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McAuliffe to give opening speech at Pocahontas Reframed American Indian film festival in Richmond – The Washington Times (11/16)

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Tribes Hoping Overhaul Of BIA Regs Will Catalyze Deals

Share us on: By **Andrew Westney**

Law360, New York (November 16, 2017, 9:35 PM EST) -- The Bureau of Indian Affairs' invitation for tribes to comment on the potential impact of updating the federal government's regulations for doing business on Native American lands elicited stories of economic development deals hampered by red tape and calls to stop state governments from imposing taxes in Indian Country. Here, Law360 looks at why and how tribes and tribal organizations say the so-called Indian Trader regulations need to be changed.

The Push for a New Tribal Business Framework

The BIA asked tribal leaders in July for more information on the economic impact of the Indian Trader regulations, as the Trump administration decides whether to follow through on an Obama-era proposal to revise the measures governing trade on tribal lands in a bid to stimulate tribal economic growth.

The agency announced its plan **last December** to develop a rule to both update and simplify the 25 CFR Part 140 regulations for "licensed Indian traders," as the agency looks to fully revise its the regulations for the first time since 1965.

The current round of comments builds on the initial comment period that ended in April. The agency has also held extensive formal consultations with tribal representatives to ask for input on developing the rule, with particular focus on how dual taxation by state and tribal governments over transactions on tribal lands can make it harder to attract investment on Indian lands.

Over 40 tribes and tribal organization responded by the agency's Oct. 30 deadline, detailing how they've lost revenues because of the uncertainty in federal regulations and federal courts about when states can tax transactions in Indian Country, and saying what a new rule to revise the regulations should accomplish.

Uncertainty Around Tribal Taxation in Current Law

Several tribes said that the U.S. Supreme Court's test for determining when a state can impose a tax on activities on tribal lands makes it difficult to predict when any given tax should apply — an issue they said revisions to the Indian Trader regulations could help clear up.

Under the balancing test established in the Supreme Court's 1980 decision in White Mountain Apache Tribe v. Bracker, the interests of the federal government and a tribe on one hand must be weighed against a state's interests in determining whether a state tax is preempted on the other.

The National Indian Gaming Association said that the Supreme Court's "current case-by-case approach to state taxation of non-Indians engaging in Indian commerce in Indian country" creates uncertainty that "undermines Indian economic development, tribal self-government and the power to tax to raise revenues."

In its comments to the BIA, the National Congress of American Indians said that the application of the Bracker analysis in Indian tax cases "has yielded extremely inconsistent results," trailing behind areas like leasing where the government has already acted to strengthen tribal interests.

Revising the trader regulations could lead to an express preemption of state and local sales taxes and use excise taxes, the NCAI said, and an overall approach to tribal taxation emphasizing tribal sovereignty and grounding the revised regulations in the Indian commerce clause of the U.S. Constitution "arguably negates the need to engage in a Bracker balancing test altogether."

The Native American Finance Officers Association in its comments also pointed to the practical impact of the Bracker analysis, saying federal courts are "making political decisions" about the application of state taxes to tribes and that "attempting to discern precedent from these decisions leaves considerable uncertainty for tribal development — adding to an already difficult economic reality."

Tribes' Lost Opportunities Under the Current Regulations

Responding to the BIA's July request for more information on tribal projects that were frustrated by current federal regulations, tribes including the Ute Indian Tribe, the Navajo

Nation and the Ewiiaapaayp Band of Kumeyaay Indians detailed potentially profitable deals that either didn’t materialize or were realized in a way that cost the tribes revenue.

The Ewiiaapaayp Band commented that the Tule Wind wind farm project on the tribe's San Diego County reservation "illustrates the significantly adverse impact of dual taxation on tribal projects."

The tribe said that it isn't eligible to take advantage of tax credits to subsidize the project and let the tribe participate as an equity investor, and instead the tribe "must occupy the position of lessor to a taxable lessee who finances and develops the project," according to the comments.

The Ute tribe called for the regulation revisions to "remove barriers to investment capital and financing for tribal enterprises," pointing to the tribe being forced to sell its stake in Ute Energy when its partner sold its own stake.

The tribe had a majority stake in the company and wanted to buy the rest, but couldn't get financing for a bond and ultimately had to sell its stake to "a Canadian non-Indian company, which means that all of the revenue is not only leaving the reservation, but also the United States," according to the comment letter.

And even where tribes can make deals specifically to mitigate the impacts of state or local taxation, those agreements often aren't as profitable as they could be, several said.

The Pueblo of Pojoaque said that it and other New Mexico tribes have a deal with the state for a gross receipts tax that allows tribes to keep 75 percent of taxes connected with their lands while the state keeps the other 25 percent.

But the state can end the deal at any time, leaving tribes and those doing business on their lands "in an extremely unpredictable and tenuous position," and the Pueblo called for agreements with state or local governments to be "encouraged but not required" under modernized Indian Trader regulations.

The Ute tribe also said that it had a useful tax revenue-sharing deal, in its case with the state of Utah for mineral development on Ute lands to help offset the effects of dual taxation.

That arrangement "has been advantageous to both the tribe and the state," but "as beneficial as our agreement has been for the tribe, there would be no need for the tribe to share these tax revenues if the tribe had clear and exclusive authority to tax natural resource development, commercial activities, and personal property within its reservation," according to the comments.

What Tribes Want from Revised Regulations

The commenting tribes and tribal organizations offered several specific recommendations to fortify tribal sovereignty and foster on-reservation economic development.

The NCAI said revised regulations should "confirm tribal court jurisdiction over all commercial activities occurring in Indian country, while leaving appropriate flexibility to allow for choice of law provisions to designate alternative forums."

If federal regulations had included such a clear declaration of tribal authority earlier, the **high court's 2016 decision** in Dollar General Corp.'s challenge to the Mississippi Band of Choctaw Indians' courts — a 4-4 tie — "may have resulted in stronger, clearer precedent favorable to Indian tribes," the NCAI said.

The group further called for the DOI to set federal standards for tribes' own regulations that the tribes could go beyond without federal approval, saying that would reduce delays and that "it would be too easy for some future administration to ignore proposed tribal regulations, or refuse to approve them."

And updating the Indian Trader regulations would impact federal court litigation too, as it would "help provide tribes with clear agency interpretations in future court proceedings centered on reservation commerce," the group said.

The Cheyenne River Sioux Tribe said that to address dual taxation, the revised regulations should include a bright-line rule preempting any state and local taxation of trade in Indian Country to avoid the confusion around the Bracker analysis.

And the National Indian Gaming Association said that the BIA should make clear that goods traded among Indian reservations aren't subject to state tax, applying the U.S. Supreme

Court's finding that states can't regulate Indian gaming that is "supporting 'reservation generated value.'"

Tribes that offer gaming spend $10 billion every year for goods and services, and "there is every reason for Indian tribes to do business with other Indian tribes, if the sanctity of Indian country generated value is recognized," NIGA said.

--Editing by Katherine Rautenberg and Jill Coffey.

Tribe Seeks Injunction Against Hemp-Seizing Calif. County

Share us on: By **RJ Vogt**

Law360, Los Angeles (November 16, 2017, 10:50 PM EST) -- The Winnemucca Shoshoni MBS tribe, American States University and others asked a California federal judge Thursday to stop San Joaquin County from enforcing a new ordinance that halted the cultivation of industrial hemp and led the county and the U.S. Drug Enforcement Administration to seize $77 million worth of their crops.

The tribe in October accused the county's Board of Supervisors of passing a law that declared a temporary moratorium on hemp farming without giving notice to the tribe, its subsidiary Free Spirit Organics LCC, the nearby American States University, its partner HRM Farms Inc., and Cannabis Science Inc., a research and development company focused on using hemp or cannabis to treat a wide variety of diseases.

On Thursday, the group asked the court for a preliminary injunction against San Joaquin County and its board while it waits for the county to respond to its suit, claiming that 8,440 members of various Native American tribes receive cannabidiol cannabinoids from the tribe's hemp farm to treat everything from high cholesterol to arthritis to chronic post-trauma pain.

"Each of these 8,440 persons has been affected by defendants' actions and will suffer the further injury of being completely without medicine for an indefinite period if defendants are not enjoined from interfering with plaintiffs' [hemp growth] moving forward," the tribe said.

The lawsuit is a response to San Joaquin's decision to ban the growing of hemp within county borders, which the tribe and its partners said the county reached in September despite having received 22 pages of information detailing how they were an established agricultural research institution.

According to the tribe, the new law flies in the face of a 2016 amendment to a section of the California Food and Agriculture Code that allowed such agricultural research institutions to grow hemp; Free Spirit Organics got its government certification to cultivate the crop in June 2016.

The group said it requested a chance to discuss the county's new law on Oct. 5 and were told to attend a Nov. 7 board meeting. But on Oct. 10, the tribe claims county enforcement agents entered its land and took the hemp before the growers had a chance at due process.

In Thursday's filing, the hemp growers said the ordinance is preempted by the federal farm bill and the state food and agricultural code, among other things. They also said the search warrant the county used to seize the hemp was suspect and failed to distinguish between marijuana and hemp.

Noting that the seizure occurred "immediately after Columbus Day," the tribe's motion for preliminary injunction hearkens back to its initial complaint, which compared the county board members to the 15th-century explorer.

"Even Christoper Columbus, whose actions directly led to the deaths of 98% of the Native American race, gave the Native Americans a chance to speak before betraying them," the tribe's October complaint said. "County counsel didn't even do that — likely because ten seconds of time to speak would have been sufficient to demonstrate that county counsel's representations to the board were fiction."

Counsel for the tribe Joseph Salama told Law360 late Thursday that the law stopped the Winnemucca and American States University from working together and establishing themselves as an early, leading producer of hemp and hemp research.

"This law is illegal — it frustrates California's intention and law allowing for research of hemp," he said. "The Winnemucca want to keep their tribe healthy and the university wanted to do their research. They were working together and now the project is in jeopardy."

Representatives for San Joaquin County did not immediately respond to requests for comment on Thursday.

The Winnemucca Shoshoni MBS tribe, American States University, Cannabis Science Inc., Free Spirit Organics and HRM Farms are represented by Joseph Salama of the Law Offices of Joseph Salama.

Counsel information or San Joaquin County and other defendants was not immediately available.

The case is Winnemucca Shoshoni MBS et al. v. San Joaquin County Board of Supervisors et al., case number 2:17-cv-02271, in the the U.S. District Court for the Eastern District of California.

--Editing by Breda Lund.

Update: This story has been updated to include comment from counsel.

Split FCC Votes To Limit Lifeline Subsidy Uses

 By **Kelcee Griffis**

Law360, New York (November 16, 2017, 7:12 PM EST) -- The Federal Communications Commission voted on Thursday to move forward with altering the way funds for the Lifeline subsidy program are awarded and disbursed, narrowing the range of services that the program applies to and contemplating a budget cap and tighter eligibility requirements for tribal lands.

The three-pronged reform package excludes so-called premium Wi-Fi services from the Lifeline program's purview and directs higher support levels to providers that possess their own facilities on tribal lands. It also generally considers funneling subsidies away from wireless resellers that currently participate in the program, which distributes about $1.5 billion in annual subsidies toward access to phone and internet services.

The FCC majority said the changes will cut down on waste, fraud and abuse in the program, but the two Democratic commissioners raised concerns that low-income and rural consumers who depend on the program will no longer be able to access or afford the services on which they rely. The subsidies translate into about $9 per household monthly or about $35 per tribal household monthly.

Commissioner Mignon Clyburn said that Thursday's package disadvantages low-income consumers by being more selective about the services that the subsidy program will cover.

The profile of a typical Lifeline user is a middle-aged single mother who is caring for a child and scraping by on an annual income of $14,000, Clyburn said. Lifeline customers will purchase whatever phone plan is available to them that meets their needs and their budgets, even if that plan is through wireless resellers, she said.

"This majority would rather toss out those viable solutions already teed up when it comes to service reform choice and ensuring that low-income Americans can afford voice and broadband services," Clyburn said.

Commissioner Jessica Rosenworcel also criticized the changes, saying the tweaks drive the

program further away from meeting needy families where they are.

“Instead of thinking about the future and doing something modern, today the FCC stepped out to slash this program from front to back,” she said.

However, the Republican majority trumpeted the reforms as necessary steps toward curbing misuse in the subsidy program. FCC Chairman Ajit Pai said the package is going to increase the caliber of connectivity funded by the program, particularly in barring Wi-Fi services that don’t offer full coverage.

“Low-income families deserve high-quality services, not cheap knockoffs. Today, we say second-class service is not good enough,” he said.

Some tribal and rural advocates were quick to react to Thursday’s vote, blasting it as a move that will hobble the Lifeline program.

Linda Sherry, a spokesperson for Consumer Action, said that four of the top five Lifeline program providers are wireless resellers, and diverting support away from them would create a service gap.

“The effect of killing off the companies serving three out of four Lifeline customers will effectively destroy the program,” she said, according to a statement.

Joe RedCloud, a former chairman of the Oglala Sioux Tribe Utility Commission, said the consequences will be particularly severe for tribal communities because most companies serving the areas do not maintain their own infrastructure.

“This would be a travesty for Indian Country because it would turn back the clock to the days of the monopoly provision of Lifeline service where consumers had but one choice for affordable telephone service,” he said in a statement.

The FCC's Lifeline program has recently come under fire for alleged shortcomings and abuse. A report issued this summer by the Government Accountability Office said auditors had been unable to confirm that one-third of the program's participants were truly eligible for subsidies, and it raised an eyebrow over the fact that service providers are in charge of verifying subscribers' eligibility. The report also found that some phone companies

approved applications for Lifeline service based on fake or unconfirmed identities.

--Editing by Emily Kokoll.

Calif., Tribe Trade Blows In Gaming Compact Row

 By **Christopher Crosby**

Law360, New York (November 16, 2017, 7:23 PM EST) -- California and a Native American tribe on Wednesday swapped blows in the tribe's suit accusing the state of renegotiating a gaming compact in bad faith in violation of the Indian Gaming Regulatory Act, with each side opposing the other's bid for summary judgment.

The Pauma Band of Luiseno Mission Indians, whose suit seeks damages and would force the state to conclude negotiations for new gaming rights within 60 days or face a finding of bad faith negotiation, told the court that California engaged in surface talks for 18 months despite having no intent to actually hammer out a new deal.

Despite commencing the negotiations to secure new gaming rights for on-track horse wagering and video lottery, Pauma said representatives for the state feigned a willingness to deal and simply offered the same compact it had negotiated with another tribe that would have reduced the number of slot machines, cut the length of the deal and increased the tribe’s revenue sharing.

The tribe characterized the state’s alleged inaction as “protectionism” of state-license gaming enterprises from the free market, and accused the state of using taxes from gaming to then defend itself from accusations of bad faith dealing.

“Absent appropriate relief, the state will defend this action using money from other tribes while also demanding that Pauma pay into the system so those monies can be used against the next tribe who challenges the state’s behavior under IGRA,” Pauma argued.

California took a dim view on Pauma’s allegations, urging the court to award it a quick win in the suit. The state argued that despite repeated requests that attorneys working for the tribe devise clear language outlining a new gaming compact, Pauma repeatedly failed to respond and never made specific proposals, eventually walking away from ongoing negotiations.

California said that the tribe currently lacks a new deal authorizing additional lottery games because it never proposed one. Finally, exhausted by Pauma’s “gamesmanship and delay,”

the state sent the tribe a proposed deal to stimulate “give-and-take negotiations.”

“Pauma' s decision to litigate rather than negotiate casts a pall over its motion for summary judgment regarding games,” the state said.

The dispute stems from a gaming compact the Pauma Band negotiated with California between 1999 and 2000 and then amended in 2004 in order to obtain more licenses to operate slot machines as part of a plan to open a large-scale casino in San Diego.

According to the tribe, it agreed to pay many times more per year than it had paid in the 1999 contract on the understanding it would acquire more licenses, but ended up stuck at the about 1,050 licenses it held under its first contract after the state mistakenly calculated it had no more licenses to give. The Ninth Circuit would later find in a separate suit that the state had about 8,000 more licenses left at the time it said it could not issue any more to the Pauma Band.

A California district court sided with the tribe in 2013, ordering the state to pay back the $36.2 million it had charged the tribe over the payment schedule directed by the 1999 contract, and the state appealed the judgment. That judgment also extended an earlier injunction restoring the 1999 contract.

In October 2015, the Ninth Circuit held in a split 2-1 decision that the district court had wrongly ordered the $36.2 million award to the tribe as restitution for the state’s failure to abide by the terms of the gaming compact, noting that the tribe never alleged the state actually breached the agreement.

Nonetheless, the circuit still found the tribe was entitled to the award, but as payback for higher rates it forked over as a result of the 2004 amendments, while finding the state had waived its sovereign immunity to the award in the compact.

Both parties asked the U.S. Supreme Court for review of that decision, although the high court **turned them both down** in in June 2016.

Pauma first filed the instant suit a month later, arguing that while the state challenged the restitution award, it needed new games in order to stay competitive with neighboring resort casinos.

The court has twice trimmed a time-barred claim from the suit alleging that California improperly used monies from a revenue-sharing fund. Pauma contends that California used the money for legally dubious negotiations as well as defending the state from tribal allegations that it negotiated in bad faith when it was meant to offset the regulatory costs incurred by the state's gaming agency and the Department of Justice in connection with administering the compact. The court allowed only those claims that occurred within the past four years to move forward.

Counsel for the parties did not immediately return a request for comment Thursday.

The Pauma Band is represented by Kevin Michael Cochrane and Cheryl A. Williams of Williams & Cochrane LLP.

California is represented by Attorney General Xavier Becerra, Senior Assistant Attorney General Sarah J. Drake, Deputy Attorney General Timothy M. Muscat and Deputy Attorney General Paras Hrishikesh Modha.

The case is Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. State of California et al., case number 3:16-cv-01713, in U.S. District Court for the Southern District of California.

--Additional reporting by Braden Campbell. Editing by Alyssa Miller.

Keystone Leaks 210K Gallons With Permit Decision Pending

Share us on: By **Dave Simpson**

Law360, New York (November 16, 2017, 10:13 PM EST) -- With a key permitting decision scheduled to come from Nebraska utility regulators Monday, the Keystone pipeline spilled 5,000 barrels, or 210,000 gallons, in northeastern South Dakota on Thursday, TransCanada Corp. said in a statement.

The leak, which was apparently isolated in less than 15 minutes, comes as the Nebraska Public Service Commission is considering whether to approve a proposed route for TransCanada's controversial Keystone XL pipeline. That decision is scheduled to come down on Monday.

"TransCanada crews safely shut down its Keystone pipeline at approximately 6 a.m. CST after a drop in pressure was detected in its operating system resulting from an oil leak that is under investigation," the company said Thursday afternoon in a release.

Ben Schreiber, senior political strategist at Friends of the Earth, an environmental nonprofit, criticized TransCanada in a statement following the spill.

"With their horrible safety record, today's spill is just the latest tragedy caused by the irresponsible oil company TransCanada," he said. "We cannot let the world's fossil fuel empires continue to drive government policy toward climate catastrophe. The only safe solution for oil and fossil fuels is to keep them in the ground."

The Keystone XL pipeline, which would carry oil sands 1,700 miles from Alberta, Canada, to U.S. refineries on the Gulf Coast, has become a lightning rod in the partisan battle over U.S. energy and climate change policy. In November 2015, former President Barack Obama rejected TransCanada's cross-border permit application, saying at the time that the project wasn't in the national interest.

But President Donald Trump — who has called climate change a hoax and who spoke in favor of the pipeline on the campaign trail — signed a presidential memorandum Jan. 24 that invited TransCanada to reapply for a cross-border permit and ordered the U.S. State

Department to complete its review of the application and issue a decision within 60 days of receiving the application.

TransCanada filed its new application with the Nebraska Public Service Commission in February, shortly after Trump issued a presidential memorandum in support of the project.

The State Department issued the cross-border permit for the project in March, a decision environmental groups and other pipeline opponents are challenging in federal court.

Shortly thereafter, the **Ponca Tribe** of Nebraska announced that it asked to intervene in proceedings before the Nebraska PCS, citing its “serious concerns.”

In 2011, former Nebraska Gov. Dave Heineman called for the state legislature to commence a special session and create a new way for pipelines — including the TransCanada project — to be approved. In April 2012, state lawmakers passed Legislative Bill 1161, which allowed requests for pipeline approvals to go to the governor or to the PSC, instead of only to the PSC. Heineman okayed the route in 2013.

The law survived an initial constitutional challenge when the Nebraska Supreme Court failed to overturn it. The court was unable to reach a supermajority of five votes to enforce its 4-3 ruling that the law was unconstitutional. That sparked a lawsuit from scores of landowners opposed to the project who argued the approval of the route was unconstitutional. But the lawsuit was dropped after TransCanada agreed in 2015 to pursue approval through the PSC.

--Additional reporting by Keith Goldberg and Christine Powell. Editing by Alanna Weissman.