

nine years. I was in a perfect position to be considered for nomination to the federal bench in 1979 when President Jimmy Carter said that he wanted to nominate some women and minorities to the federal bench. Timing makes a difference. I was in the right spot at the right time. I had had significant judicial experience. I was of the right sex. I was of the right age. The politicians and President Carter didn't even mind that I was and still am a registered Independent—at last count, the only registered Independent in the federal judiciary.

Benchmarks: My impression of your decisions as a federal judge—particularly environmental decisions—is that they have been historically important. What are some of the cases and decisions you consider most significant?

Judge Frye: In the case of *Anna Penk v. Oregon State Board of Higher Education*, twenty-two female faculty members brought a class action in federal court against the Oregon State Board of Higher Education, claiming that there was a pattern and practice of treating female faculty members differently from male faculty members in terms of rank, pay, promotion, tenure, and administrative appointments in all of the public colleges and universities in the State of Oregon. The trial took the better part of six months. In a 487-page memorandum opinion, I found that the efforts of the Oregon State Board of Higher Education to bring its female employees into parity with its male employees had been impeded more by external economic factors than by a lack of effort on the part of the Oregon State Board of Higher Education to redress the historic imbalances between the sexes. I found no pattern or practice of sex discrimination in any state college or university. While the plaintiffs mainly failed in their lawsuit, the repercussions from that lawsuit were benefi-

cial to the Oregon State System of Higher Education and to the State of Oregon because of the many voluntary changes that were made in the various institutions to ensure that there is no appearance of sex discrimination and that sex discrimination has no place in our colleges and universities.

In *State of Oregon, et al. v. City of Raineeshpuram*, the State of Oregon and several state officials sought a federal judicial declaration that the State could not legally recognize the status of the City of Raineeshpuram as a municipality because the very existence of the City of Raineeshpuram constituted an establishment of religion contrary to the First Amendment to the United States Constitution and therefore the incorporation of the City of Raineeshpuram was null and void. The State of Oregon argued that because every act of the City of Raineeshpuram benefited a religion, and that religion was so intertwined with the City's operation, the City's very existence constituted the establishment of a religion by a municipal government and violated the First Amendment to the United States Constitution. I ruled that from the date of its incorporation, all of the real property in the City of Raineeshpuram was owned and controlled by a religious organization whose purpose was to promote the religion, whatever that religion was, of the Bhagwan Shree Rajneesh. I ruled that the religious organization that owned and controlled all of the real property in the City of Raineeshpuram had the power to decide who could reside in the City of Raineeshpuram. I

ruled that whenever the City of Raineeshpuram exercised its governmental powers, it was to benefit this religious organization, and therefore the recognition of the municipal status of Raineeshpuram by the State of Oregon amounted to the granting of governmental powers to a religious organization in violation of the First Amendment to the United States Constitution. I further ruled that Wasco County

was not required or even permitted to pay public monies or to provide public services to the City of Raineeshpuram because to do so would constitute an establishment of religion by government in violation of the First Amendment to the United States Constitution. The Bhagwan Shree Rajneesh and his followers left Wasco County and the State of Oregon shortly thereafter. Some went to prison and others went to foreign countries.

On October 19, 1987, I was assigned the case of *Portland Audubon Society, et al. v. Manual Lujan*, the Secretary of the Department of the Interior. The plaintiffs challenged the decision of the director of the Oregon Bureau of Land Management not to prepare a Supplemental Environmental Impact Statement to the Timber Management Plans in order to address new scientific studies and analyses concerning the habitat needed by northern spotted owls. I entered a preliminary injunction which halted the logging of old growth forests on lands managed by the federal Bureau of Land Management pending resolution of the case on the merits. This case moved back and forth between my court, the United States District Court for the District of Oregon, and the United States Court of Appeals for the Ninth Circuit for over seven years. By the time the case was closed in May of 1994, new forest management plans were in effect. This time-consuming and ground-breaking case was pending

since this issue first was raised."

The second concern was that the first four cases were drug cases, and the defense counsel suggested that they were victimless crimes and therefore fell outside the tribal resolution. Although it could be argued that this was a non-issue and drug cases clearly fall within the jurisdiction of the magistrate's court, it was considered wise to avoid protracted pretrial motions in misdemeanor cases.

As Olson explains, "We decided to negotiate with defense counsel and put those four defendants on pretrial diversion until we were able to address the underlying legal issues. Although the defendants were technically on *informal* probation, however, the exact same terms and conditions of probation were imposed as would have been had these defendants been convicted and sentenced in the formal proceedings."

The tribe also asked the magistrate's court to build into probation the traditional tribal punishment of banishment. The tribal court, in fact, had often included exclusion orders in its decisions, but the tribe was having trouble enforcing them. In the first four cases, the magistrate's court built exclusion orders into the pretrial diversion agreements and then enforced the orders through a revocation of probation or a revocation of the agreement, should the terms of probation be violated.

"That brings the U.S. Probation Office in as the enforcement agency for

exclusion orders, and that's been very successful," says Olson.

One of the goals of the Warm Springs project has been to educate federal court personnel about tribal culture so that court decisions can be made with traditional punishments and other traditions in mind. "That," says Olson, "has begun to happen."

Progress to Date

The original tribal resolution that gave rise to the project called for a progress report, which was delivered in June 1996. During that meeting with the tribal council, Olson, Hubel, and Jackson reported on the first four cases, listened to continuing concerns about law enforcement problems on the reservation, and worked with the tribal attorney to draft a new resolution covering some of the jurisdictional issues that had been raised. The council passed this new, broader resolution, which authorized the project to continue indefinitely, and expressed unanimous approval of the project.

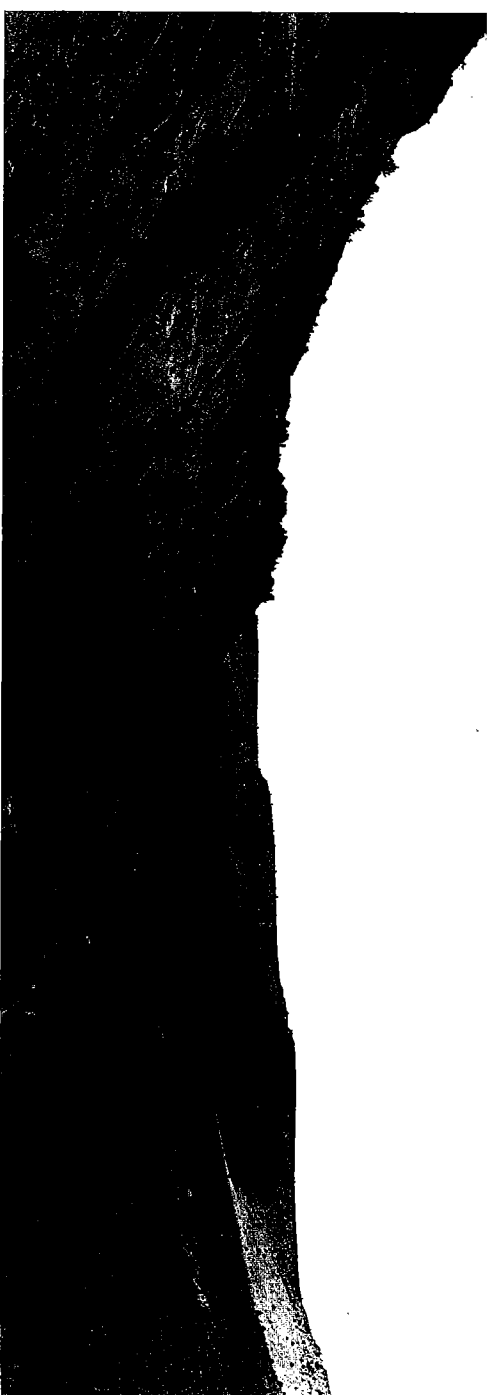
In August, Judge Canby of the Ninth Circuit, Deputy Assistant Attorney General Mary Morgan, and U.S. Attorney Kris Olson, along with two tribal judges (Mary Wynner and Casey Vicenti, appeared on a panel at the Ninth Circuit Judicial Conference in Sun Valley, Idaho, to discuss the Warm Springs project. In their presentation they discussed deference to tribal courts on interpretations of tribal law, the expansion of Oregon's Magistrate Court model to other reservations, and the need for the ultimate "over-ruling" of

Olyphant, either by Congress or by a new Supreme Court more sensitive to the issues of sovereignty.

"Janet Reno is very keen on this project," says Olson. A recent report by the Deputy Assistant Attorney General noted, "One of the Attorney General's top priorities is to improve law enforcement in Indian country. The U.S. Magistrate Court Project is a model program designed to provide more comprehensive federal law enforcement in Indian country."

The report goes on to urge other tribes to consider adopting a program like the one at Warm Springs and outlines three ingredients that make such a project feasible: (1) The federal judges in a district must be willing to offer the time of a federal magistrate to a reservation; (2) the U.S. attorney must have the resources available to staff the magistrate court; and (3) the tribal government must be willing to have the court on the reservation and provide a place for it to meet.

At Warm Springs, all of these elements are in place. "It was a happy combination of timing and personnel. When we saw Dennis Hubel's appointment in Bend, we thought, 'Here's a chance to work with the Warm Springs. Originally we were exploring whether a tribal judge could be named a U.S. magistrate, but then we had a dual sovereign, because they are appointed by one sovereign and take an oath to that sovereign. So it was decided it would be easier to have the magistrate. Luckily, there's a degree of trust in this state between the federal court and the tribal





Warm Springs Safety Officer Ania Jackson Talks About the Project

"I believe the project has been successful so far and will continue to be beneficial to the Tribe. It was actually the federal government's actions over the years that prompted this project. The project would not be necessary if the U.S. Supreme Court had ruled differently in the *Ojibant* case or if the ruling in that case had been limited to the Sугunamish Tribe. Mainly because of *Ojibant*, the federal government is now having to pay for a federal magistrate court to try misdemeanor and lesser federal offenses committed by non-Indians on the reservation against Indians. While I believe the magistrate project is a good temporary solution, the more permanent solution must be to overturn the *Ojibant* decision, or at least limit its application. That way, tribal courts can exercise criminal jurisdiction over non-Indian offenders and the federal government will not have the expense of establishing a magistrate court on the reservation.

"There were many circumstances on the Warm Springs reservation that prompted the development of this project. Over the past twenty to thirty years, an increasing number of non-Indians have come onto the reservation for a variety of reasons. This has led to an increase in criminal activity on the reservation, and especially to an increase in drug-related activity. Non-Indian drug traffickers, realizing the lack of criminal prosecution on Indian reservations, took advantage of this fact in the Northwest and made this area the hub of their multi-state, multi-reservation illegal drug trafficking networks.

"The Warm Springs Tribe prosecutes non-Indian drug offenders through the Warm Springs Tribal Court on civil infractions, but because of *Ojibant* is unable to criminally prosecute them in the tribal court. Often there is not a sufficient amount of drugs involved to meet the amount needed for prosecution in the U.S. District Court. Before the magistrate project, these cases were not being criminally prosecuted anywhere. The magistrate project allows us to criminally prosecute non-Indian drug cases where a smaller amount of drugs is involved.

"One aspect of this project I really like is that tribal employees get a chance to work alongside federal employees and eventually become cross-designated. This enhances the skills and credibility of our employees, which they can take wherever they go. One of the best things to come out of this project has been a strengthening of the working relationship between the Tribe and the federal court and federal agencies. This project has given us a chance to educate each other and has broken down barriers and misunderstandings about our respective justice systems. I believe this can only help us to take a united front in reaching the long-term goal of allowing Tribes to criminally prosecute everyone who commits a crime on the reservation. It also opens the door to our exploring other ways we can work together to combat crime in Indian country."

governments that isn't always the case in other states."

Some of the trust, where the Warm Springs are concerned, may stem from the fact that, aside from Dennis Hubel, other federal court representatives in the project have worked with the Warm Springs in various capacities. U.S. District Court Judge Owen M. Panzer, once a member of the same Bend firm as Magistrate Hubel, has had a long and close association with the Warm Springs Indians and has a keen interest in their history and culture. Kris Olson, who shares this interest, has long worked with the Warm Springs and currently serves on the board of their tribal museum.

Other Reservations

When Public Law 280 was enacted, Oregon was one of five mandatory states, which meant that that law was to take effect over all Indian country in the state. The Warm Springs Tribe lobbied Congress and was granted an exception in the original bill, in large part because of its long existing, well-run tribal court. Since 1968 two other tribes have successfully gone through retrocession.

In May 1996 Kris Olson met with the Public Safety Committee on the Umatilla Reservation in eastern Oregon to explore the tribe's interest in replicating the Warm Springs project. The Umatilla board of trustees asked that participants in the project make a formal presentation and seek a resolution from the Board in August. In particular, the Board asked that Magistrate Hubel consider establishing a magistrate court on the reservation because the Umatillas have heard such good things about his work at Warm Springs.

The Burns Paiute—the only other tribal government that could consider adopting the Warm Springs model—does not have a tribal court and has too few cases to warrant a magistrate's court. However, word of this model has spread nationwide. Wyoming and North Dakota have adopted it, and many others, including several Washington tribes, are considering it.

Other Legal Questions the Magistrate Court Might Address

As the work of the magistrate court progresses, it may face new challenges, depending on the way cases are charged and whether incarceration is sought.

As Kris Olson explains, "We chose to charge these cases as petty offenses and not to seek incarceration, so we didn't have the problems of appointment of counsel. If we charge a case in such a way that the defendant is entitled to a jury, that's going

to raise some really interesting questions, because first of all we have no jury pool particular to that area and we don't have the facilities on the reservation to conduct jury trials. We don't have a jury deliberation room or a courtroom that's big enough to accommodate a jury. So if that starts happening, we've worked with the clerk and the administrative office of the court to support putting a temporary facility there—maybe a trailer or a pre-manufactured building to accommodate that. But right now we don't have the

caseload to warrant doing so." As the evidence comes in, however, the future of the Warm Springs project seems promising. As the Department of Justice report noted, "The Justice Department is hopeful that the U.S. Magistrate Court in Warm Springs will be successful in sending a message to offenders that they can no longer commit crimes in Indian country with impunity. It will serve as a model for federal and tribal courts across the United States in developing a cooperative relationship."

The Honorable Helen J. Frye Talks About Her Years on the Bench

For our second article about The Honorable Helen J. Frye, we asked her to reminisce about her service on the Lane County Circuit Court and her years as the first woman federal court judge in Oregon.

Benchmarks: One of your circuit court cases that got considerable media attention was the "Lederer Case." Could you describe the case and your work on it?

Judge Frye: The case, *State of Oregon v. Belinda Lederer*, might have been the case for which I was best known as a state circuit court judge because the charge against Belinda Lederer was murder, and the facts were sensational. Belinda Lederer was one of a number of young,

white women who became followers of "Snake" Brooks, a charismatic black man. Brooks and "his women" and children (several of the women had small children) lived in Eugene in a commune until public concern for the children caused the group to move up the McKenzie River some 35 or 40 miles from Eugene. There, they lived in an open campground. When a deputy sheriff went to Brooks' camp to check on the welfare of the children and to see if they were enrolled in school, Belinda Lederer shot and killed him. The case had everything to incite the emotions of the public—a cult, a man and a harem of women, chil-

dren living in primitive circumstances and not attending school, and the death of a deputy sheriff. The criminal case—*State of Oregon v. Belinda Lederer*—was assigned to me for trial. Public opinion in Lane County was so strongly against "Snake" Brooks and his commune that it was apparent Belinda Lederer could not obtain an unbiased jury and therefore a fair trial in Lane County. The case was transferred to the Multnomah County Courthouse for trial and I spent three weeks in Portland presiding over that trial.

Belinda Lederer was convicted and spent many years in the Oregon State Penitentiary. The last I heard of her, she was living in Hawaii in a commune with "Snake" Brooks.

Benchmarks: Were there other cases that were particularly significant for you as a circuit court judge—cases in which you think your decisions were particularly appropriate or important?

Judge Frye: Every decision a judge makes is of great significance to the litigants. I presided over a suit for dissolution of marriage in which there were no children and only two items of property in dispute: a stray calf that the parties had raised by hand-feeding it from a baby's bottle and a decanter that they had purchased while they were on a trip to Europe. Each party cherished the decanter. Each party loved the calf. I allowed each party to have the decanter in his or her posses-

sion for six months of the year. I awarded custody of the calf to the party with the premises most conducive to grazing—with ample visitation to the other party. There was no appeal. I heard nothing thereafter. I'll always remember these litigants because they taught me that EVERY decision I make is of a great importance to the people involved—and sometimes even to an animal.

Benchmarks: Tell us about the steps leading to your appointment as a federal judge.

Judge Frye: I was the first woman in the State of Oregon to be appointed to the position of circuit court judge. (The circuit court is the state court of general jurisdiction.) Governor Tom McCall appointed me to that position, and I took the oath of office on July 21, 1971. There was significant publicity—and controversy—over my appointment: Could a woman really preside over a court of general jurisdiction? Could a woman preside over a murder case? A personal injury case? In the spring of 1972, the Lane County Bar Association and *The Eugene Register Guard* supported me when I ran for election to retain my position as a state circuit court judge. I won the contested election to become the first woman in the State of Oregon to be elected to the position of circuit court judge. Because I had been a circuit court judge for nearly

