National Tribal Health Conference

"*Understanding the Connections Between Attacks on Tribal Sovereignty and the Trust Responsibility*"

September 17, 2019

3:30-5:00 pm

Thomasina Real Bird

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Road Map

- Political Classification
- *Brackeen* Litigation
- USFW Eagle Feathers
- Johnson O'Malley
- DHHS Section 1115 Demonstrations

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Political Classification

- "Domestic dependent nations"
  - *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
- Tribes have been treated as sovereigns historically.
  - Treaty negotiations, self governance, self determination.
- The guardian-wards relationship did not abolish preexisting tribal powers or make the tribes dependent on federal law for their powers of self-government
  - *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).
- Tribes are independent from States.
  - *United States v. Kagama*, 118 US. 375 (1886).
- Once a tribe is recognized as a political body, it remains sovereign unless Congress divests the sovereignty.
  - *Harjo v. Kleppe*, 420 F. Supp. 1110, 1142-1143 (D.D.C. 1976); *United States v. Long*, 324 F.3d 475, 479-480 (7th Cir. 2003).

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Political Classification

Racial Classification versus Political Classification

- Indians are a political classification, not racial
  - *Morton v. Mancari*, 417 U.S. 535 (1974).
- Politically sovereign nations
  - Self-governance
  - Tribal governments
    - Legislatures, tribal councils, judicial systems
- Race refers to a person's physical characteristics while political classification is not racially based.

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Indian Child Welfare Act of1978

- ICWA was enacted to help keep families together.
  - Studies proved that Native communities were facing a crisis with Indian children being removed from their parents, extended families, and communities.
    - 85% of the 25%-35% of all Native children that were removed were placed outside of Native communities.
- ICWA sets federal requirements that apply to state proceedings involving an Indian child who is an enrolled member or eligible for enrollment.

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ICWA

- ICWA requirements:
  - Caseworkers must make active efforts to the family;
  - Identify a placement that fits under ICWA preference provisions;
  - Notifying the child's tribe and the child's parents of the custody proceeding; and
  - Working actively to involve the child's tribe and the child's parents in the proceedings.

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ICWA

Recent Attacks on ICWA- attacking political classification

- *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (2018).
  - A non-Native couple wished to adopt an Indian child after fostering the child for over a year.
  - The couple sued for the right to adopt the child, with the support of Texas Attorney General Ken Praxton.
    - Attorney General Praxton argued that ICWA unlawfully "elevates a child's race over their best interest."
- U.S. District Court Judge Reed O'Connor sided with Texas, holding ICWA to be unconstitutional.

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ICWA

- *Brackeen v. Zinke*, No. 18-11479, 2019 U.S. App. (5th Cir. Aug. 9, 2019).
  - Held that ICWA's definition of an Indian child was constitutional as it was based on a political classification that was rationally related to the fulfillment of Congress' unique obligation towards Indians.
  - ICWA preempted conflicting state laws and did not violate the anti-commandeering doctrine as it required states to take administrative action to comply with federal standards.

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ICWA

Significance of the Fifth Circuit's Holding

- Reaffirmed the constitutionality of ICWA.
- The lower court attempted to alter how an Indian is classified, from a political to a racial classification. The Fifth Circuit clearly stated that pursuant to *Morton v. Mancari*, Indians are a political classification, not a racial classification.
- Additionally, the Fifth Circuit stated that the lower court erred when stating strict scrutiny applied because "Indian Child" is not a race based-classification.

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Eagle Feathers

- Native Americans may possess eagle feathers for religious and spiritual reasons.
  - The Secretary of Interior has the authority to regulate the issuance of permits for eagle feathers
    - 16 U.S.C. § 668(a)
  - To take and have an eagle feather the Code of Federal Regulations mandate that:
    - The individual be a member of a federally recognized tribe.
      - 50 CFR 22.22

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DOI Current Eagle Feather Policy

- The Department of Justice recognizes the cultural significance of Eagle Feathers for historical and current religious and cultural use by Tribes and Tribal members.
- The Federal Government is interested in protecting Eagles from unlawful takings while respecting Tribes and Tribal members' use of feathers.
- Long standing Morton Policy
  - Possessing, using, wearing, or carrying federally protected birds, bird feathers, or other bird parts.
- Members of federally recognized tribes are covered by Morton Policy regardless of whether they have a Fish and Wildlife Service Permit
  - Memorandum from the Office of the Attorney General, "Possession or Use of the Feathers or Other Parts of Federally Protected Birds for Tribal Cultural and Religious Purposes," Oct. 12, 2012.

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Eagle Protection Act 16 U.S.C. § 668

- The Eagle Protection Act authorizes the permitted "taking, possession, and transportation of bald or golden eagles for eight discrete purposes, including the narrow exception "for the religious purposes of Indian tribes."
  - Prohibited taking of Eagle Feathers without FWS permission.
  - Amended in 1962 to allow members of federally recognized Indian tribes access to eagles and eagle parts for religious ceremonies.
- The "Indian tribe" exception in the Eagle Act is a political and treaty relationship between federally recognized tribes and the federal government.
  - *Morton v. Mancari* (Indian Tribes are political sovereigns).
  - *U.S. v. Dion* (treaty right)

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Soto Petition

- Petition submitted by Pastor Robert Soto as part of a settlement agreement in *McAllen Grace Brethren Church v. Jewel*, No. 7:07-cv-060 (S.D. Tex. June 3, 2016). ("Petition")
  - Amend regulations to expand the exception beyond members of federally recognized tribes to allow all "sincere religious believers," including non-Indians, the ability to possess and use eagle feathers.

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Fish & Wildlife Service Proposed Rulemaking

- Protect "only sincere religious exercise – not those who fake Native American religious practices for personal or commercial gain" by providing a "presumption of sincerity" to four distinct groups:
  1. Members of federally recognized Indian tribes;
  2. Members of state recognized tribes;
  3. Members of a Native American church;
  4. Members of other Native American religious organizations.
- All other individuals who wish to possess and use eagles and their parts would have the opportunity to "demonstrate their sincerity in other ways."

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Eagle Feathers Conclusions

- The Petition and Proposed Rulemaking challenges the political vs. racial distinction upheld by the Supreme Court in *Morton v. Mancari* which, if overturned, would likely render the laws, policies, and programs benefiting Indian people as unconstitutional.
- This misguided challenge seek to reclassify tribes as a race based group as opposed to sovereign governments and undermine the sole basis by which tribes exist as a separate and distinct political entities under federal law
- For these reasons federally recognized tribes and tribal organizations should oppose the Soto Petition through all means possible, including the submission of comments and participation in consultations.

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Johnson-O'Malley

Johnson-O'Malley Act of 1934 ("JOM")

- Authorizes contracts for education of eligible Indian students enrolled in public schools and previously private schools.
- Local program
  - Operated under educational plans that are approved by the BIE
    - Contains educational objectives to address needs of eligible American Indian and Alaska Native students.
  - Johnson-O'Malley Supplemental Indian Education Program Modernization Act
    - P.L. 115-404
    - December 31, 2018

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Johnson-O'Malley Falling Short

- Congress has found that the JOM program:
  - Has repeatedly failed to make an accurate count of JOM eligible Indian students; and
  - Created roadblocks for tribes and tribal organizations who seek to contract JOM or update existing JOM contracts

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Johnson-O'Malley Proposed Rule

- BIA has proposed a rule change for how a student can be eligible for JOM.
  - "That to be eligible for JOM a student must be either a member of a federally recognized tribe or at least one quarter degree of Indian blood and a descendant of a member of a federally recognized tribe."
    - Changing from the requirement that an Indian student has one quarter or more degree of Indian blood.
- Funding Formula changes
  - Requires BIE to look at how the funding formula can be clarified to ensure full participation. If information used in the formula that funds a school's JOM contract is changed, no existing JOM contract may receive less than it has been getting.

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Johnson-O'Malley

Why the Proposed Rule is Significant

- BIA is changing how it will interact with Tribes based on how a child qualifies for the JOM requirements.
- Agencies have the capacity to propose rule changes and implement new rules for how they interact with Tribes and Enrolled Members.
  - Just like the Eagle Feather Petition that FWS is considering, these rules will have a big impact with how agencies interact with Tribes.

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Department of Health and Human Services

- Executive Order 13175 Consultation and Coordination with Indian Tribal Governments
  - Tribes are Domestic Dependent Nations.
  - The federal government must uphold the trust responsibility to tribes.
  - Federally recognized tribes have inherent sovereign powers, including the right to self-governance.
  - Government-to-government consultation to address issues concerning tribal self-government, tribal trust resources, treaty rights, and other rights.
- Agencies:
  - Encourage tribes to develop their own policies.
  - Defer to tribes to develop standards.
  - Consultation process.

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DHHS Consultation Policy

- Prior to action being taken that will impact tribes, DHHS will:
  - When promulgating regulations:
    - DHHS will first consult with tribal officials.
    - Provide a tribal summary impact statement.
  - Agencies may not promulgate regulations that has tribal implications and that preempt Tribal law unless prior to promulgation the agency has:
    - Consulted with tribal officials throughout all stages of the process for the proposed regulation.
    - Provided tribal summary impact statement.
    - Made available to the Secretary any written communications submitted to DHHS by tribal officials.

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Section 1115 Waiver Applications

- Section 1115 waiver applications:
  - Multiple State have submitted Section 1115 waiver applications for demonstration projects that would impose work requirements on recipients of Medicaid.
  - All but three states did not include an exemption request for members of federally recognized tribes.
  - All States attested to consulting with Tribes prior to the submission of their Section 1115 waiver applications
- DHHS has been rejecting tribal requests for exemptions from state work requirements for Medicaid recipients

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Center for Medicare and Medicaid Services

- CMS has declined to approve exemptions for beneficiaries of IHS from State Medicaid Demonstration Waivers and Medicaid State Plan Amendments when exemption requests submitted by Tribes.
- Dear Tribal Leader Letter from CMS Director Brian Neal, January 17, 2018.
  - CMS could not approve Tribes for requested exemptions because CMS is constrained by statute.
  - CMS is concerned that requiring states to exempt American Indians and Alaska Natives could raise civil rights concerns.
    - This is an incorrect presumption as the government has a unique relationship with tribes and Indians to uphold the trust responsibility. Moreover, Indians are a political classification, not a racial classification. Thus, so long as the exemption is rationally related to upholding the trust responsibility, it should not raise civil rights concerns.
- All Tribes' Call, February 1, 2018.
  - CMS took the position that it may only make accommodations for IHS beneficiaries when Congress enacted a statute authorizing it to do so.

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DHHS

- Section 1911 Social Security Act
  - Authorizes IHS and tribally operated programs to bill the Medicaid program.
  - Enacted to provide supplemental federal funding to Indian Health.
  - Designed to ensure that Medicaid funds would flow into IHS institutions.
- CMS has the authority to provide special treatment in administering statutes under its jurisdiction if it's doing so in a way that is rationally related to its unique trust responsibility to Indians.

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DHHS

Civil Rights Act and Affordable Care Act do not Prohibit Exemptions

- Civil Rights Act of 1964 Prohibits racial discrimination
- Affordable Care Act
  - "[A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or any program or activity that is administered by an Executive Agency or any entity established under this title."
- HHS regulations prohibit *race* based discrimination.
- CMS incorrectly presumes that Indians are a racial classification when in fact, American Indians are a political classification. *Morton v. Mancari*

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DHHS

No Exemptions Create Additional Problems in Indian Communities

Lack of opportunities

- Rural communities often do not have employment the opportunities that cities have.
- Not allowing tribes and Indians to be exempted from work requirements will result in people not receiving necessary medical care
  - Medical care is often the difference between life and death amongst Native communities.

Updates from Kentucky, Arkansas, Mississippi, Utah, South Dakota

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