative Law, Intellectual Property Law, Immigration Law, and Public Interest Law.

Interested?

Contact Dallas Whiteley, white2@seattleu.edu

Upcoming Event

University of Washington

Indian Law Symposium, September 6-7, 2018

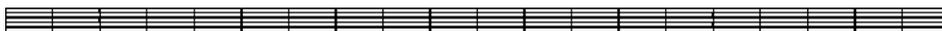
For registration and agenda, see <https://www.law.uw.edu/events/indian-law-symposium>.

Urban Indian Legal Clinic Looking for Volunteers

Urban Indian Legal Clinic at Chief Seattle Club is looking for attorneys to join our volunteer roster. Chief Seattle Club is a nonprofit in Seattle serving Native American and Alaska Native peoples experiencing homelessness. We hold a legal clinic for our members and the indigenous community of King County to receive free legal aid. The lawyers do not represent who they see, but they can provide legal advice and support during 30-minute sessions. If you're interested in volunteering, please contact Chief Seattle Club's program manager, Colleen Chalmers, at colleen.chalmers@chiefseattleclub.org.

Don't Forget

Members: Don't Miss Out on Upcoming Opportunities – Remember to update your contact information with the WSBA and renew your membership with WSBA Indian Law Section.



WORD FROM THE CHAIR from page 2

ILS in 1988 exist today – to provide a forum for attorneys representing tribes and tribal members to put their heads together on difficult issues, to educate other attorneys about tribal governments, sovereignty and the Indian law canon, and to expand opportunities for Native American attorneys and law students seeking to practice in Washington state. Although much has changed in both rhetoric and practice by the State of Washington since 1988, this year saw a significant number of appeals by the State of Washington to the Ninth Circuit and Supreme Court, including *United States v. Washington* [Culverts], *Washington State Dep’t of Licensing v. Cougar Den Inc.*, and *Stillaguamish Tribe v. State of Washington*, in which the State opposed tribes’ fundamental treaty rights and sovereign immunity. Thus, collaboration among thought leaders, practitioners and students, education among our non-Indian law colleagues, and increasing access to law school and the bar remain critical today.

WSBA Business

2017 saw the “realignment” of WSBA Sections’ bylaws to make them uniform and consistent with WSBA priorities. After much discussion, the executive committee submitted revised bylaws which are consistent with WSBA’s alignment effort and which strive to maintain traditions central to ILS. For example, the ILS election has moved

from September to May and elections will be held online to increase voter turnout; however, we are also maintaining our more intimate in-person election forum where ILS members can meet the candidates for the next year’s executive committee prior to voting. In addition to submitting revised bylaws, ILS submitted a letter to the Board of Governors expressing our concern regarding WSBA’s prioritization of its own fiscal and bureaucratic interests over the needs of ILS members and that this fuels distrust, frustration and organizational fatigue among members and volunteers.

ILS Election of New Members to the Executive Committee

ILS warmly welcomes new members to the executive committee Amy Lettig, Felecia Shue, Daniel Rey-Bear and Jennifer Yogi. Thank you in advance for your service!

Next Meeting

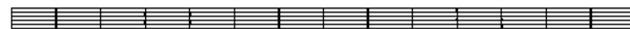
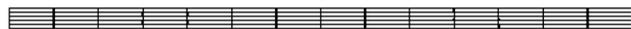
The next meeting of the Indian Law Section will be held on September 6, 2018, at 4:50 p.m. at the University of Washington’s annual Indian Law Symposium. See you there!

1 The text of revised APR 8 is available at http://www.courts.wa.gov/court_rules/?fa=court_rules.adopted.

HB-2951: INCREASING SERVICES TO REPORT AND INVESTIGATE MISSING NATIVE AMERICAN WOMEN from page 1

HB-2951 requires the WSP to work with tribal law enforcement agencies and the Governor’s Office of Indian Affairs to conduct a study to increase state resources for reporting and identifying missing Native American women. Meetings will be convened inviting tribal and law enforcement partners, tribes, and urban Indian organizations to determine the scope of the problem, identifying barriers, and finding ways to create partnerships with the goal of increasing reporting and investigation of missing Native American women. Respect for government-to-government relations must be given by the state when consulting and collaborating with federally recognized tribes.

The deadline for the WSP to report the study findings to the Washington Legislature is June 1, 2019. Results must include the number of missing Native American women in Washington, identification of barriers in providing state resources to identify the issue, and recommendations including proposed legislation to address the problem. HB-2951 was passed by the House on March 3, 2018, passed by the Senate on March 1, 2018, and signed by Governor Jay Inslee on March 15, 2018.



EXERCISING SOVEREIGNTY THROUGH TRIBAL COURTS from page 3

In many tribal nations, however, there isn't the option to have such a distance between the decision-makers and the parties, due to the close-knit nature of the communities. Indeed, while so much knowledge has been lost about indigenous justice systems in the United States, there are still examples that provide a window into very old justice models. And despite the diverse cultures those tribes represent, there are some commonalities in indigenous justice systems prior to colonization-- the most important one is the intertwined relationship between the community and the justice system.

This can be illustrated at some tribes by the lack of separation between the elected body of a tribe and its justice system. While the establishment of elected tribal bodies is primarily because of federal policy, the use of those bodies *as* the tribal justice system may be based on much older traditions regarding the role of leaders in tribes. Many tribes in Alaska and in the Lower 48 use elected officials to settle disputes or dispense law and order justice for their communities. Some models have the tribal council sitting as the decision-maker over disputes, child welfare cases, and law and order violations. Some designate a set number of individuals from the tribal council to serve as judges. In other communities, the case may be heard by judges at the trial level, but the elected body serves as the appellate court. In many of these communities, these models have long been their tradition.

One area of the country that has clear examples of these types of justice systems is throughout Alaska. Specifically in the Kuskokwim River Delta, many of the federally recognized tribal citizens are still primarily Yup'ik speaking and their justice systems are still very traditional. At the Native Village of Kongiganak, the judges all are elders and preside over issues in panels of two or three. All hearings are in Yup'ik language, with an English translator for participants who are not primarily Yup'ik speaking. No attorney has ever appeared in their court. Their codes provide a basic civil justice structure and there are no state or federal police in the Village, which is only accessible by plane. The Tribe employs two community members as "tribal police officers" (TPOs) but they are not academy-trained and do not carry firearms. People who violate the laws of the Village are cited by the TPOs and brought before the elder judges where they can either admit the violation or dispute it. If they dispute it, the judges will listen to everyone and decide if the violation occurred. If they find the violation occurred, they work with the parties and others present to create a response which normally involves community service, fines and "counseling." Community service is usually assisting other citizens with gathering food or firewood or doing work for the Village itself. Fines are sometimes ordered. Counseling involves meeting with the elder judges and talking about why the community has

its rules and how the person's actions hurt the Village. In extreme cases, they will banish people from the Village for crimes involving selling drugs, violence, or repeated smuggling or brewing of alcohol. This tribe has run their system for time immemorial – without any dedicated tribal court funding.

While the Curtis Act was the only federal statute to prohibit federally-recognized tribes from creating and sustaining their own tribal justice systems, a lack of funding for those systems has been a primary force slowing their growth. Over the course of the 19th century, the federal government began exerting control over the tribes in almost all areas of governance.⁷ This era brought the Indian boarding schools, Indian hospital and the Courts of Indian Offenses.⁸ But this complete federal control changed with the passage of the Indian Self-Determination and Education Assistance Act of 1975. Under this Act, tribes are able to contract away services from the federal government, including justice services. With this funding, tribes reestablished tribal justice systems and they have been growing ever since. In addition to federal funding, tribal resources from economic development are used to supplement their tribal court, sometimes by many times. As an example of how extreme this funding differential can be, the federal base funding for the Tulalip Tribal Court is approximately 2 percent of the total court budget.

This post-1975 funding expansion was seen clearly in the Pacific Northwest. In 1979, 13 tribes joined together to create an intertribal court system to centralize court functions into a single organization providing circuit riding judges and prosecutors who would apply the law of each tribe where they were assigned. In 1980, these tribes incorporated the Northwest Intertribal Court System. Later, the Northwest Intertribal Court of Appeals was added to NICS. Over time, many of the original tribes who created NICS have withdrawn from it and have formed their own standalone tribal courts.

The tribal courts today are often a hybrid of U.S. models and traditional systems. For instance, The Tulalip Tribal Court is a very western model, based on the tribal statutes that create it and require specific process. Within the very standard court, however, one traditional aspect of the court is the time spent on the cases. Tulalip has a special calendar for criminal defendants who are held in jail. This "in-custody" calendar lasts the full morning and is capped at six defendants. Compare that to a morning criminal in-custody docket for the City of Marysville. That docket regularly has 25 defendants on a single judge's calendar. Tribal Courts also are much more willing to take input on cases from family members, victims, chemical dependency and mental health counselors, and other service providers. In addition to the use of traditional philosophies in

(continued on page 8)

EXERCISING SOVEREIGNTY THROUGH TRIBAL COURTS from page 7

the adversarial, western-style dockets, tribal courts often have diversions out of those dockets into more traditional forms of justice. These can include Elders Courts, Youth Courts, Healing to Wellness Courts, Peacemaking Circles, Sentencing Circles, and a variety of other very traditional, indigenous-informed justice models.

One fascinating recent development is the incorporation of indigenous traditions into state courts. For example the Peacemaking Model, common among tribal courts, is now being deployed in state courts in places like Redhook, New York, and Ann Arbor, Michigan. We see the traditions of tribal courts in state drug courts where researchers have found that the more time the judges spend talking to the defendant, the higher probability that the defendant will be in compliance with their court-mandated services. The attempt to individualize justice that tribal courts have always strived for is being used in state courts, which also has been found to increase the probability of compliance by a defendant or civil party.

Finally, a unique and recent evolution of tribal courts is the merging of tribal and state courts over cases involving tribal members. At the White Earth Nation in Minnesota, tribal member defendants who are charged with crimes off-reservation are referred to the Tribe’s Healing to Wellness Court for oversight, using both tribal and state services to assist defendants with addiction to a healthy future. The Tulalip Wellness Court has had criminal cases from Pierce County deferred to tribal oversight in cases where the tribal member was also charged by the Tulalip Tribes. At the Kenaitze Tribe of Alaska, the state court is sending non-Indian defendants to participate in the Kenaitze Henu’ Court, a Healing to Wellness Court, and to the Kenaitze Peacemaking Circle. These examples of tribal and state court cooperation over cases of common interest are the new frontier of tribal courts in the United States.

Notwithstanding the efforts to assimilate the tribes into the mainstream and the lack of adequate funding for tribal justice systems, tribal courts are an extremely important part of the sovereignty of the federally recognized tribes. Whether those courts look much like how they have looked for thousands of years, or if they look very similar to a state or federal court, they are working to make reservations safer and to provide a place for controversies to be decided peacefully and according to the laws and customs of each tribe.

1 18 U.S.C. § 1152.
 2 109 U.S. 556 (1883).
 3 18 U.S.C § 1153.
 4 PL 55-517.
 5 25 U.S.C. § 503.
 6 Muscogee Creek Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988).
 7 Cohen’s Handbook of Federal Indian Law 1378 (2012 ed.).
 8 *Id.*

ADMINISTRATIVE LAW

ALTERNATIVE DISPUTE RESOLUTION

ANIMAL LAW

ANTITRUST, CONSUMER PROTECTION AND UNFAIR BUSINESS PRACTICES

BUSINESS LAW

CANNABIS LAW

CIVIL RIGHTS LAW

CONSTRUCTION LAW

CORPORATE COUNSEL

CREDITOR DEBTOR RIGHTS

CRIMINAL LAW

ELDER LAW

ENVIRONMENTAL AND LAND USE LAW

FAMILY LAW

HEALTH LAW

INDIAN LAW

INTELLECTUAL PROPERTY

INTERNATIONAL PRACTICE

JUVENILE LAW

LABOR AND EMPLOYMENT LAW

LEGAL ASSISTANCE TO MILITARY PERSONNEL

LESBIAN GAY BISEXUAL AND TRANSGENDER (LGBT) LAW

LITIGATION

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What is the membership year?

Jan. 1 to Dec. 31.

What about law students?

Law students can join any section for \$18.75.

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WSBA Sections

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Exceptions Under the Indian Country Crimes Act

The ICCA precludes federal criminal jurisdiction in three instances: where the offense is committed by one Indian against the person or property of another; where the Indian offender has already been punished by tribal law; and where a treaty secures to the tribe exclusive jurisdiction over prosecution of the relevant conduct.¹⁵

Two of these exceptions are inapplicable to Smith's case. First, although the Confederated Tribes of Warm Springs tribal code criminalizes eluding, the Tribe has not charged Smith.¹⁶ Contrary to Smith's arguments in this appeal, the exception depends upon an actual and not a potential prosecution.¹⁷ Second, no party has identified a treaty provision committing prosecution of this offense to the tribe's exclusive jurisdiction. Thus, the question that remains is whether the so-called "Indian versus Indian" exception applies.¹⁸

It is this exception that led the Supreme Court to grant a writ of habeas corpus in the famous case of *Ex Parte Crow Dog*, holding that the ICCA did not support the prosecution of the Brule Sioux member Crow Dog for the murder of another Sioux member, Spotted Tail.¹⁹ The Court explained that a federal enclave murder statute was in effect at that time but conditioned its application on the exceptions codified in the ICCA.²⁰ In response to this decision, Congress passed the MCA extending federal criminal jurisdiction over certain enumerated offenses, regardless of whether a prosecution implicates an ICCA exception. Notably, that enumeration does not include fleeing or attempting to elude the police.

A controversy persists whether this exception encompasses and precludes from federal prosecution victimless crimes. The Supreme Court has held this exception to encompass crimes of adultery as they concern internal domestic relations or put otherwise "the conduct of one [tribal member] toward another," an area traditionally within exclusive tribal jurisdiction.²¹ One might argue that the crime of elusion also concerns the internal domestic relations between tribal offenders and the tribal nation's law enforcement, a sensitive area historically committed to the tribe's exclusive jurisdiction. In considering whether a crime is victimless, courts have considered not only whether the offense specifies a victim but also whether it places others at personal or legal risk.

For example, in *United States v. Sosseur*, the Seventh Circuit held that operating slot machines in violation of Wisconsin law was not an Indian versus Indian crime because the machines were made available to the public, inducing non-Indians to violate Wisconsin law.²² Similarly, the Eighth Circuit held that driving under the influence

was "an offense against the public at large, both Indian and non-Indian, rather than a true 'victimless' crime."²³ The Ninth Circuit focused on the state law's intent, affirming a conviction for illegal sale of fireworks in violation of an assimilated Washington law.²⁴ It relied on "Washington's determination that the possession of fireworks is dangerous to the general welfare of its citizens."²⁵

The Ninth Circuit will likely decline to hold the crime of elusion to be victimless. In doing so, it should clarify whether this analysis turns on the court's independent consideration of the crime's impact, on the legislative intent underlying the relevant state statute, or on some other basis. Serious crimes against the person of the direct victim often put bystanders at risk of collateral impact. But

if the danger of impact to non-Indians was the governing criterion then Congress would have had no reason to include arson within the enumerated offenses under the MCA.²⁶ Under that pro-

vision, the United States can prosecute arson regardless of the victim's Indian status. This would seem unnecessary if the governing consideration was whether non-Indians could be endangered. If that were the consideration, then the United States could simply assimilate a state arson statute and prosecute Indians without concern for the Indian versus Indian offense. After all, the spread of fire does not discriminate between the occupants of neighboring buildings based on tribal membership. But Congress determined that the ICCA's exceptions would limit such prosecutions and thus included this offense within the MCA. For this reason, the Ninth Circuit in Smith's case should focus on whom the statute intended to protect or, even more narrowly, on who Smith's crime injured.

Smith's conduct in attempting to elude tribal police was an Indian versus Indian offense. Oregon Revised Statute § 811.540(1), the basis for Smith's conviction, makes no reference to the public or the sort of reckless conduct that would endanger bystanders. It speaks only of an offender who, operating a motor vehicle, flees or attempts to elude the police. It is codified adjacent to a statute criminalizing failure to obey police instructions.

Such a statute is directed at criminalizing obstruction of the government's interest in effective law enforcement. In Smith's case, it would concern the Warm Springs Tribe's interest in arresting Smith so that he might be charged under tribal law or extradited to another jurisdiction. This is a crime directed against the Tribe. Unless the court holds that the tribe is not a person under the ICCA, it should conclude that the crime of elusion is either one committed by an Indian offender against his tribal government,

(continued on page 10)

"WITHOUT DISPUTE, THE CROWN HAD REFUSED TO CONSULT WITH THE SINIXT, ALTHOUGH THE SINIXT HAD MADE OVERTURES TO THIS EFFECT."

or else one that falls within the Tribe’s internal domestic affairs, and thus exclusive criminal jurisdiction of the Warm Springs tribe.

This straightforward analysis preserves the proper application of the ACA with focus on the narrow and determinative question. Smith’s arguments, by contrast, go too far.

Smith’s Arguments: Their Merits with a Suggestion for Congressional Amendment

The federal public defender must be given credit for the zealotry of his arguments on appeal. But several are explicitly and reasonably precluded by controlling precedent. The Ninth Circuit should hold summarily on these and avoid the risk of confusing this sensitive question of overlapping criminal jurisdiction.

Smith first argues that the United States may only charge an Indian in Indian Country for offenses enumerated in the MCA, which does not list the crime of elusion. He contends that the MCA occupies the field of federal criminal law in Indian Country. The Ninth Circuit has explicitly held otherwise.²⁷ Further, the ICCA contemplates prosecution for crimes beyond the MCA. Crimes listed in the MCA can be prosecuted without regard to the ICCA exceptions. If they represented all the crimes amenable to federal prosecution, the ICCA exceptions would have no application.

Smith next argues that the ACA does not apply to the Warm Springs reservation because it was not “reserved or acquired for the use of the United States” and is not “under the exclusive or concurrent jurisdiction” of the United States. The quoted language from 18 U.S.C. § 7 defines certain federal enclaves. Tribal reservations are indeed reserved from the public domain for federal usage as homelands for tribal nations under concurrent federal-tribal jurisdiction.²⁸ As the D.C. District Court explained, while questions could be raised about including reservations in this definition, 170 years of judicial precedent and Congress’s silent approval control.²⁹

Smith next argues that the ACA can only apply when necessary to fill some gap in criminal enforcement. The classic case is the application of assimilated state criminal law to supplement the Uniform Code of Military Justice on military reservations.³⁰ Indians on tribal reservations, by contrast, are generally subject to the relevant tribe’s comprehensive criminal code. But the text of the ACA is clear that the gaps referenced are those in federal law.³¹ When considered together with the ICCA, it becomes clear that application of the ACA is improper when the tribe has prosecuted the conduct, not simply criminalized it. But because of the strong federal policy interest in furthering tribal sovereignty, the Congress should amend the ACA to preclude assimilation when a tribal criminal law is on point.

In sum, I make two recommendations to the Ninth Circuit and one to Congress based on this case:

The court should clarify that the ICCA is necessary to extend the ACA to Indian Country and thus the ACA’s application is conditioned by the ICCA’s exceptions.

The court should focus on whether the Indian versus Indian exception applies, whether it includes a corollary for victimless crimes, and if not how the victim of a crime is to be determined. This analysis should turn on who the state statute intended to protect and should consider whether the statute’s application touches upon internal tribal affairs. In this case, the Oregon statute protects against obstruction of law enforcement. The tribe is the victim and the conduct at issue is a matter of internal tribal relations.

Congress should amend the ACA to preclude assimilation where the gap in federal law is filled by tribal law.

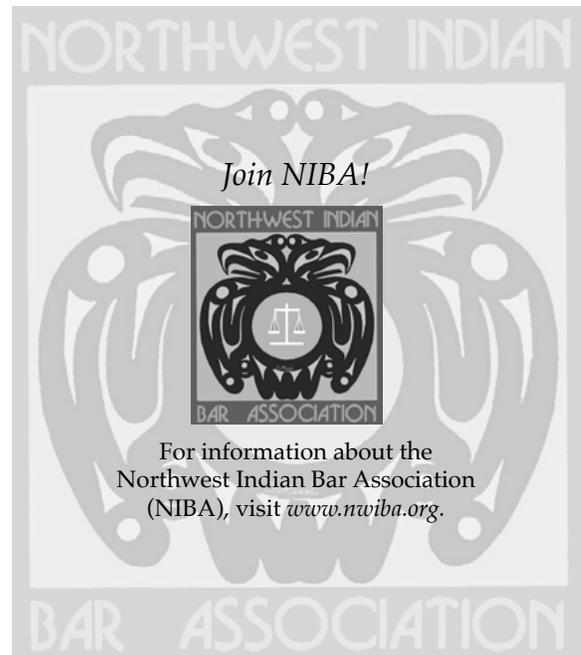
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1 18 U.S.C. § 13(a).
 2 Lewis v. United States, 523 U.S. 155, 164-65, 118 S. Ct. 1135, 140 L. Ed. 2d 271 (1998).
 3 18 U.S.C. § 1152.
 4 United States v. Begay, 42 F.3d 486, 498 (9th Cir. 1994).
 5 *Id.* (quoting United States v. Strong, 778 F.2d 1393, 1396 (9th Cir. 1985)).
 6 *Id.* at 500.
 7 United States v. Bare, 800 F.3d 1011, 1017 (9th Cir. 2015); United States v. Marcyes, 557 F.2d 1361, 1364 (9th Cir. 1977).
 8 E.g., United States v. Thunder Hawk, 127 F.3d 705, 707 (8th Cir. 1997); United States v. Sosseur, 181 F.2d 873, 875 (7th Cir. 1950).
 9 Thunder Hawk, 127 F.3d at 706-07; Sosseur, 181 F.2d at 875.
 10 557 F.2d 1361, 1363 (9th Cir. 1977).
 11 *Id.* at 1364.
 12 *Id.* at 1365 n. 1.
 13 *Id.*
 14 Answering Brief of Plaintiff-Appellee, United States v. Smith, No. 17-30248 (9th Cir. 2018).
 15 18 U.S.C. § 1152.
 16 Warm Springs Tribal Code § 310.520.
 17 Sosseur, 181 F.2d at 876.
 18 Thunder Hawk, 127 F.3d at 706.
 19 109 U.S. 556, 557-58, 562, 3 S. Ct. 396, 27 L. Ed. 1030 (1883).
 20 *Id.* at 558.

(continued on page 11)

ELUDING THE PROPER SCOPE OF FEDERAL JURISDICTION: UNITED STATES v. JOHNNY SMITH AND THE ASSIMILATIVE CRIMES ACT
from page 10

- 21 United States v. Quiver, 241 U.S. 602, 605-06, 36 S. Ct. 699, 60 L. Ed. 1196 (1916).
- 22 181 F.2d at 876.
- 23 Thunder Hawk, 127 F.3d at 709.
- 24 Marcyes, 557 F.2d at 1364.
- 25 *Id.*
- 26 18 U.S.C. § 1153.
- 27 Begay, 42 F.3d at 499.
- 28 Williams v. United States, 327 U.S. 711, 713, 66 S. Ct. 778, 90 L. Ed. 962 (1946); United States v. Pino, 606 F.2d 908, 914 (10th Cir. 1979).
- 29 Pueblo of Santa Ana v. Hodel, 663 F.Supp. 1300, 1310 n. 13 (D.D.C. 1987).
- 30 See Pueblo of Santa Ana, 663 F. Supp. At 1309.
- 31 18 U.S.C. § 13(a).



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