Effective Partnering with Our Federal Trustee: Introduction

15th ANNUAL MICHIGAN STATE UNIVERSITY INDIGENOUS LAW CONFERENCE & TRIBAL IN-HOUSE COUNSEL ASSOCIATION LAW CONFERENCE

November 15, 2018
Overview of Program

Origins of this Panel
• In-House v. Federal Perspective

DOI Perspective
• Regional Solicitor’s Office
• DC Solicitor’s Office

DOJ Perspective

Conclusion
• Questions
In-House Need for Federal Approvals and Assistance

• Immediate NIGC Interaction
  – Indian Lands Opinion issue
  – Management Contract
  – Class II regulations

• DOI issues
  – Indian Lands Opinion (DC)
  – Secretarial Procedures (DC)
  – RAP approval (DC)
  – FTCA (Region)

• DOJ issues
  – State court case involving *Carcieri*
  – State AG lawsuit against Gaming
Exposure to the “Dark” Side (Federal Government, That Is)

- Introduction to Massive Organization and Politics within DOI
  - Regional Solicitor’s Offices
  - Political v. Career Divide
  - BIA v. NPS, BLM
- DOJ as “Outside Counsel” for DOI
  - Rulemaking “Review”
  - Requests for Affirmative Litigation
  - Coordination in defense of DOI actions
- DOJ Dynamics
  - ENRD (Indian Resources Division v. Natural Resources Division)
  - Solicitor General’s Office
  - OTJ
  - US Attorneys’ Offices
Questions and Challenges Continue

- **Changing Administrations**
  - Changes in structure
    - Water Division
  - Changes in personnel

- **Changing Policies**
  - Land Into Trust
    - *Carcieri*
    - Environmental Requirements
  - Gaming land and compact approvals
  - Litigation positions?

- **Continued Communication with Federal Contacts**
  - Lunch with Eric!
  - Outreach to Kara and Daron
2018 ILPC/TICA Conference
Effective Partnering with you Federal Trustee
~A Regional Perspective~

Kara Pfister, DOI, Office of the Regional Solicitor, Twin Cities
November 15, 2018
Local BIA Offices ~
A Good Place to Start!
SOL Attorneys Represent the Secretary

Northeast Regional Solicitor
Tony Sullins

From the Solicitor’s Manual:

PART I DELEGATIONS

Chapter 1 General Delegations of Authority

1. The Solicitor is the chief law officer of the Department, the principal legal adviser to the Secretary, and is responsible for all legal work in the Department, except for that delegated to the Office of Hearings and Appeals, the Inspector General, the Legislative Counsel, and the Justices of American Samoa. The Solicitor's authority is described in 43 U.S.C. § 1455 and in Parts 205 and 209 of the Departmental Manual (DM).
Federal Authority & Jurisdictional Issues
Federal Employee as the Defendant in Tribal Court? As a Witness?

[I picked the picture because I liked the hat!]
Federal Funding for Tribal Treaty or Trust Resource Litigation
DOI Litigation
Federal Tort Claims

Under the FTCA, the United States may be held liable for property damage, personal injury, and death caused by the negligent or wrongful act or omission of a federal employee acting within the scope of his or her federal employment. 28 U.S.C. §§ 2671 et seq.
The End

I welcome your questions!
[At the end of our panel]
Effective Partnering with your Federal Trustee a Perspective from Main Interior
SOL provides advice, counsel, and legal representation to the Immediate Office of the Secretary, the Assistant Secretaries, and all other bureaus and offices overseen by the Secretary, ensuring that the Department’s bureaus carry out their responsibilities in accordance with the law.

SOL attorneys act as in-house counsel and represent the Department in administrative hearings and appeals, and provide subject matter expertise, and work in conjunction with the Department of Justice in representing the Department in judicial proceedings.
DIA has an Associate Solicitor and four branches, each headed by an Assistant Solicitor, with a total of approximately 30 attorneys.

DIA provides legal assistance and counsel on Indian matters to the Secretary, Deputy Secretary, and Assistant Secretaries.

DIA has primary responsibility for legal matters related to the programs and activities of the Bureau of Indian Affairs, Bureau of Indian Education, Office of Special Trustee, and Land Buy Back Program.
Who is DIA?
DIA Branches

- Environment and Lands
- Self-Governance and Economic Development
- Tribal Government Services
- Trust Services
What does DIA do?

- Legal Opinions
  - M-Opinions
  - Other written opinions

- Informal Legal Advice

- Review for Legal Sufficiency

- Regulations and guidance
  - Draft
  - Consultations

- Litigation
  - Defensive
  - Affirmative
Our work is driven by deadlines and priorities.

- **Deadlines**
  - Litigation, statutory, or regulatory deadlines take precedence.

- **Priorities**
  - Secretarial, policy, program, and front office priorities.
Engage us.

Share your analysis.

Don’t ignore the hard stuff.
Questions

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United States Department of Justice
Environment & Natural Resources Division

15TH ANNUAL MSU ILPC/TICA INDIGENOUS LAW CONFERENCE
NOVEMBER 15, 2018
ENRD History and Overview

- Since founded in 1909 as the “Public Lands Division,” ENRD has been charged with principal responsibility for representing the US in litigation to protect tribal lands and resources.

- ENRD’s Indian Resources Section was created in 1975 to focus exclusively on this aspect of the Division’s core mission.

- Today, the US holds nearly 60 million acres in trust for tribes and individual Indians. Litigation to protect tribal lands, resources, and jurisdiction has significantly expanded in scope, volume and complexity.
ENRD Cases and Primary Clients

Pending cases/matters by type

- Defensive**: 52%
- Affirmative*: 37%
- Criminal: 4%
- Condemnation: 3%
- Agriculture: 6%
- Commerce: 3%
- Interior: 24%
- Homeland Sec: 2%
- Energy: 1%
- GSA: <1%
- DOJ**: 1%
- Other*: 6%
- Vet. Affairs: 0%
- Transportation: 3%
- FOIA: <1%
- Legislative: <1%
- Policy: 1%
- Program: 2%
- Other***: <1%
- Congressional: <1%

Pending cases/matters by client

- EPA: 45%
- GSA: <1%
- DOJ**: 1%
- Interior: 24%
- Homeland Sec: 2%
- Energy: 1%
- Transportation: 3%
- Vet. Affairs: 0%
- Other*: 6%
- Agriculture: 6%
- Commerce: 3%
- Affirmative*: 37%
- Criminal: 4%
- Condemnation: 3%
- Interior: 24%
- Homeland Sec: 2%
- Energy: 1%
- GSA: <1%
- DOJ**: 1%
- Other*: 6%
- Vet. Affairs: 0%
- Transportation: 3%
ENRD’s Indian Resources Section: What We Do

- Water Rights Litigation
- Defending Challenges to Agency Action (APA Litigation)
- Affirmative Litigation
What We Do: Water Rights Litigation

- **General Stream Adjudications**
  - Klamath Basin (OR)
  - Little Colorado Basin (AZ)
  - Yakima River Basin (WA)
  - Montana State-Wide Adjudication

- **Negotiation of Water Compacts and Settlements**
What We Do: APA Litigation

Defending federal agency actions in furtherance of tribal interests
- DOI regulations
- DOI land-into-trust
- Gaming compacts and ordinances
- EPA permits and determinations

Patchak v. Jewell (D.D.C.) (land into trust)
State of Kansas v. NIGC (D. Kan.) (Indian lands opinion)
Desert Water Agency v. DOI (C.D. Cal.) (BIA leasing regulations)
What We Do: Affirmative Litigation

- Intervention and Amicus Participation
  - Tribal Water Rights
  - Reservation Boundaries
  - Tribal Jurisdiction and Sovereignty
  - Treaty Hunting and Fishing Rights

_Village of Pender v. Parker_ (D. Neb.) (Omaha reservation boundaries)
_United States v. Washington_ (W.D. Wash.) (treaty fishing rights)
_Oneida Nation v. Village of Hobart_ (E.D. Wis.) (Oneida reservation boundaries)
ENVIRONMENT AND NATURAL RESOURCES DIVISION

ASSISTANT ATTORNEY GENERAL

- PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
  - NATURAL RESOURCES SECTION
  - EXECUTIVE OFFICE
  - APPELLATE SECTION
  - INDIAN RESOURCES SECTION

- DEPUTY ASSISTANT ATTORNEY GENERAL
  - ENVIRONMENTAL ENFORCEMENT SECTION
  - LAND ACQUISITION SECTION
  - ENVIRONMENTAL DEFENSE SECTION
  - LAW AND POLICY SECTION
  - ENVIRONMENTAL CRIMES SECTION
  - WILDLIFE AND MARINE RESOURCES SECTION

- DEPUTY ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
Office of Tribal Justice (OTJ)

- Formed in 1995.
- Tribal Law and Order Act (TLOA) (2010).
- TLOA Sec. 106. Office of Tribal Justice.
TLOA Sec. 106. Office of Tribal Justice.

(c) DUTIES.—The Office of Tribal Justice shall—

(1) serve as the program and legal policy advisor to the Attorney General with respect to the treaty and trust relationship between the United States and Indian tribes;

(2) serve as the point of contact for federally recognized tribal governments and tribal organizations with respect to questions and comments regarding policies and programs of the Department and issues relating to public safety and justice in Indian country; and

(3) coordinate with other bureaus, agencies, offices, and divisions within the Department of Justice to ensure that each component has an accountable process to ensure meaningful and timely consultation with tribal leaders in the development of regulatory policies and other actions . . . .
Office of Tribal Justice (OTJ)

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