



# Indian Law Newsletter



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## Message from the Chair



By Aubrey Seffernick

Greetings friends and colleagues!

I want to extend a huge thank you to all of you that have given your time, energy, and expertise to strengthening the Indian Law Section's reach this year. For those of you looking to become more engaged, we are always looking for contributions to the newsletter, speakers for our annual CLE, or help with outreach and engagement. In addition, we need more practitioners willing to serve as officers or on the board of trustees.

This year the section has a renewed focus on supporting young American Indian lawyers and students. The section welcomed a Young Lawyer Liaison this year, Greg Touchton, to connect new lawyers with our programs and activities. In addition, we are offering 10 scholarships to our annual CLE to help make the program more accessible to new lawyers, as well as to seasoned practitioners who need financial assistance to attend. (Full scholarship criteria and application information is available at our WSBA website <http://www.wsba.org/Legal-Community/Sections/Indian-Law-Section>) But we'd like to do more. We are currently looking for people passionate about mentorship and connecting students with resources to grow the number of native students in law school and to develop programs that will support those students that have already embarked on their legal studies.

I am also pleased to announce that the Indian Law Section will hold the 27th Annual Indian Law Seminar on June 11, 2015, which will be followed by the Northwest Indian Bar Association dinner. There are rarely legal issues affecting the population of Washington that don't have further ramifications in Indian country—land use, employment

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## NEW IRS GUIDANCE ON GENERAL WELFARE: Notice 2015-34: Clarifies IRS Position and Seeks Comments From Tribes



By Wendy S. Pearson

On April 16, 2015, the Internal Revenue Service ("IRS") released Notice 2015-34, its first guidance on tribal general welfare programs since the Tribal General Welfare Exclusion Act of 2014 (the "Act") was signed into law in September 2014. The Act added a new Internal Revenue Code section §139E (Code §139E) that codifies the general welfare exclusion as applicable to Indian tribal government programs. Prior to that codification, the general welfare exclusion was simply an administrative tax exemption that the IRS permitted for certain types of payments made to individuals by governmental entities according to legislatively provided social benefit programs for the promotion of general welfare.

Three months before the Act became law, the IRS released Revenue Procedure 2014-35 (Rev. Proc. 2014-35), which clarified how the general welfare exclusion would be applied to tribal government programs. Rev. Proc. 2014-35 provides a series of safe harbors applicable to specific types of tribal general welfare programs. Rev. Proc. 2014-35 establishes minimum requirements for a tribal general welfare program to qualify for safe-harbor treatment, as follows:

1. The payment must be made according to a specific Indian tribal government program;
2. The program must have written guidelines specifying how individuals may qualify for the benefit;
3. The benefit must be made available to any

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tribal member or qualified nonmembers, or identified group of members, who satisfy the program guidelines (subject to budgetary constraints);

4. The distribution of benefits from the program does not discriminate in favor of members of the tribe’s governing body;
5. The benefit is not compensation for services; and
6. The benefit is not lavish or extravagant under the facts and circumstances;

Upon meeting the above requirements, Rev. Proc. 2014-35 provides that the IRS will conclusively presume that certain payments from Indian tribes to tribal members and qualified non-members qualify as tax exempt under the general welfare exclusion. The types of payments that qualify for this safe-harbor treatment are listed in the Revenue Procedure and include a nonexclusive list of 23 different programs related to housing, education, elder care, transportation, cultural and religious programs and other qualifying assistance. If the tribal welfare program does not fall within a safe-harbor, it can still qualify under the general welfare exclusion if proved by the Tribe to be a government program for the promotion of general welfare that does not constitute compensation.

Internal Revenue Code §139E, created by the Act, includes similar requirements to those found in the Revenue Procedure. The section provides that tribal government benefits qualify for exclusion from income only if all of the following criteria are met:

1. The tribal government program is administered under specified guidelines;
2. The tribal government program does not discriminate in favor of members of the tribe’s governing body;
3. The benefit:
  - a. Must be made available to any tribal member (including spouses and dependents) who meet the government program guidelines;
  - b. Is not compensation for services; and
  - c. Is not lavish or extravagant.

There are some key differences between the Revenue Procedure and Code §139E. In many respects Code §139E  
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*Section logo designed by Scott Sufficool*

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law, education, leadership, and campaign contributions all take on further nuances when they intersect with Indian law. Staying current is a constant challenge and this year’s CLE addresses some of these unique issues. The program will take place at the WSBA Conference Center in downtown Seattle, and then we encourage all attendees to take a short jaunt down the hill to mingle at the Northwest Indian Bar Association’s annual dinner gala.

Finally, I want to take a moment to celebrate the success of our annual holiday party. Over 50 section members came out to celebrate the season. Mary Rodriguez, section trustee, led the effort to leverage the event to collect meaningful gifts for organizations caring for the most vulnerable in our community. Holiday party attendees donated \$220 to Roots and Chief Seattle Club, as well as numerous toiletries and supplies.

Thank you again for all your support, and please reach out to me if you’d like to become more involved in the section’s leadership, events, and programs!

## INDIAN LAW NEWS YOU CAN USE

## Washington Supreme Court Gets it Wrong in *State v. Shale*



By Gabriel Galanda & Amber Penn-Roco

In March, the Washington Supreme Court handed down *State v. Shale*, moving our state in the wrong direction

on the subject of tribal criminal jurisdiction.<sup>1</sup> The court held that the State of Washington possessed jurisdiction over a crime committed by an Indian, in Indian Country, because the Indian was not a member of the Tribe on whose reservation lands the crime allegedly occurred. Like some of the court's preceding Indian criminal law decisions, *Shale* goes against prevailing local and national policy that seeks to restore—not further erode—tribal criminal authority over criminal actors in Indian Country.

### The Case

In *Shale*, the defendant was an enrolled member of the Confederated Tribes and Bands of the Yakama Nation. The defendant was convicted of raping a child.

After being released from prison, the defendant moved to Seattle, where he registered as sex offender with King County. By 2012, the defendant moved onto the Quinault Indian Nation's Reservation, which traverses a pocket of remote Jefferson County, along the Pacific Coast. The State prosecuted and eventually convicted the defendant for failing to register as a sex offender in Jefferson County. The defendant asserted that the State lacked jurisdiction to prosecute him, as the charged crime was committed on the Quinault Reservation and thus beyond Washington state jurisdiction.

The jurisdictional facts of the case were left rather unclear despite guidance from the U.S. Supreme Court that "[t]he ownership status of land ... may sometimes be a dispositive factor" in matters of tribal jurisdiction.<sup>2</sup> The court explained that during a joint investigation by Jefferson County and Quinault Nation police, "[o]ne officer"—it is unclear which—"went to Shale's father's home, which may have been in Clallam County, and spoke to Shale himself."<sup>3</sup> The Quinault officer also "went to the Quinault reservation in Jefferson County ... and [learned] that Shale ha[d] been living on the reservation for approximately a year."<sup>4</sup> Although the defendant's trial testimony and police reports "suggest" he was dividing his time between the

two residences—meaning in two different counties and two different sovereign jurisdictions—the court left that pivotal jurisdictional fact to guesswork.<sup>5</sup> Further, because it was unclear whether the defendant possibly "resided on fee, trust or allotment land" on the Quinault Reservation, the court "assume[d] without deciding that he was living on trust or allotment land within the tribe's jurisdictional boundaries at the relevant time."<sup>6</sup>

Ultimately, after an extensive discussion of Washington's counterpart to federal Public Law 280—whereby in 1963 the State unilaterally assumed certain criminal and civil jurisdiction over Indians in Washington Indian Country—and the State's progressive retrocession of that authority in favor of tribal governments that began in 1968, the *Shale* court held that "the federal government accepted retrocession of state jurisdiction over members of the Quinault Indian Nation only while on their Quinault Reservation."<sup>7</sup> As the defendant was not a member of the Quinault Indian Nation, jurisdiction over him had not been retroceded by

the State. Accordingly, the court determined that the State possessed the power to prosecute him. In doing so, the court got it wrong.

### The Wrong

The court's opinion is primarily based on its wholly mistaken belief that when

Public Law 280 was passed by Congress in the 1950s and enacted and amended by Washington state in the 1960s, "neither this state nor the federal government would have understood that one tribe's court could have jurisdiction over members of another tribe."<sup>8</sup> To reach that conclusion, the court relied upon *Duro v. Reina*, 495 U.S. 676 (1990), where the U.S. Supreme Court held a tribe no longer possessed the authority to prosecute a "nonmember Indian." However, Congress enacted new legislation that effectively overruled *Duro*, as affirmed by the U.S. Supreme Court in *United States v. Lara*, 541 U.S. 193 (2004). The "*Duro* fix" legislation was passed less than six months after the *Duro* decision was issued.<sup>9</sup> The *Shale* court conceded that *Duro* was not good law earlier in its opinion, but later relied on *Duro* to argue that the State had jurisdiction insofar as the retrocession of state authority did not extend to nonmember Indians.<sup>10</sup>

The *Shale* Court failed to appreciate federal legislative history of the *Duro* fix, which expressly indicated that both Congress and the President understood that tribes have **always** had inherent jurisdiction over nonmember Indians. The Congressional legislative history from the *Duro* fix makes it clear that "tribes have retained the criminal

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## Reverse Bracker: Just Taxation Near Indian Country



By Anthony Broadman and  
Chase Iron Eyes

Just as the U.S. Supreme Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143

(1980), has been construed to allow state governments to reach into Indian country and collect taxes on reservation transactions involving non-Indians, tribal governments should be able to reach beyond their boundaries, and generate revenue from off-reservation transactions involving their members.

*Bracker* and its progeny stem from the notion that states are entitled to tax revenue on, for instance, sales to non-Indians buyers, because those buyers rely on state infrastructure and should not be able to spend money without supporting that infrastructure. But for Tribes whose members leave the reservation to spend money, the same rationale should be true. Just as those members use tribal infrastructure, taxes on sales to such members should go to the jurisdictions where they live: reservations.

But current federal Indian tax law presents a major impediment to fair taxation. In general, absent a treaty bar, there is no legal basis for a reverse *Bracker* rule. In general, “[a]bsent express federal law to the contrary,” tribal commerce “going beyond reservation boundaries” is nearly always “subject to non-discriminatory state law otherwise applicable to all citizens of the State.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). The theoretical barrier is buttressed by the practical reality that states aggressively pursue any tax revenue with even a tenuous state nexus. See *Fond du Lac Band of Lake Superior Chippewa v. Frans*, 649 F.3d 849, 850 (8th Cir. 2011) (upholding taxation of tribal members who resided in Indian country but earned income outside state).

Federal Indian tax law, however, has never blocked the way of tribes and tribal members fighting to advance their rights. In fact, tribal disobedience, or the “process by which Indigenous people engage in ‘disobedient’ actions against the colonizing government in order to protect and defend their inherent and treaty-recognized rights,” is absolutely critical to the survival of tribal sovereignty. Without descending into the Tea Party rabbit hole or engaging in “Tribal Lawyer Bullshit,” it’s at least fair to say that good faith resistance to illegal taxation is a shared American value. In short,

when we can do so under appropriate procedural and legal scenarios, we should not pay illegal taxes.

Tribes whose borders are delineated by non-Indian liquor stores, discount grocers, used-car dealers, and check-cashing outlets should consider whether taxes paid by Indians just beyond the reservation boundaries can be resisted, openly and civilly. Of course, lawsuits over taxes paid under duress are not subject to a statute of limitations. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 32 (1990).

Beyond disobedience, tribal spending power and economic self-determination may present even more powerful tools in the fight for economic justice near the reservation. For example, a tribal community could aspire to shut down the Big Box store just beyond reservation boundaries by collectively not shopping there any longer.

Also, if non-Indian retailers want to do business with Indians, they should be forced to support the reservation-based infrastructure that Indian customers use. Recent changes to BIA leasing regulations make

[T]AXES ON SALES TO [T]RIBAL MEMBERS SHOULD GO TO THE JURISDICTIONS WHERE THEY LIVE: RESERVATIONS.

this approach pretty obvious. States cannot tax “activities” on Indian land subject to the leasing regulations. 25 C.F.R. § 162.017(b). Tribes, however, can tax or otherwise derive economic benefit from new non-Indian reservation activity fostered under such leasing regulations. Now, more than ever, the federal policy behind Indian self-determination is being expressed as a matter of economic justice—not simply a governmental one.

Finally, just as non-Indian businesses airdrop into reservations to take advantage of tribal customer bases, tribal businesses should take advantage of urban trust land near urban Indians. Like the black-economic-empowerment movement, tribes should provide the opportunity for urban Indians to support urban tribal economic development. Sales to Indians in Indian country are simply not taxable—even if that Indian country is located within the boundaries of a metropolis. *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 168 (1973).

States will not voluntarily give up on the taxation of Indian commerce. They are rational, greedy actors. It will take a financial deterrent, an incentive to accept an alternative arrangement. Many states already have the legal basis to reach such agreements with Tribes. Negotiated resolutions must be made more desirable through the unpleasantness of all other alternatives.

For decades—maybe centuries—urban centers like Rapid City have profited from the Indian dollar. In addition to losing substantive economic development to non-Indian businesses, tribal governments have lost valuable tax

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**NEW IRS GUIDANCE ON GENERAL WELFARE** from page 2

is broader than the Revenue Procedure. Yet there are benefits of the Revenue Procedure that are not articulated in Code §139E. For instance, Code §139E does not limit the exemption to certain types of benefits or programs and does not define what may qualify as “promotion of general welfare.” On the other hand, Rev. Proc. 2014-35 provides safe-harbor tax treatment for certain types of programs and Code §139E does not provide safe-harbors. In addition, Code §139E states that eligible beneficiaries include the tribal member, spouse and dependent. Rev. Proc. 2014-35 has a more expansive beneficiary class of “qualified non-members” that includes spouse, former spouse, legally recognized domestic partner, ancestor, descendent, or dependent of the tribal member. That said, the Act’s legislative history clarifies that the qualifying tribal welfare programs are to be broadly construed and not limited to specific types of programs and in that regard Congress stated, “it is expected that the IRS will develop regulations that are no less favorable to tribes than Revenue Procedure 2014-35.” In addition, the Act explicitly states “[a]mbiguities in section 139E ... shall be resolved in favor of Indian tribal governments and deference shall be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit to the general welfare of the tribal community.”

Some tribes have expressed concern about the impact of Code §139E on Rev. Proc. 2014-35. That is, to what extent can a tribe rely on Rev. Proc. 2014-35 to qualify for safe-harbor tax treatment? How will the IRS conform Rev. Proc. 2014-35 to Code §139E? When will regulations be issued which implement Code §139E? How will “lavish and extravagant” be defined in consultation with tribes as required by the Act? Notice 2015-34 attempts to answer some of these questions and seeks input from tribes on the mandates of the Act.

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**REVERSE BRACKER: JUST TAXATION NEAR INDIAN COUNTRY**  
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revenue. Through Indian disobedience, targeted spending choices, and aggressive urban economic ventures, the non-Indian tax suck driven by *Bracker* could be reversed.

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Notice 2015-34 states that taxpayers may continue to rely on the Rev. Proc. 2014-35. The IRS suggests that the Revenue Procedure remains beneficial to tribes as it is broader than Code §139E in some respects, such as with regard to providing a safe-harbor determination that “need” is met for the 23 types of programs listed in the Revenue Procedure. There remains some question whether “need” is relevant under Code §139E. Regardless, the IRS has signaled that tribes can safely pattern their programs upon Rev. Proc. 2014-35 guidance.

As to interpreting Code §139E and meeting the Congressional mandate that IRS expand rather than restrict the safe-harbors, Notice 2015-34 requests comments from tribes on three initial aspects:

1. What guidelines would be helpful to Indian tribal governments in determining whether benefits provided under governmental programs are lavish or extravagant?
2. What tribal customs or government practices may establish an Indian tribal government program administered through specific guidelines under the Act? How may programs established by tribal custom or government practice be identified?
3. How should items of cultural significance, cash honoraria, and cultural or ceremonial activities for the transmission of tribal culture be defined?

The IRS also invites general comments on any other issues pertaining to Code §139E or other provisions of the Act. **All comments are due by Oct. 14, 2015.**

This is an important opportunity to provide much-needed input on guidelines that should ensure that the IRS gives deference to tribes on their development of general welfare programs.

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## WASHINGTON SUPREME COURT GETS IT WRONG IN STATE V. SHALE from page 3

jurisdiction over non-member Indians and this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations.<sup>11</sup> “[T]he assumption in Congress has *always* been that tribal governments do have such jurisdiction, and Federal statutes reflect this view.”<sup>12</sup> Further, “Tribal Governments retain all powers of self-government except those which have been explicitly divested by the Congress. Congress has never acted to divest tribal governments of this authority.”<sup>13</sup>

Indeed, a tribe’s ability to govern the conduct of both member and nonmember Indians in Indian Country has been recognized by the federal government as far back as the 1800s.<sup>14</sup> Historically, it has been Congress’ “consistent practice” to “leav[e] to Indian tribes the task of punishing crimes committed by Indians against Indians” and there is a “congressional presumption that tribes had power over all disputes between Indians regardless of tribal membership.”<sup>15</sup> As the *Lara* court explained, what Congress has recognized is an “‘inherent’ tribal power ... to prosecute nonmember Indians.”<sup>16</sup> In other words, tribes have possessed such power forever.

More broadly, it is prevailing federal and state policy to enhance tribal governments’ criminal jurisdiction over people in tribal territories. In 2010, Congress passed the Tribal Law and Order Act, expanding the punitive abilities of tribal courts, including enhanced sentencing authority over member and nonmember Indian defendants.<sup>17</sup> Congress found that “tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country.”<sup>18</sup> In 2013, Congress’ Violence Against Women included provisions that restored tribal criminal jurisdiction over acts of domestic violence committed by non-Indians in Indian Country.<sup>19</sup>

Meanwhile, in 2012, the Washington State Legislature passed a law that allows tribes to petition the Governor to have the State retrocede from “all or part” of the criminal and civil jurisdiction it usurped from the tribes in 1963 under Public Law 280.<sup>20</sup> In 2014, Governor Jay Inslee signed a proclamation supporting the Yakama Nation’s efforts towards state retrocession from over 1.2 million acres of Yakama Nation lands in Washington; the U.S. Department of the Interior Secretary is expected to authorize that retrocession soon.<sup>21</sup> These new federal and state laws demonstrate a national trend to enhance, not derogate, tribal authority over crimes committed in Indian Country, especially those committed by Indians.

*Shale*, in contrast, moved Washington state in the opposite direction. The court focused on RCW 37.12.010, which provides that the State’s criminal jurisdiction “shall

not apply to Indians when on *their* tribal lands.”<sup>22</sup> The court adopted a narrow interpretation of that phrase to limit a tribe’s jurisdiction over “their” lands to include only acts committed by the tribe’s own members.<sup>23</sup> To do so, the court made an archaic distinction between member and nonmember Indians vis-à-vis tribal criminal jurisdiction. The court also failed to apply the U.S. Supreme Court-prescribed canon of construction that any ambiguity in a statute must be resolved in favor of Indians, as it has done in the recent past.<sup>24</sup>

Moreover, the court ignored its own related precedent, specifically *State v. Jim*, 173 Wn. 2d 672 (2012), where the three words “their tribal lands” did not prevent the court from ruling that the State lacked jurisdiction over an Indian fishing on a treaty fishing access site on the Columbia River that Congress has designated for the benefit of four tribes. There, the court construed “their tribal lands” to benefit each of those tribes and their members interchangeably.<sup>25</sup>

The court’s conclusion in *Jim* makes sense given the reality that Indians of various tribes routinely live and work together on any given tribal lands. In support of the *Duro*-fix, Congress recognized that nonmember

Indians “own homes and property on reservations, are part of the labor force on the reservation, and frequently are married to tribal members” and that they “receive the benefits of programs and services operated by the tribal government,” necessitating tribal criminal jurisdiction over nonmembers.<sup>26</sup>

The same logic could have been deployed, or at least discussed, in *Shale* to assess tribal court criminal power. Instead, the *Shale* court entirely failed to consider the reality of life in Indian Country, resulting in a myopic outcome.

### The Real Wrong

*Shale* is the latest in a line of regressive tribal criminal jurisdiction rulings by the court.<sup>27</sup> For example, in *State v. Eriksen*, 172 Wn. 2d 506 (2011), the court curiously reversed itself to hold that tribal police officers it hot pursuit of a drunk-driving suspect do not have the authority to stop and detain him once he leaves the reservation. There, the Justices admitted that their decision “create[d] serious policy problems, such as the incentive for intoxicated drivers to race for the reservation border.”<sup>28</sup> In *State v. Clark*, the court examined the State’s ability to search on-reservation tribal trust land for a crime committed by an Indian off of his reservation.<sup>29</sup> There, despite the fact that the tribe had codified procedures for a “State to obtain a tribal warrant in addition to a state warrant,” because the tribal law did

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[A] TRIBE’S ABILITY TO GOVERN THE CONDUCT OF BOTH MEMBER AND NONMEMBER INDIANS IN INDIAN COUNTRY HAS BEEN RECOGNIZED BY THE FEDERAL GOVERNMENT AS FAR BACK AS THE 1800S.

## WASHINGTON SUPREME COURT GETS IT WRONG IN STATE V. SHALE from page 6

not precisely spell out “the way the State executes its own process” on Indian lands, the court held that “the State does not infringe tribal sovereignty by searching reservation lands” in disregard for that codified tribal law.<sup>30</sup>

Underlying the court’s Indian criminal jurisprudence is a mix of paternalism and misunderstanding. On the one hand, the *Shale* court speculated that the Quinault Indian Nation “may welcome the State’s assistance in prosecuting unregistered sex offenders.”<sup>31</sup> That may be true but it is not for the State of Washington to say what tribal governments may or may not welcome. In fact, it was the State’s unilateral assumption of jurisdiction over Indians in Indian Country in 1963 that caused the jurisdictional maze that is P.L. 280 jurisdiction in Washington, and in turn caused “a significant negative impact on the ability to provide public safety to Indian communities.”<sup>32</sup>

On the other hand is the court’s mistaken notion that tribal governments somehow intend to “frustrate[] the State’s ability to punish those who break the law.”<sup>33</sup> In *Shale*, the court presumed that the Quinault Indian Nation “made the deliberate decision” not to prosecute the defendant based merely on the fact that a tribal officer’s assistance in the State’s criminal investigation—one that did not even clearly conclude where the crime occurred—did not yield a tribal prosecution.<sup>34</sup> Likewise, during oral argument in *Clark* two years ago, one Justice cited dicta by Justice Anton Scalia in *Nevada v. Hicks*, 533 U.S. 353, 364 (2001), to imply that Washington tribes are content to serve as an “asylum for fugitives from justice.”

Congress understands that tribes want to eradicate sex offenders, wife beaters and other criminals from their homelands, and the U.S. Supreme Court has affirmed tribal jurisdiction to do so. More importantly, the Washington State Legislature and Governor share that understanding, or they would not have trusted tribes, like the Yakama Nation, to reassume authority over their lands upon the State’s retrocession therefrom. Our state’s highest court “should not unnecessarily ignore state policies”—meaning prevailing, not archaic, state policies—“when fashioning a remedy.”<sup>35</sup> To be sure, deterring crime throughout Washington state, and empowering tribal justice systems, are not mutually exclusive state policies. In fact, the 29 tribal sovereigns in our state aspire to exactly both of those goals.

In all, it is now time for the Washington Supreme Court to correct its wrong and move in union with other lawmakers and sovereigns in our State—towards the restoration of tribal criminal authority over bad actors on Indian lands.

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- 1 No. 90906-7, slip op. at 16 (Wash. Mar. 19, 2015).
- 2 *Nevada v. Hicks*, 533 U.S. 353, 360 (2001).
- 3 *Shale*, No. 90906-7, at 2 (emphasis added).
- 4 *Id.*
- 5 *Id.*
- 6 *Id.* at 10.
- 7 *Id.* at 15.
- 8 *Shale*, No. 90906-7, at 15.
- 9 Act of Nov. 5, 1990, §§ 8077(b)-(d), 104 Stat. 1892-1893 (temporary legislation until September 30, 1991); Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation).
- 10 *Shale*, No. 90906-7, at 15-16.
- 11 H. R. Rep. No. 102-61, p. 5 (1991) (emphasis added).
- 12 S. Rep. No. 102-168, p. 3 (1991) (emphasis added).
- 13 137 Cong. Rec. S5223-24 (daily ed. Apr. 25, 1991) (statement of Sen. Inouye).
- 14 See 137 Cong. Rec. S5223-24 (daily ed. Apr. 25, 1991) (statement of Sen. Inouye) (citing *Duro* (Brennan, J., dissenting)).
- 15 *Id.*
- 16 *United States v. Lara*, 541 U.S. 193, 199 (2004) (emphasis in original).
- 17 Pub. L. No. 111-211, 124 Stat. 2258 (2010).
- 18 *Id.*, § 202.
- 19 Pub. L. No. 113-4, 127 Stat. 54 (2013).
- 20 RCW 37.12.160(1).
- 21 Wash. Gov. Proclamation No. 14-01 (2014).
- 22 *Shale*, No. 90906-7, at 9-10.
- 23 *Id.* at 15.
- 24 *State v. Eriksen*, 170 Wn.2d 209 (2010) (“Eriksen I”) (citing *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943), superseded by 172 Wn.2d 506 (2010) (“Eriksen II”); 172 Wn.2d. 506 (“Eriksen III”).
- 25 *State v. Jim*, 273 P3d 434 (Wash. 2012).
- 26 137 Cong. Rec. S5223-24 (daily ed. Apr. 25, 1991) (statement of Sen. Inouye).
- 27 See generally *Washington Tribal/State Relations Evolving, But Further Work is Needed*, Bar Bulletin, December 2013 (“Hopefully, our state Supreme Court will carefully consider this State’s new policy of Indian relations when next crafting a remedy that affects the inherent rights of both of our state’s sovereigns.”).
- 28 *Id.* at 1083.
- 29 308 P3d 590 (2013).
- 30 *Id.* at 596-97.
- 31 *Shale*, No. 90906-7, at 13.
- 32 See generally Pub. L. No. 113-4, *supra*, § 202.
- 33 *Clark*, 308 P3d at 596.
- 34 *Shale*, No. 90906-7, at 13.
- 35 *Karcher v. Daggett*, 466 U.S. 910, 911 (1984) (Stevens, J., concurring).



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WSBA, in partnership with the WSBA Indian Law Section, presents:

## The Land, the People, and the Law: 27th Annual WSBA Indian Law Seminar

Thursday, June 11, 2015

WSBA Conference Center \*  
1501 Fourth Ave., Ste. 308

Seattle, WA 98101

(with live webcast option)

Approved for 6 CLE credits

(5 general + 1 ethics) for Washington attorneys.

Tuition: \$275

\*The WSBA Conference Center is equipped with hearing access via an induction loop.



### Schedule

**7:30 a.m. Check-in • Registration • Coffee and Pastry Service**

**8:30 a.m. Welcome and Traditional Program [Optional – not for CLE Credit]**

Aubrey A. Seffernick – Miller Nash Graham & Dunn LLP, Seattle; Indian Law Section Chair  
Gene Tagaban – Tlingit, Traditional Artist

**8:55 a.m. Seminar Opening Remarks and Introductions by Program Chair**

Aubrey A. Seffernick – Miller Nash Graham & Dunn LLP, Seattle; Indian Law Section Chair

**9:00 a.m. Litigation Update**

Review key court decisions that continue to shape our practices.

Tom Schlosser – Morisset, Schlosser, Jozwiak & Somerville, Seattle

**9:45 a.m. New Federal Regulations for Rights of Way and Leasing Indian Lands**

Diana R. Bob – Stoel Rives LLP, Seattle  
Sarah E. Lawson – Snoqualmie Indian Tribe, Snoqualmie

**10:30 a.m. Break**

**10:45 a.m. Laws of General Applicability; Federal Power Commission v. Tuscarora**

Delve into how federal employment laws are being applied to tribes under the Tuscarora decision.

Thane Somervill – Morisset, Schlosser, Jozwiak & Somerville, Seattle

**11:15 a.m. 40th Anniversary of the Indian Self-Determination and Education Assistance Act**

This year marks the 40th anniversary of the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), a cornerstone of modern federal Indian policy. In 1988, amendments to the ISDEAA created the Tribal Self-Governance Demonstration Project. By providing a statutory basis for the broader movement of tribal self-determination and self-governance, this legislation recognized and advanced the proposition that Indian tribes can provide better governmental services to their own members than can distant federal bureaucracies. The self-determination and self-governance policy has proven so successful that today the vast majority of all federal Indian programs are carried out by tribes rather than federal agencies. Get an overview of the history of the ISDEAA and the tribal self-governance project, learn of challenges to the continued growth of ISDEAA contracting and self-governance compacting, and discusses possible directions that the program could take in the coming years.

Geoffrey D. Strommer – Hobbs Straus Dean & Walker LLP, Portland, OR

**11:45 a.m. Lunch on Your Own**





WSBA, in partnership with the WSBA Indian Law Section, presents:

## The Land, the People, and the Law: 27th Annual WSBA Indian Law Seminar

### Schedule Cont.

#### 1:00 p.m. Tribal Official Immunity in Washington

Recent decisions threaten Washington's application of the tribal official immunity doctrine. The panel will look at how the risk of suit against Tribal Officials may impact their daily decision making. What strategies do litigators have at their disposal to deal with this issue? How should in-house attorneys counsel their clients in light of this seemingly crumbling doctrine?

*Rob Roy Smith – Kilpatrick Townsend & Stockton, LLP, Seattle*  
*Moderator: Claire Newman – Kilpatrick Townsend & Stockton, LLP, Seattle*

#### 1:45 p.m. Finding a Cure for Tribal Disenrollment

Ryan will speak from a similarly titled forthcoming Arizona Law Review article in which he and Gabe Galanda surveyed the last two centuries of federal American Indian policy around disenrollment, as distinguished from the sovereign power, to set limits on citizenship.

*Ryan D. Dreveskracht – Galanda Broadman, PLLC, Seattle*

#### 2:15 p.m. Break

#### 2:30 p.m. Representing, Defending and Adjudicating Employment Matters In Tribal Forums

- Navigating the Employment Policy Manual and Tribal Law.
- Remedies -- Look for Limited Waivers of Sovereign Immunity.
- Problems -- Unclear policy manuals and Tribal codes with conflicting procedures.
- GOAL: Strengthen Tribal Sovereigns by having clearly written procedures for everyone to understand.

*Hon. Lisa J. Dickinson – Dickinson Law Firm PLLC, Spokane*  
*Millie A. Kennedy – Northwest Justice Project, Seattle*

#### 3:15 p.m. Confederated Salish and Kootenai Tribes' Corporation, Energy Keepers, Inc. Acquisition of Kerr Hydroelectric Project

Get an inside look at the background, history, FERC process, conveyance price arbitration, business startup activities, corporate structure and planning involved in the tribally owned Kerr Dam hydro project.

*Joe Hovencotter – Energy Keepers, Inc., Polson, MT*

#### 3:45 p.m. ETHICS: Campaign Contribution in State/ Federal/Tribal Races

As tribes become more involved in local, state, tribal, and federal races, what are some strategic and the legal considerations involved in political action? What ethics pitfall do attorneys need to be aware of when advising or working with clients in the political arena?

*Aubrey Seffernick – Miller Nash Graham & Dunn, LLP*  
*Chloe Thompson – Port Madison Enterprises, Suquamish*



ADMINISTRATIVE LAW  
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 ANIMAL LAW  
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WASHINGTON STATE BAR ASSOCIATION  
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