State Bar of Michigan
American Indian Law Section

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Pending Legislation to Amend the Indian Child Welfare Act

Submitted by James A. Bransky, Staff Attorney, Michigan Indian Legal Services

Senator McCain and Representative Young introduced companion bills in the House and Senate, S 569 and HR 1082 ("the Bills," "amendments" or "legislation"), to amend the Indian Child Welfare of 1978, 25 USC §§ 1901-1961. S 569 was introduced on April 14, 1997 and reported out favorably by the Senate Committee on Indian Affairs and placed on the Senate Legislative Calendar under General Orders, Calendar No. 295, on November 13, 1997. HR 1082 was referred to the House Committee on Resources on March 24, 1997. The House and Senate Committees held joint hearings on the Bills on June 18, 1997.

Very briefly, the United States Congress enacted the Indian Child Welfare Act (ICWA) to prevent the unwarranted breakup of Indian families by state courts and state and private agencies, and to protect and preserve the jurisdiction and future of Indian tribes. The ICWA accomplishes these goals by affirming the exclusive jurisdiction of Indian tribes over their children domiciled on their reservations, allowing for tribal intervention in state court proceedings, setting minimum standards that state courts must follow in removal proceedings involving Indian children, and mandating preferences for foster care and adoptive placements.

The central provisions of the amendments would clarify Indian tribes' rights to notice and intervention in voluntary proceedings. The amendments would provide for enforce-

continued on page 3

Legislative Developments

By Katherine J. Scotta, Staff Attorney, Michigan Indian Legal Services

During the past year, a theme in the United States Congress has been the sovereign status of Indian nations, tribes and bands. Congress has spent a good deal of time re-examining the government-to-government relationship and continues to consider legislation that may impact the sovereignty of Indian nations and people into the new millennium.

A piece of legislation getting a great deal of attention in Indian Country is Sen. Gorton's (WA) proposed *American Indian Equal Justice Act*, (S1691) which would waive tribal government immunity relating to varied governmental activities and would allow tribal governments to be sued in both federal and state courts. The bill proposes to require tribes, tribal corporations or members of tribes to collect and remit to the States any excise, use, or sales tax imposed by that State on nonmembers as a consequence of the purchase of goods or services from the tribe, tribal corporation or member. The legislation would permit a

continued on page 9

CONTENTS

Editor's note

Barry L Levine

We continue to owe a debt of gratitude to the Indian Law Center at the U of D Mercy School of Law for the case summaries provided by law student, Charlene Haley. We continue to hope that, in the future, we will be able to supplement these materials with summaries of decisions from tribal courts within Michigan. While your editor has made a written request to all tribal courts to forward copies of the written court decisions, none of the courts have yet chosen to provide us with them. I request that any of you who have obtained tribal court decisions provide them to us.

We hope that many of you will be able to attend the section meeting as well as the presentation at the State Bar annual meeting. Please feel free to contact me or any other member of the section with your suggestions on programs and information so that this section can better meet your needs.

Summarizing the Activities of American Indian Law Section 1997-1998

James Keedy, Chair

The American Indian Law Section began its third year at the State Bar of Michigan's annual convention in Detroit in September, 1997. At the meeting, James A Keedy was elected chair, Donna Budnick chair-elect and Tom Silva secretary/ treasurer. Sheila Gaskell, Hon. Bruce Havens, Barry Levine and Brenda Quick were elected to two-year terms on the council.

Also at the annual meeting, the Section presented "A Day in Tribal Court." The first topic was entitled *Indian Child Welfare Act Transfer Motion.* In this presentation, the state court judge considered the request of the Indian child's tribe that the pending child welfare proceeding be transferred to tribal court. The Indian Child Welfare Act (ICWA) provides that in a case where an Indian child is the subject of an out-of-home placement, the child, the child's parents or the child's tribe may petition the court to transfer the matter to tribal court. The ICWA states that the state court shall transfer the case absent good cause to the contrary. The second presentation was *Collection of Judgment from Tribal Members.* The demonstration simulated the collection of a judgment in tribal court. The final topic was *Juvenile Delinquency Adjudication in Tribal Court*. The case demonstrated the workings of a typical tribal court in the matter of a juvenile charged with being in possession of alcohol and in violation of curfew . The prosecutor presented the resolution suggested by the tribe's child welfare committee.

A subcommittee under Jacqueline Hand, U of D-Mercy professor, is hard at work on the panel presentation for the annual meeting this coming September. It will be entitled, "Doing Business with an Indian Tribe." Speakers will discuss various issues that arise when doing business with an Indian tribe, including sovereign immunity, contracting and financing, and security interests.

In October, the Section's newsletter was put on the American Indian Law Section web page at the State Bar's web site. The newsletter can be reviewed and downloaded from *http://www.michbar.org/sections/amerindian/summer97.html*. A subcommittee under Barry Levine is hard at work on the next issue of the Section's newsletter which will be out in August, 1998. Students at the U of D-Mercy Law School will again provide the Indian law case reviews.

The Section will be presenting an annual award to commemorate an individual that has contributed significantly to the development of Indian law or legal institutions or advancing the legal rights of Indian people in Michigan.

Council Members
American Indian Law Section Information

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Indian Child Welfare Act

continued from page 1

able open adoption agreements in states, such as Michigan, that have no such provision. The amendments would also impose criminal sanctions on parties who attempt to avoid the provisions of the ICWA by misleading or withholding information from courts.

The Bills would provide this greater certainty by amending section 103(c) of the ICWA (25 USC § 1913(c)) by providing that tribes must be notified in all voluntary, as well as involuntary proceedings. This amendment would then set explicit deadlines after the tribe receives notification to intervene. A tribe that fails to meet the stated deadlines would forfeit its right to intervene in the proceeding. A tribe would have a right to intervene at any time in the proceeding if it does not receive proper notice.[1]

Biological parents considering adoptive placement often desire a legal right to periodically visit their children after the adoption occurs. Michigan law contains no provision for enforcement of an open adoption agreement. The Bills would allow for enforceable open adoption agreements that could include extended family members and the child's tribe, as well as the biological parents.[2]

Finally, the Bills would provide criminal sanctions for a person involved in a child placement proceeding, other than a birth parent, who "knowingly and willfully" falsifies, conceals or omits information concerning whether a child is an Indian child, or a parent is an Indian.[3] The sponsors of the legislation included these provisions based on their finding that:

> There is no dispute that in some instances, unscrupulous adoption promoters, including some attorneys, have abused the absence of specific procedures by encouraging those wishing to facilitate the adoption of an Indian child to hide or obscure a child's tribal heritage either when a placement is first made or when a petition is filed for an adoption decree.[4]

As explained in the congressional reports, these Bills are the result of successful negotiation between Indian tribes and adoption agencies:

> Discussions between adoption professionals and tribal representatives revealed that the interests of the adoptive families, tribes, and most of all, Indian children were not served by a system that left adoptions subject to collateral attack if tribes were not given notice of a voluntary adoption and which placed no limits on when a tribe may intervene. These discussions commenced at the June 1996 midyear convention of the National Congress of American Indians (NCAI) at Tulsa, Oklahoma. On June 26, 1996, a legislative hearing before the Senate Indian Affairs Committee addressed the need for procedural clarity in voluntary child custody proceedings. Working together, tribal representatives and adoption professionals identified changes that would address problems with the ICWA's implementation in ways that both adoption advocates and Indian tribes would find acceptable. . . .[5]

The placement priorities, and jurisdiction and intervention rights of Indian tribes apply to voluntary proceedings. However, the ICWA only requires that notice be given to Indian tribes in involuntary proceedings. This gap in the law has caused uncertainty in long term placements.

The Senate Report observes:

> . . .In a few highly publicized cases, however, the Act falls short of fulfilling Congressional objectives. These problems can be largely attributed to the Act's lack of explicit procedures for how and when a child's tribe is to be notified in some adoptions. These cases have created the very type of conflict and protracted litigation that Congress sought to eliminate by enacting the ICWA.
>
> S. 569 seeks to extend the benefits of greater certainty, stability, and finality to all child custody proceedings covered by the ICWA. The bill's provisions are largely procedural. S. 569 clarifies or prescribes procedures to eliminate the conflicts that sometimes result when the absence of immediate notice to the child's tribe forces the tribe to choose between waiving its ICWA-codified rights or intervening late in a child custody proceeding. Such late intervention is often opposed by the other participants in the proceeding. These opposing parties claim that tribal intervention disrupts their settled expectations. Tribes respond that the absence of explicit notification procedures often prevents them asserting their legitimate interests in a more timely fashion.[6]

Overall, the Bills appear to truly represent a well reasoned compromise between Indian tribes and adoption advocates. This legislation would clarify the ICWA in a manner consistent with the original congressional intent, and avoid collateral attack of long term placements.

1. S 569 §§ 5-8.
2. S 569 § 8.
3. S 569 § 9.
4. Senate Rpt. 105-106.
5. *Id*.
6. *Id*.

MARK YOUR CALENDAR!

State Bar of Michigan Annual Meeting

September 16-18, 1998

Lansing, Michigan

U.S. SUPREME COURT

Minnesota, et al. v Leech Lake Band of Chippewa Indians

United States Supreme Court, No. 97-174, June 8, 1998

General Allotment Act
Burke Act
Nelson Act
State *ad valorem* taxes
Indian Reorganization Act

Issue: Is reservation land sold to non-Indians in fee simple under the General Allotment Act, then later reacquired by the Tribe, subject to state and local government *ad valorem* taxes?

Holding: Yes. According to County of *Yakima v. Confederated Tribes of Yakima Nation*, 502 U.S. 251, 253-254, Congress' intent to authorize state and local taxation of Indian lands must be "unmistakably clear". When providing for the public sale of reservation land to non-Indians in the Nelson Act, Congress removed that land from federal protection, making it unmistakably clear that Congress intended those lands to be taxable by local and state governments.

Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc.

United States Supreme Court, 1998 U.S. LEXIS 3406
May 26, 1998

Sovereign Immunity
Treaty of 1867
Interstate Commerce Clause

Issue: Can the Kiowa Tribe be sued without its consent in state court for breach of contract arising from the tribe's purchase of a business located outside Indian reservation?

Holding: No. The United States Supreme Court held, as a matter of federal law, unless Congress has authorized civil suits or the tribe has waived its immunity, Indian tribes enjoy sovereign immunity from suits on commercial or governmental contracts made off the reservation. The Court states that it is up to Congress to exercise its authority to limit tribal immunity through legislation.

Montana, et al. v Crow Tribe of Indians

No. 96-1829, May 18, 1998

Indian Mineral Leasing Act of 1938
Contract: Coal mining lease on ceded strip
State-Tribal taxation

Issue: Whether the Tribe, or the United States as its trustee, may recover state and county taxes imposed on and paid by the Tribe's mineral lessee for an on-reservation ceded strip parcel of land?

Holding: The United States Supreme Court held that the restitution sought for the Tribe is not warranted. The lessee, did not qualify for a tax refund because the company failed to pursue protest and claim procedures within the time Montana law prescribes and the Tribe did nothing to prompt the lessee to initiate appropriate refund proceedings. The lessee had entered into a settlement with the State and the County relinquished any claim it may have had for return of the tax payments.

Alaska v Native Village of Venetie Tribal Government, et al.

United States Supreme Court, 118 S.Ct. 948, 1998 U.S. LEXIS 1449, February 25, 1998

Alaska Native Claims Settlement Act of 1971

Issue: Whether the land owned and controlled by a Village made of an Indian tribe in Alaska is Indian Country within the meaning of 18 U.S.C. § 1151?

Holding: No**.** The Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601-1642 transferred the Village title to the tribe and the United States no longer hold the land in trust for the tribe. The Supreme Court held that the Venetie Village is not "Indian country" within the meaning of 18 U.S.C. § 1151 and the tribe lacked the power to impose a tax upon nonmembers of the tribe. The government's continuing provisions for health, welfare, and economic programs to Natives in the Village was not considered by the court to be a form of active federal control. Finally, the Tribe's ANCSA lands did not satisfy the two requirements to be a "Dependent Indian community," which were: (1) the land must have been set aside by the federal government for the use of the Indians as Indian land; (2) they must be under federal superintendence. See

U.S. v Sandoval, 231 U.S. 28, 34 S.Ct. 1. South Dakota v Yankton Sioux Tribe, et al.

United States Supreme Court, 118 S.Ct. 789, 1998 U.S. LEXIS 647, January 26, 1998

General Allotment Act of 1887
Dawes Act
Landfill site

Issue: Does the State have primary jurisdiction over land owned by non-Indians on the Yankton Sioux reservation that was opened up to non-Indians for settlement pursuant to a 1894 Act?

Holding: The Supreme Court held that the State has primary jurisdiction over the waste site that lies on unalloted, ceded lands which had been severed from the Yankton Sioux reservation. In the 1894 Act, the language demonstrated that Congress intended to diminish the Tribe's territory, such that the ceded lands were no longer included within the boundaries of "Indian country". No mention was made to the preservation of the 1858 reservation boundaries in the 1892 Agreement.

U.S. COURT OF APPEALS

Keweenaw Bay Indian Community v United States, et al.

Sixth Circuit Court of Appeals, 25 ILR 2035
February 10, 1998

Indian Gaming Regulatory Act
Tribal-state gaming compact
National Indian Gaming Commission
Secretary of the Interior

Issues: (1) Does § 2719 of the Indian Gaming Regulatory Act (IGRA) apply to Indian gaming created by a tribal-state gaming compact?

(2) Can § 2719(a) of the Indian Gaming Regulatory Act prohibit Indian gaming on "after-acquired" off-reserve lands after October 17, 1988?

Holdings: (1) Yes. The District Court concluded that IRGA does not require that Class III gaming activities authorized by a tribal-state compact also undergo the approval contained in 25 U.S.C. § 2719. However, Congress had created the IGRA in 1988 in order for the states to prevent or regulate Indian gaming.

(2) Yes. The Sixth Circuit held that when a tribal government enters into a valid tribal-state compact for Class III gaming under the authority of the IGRA, which is approved by the Secretary of the Interior, the provisions of § 2719 addressing gaming on off-reserve acquired lands after October 17, 1988, will also apply to Indian gaming on those lands.

The Interior Secretary's involvement is at two levels. The Secretary may disapprove a compact only if the compact violates an IGRA provision, any other federal law or the United States' trust obligations to a tribe. 25 U.S.C. § 2710(d)(8)(B). The Michigan Governor's endorsement of the compact is of the terms of the compact itself, like the Interior Secretary's two distinct instances of involvement, of a different nature from his concurrence in the Interior Secretary's discretionary "best-interest" waiver of § 2719's general gaming prohibition.

United States v Santee Sioux Tribe of Nebraska

Eighth Circuit Court of Appeals, 135 F.3d 558
January 29, 1998

National Indian Gaming Commission
Indian Gaming Regulatory Act
Tribal gaming closure

Issue: Does the Attorney General have the power to seek enforcement of a closure order from the Chairman of the National Indian Gaming Commission?

Holding: Yes. The Attorney General has exclusive authority and plenary power under statute reserving to the Department of Justice to control conduct of litigation in which the U.S. is involved. The Santee Sioux Tribe of Nebraska operated video poker, blackjack, and slot machines illegally under the Indian Gaming Regulatory Act. Injunctive relief should not be considered unless the case shows real threat of future violation of law or a concurrent violation of a nature likely to continue or recur.

United States v Weise

Eighth Circuit Court of Appeals, 128 F.3d 672
October 30, 1997

Criminal Jurisdiction
U.S. Sentencing Guidelines
Red Lake Reservation
Downward sentence departure

Issue: Did the District Court err in granting a downward sentence departure from the U.S. Sentencing Guidelines § 5K2.0 by considering the defendant's employment history, family ties, reputation in his community and extraordinary difficulties that defendant struggled against and overcame on the Red Lake Indian Reservation?

Holding: Yes. The U.S. Court of Appeals held that: (1) Court of Appeals had previously foreclosed the possibility of a downward sentencing departure on the grounds of aberrant behavior; and (2) departure based on employment history, family ties, reputation in the community, and the difficulties of living on an Indian reservation was deciding wrongly. The U.S. Sentencing Guidelines § 5K2.0 does permit District Courts to depart downward from the Guidelines if the court finds "mitigating circumstances" that are not taken into consideration by the U.S.S.G. *Koon v. U.S.* 518 U.S. 81, stated that discouraged factors should be relied on only in exceptional cases, when "the factor is present to an exceptional degree or in some other way makes the case differently from the ordinary case where the factor is present".

Wilson v Marchington

Ninth Curcuit Court of Appeals, 127 F.3d 805
September 23, 1997

U.S. Constitution Article IV, §1
Personal and Subject Matter Jurisdiction

Issue: Does the principles of "comity" or "full faith and credit" govern whether federal courts must recognize or enforce tribal court judgments?

Holding: The Court of Appeals held that the principles of comity, not full faith and credit, govern whether a district court should recognize and enforce judgments produced in tribal court. The existence of both personal and subject matter juris-

diction in the Tribal court is the necessary prerequisite for federal court recognition and enforcement of tribal court judgments (Restatement 3rd of Foreign Relations Law § 482). Tribal court proceedings must afford the defendant basic tenants of due process or judgments will not be recognized by federal courts (U.S. Court of Appeals Constitution Amend. 14). In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances: (1) the judgment was obtained by fraud; (2) the judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties contractual choice of forums; or (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the U.S. or the forum state in which recognition of the judgment is sought.

Yavapai-Prescott Indian Tribe v Scott

Ninth Circuit Court of Appeals, 117 F.3d 1107
June 30, 1997

Taxation
Arizona Department of Revenue
Non-Native Business on Tribal Land

Issue: Does the state have an interest in the assessment of a business transaction privilege tax on sales and rentals pertaining to non-Indian lessee's food and beverage sales and room rentals to non-Indians at hotels located on the reservation?

Holding: Yes. Federal and tribal interests did not outweigh Arizona's interests pertaining to non-Indian lessee's food and beverage sales and room rentals to non-Indians at hotel location on the reservation. Arizona's assessment of business transaction privilege taxes are not preempted on those sales and rentals, considering that no tribal members were employed at hotel, tribe did not have active role in hotel's business, and state provided substantial services relating to law governing crimes, liens, and employment matters. In this case, the tribe did not have an active role in the creation in the hotel which is necessary in order to establish preemption of state tax.

U.S. DISTRICT COURT

United States v Anthony, Y.

U.S. District Court of New Mexico, 990 F.Supp. 1310
January 23, 1998

Federal Rules of Evidence
Juvenile Delinquency Act

Issues: (1) What factors are used to determine when juveniles who commit crimes in Indian Country are transferred to adult status in federal court?

(2) Do the hearsay rules pursuant to the Federal Rules of Evidence apply to transfer hearings that involve Native American juveniles?

Holdings: (1) There are six factors set out in the Juvenile Delinquency Act 18 U.S.C. § 5032 that are used in the interest of justice to balance against the needs to protect the public from violent and dangerous individuals and providing sanction for and social acts. The six factors are: 1) age and social background; 2) nature of the alleged offense; 3) extent and nature of prior delinquency record; 4) present intelligent development and psychological maturity; 5) past treatment efforts and response to efforts; 6) availability of appropriate programs.

In this case, there were two Native American juveniles charged with murder. One juvenile was not transferred to adult status in federal court because he had strong family connections, did not have an extensive juvenile record, and he showed an ability to make good choices about his life while he was incarcerated. The other juvenile was transferred to adult status in federal court because he came from an unstable and unsupportive family, he played a leadership role in the murders, he has an extensive juvenile record and prior rehabilitative treatment failed.

Native American juveniles in New Mexico who commit crimes on federally recognized Indian reservations and who are transferred to adult status in federal court face much longer terms of incarceration than do juveniles who are prosecuted in the New Mexico state court.

(2) No. Federal Rules of Evidence do not apply to transfer hearings. Government of Virgin Islands in Interest of A.M., 34 F.3d 153.

Gugleilmino-Johnson v Devils Lake Education Board

Civ. No. A2-96-101, October 1, 1997

Principles of Comity
Sovereign Immunity
Employment: Wrongful Termination

Issue: Does federal jurisdiction and sovereign immunity apply to actions seeking damages for wrongful discharge of a faculty member of a tribal school?

Holding: No. Eighth Circuit held that it is clear that tribal courts, under the principle of comity, should be given the opportunity to determine if it has jurisdiction over matters of civil disputes affecting tribal interests.

Baraga Products, Inc. v Commissioner of Revenue

United States District Court, W.D. Michigan, Southern Division, 971 F.Supp. 294, March 17, 1997

Michigan Commissioner of Revenue
Single Business Tax Exemption

Native single corporation shareholder

Issue: Is a state licensed corporation owned by a single Native American shareholder exempt form a state's Single Business Tax?

Holding: No. The District Court held that the corporation was not exempt from state tax. Corporations may be entitled to protection of taxation of an Indian tribe if it is acting as tribe's agent. The Supreme Court of the United States has limited immunity for state taxes only to corporations whose business activity is entirely on a reservation and income that is earned on an Indian reservation, by an enrolled member of a federally recognized tribe, and who lives on the tribal reservation of the tribe in which the member is enrolled. In this case, the corporation was incorporated under the laws of the State of Michigan and not organized under tribal laws.

STATE COURTS

Munson, et al. v State Superintendent of Public Instruction, et al.

Wisconsin Court of Appeals, 25 ILR 5059
February 17, 1998

Office of Civil Rights: Discrimination - Indian logos
Department of Public Instruction

Issue: Does the Mosinee School District violate the pupil nondiscrimination provision of Wisconsin law when the school uses an Indian logo as a mascot and on school apparel and on large signs throughout the school?

Holding: No. The court uses the standard, "whether a reasonable person, one similarly situated to the Native appellant and her children, would find that the Indian logos depict a negative stereotype that is detrimental or harmful to a protected class or person. The Wisconsin Court of Appeals held that a reasonable person would not see the Indian logo to depict a negative stereotype, despite the evidence that: (1) the Department of Public Instruction interviewed 23 students and only one student had a small part of Indian ancestry; (2) the Wisconsin Indian Education Association Board condemned the use of Indian logos; (3) one of the Native students had been called "stupid Indian" and "the squaw"; (4) at pep rallies students would mimic religious Indian dances and make war-cries.

The Office of Civil Rights (OCR) test for finding a violation is (1) that a racially hostile environment exists, (2) of which a school has actual or constructive notice, (3) and where the school has not taken action reasonably calculated to redress the hostile environment. The Wisconsin Court of Appeals held that the school's use of the Indian logo did not create a hostile environment. The appellant failed the second part of the test because most of the incidents were not reported to school authorities when they occurred and that the principal brought the concerns to the attention of teachers and staff and that the use of the logo, mascot and certain cheers had lessened.

Stevens v Department of Social Services

Court of Appeals of Michigan, 572 N.W.2d 41
October 17, 1997

Department of Social Services
Indian Tribal Judgment Funds Use or Distribution Act
Indian Gaming Regulatory Act

Issue: Does the Indian Tribal Judgment Funds Use or Distribution Act §§ 1, 7, 25 U.S.C.A. §§ 1401, 1407, prohibit the Department of Social Services from considering tribal gaming revenue from purposes of eligibility for families with dependent children (ADC) benefits?

Holding: No. The Court of Appeals held that no federal statute or regulation prohibited considering tribal gaming revenue as income for ADC eligibility purposes. Revenues received by tribal members are not held in trust by federal government or obtained as the result of a judgment and can be considered as income.

State of Idaho, ex rel., Industrial Commission v Indian Country Enterprises, Inc.

Supreme Court of Idaho, 944 P.2d 117, July 8, 1997

State Industrial Commission
Worker's Compensation
Coeur d'Alene Indian Tribe

Issue: Do state courts have jurisdiction to enforce state's workers' compensation laws against a tribal member operating a business on an Indian reservation?

Holding: Yes. Supreme Court of Idaho held that the district court had subject matter jurisdiction over Industrial Commission's action. State courts have subject matter jurisdiction to enforce workers' compensation laws against Indian tribe members operating a business on Indian reservations.

Pursuant to 40 U.S.C. § 290, Idaho's workers' compensation laws apply on land "owned or held by the United States by deed or act of cession, by purchase or otherwise." The right which Indians hold in reservation land is that of occupancy, the fee simple and right of disposition remains in the United States. As a result, the reservation is land "owned or held by the United States" and, under 40 U.S.C. § 290, Idaho's workers' compensation laws apply against Indian tribal members operating a business on Indian reservations.

TRIBAL COURTS

Helgeson v Lac Du Flambeau Band of Lake Superior Chippewa Indians

Lac Du Flambeau Tribal Appellate Court
No. 97-APP-001, January 30, 1998

National Indian Gaming Commission
Tribal-State Compact
Indian Reorganization Act

Issue: Whether the tribal court has jurisdiction over the conduct of non-Indians, on fee land, who violated a tribal ordinance?

Holding: The Lac Du Flambeau Band of Lake Superior Chippewa Indians Tribal Court has the authority to adopt ordinances and that the ordinance in question was done in accordance with tribal regulations under Article VI of the U.S. Constitution and Bylaws established by the tribe and approved by the National Indian Gaming Commission.

Chatterson v Confederated Tribes of Siletz Indians of Oregon

Siletz Court of Appeals, AP96-03, October 9, 1997

Equal Protection Clause
Indian Civil Rights Act
Tribal Statute of Limitations
Employment: Wrongful termination

Issue: Is the Equal Protection Clause of the U.S. Constitution and the Indian Civil Rights Act violated when a tribe places separate statute of limitations for "tribes and tribal officials" and "all others members?"

Holding: No. Tribal sovereign immunity has given Tribal Nations the power not to permit lawsuits to be brought against them without their express permission. By choice, the tribe had granted a limited waiver of sovereign immunity through their Court Rules and Procedures by allowing for two statute of limitation of actions: 1) those brought against the tribe and/or tribal officials (60 days); 2) those brought against all others (2 years).

In the Matter of Atkinson Trading Company, Inc.

Navajo Nation Supreme Court, August 22, 1997

Navajo Nation Hotel Occupancy Tax
General Allotment Act
1934 Boundary Act

Issues: Does the Navajo Nation have the authority to impose its hotel occupancy tax on non-Indian guests of a hotel on fee land located within the exterior boundaries of the reservation? Does the Navajo Nation have the lawful power to require a non-Indian hotel owner to collect and remit the tax to the tribe?

Holdings: Yes. Court held that Atkinson was subject to provisions of the Navajo Nation Hotel Occupancy Tax to help compensate the costs of Navajo Nation governmental services which benefit Atkinson and its guests.

Yes. The Navajo Nation benefit from governmental authority over its territory and prescribe the terms upon which non-Indians conduct business with in its borders.

First Bank v Knight

Fort Berthold Tribal Court, No. 97C-0005
February 26, 1997

Tribal Business License
Federal Traders License
Off reserve loan agreement

Issue: Does the absence of a tribal business license or federal traders license bar an off-reserve corporation from bringing suit in tribal court for nonpayment of a loan agreement made off the reservation boundaries?

Holding: No. The Fort Berthold District Court held that their tribal code contained a licensing provision for certain businesses of the reservation, but no across-the-board license requirement has been imposed and enforcement was infrequent, therefore did not bar the plaintiff from bringing suit in tribal court.

Legislative Developments

continued from page 1

State to bring a cause of action in U.S. District Court to enforce the requirement. As of publication, S1691, is still in committee.

An important bill for Michigan Indians is S659, introduced by Senator John Glenn (Ohio). The bill proposes amendments to the Great Lakes Fish and Wildlife Restoration of Act of 1990 including the development and implementation of proposals for the restoration of fish and wildlife resources in the Great Lakes Basin and the inclusion of microorganisms within the definition of "non indigenous species," The bill would require maintenance of functions of the Great Lakes Coordination Office in East Lansing and the Upper and Lower Great Lakes Fishery Resources offices. In the House, HR1481 proposes the same amendments to the Act.

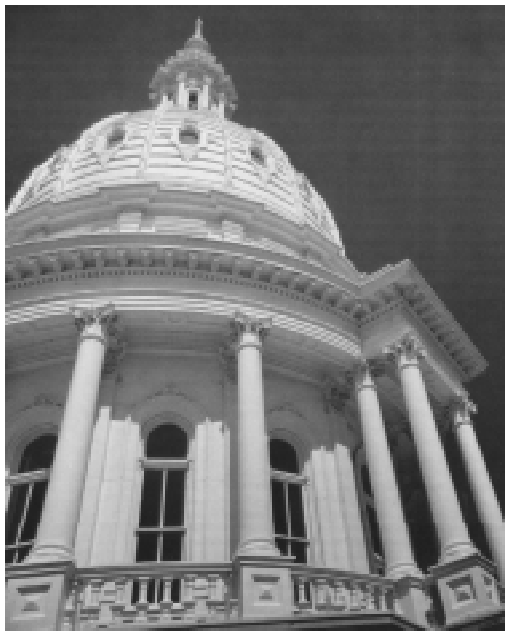
Another piece of legislation impacting the sovereign status of Indian nations, is HR2646 which proposes expansion of the scope and application of tax-sheltered savings accounts. The senate version of the bill passed by a single vote and includes an amendment, proposed by Sen. Gorton (WA) which would shift funding of Indian education, including that for the Office of Indian Education, from the Department of Education to state block grants. The version of HR2646 passed by the House of Representatives does not include the block grant amendment.

Senators Gorton (WA), and Bryan (NV) successfully argued for two amendments to tobacco legislation (S.1415), before the Senate Commerce Committee. The first requires tribes to collect and pay state taxes on tobacco to the federal Treasury, which will, in turn, disburse the tax funds to the states. The second amendment changes the definition of "Indian reservation" to exclude lands owned in fee by tribes. The tobacco bill was killed on June 17, 1998.

Senator Ben Nighthorse Campbell's bill (S1797), would have made provisions of S1415, or any other Act that would effectuate the national tobacco settlement agreement of June 20, 1997 applicable to manufacture, distribution or sale of tobacco or tobacco products within the boundaries of Indian reservations or on Indian land except for traditional or religious uses. Tribes would be subject to liability for any fee levied on other manufactures in regard to

continued from page 9

any tobacco trust fund. Tribes would be subject to surcharges applicable under the Acts effectuating the settlement agreement. The legislation would require compliance with the requirements of the Federal Food, Drug and Cosmetic Act with regard to tobacco and tobacco products manufactured distributed or sold on reservations and Indian lands. The proposed amendments were reported favorable along with other amendments to the tobacco bill on April 1, 1998. The defeat of the bill does not necessarily defeat the proposed amendments because the language proposed by Sen. Nighthorse Campbell would make the amendments applicable to any bill that would effectuate the national tobacco settlement agreement.



In October 1997, the Indian Trust Lands Reform Act (S.1329) was referred to Senate Committee on Indian Affairs and no further action has been taken on the proposed law that would prohibit the Secretary of the Interior from taking any land outside an Indian reservation in trust on behalf of an economically self-sufficient tribe, if such lands are to be used for gaming or commercial purposes.

Some other federal legislation proposed includes a bill to amend the Indian Health Care Improvement Act (S2001) to create a permanent program of direct billing of medicare, medicaid and third party payers and would expand eligibility under these programs to other tribes and tribal organizations. The bill has been referred to the Senate Committee on Indian Affairs. The House Subcommittee on Surface Transportation is considering H.R.3966 which would amend Title 23 of the U.S. Code to provide for collection and payment of state taxes imposed on motor fuels sold on Indian land; A house has been proposed for the protection and conservation of deer and elk and for equitable hunting laws in the state of Washington. Technical changes to the Federal Recognition Administrative Procedures Act of 1997 was ordered to be reported to the House on May 20, 1998. The bill (HR 1154) would authorize the Commission on Indian Recognition to assume authority to recognize a petitioning Indian group's tribal status from the Department of the Interior. Senator John McCain (Ariz.) has introduced a bill that would amend the Internal Revenue Code to exempt from federal taxation, income derived from natural resources-related activity by Indians or qualified Indian entities. The bill would prohibit taxes on remuneration paid for services performed in natural resources related activity by members of tribes for other members of tribes. The bill has been referred to the Senate Committee on Finance. A House bill designed to repeal a provision of the Indian Self Determination Act, (HR 3219) has been referred to the House Committee on Resources. The legislation would prohibit the exemption of former officers and employees of the United States from restrictions on aiding and advising Indian tribes.

President Clinton has indicated that despite his opposition to a plan to build a 4-lane highway across Petroglyph National Monument, he will sign legislation which includes approval of the highway plan.

The Bureau of Indian Affairs Reorganization Act (S.545) was introduced by Sen. John McCain (Ariz.) in April 1997. It proposes to instruct the Secretary of the Interior to enter into compacts with appropriate Indian tribes to reorganize the Bureau of Indian Affairs. The legislation also sought to direct the Secretary to establish a program for tribal participation in BIA budget requests and to direct the Secretary of Health and Human Services to establish a program of tribal participation regarding Indian Health Service budget requests.

The Juvenile Justice and Delinquency Prevention Improvement Act, (S754) introduced by Sen. Ben Nighthorse Campbell (Colo.) was referred to Senate Committee on Indian Affairs in mid-May, 1997. The Act would amend the Juvenile Justice and Delinquency Prevention Act of 1974, eliminating pass-through of federal assistance to tribes that perform law enforcement functions and which agree to certain requirements to any cooperative program conducted with an Indian tribe. The participation of tribes would be funded from amounts made available under the program established by S754 to provide direct grants to tribes. Direct funding is earmarked for establishment, operation and evaluation of projects designed to achieve compliance with requirements relating to detention and other sections of the Act. The funds would also be used to promote improvement of participating tribes' juvenile justice systems. Grants would be competitive, granted annually and includes oversight provisions. At time of publication, the Act was still in committee.

Amendments to section E of the Social Security Act have been proposed in H.R. 261. Early in 1997, the amendments, which would provide federal funding for foster care and adoption assistance programs to tribes and Alaska Native villages, went to the Ways and Means Committee and was referred to the Subcommittee on Human Resources. There had been no further action at time of publication.

In Michigan, legislators have proposed what is being commonly referred to as "The Fish or Chips Act" (SB 1022), which provides for the surrender of fishing rights by Indian tribes which engage in or authorize others to engage in casino gaming. A resolution (HR 226) to amend treaty agreements regarding Indian fishing rights and to provide "more effective" ways to settle disputes concerning gill netting practices was proposed in March 1998, and referred to the House Committee on Environment, Conservation and Recreation. The State Senate Committee on Appropriations is considering a bill (SB132) that would earmark a certain percentage of revenues from class III gaming compacts for environmental cleanup and redevelopment funds. ■

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American Indian Law Section Annual Meeting Program

September 18, 1998

Title: Doing Business with Federally Recognized Indian Tribes in Michigan

Program Chair: Professor Jacqueline P. Hand, Director
University of Detroit Mercy Indian Law Center

Speakers: James M. Janetta, Senior Staff Attorney, Sault Ste. Marie Tribe of Chippewa Indians
"Significan Issues in Employment Law, Commercial Law and Tort Claims in Doing Business with Tribes"

William A. Dornbos, Howard and Howard, P.C. Kalamazoo, MI
"Negotiating Contracts with Indian Tribes"

Frederick R. Bimber, Frederick R. Bimber, P.C.,
Traverse City, MI
"Issues in Representing Lenders in Security Agreements with Tribes"

Barry L. Levine, of Counsel, Olson, Noonan, Ursu & Ringsmuth,
Traverse City, MI
"Resolving Disputes—The Effect of Tribal Sovereign Immunity, Selecting the Appropriate Forum for Resolution—Tribal State or Federal; Litigation, Arbitration or other Alternative Dispute Resolution Mechanisms."

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