

# CALIFORNIA TRIBAL COURT/STATE COURT FORUM

## Forum E-Update

SEPTEMBER 2013

### CALIFORNIA TRIBAL COURT/STATE COURT FORUM

HON. RICHARD C. BLAKE  
*Cochair*

HON. DENNIS M. PERLUSS  
*Cochair*

*Hon. Abby Abinanti  
Hon. April E. Attebury  
Hon. Mitchell L. Beckloff  
Hon. Jerilyn L. Borack  
Hon. Anthony J. Brandenburg  
Hon. Leonard P. Edwards (Ret.)*

*Volunteer Mentor Judge  
Hon. Kimberly A. Gaab  
Hon. Michael Golden  
Hon. Cynthia Gomez  
Mr. Olin Jones  
Hon. Suzanne N. Kingsbury  
Hon. William Kockenmeister  
Hon. James R. Lambden  
Hon. Anthony Lee  
Hon. Lester J. Marston  
Hon. Robert Moeller  
Hon. David E. Nelson  
Hon. Kimberly J. Nystrom-Geist  
Hon. Deborah A. Ryan  
Hon. Deborah L. Sanchez  
Hon. Dean T. Stout  
Hon. Allen H. Sumner  
Hon. Juan Ulloa  
Hon. Claudette C. White  
Hon. Christine Williams  
Hon. Christopher G. Wilson  
Hon. Joseph J. Wiseman  
Hon. Sarah S. Works*

### FORUM PROPOSALS

(To view these proposals, see forum home page  
<http://www.courts.ca.gov/3065.htm>)

**SB 406:** The California Judicial Council approved sponsoring legislation to provide a streamlined procedure for the recognition and enforcement of tribal court civil judgments.

**Child Support:** Proposal to add a new California Rule of Court that would provide a consistent procedure for the discretionary transfer of title IV-D child support cases from the state courts to tribal courts where there is concurrent jurisdiction over the matter in controversy.

**Psychotropic Medication:** Proposal to revise rules and forms relating to notice of Indian Tribes.

**Tribal Access to Confidential Juvenile Court Files:** Proposal to amend section 827 of the Welfare and Institutions Code.

**Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) proposed for California:** Comment on tentative recommendation of the California Law Revision Commission for adoption in California of a modified version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act to address issues involving conservatorships for members of Indian tribes located California.

### FORUM EVENTS

#### Cross-Cultural Court Exchanges

The forum has planned a series of local tribal court/state court exchanges to both model the collaborative relationships among tribal and state court judges at a local level and foster partnerships among tribal and non-tribal agencies and service providers. Through these exchanges, which are judicially-convened on tribal lands, participants identify areas of mutual concern, new ways of working together, and coordinated approaches to enforcing tribal and state court orders. Since no court order is self-executing, these exchanges serve to support both state and tribal courts by ensuring that those who are providing court-connected services are working together to meet the needs of their tribal communities regardless of whether citizens walk through the tribal or state courthouse doors. Forum members, Judge Claudette White, Chief Judge of the Quechan Tribal Court, and Judge Juan Ulloa, Judge of the Superior Court of Imperial County co-hosted the first exchange. Forum members, Judge Abby Abinanti, Chief Judge of the Yurok Tribal Court and Judge Christopher G. Wilson co-hosted the second exchange. Judge Richard C. Blake and Judge Christopher G. Wilson cohosted the third exchange at Hoopa on September 12, 2013. Over 65 participants came together at Hoopa. For more information about any of these exchanges, contact Jenny Walter, [jennifer.walter@jud.ca.gov](mailto:jennifer.walter@jud.ca.gov).

CALIFORNIA TRIBAL COURT/STATE COURT FORUM

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**JUDICIAL COUNCIL  
ADMINISTRATIVE OFFICE  
OF THE COURTS**  
JUDICIAL COURT OPERATIONS  
SERVICES DIVISION  
CENTER FOR FAMILIES,  
CHILDREN & THE COURTS  
455 Golden Gate Avenue  
San Francisco, California 94102

## EDUCATIONAL OPPORTUNITIES

*The State Judicial Branch has a Court Extranet with educational and other resources for state court judges and tribal court judges. This Website contains information relevant to all levels of judicial branch personnel and includes resources designed to meet education, facilities, financial, human resources, legal, special court projects, technology, and other informational needs. It also offers both current news and archived resources. For more information, please contact Angelica Souza at 415-865-7417 or [angelica.souza@jud.ca.gov](mailto:angelica.souza@jud.ca.gov).*

### Tribal/State Programs Staff:

Vida Castaneda, Court  
Services Analyst,  
[vida.castaneda@jud.ca.gov](mailto:vida.castaneda@jud.ca.gov) or  
415-865-7874

Ann Gilmour, Attorney,  
[ann.gilmour@jud.ca.gov](mailto:ann.gilmour@jud.ca.gov) or  
415-865-4207

Angelica Souza, Administrative  
Coordinator,  
[angelica.souza@jud.ca.gov](mailto:angelica.souza@jud.ca.gov) or  
415-865-7417

Jenny Walter, Supervising  
Attorney,  
[jennifer.walter@jud.ca.gov](mailto:jennifer.walter@jud.ca.gov) or  
415-865-7687

Tribal/State Programs Link:  
<http://www.courts.ca.gov/programs-tribal.htm>

### **Collaborative Approaches to Justice Information Sharing among Tribal, State and Local Justice Agencies**

**Tuesday, September 24 at 12:00 PM PST (3:00 PM EST)**

Many jurisdictions across the country are working to improve sharing of vital justice information across jurisdictional and agency boundaries. Tribal, local and state agencies are developing methods of sharing information related to management of sex offenders, homeland security and child welfare issues. This webinar will highlight collaborative approaches to justice information sharing that respect tribal sovereignty and traditions while providing public safety to all citizens. Tribal law enforcement officials will discuss efforts to share information across jurisdictional boundaries as partners in the Regional Organized Crime Information Center for the Southeastern United States and the East Valley Fusion Center in Phoenix, Arizona. A representative of the Regional Information Sharing System (RISS) will provide information about resources that facilitate criminal justice information sharing among tribal, state, and local justice agencies. To register, [click here](#).

### **28th Annual California Indian Conference and Gathering October 3-5, 2013 California State University**

The California Indian Conference and Gathering is an annual event for the exchange of views and information among academics, educators, California Indians, students, tribal nations, native organizations and community members focusing on California Indians. <http://californiaindianconference.org/>

### **Beyond the Bench XXII**

**December 2-4, 2013 in Los Angeles, CA**

Beyond the Bench XXII will be taking place December 2-4, 2013, at the Marriott Hotel in Anaheim, CA. Visit this link: <http://www.courts.ca.gov/programs-cfcc.htm>

These programs are supported with funds from the Office on Violence Against Women, U.S. Department of Justice that are administered through the California Emergency Management Agency (CalEMA), the U.S. Department of Health and Human Services, Court Improvement Program, and the California Department of Social Services.

**CALIFORNIA TRIBAL COURT/STATE COURT FORUM**

# CALIFORNIA TRIBAL COURT/STATE COURT FORUM

## **ICWA Educational Resource Video - Bringing our Children Home: An Introduction to the Indian Child Welfare Act**

The video will be a companion to the National ICWA Judicial Curriculum currently in development, a resource designed for state court judges, courts, and judicial educators.

[http://courts.ms.gov/trialcourts/youthcourt/youthcourt\\_vcvideos.html](http://courts.ms.gov/trialcourts/youthcourt/youthcourt_vcvideos.html)

## **Partnering with Justice Systems for Behavioral Health Treatment and Prevention Webinar Tuesday, September 24, 2013 at 12:00 - 1:30 p.m. PST**

The Indian Health Service, Division of Behavioral Health (DBH), is pleased to announce the launch of a new monthly webinar series. The webinar will look at Healing to Wellness Courts and the Victim Advocate support system, the goals of the approaches, the barriers encountered, and the ways behavioral practitioners can forge productive partnerships with stakeholders in the justice system. There is no cost and no need to preregistration. CME/CEU credit will be offered. To connect to the webinar please click here: <https://ihs.adobeconnect.com/dbh>, select "Enter as a guest", enter your name (First and Last) in the Field name; enter the room passcode: **dbh**; press the "Enter Room" button. Audio Options: 1) Select "Dial-out" and have Adobe Connect call you by entering your phone number, or 2) Select: "Dial-in to the Audio Conference via Phone" and call into the meeting using the number provided by selecting this option or 3) Select "Using computer" to listen through your computer speakers. For technical assistance contact Alaina George [alaina.george@ihs.gov](mailto:alaina.george@ihs.gov) (505) 248-4531. For more information contact Amina Bashir at [Amina.Bashir@ihs.gov](mailto:Amina.Bashir@ihs.gov) or (301) 443-6581 (office).

## **2013 National Tribal Judicial Conference & NAICJA Annual Meeting October 9-11, 2013 in Cabazon, CA**

The National American Indian Court Judges Association (NAICJA) is pleased to announce that the 2013 National Tribal Judicial Conference & NAICJA Annual Meeting will be held at the Morongo Casino Resort & Spa in Cabazon, California on October 9 – 11, 2013. This theme for this year's conference is *Renewing and Strengthening Tribal Justice System Foundations*. The Conference is open to the public and will provide information, training and networking opportunities for judges, court personnel and other persons interested in American Indian & Alaska Native tribal justice systems. For more information see this link: <http://naicja.org/events/2013conference>

## **SURVEY**

### **Addiction in Indian Country: Tribal Justice Survey**

The National Tribal Judicial Center at the National Judicial College (NTJC/NJC), with funding support from the Bureau of Justice Assistance (BJA), is conducting an on-line survey to assess training needs on addiction related issues and tribal justice systems. <https://www.surveymonkey.com/s/YGT78KD>

# CALIFORNIA TRIBAL COURT/STATE COURT FORUM

## GRANT OPPORTUNITIES

### **Surdna Foundation**

#### **Deadline: Open (Letters of Inquiry)**

The Thriving Cultures Program supports programs that successfully connect teens to artistically rigorous and culturally relevant programs that equip them with practical and life-enhancing skills. This foundation supports programs that prepare young, emerging artists to be creative and innovative leaders in their communities. <http://www.surdna.org>

### **Public and Indian Housing Family Self-Sufficiency Program**

#### **Department of Housing and Urban Development**

#### **Deadline: October 7, 2013**

The purpose of the PH FSS program is to promote the development of local strategies to coordinate the use of assistance under the Public Housing program with public and private resources to enable participating families to increase earned income and financial literacy, reduce or eliminate the need for welfare assistance, and make progress toward economic independence and self-sufficiency.

<http://www.grants.gov/web/grants/search-grants.html>

## Indian Child Welfare Act Cases in the News

### **UN expert urges respect for the rights of Cherokee child in custody dispute**

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13695&LangID=E>

### **Court rules Baby Desirai must be returned to Oklahoma**

The Baby Desirai case mirrors the "Baby Veronica" custody battle, between her South Carolina adoptive parents and her biological father, an Oklahoma native.

<http://www.newson6.com/global/story.asp?s=23406889>

### **Baby Veronica update: Both sides spend several hours in court**

Tulsa World - September 17, 2013

Meeting for a second straight day, Baby Veronica's competing sets of parents spent several hours at a downtown courthouse Tuesday. Repeating Monday's routine, they arrived early, broke for lunch and came back for most of the afternoon. But the entire sixth floor of the state's Kerr office building, where the Court of Civil Appeals meets in Tulsa, was closed to the public. Also: After SCOTUS, Baby Veronica Still Not in Adopted Parents' Custody:

[http://blogs.findlaw.com/supreme\\_court/2013/09/after-scotus-baby-veronica-still-not-in-adopted-parents-custody.html](http://blogs.findlaw.com/supreme_court/2013/09/after-scotus-baby-veronica-still-not-in-adopted-parents-custody.html)

[http://www.tulsaworld.com/article.aspx/Baby\\_Veronica\\_case\\_Court\\_hearing\\_resumes\\_today/2013\\_0917\\_800\\_0\\_BabyVe347647](http://www.tulsaworld.com/article.aspx/Baby_Veronica_case_Court_hearing_resumes_today/2013_0917_800_0_BabyVe347647)

## Federal Legislation in the News

**HR 3030 (Introduced August 2, 2013, referred to House Ways and Means)**

# CALIFORNIA TRIBAL COURT/STATE COURT FORUM

This bill would amend the Internal Revenue Code and the Social Security Act to ensure that tribal child support enforcement agencies have the authority to access parent locator services, which are currently only available to state and local governments but not tribes. Also, the tax code would be amended to allow tribal child support enforcement agencies to enforce orders for support through the authority to withhold past due child support payment from the federal income tax returns of parents with past due obligations.

[http://waysandmeans.house.gov/uploadedfiles/national\\_congress\\_of\\_american\\_indians\\_17.pdf](http://waysandmeans.house.gov/uploadedfiles/national_congress_of_american_indians_17.pdf)

<http://www.govtrack.us/congress/bills/113/hr3030>

## Article

### **Gaming On The Razor's Edge: The Supreme Court Grants Cert in *Michigan v. Bay Mills Indian Community*, and Tribal Sovereign Immunity is in Play<sup>1</sup>**

Coming on the heels of the *Baby Veronica* case decided last term, the United States Supreme Court will hear arguments in *Michigan v. Bay Mills Indian Community* on December 2, 2013, a case that has the potential to drastically alter the legal landscape of tribal sovereign immunity.

#### **1. Facts of Case and Proceedings Below**

The Bay Mills Indian Community opened a casino, pursuant to a Tribal Gaming Commission license, approximately 100 miles from its reservation on land recently bought by the Tribe. The State of Michigan filed suit in federal court seeking an injunction to close the casino, claiming that it was not located on Indian land, and, therefore, violated Michigan gaming law. The district court granted the injunction, and the Sixth Circuit reversed, holding that the federal court had no jurisdiction, and that Indian sovereign immunity would bar the case even if jurisdiction existed. The United States Supreme Court granted Michigan's cert petition on June 24, 2013.

The case implicates the jurisdictional provisions of the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2701 *et seq.* IGRA grants federal court jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on *Indian lands* and conducted in violation of any Tribal-State compact ..." 25 U.S.C. § 2710(d)(7)(A)(ii).

Two main issues are raised by Michigan's cert petition: (1) whether the federal courts have jurisdiction over its claims, and (2) if the federal court does have jurisdiction, whether sovereign immunity prevents Michigan from pursuing the action.

#### **2. The Question of Federal Court Jurisdiction**

The Sixth Circuit decided that since an element of § 2710(d)(7)(A)(ii) was missing—namely that the gaming activity take place on Indian lands—the federal court had no jurisdiction over Michigan's case. In its cert petition, Michigan argued that the Sixth Circuit was wrong, noting that

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<sup>1</sup> Joseph J. Wiseman, Tribal Court Judge, Dry Creek Rancheria Band of Pomo Indians; Professor of Federal Indian Law, Empire College School of Law, Santa Rosa, California.

# CALIFORNIA TRIBAL COURT/STATE COURT FORUM

28 U.S.C. § 1331 gives the federal district courts jurisdiction over all civil actions arising under the laws of the United States. Since IGRA is a law of the United States, and since the acts took place on United States land, Michigan reasoned, the federal court has jurisdiction.

Michigan also argued that a circuit split exists, which the Supreme Court must resolve. According to the Michigan, the Sixth Circuit's decision is in conflict with decisions of the Ninth and Tenth Circuits. The Ninth Circuit held that IGRA necessarily confers jurisdiction on federal courts to enforce tribal/state gaming compacts. See *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997). Likewise, in *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997), the Tenth Circuit found a federal question allowing jurisdiction under § 1331.

Neither the Tribe nor the Solicitor General, who filed an amicus brief urging the Supreme Court to deny cert, appear to have addressed the appropriateness of using § 1331. *Opposition*, pp. 22-23; *Amicus*, p. 13. The Tribe argued that the Sixth Circuit got it right under IGRA, and that there is no substantial circuit split such that the Supreme Court needs to take this case. According to the Tribe, *Cabazon's* gaming compact included language whereby the state and the tribe agreed to have their claims heard in the federal courts, unlike here. Regarding the application of § 1331, the Tribe merely asserted that, unlike the *Cabazon* case, here tribal sovereignty immunity was never waived. *Opposition*, pp. 22-23.

The Solicitor General aligned itself with the Tribe in recommending against granting certiorari. The Solicitor General employed a complicated analysis under § 2703 (defining Indian land) and § 2719 (not allowing casinos on trust land created after 1980). According to the Solicitor General, since the property is held in fee and was recently purchased with money from the Michigan Indian Land Claims Settlement Act, the land was not Indian land under § 2703's definition, and, therefore, there is no jurisdiction under § 2710. *Amicus Brief*, p. 8.

The Tribe and the Solicitor General failed to adequately explain why § 1331 would not give the federal courts jurisdiction over the dispute, and it is likely the Supreme Court will agree with Michigan that in creating IGRA Congress intended provide federal courts with general jurisdiction under § 1331 over gaming disputes, regardless of whether the case satisfies the jurisdictional predicates of § 2710 of IGRA.

### 3. Will Tribal Sovereign Immunity Survive?

The Sixth Circuit held that sovereign immunity barred the case. Michigan claimed in its cert petition that Congress abrogated tribal immunity under IGRA, or that the Tribe waived its sovereign immunity by participating in gaming activity under IGRA. Michigan again claimed a circuit split, citing again *Mescalero Apache Tribe v. New Mexico*. There, the Tenth Circuit held that "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Mescalero*, 131 F.3d 1379

The Tribe's position, on the other hand, rests on the well-known proposition that abrogation of tribal sovereign immunity by Congress must be clear and unequivocal and may not be implied. *Opposition*, p. 9, citing *Oklahoma Tax Commission v. Citizen Band, Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). According to the Tribe, IGRA is a detailed scheme and under § 2710, does not appear to waive sovereign immunity for gaming activities not occurring on tribal land. *Opposition*, p. 10. The Tribe also argued that *Mescalero* was wrongly decided, as the

# CALIFORNIA TRIBAL COURT/STATE COURT FORUM

Tenth Circuit cited no authority for its decision that IGRA abrogates a tribe's sovereign immunity, and that there is no real circuit split, since the Tenth Circuit case is an outlier. *Opposition*, p. 21. The Solicitor General agreed. *Amicus Brief*, p. 17.

Given the current composition of the Supreme Court its recent jurisprudence in Indian law cases, there is the real risk that the Court will not be comfortable with tribes reaping the benefits of IGRA while simultaneously invoking sovereign immunity to argue that they cannot be compelled to follow the rules of IGRA. This is especially true where the tribe's position is that it would be compelled to follow the rules of IGRA on Indian land, but sovereign immunity kicks in when the gaming activity does not occur on Indian land. This case will be a chance for the Court either to (1) honor tribes' sovereign immunity where Congress has not expressly limited it, or (2) to drastically limit tribal sovereign immunity in situations including tribal participation in a Congressional scheme.

#### **4. Whether Other Avenues Existed Other Than Supreme Court Review**

Both the Tribe and the Solicitor General argued that there were other avenues available to Michigan that did not require intervention by the Supreme Court, again addressing issues of tribal sovereign immunity. Their argument is now moot, since the Supreme Court has granted certiorari. However, a fair amount of the briefing included reasons why the Supreme Court did not have to take this case. The Tribe argued that there already is another suit, raising state claims against Indian officials (a la *ex parte Young*). The Solicitor General also noted that there is any number of state law enforcement/ federal administrative remedies that might be able to accomplish the same outcome as a federal suit.

Michigan replied that compelling the state to sue Indian officials in state court is ripe for conflict between the state and the tribes without any federal oversight. *Petition*, p. 16. It compared the situation to the State of Michigan suing England's Prime Minister. *Id.* at 17. In addition, Michigan noted that law enforcement had yet to act, and that it was unrealistic to expect Michigan to just sit and wait for law enforcement to notice and take action while illegal gambling occurred within its borders.

This case raises the troubling prospect that the Supreme Court will severely limit tribal sovereign immunity by allowing 28 U.S.C. § 1331—the general federal question jurisdictional grant—to trump tribal sovereign immunity whenever a tribe engages in activity authorized by a federal statute. If so, the bedrock principal that tribal sovereign immunity can only be waived by clear and unequivocal action by Congress will be a thing of the past.