

Indian Law



Published by the Indian Law Section

SECTION NEWS

Meetings.

A Section Board meeting was held telephonically on February 5, 2001. The draft minutes of the meeting may be viewed on the Section's website at www.wisbar.org/sections/indian. The next meeting of the Board will be held at the Bar center in Madison on March 14, 2001, at 3:30 pm.

Nominations/Elections.

Annual elections will be held for the two Board seats that expire June 30, 2001. Anyone interested in serving is

invited to contact the Nominations committee chair JoDeen Lowe.

Convention CLE Program.

The Section will present a fascinating and provocative program at the Annual State Bar Convention on May 2, 2001, from 1:30-4:30 pm at the Grand Geneva Resort, Lake Geneva, Wisconsin. The theme will be "Looking into the Future: Indian Country Ten Years Hence." Speakers Clay Smith, lately of the Montana Attorney General's Office, Charles Curtis, Foley &

Lardner, and John Echohawk, Executive Director of the Native American Rights Fund. These eminent lawyers will address the topic from the perspective of the Tribe, private non-Indian landowner or business owner, State government, respectively. The section is grateful to Milton Rosenberg for his efforts in organizing this outstanding program.

NEW FEE TO TRUST REGULATIONS ISSUED

Final rules relating to "Acquisition of Title to Land in Trust" were issued by the Bureau of Indian Affairs January 16, 2001. While the regulations state an effective date of February 15, 2001, pursuant to President Bush's 60 day hold order, the actual effective date will be March 17, 2001. The new rules are extensive. Essentially, applications for transfer of land from fee to trust status will be given a presumption of approval where the land is within reservation boundaries but will be subject to greater scrutiny, and the concerns of objecting local

governments given greater deference, for off reservation acquisitions. The more remote the land is from the reservation, the greater the scrutiny it will receive. A "tribal land acquisition area" concept is included to address tribes without reservations. The rules require BIA to issue a decision within 120 days of receiving a complete application package.

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FEDERAL LEGISLATION UPDATE

A number of bills affecting Indian country were enacted into law during the final weeks of the 106th Congress. A summary of some of the major new laws follows.

The "Omnibus Indian Advancement Act," which became Pub. L. 106-568 December 27, 2001 (hereinafter "Omnibus Act"), combines in a single piece of legislation several Indian country bills previously introduced separately. Title VIII of Omnibus Act, known as the Native American Laws Technical Corrections Act of 2000, (1) repeals provisions of law restricting the assignment of contracts with Indians and requiring approval of such assignments by the Secretary of the Interior, (2) repeals provisions of the Federal Criminal Code relating to penalties for (a) receiving money contrary to certain provisions regarding Indian contracts for services, and (b) receiving money in connection with certain Indian enrollment contracts pertaining to the Five Civilized Tribes, (3) extends through FY 2001 authorization of appropriations for each program under the Indian Health Care Improvement Act and the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, (4) amends the Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act of 1992 to (a) provide that the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation develop resources to properly train Native American and Alaskan Native professionals in health care and public policy, (b) applies the Act's administrative provisions to activities of the Foundation, and (c) authorizes appropriations.

Title X of the Omnibus Act, Native American Home Ownership, establishes a Land Title Report Commission to facilitate home loan mortgages on Indian trust lands, amends the Housing and Community Development Act of 1992 to make permanent the "Section 184" Indian Housing Loan Guaranty Program, and amends the Native American Housing and Self-Determination Act ("NAHASDA"). The NAHASDA amendments (1) restrict the Secretary of HUD's authority to waive housing plan requirements to not more than 90 days, (2) permit the Secretary to waive local cooperation requirements upon a good faith showing and agreement to make certain payments in lieu of taxes, (3) permit assistance to Indian families who are not low income on a showing of need, (4) eliminate separate housing plan requirements for small tribes, (5) permit the Secretary to waive certain environmental review requirements under specified conditions, (6) permit reservation housing assistance for full-time law enforcement officers, (7) revise audit review and hearing provisions, (8) prescribe a funding formula for housing authorities operating fewer than 250 units based on an average FY 1992 through 1997 allocations formula, and (9) repeal the requirement requiring certification of compliance with subsidy layering requirements. Title X also amends the Multi-Family Rental Housing Loan Guaranty Program pursuant to Section 538 of the Housing Act of 1949 to remove transfer of title to the Secretary of Agriculture as a precondition for payment on the loan guaranty.

Title XI of the Omnibus Act, the Indian Employment, Training and Related Services Act Amendments of 2000, amends the Indian Employment

Training and Related Services Demonstration Act of 1992 to (1) revise requirements requiring affected programs to include programs for assisting Indian youth and adults, (2) requires a Secretary of the Interior to reconsider disapproval of any statutory waiver requested by a tribe, and (3) authorizes the use of a percentage of funds made available under the Act for the creation of employment opportunities.

Title XIII of the Omnibus Act, known as the American Indian Education Foundation Act of 2000, amends the Indian Self-Determination and Education Assistance Act to direct the Secretary of the Interior to establish within the District of Columbia the "American Indian Education Foundation" as a charitable and nonprofit federally-chartered corporation. The Foundation's purpose is to encourage, accept and administer private gifts for the benefit or support of educational opportunities of American Indians who attend schools funded by the BIA.

Title V of the American Home Ownership and Economic Opportunity Act of 2000, H. R. 5640, P. L. 106-569, entitled "Native American Homeownership," largely duplicates Title X of the Omnibus Act, described above, but includes an important additional provision. Section 503(i) permits tribes or tribally designated housing entities to avoid paying the federally established "Davis-Bacon" wage rates for NAHASDA development projects where the tribe enacts a law requiring payment of prevailing wages, as established by the Tribe.

The Consolidated Appropriations Act for Labor, Health and Human Services and Education and Related Agencies, H. R. 4577, became Pub.

L. 106-554 December 21, 2000 ("Consolidated Appropriations Act"). Provisions in the Bill relevant to Indian country include the **Community Renewal Tax Relief Act of 2000** which provides tax incentives in "renewal communities" to be designated through an application process pursuant to federal regulations to be published within four months of enactment. The Act includes special provisions addressing applications from Indian tribes. The tax incentives include an exemption from the capital gains tax from the sale or exchange of a qualified community asset held for

more than five years, an employment credit, a "commercial revitalization deduction" and increased expense deductions.

The Consolidated Appropriations Act, Section 134, also amends the Tax Code to provide explicitly that NAHASDA funds, like HOME funds, are not "federal subsidies," for purposes of determining eligibility for the 9% low income housing tax credit. This provision will help tribes finance affordable housing development.

Section 166 of the Consolidated Appropriations Act amends the **Federal Unemployment Tax Act (FUTA)** to provide that tribal governments are treated like state and local governments for purposes of the Act. Specifically, instead of being required to make payments into an unemployment tax account, tribes will have the opportunity to elect instead to reimburse the unemployment compensation fund only when claims are made against the Fund by former tribal employees.

U. S. SUPREME COURT UPDATE

In our last newsletter, we summarized the issues that the U. S. Supreme Court will address in [Klamath Water Users Protective Association v. Department of the Interior, Nevada, Hicks, C&L Enterprises, Inc. v. Citizen Potawatomi Nation, and Atkinson Trading Co. v. Shirley](#). Oral argument has been set for March 19th in the [C&L](#) case, for March 21st in the [Hicks](#) case, and March 27th in [Atkinson](#).

On January 10, 2000, the United States Supreme Court heard oral arguments in the case of [Klamath Water Users Protective Association v. Department of Interior](#), 191 F. 3d 1115 (1999). The question before the Court was: "Are documents submitted by Indian tribes at the request of the Department of the Interior during ongoing administrative and adjudicative proceedings involving water rights, and allocations affecting the tribes' interests, exempt under the Freedom of Information Act as "inter-agency or intra-agency memorandums or letters?"

On January 22, 2001, the Court granted certiorari in [Chickasaw Nation v. United States](#), and its companion case, [Choctaw Nation of Oklahoma v. United States](#). In the lower court decisions, [Chickasaw Nation v. U.S.](#), 210 F. 3d 389 (2000) and [Choctaw Nation v. U.S.](#), 208 F. 3d 871 (2000), the 10th Circuit Court of Appeals affirmed district court decisions holding that "pull tabs," gaming devices sold at tribal gaming centers and convenience stores, involve taxable wagers, as defined at 26 U.S.C. § 4421, requiring payment of federal wagering excise taxes. The Court rejected the tribes' argument that an Indian nation is not a "person" within the meaning of 26 U.S.C. § 770(a)(1) and also rejected the tribes' argument that imposition of the tax constituted a violation of the Indian Gaming Regulatory Act. The question presented to the Supreme Court is "under applicable Indian-law canons of statutory construction, does the Indian Gaming regulatory Act (IGRA) confer on Indian tribes conducting "pull tab" gaming operations the same exemption from federal wagering taxes afforded

to states by Chapter 35 of the Internal Revenue Code?" Oral argument has not been set.

The Supreme Court has agreed to review the decision of the 9th Circuit Court of Appeals in [State of Idaho v. United States of America](#), 210 F. 3d 1067 (9th Cir. 2000). The case involves the Coeur d'Alene Indian reservation, which was created by an executive order that included a portion of the bed of Coeur d'Alene Lake and the St. Joe River as part of the reservation. The District Court found that at the time of Idaho's admission to the union, Congress manifested its intent that the reservation include submerged lands. The question presented to the Supreme Court is whether the Court of Appeals erred in affirming the District Court's conclusion that Congress' actions established its intent, when Idaho was admitted to the union, to defeat the state's title to those submerged lands. Oral argument in the case has not been set.

SELECTED COURT DECISIONS

In U.S. v. White, 237 F.3d 170 (2nd Cir. 2001), the Second Circuit Court of Appeals held that members of the Mohawk Nation conducting business within the St. Regis Mohawk Indian Reservation were, as a matter of law, required to prepare and file IRS Form 8300 reporting currency and transactions in which they receive more than \$10,000 in cash, as required by 26 U.S.C. § 6050L. Defendants' convictions for violating 31 U.S.C. § 5313(a) relating to money laundering were affirmed.

In Okanogan Highlands Alliance v. Williams, 2000 W.L. 1879978 (9th Cir. 2000), the plaintiffs, including the Confederated Tribes of the Colville Reservation, challenged the adequacy of an environmental impact statement and record of decision prepared by the U.S. Forest Service in connection with a proposed gold mining operation in the State of Washington. The 9th Circuit Court of Appeals rejected the plaintiffs' challenge, holding that the Forest Service did not consider inappropriate documents, the environmental impact statement was sufficient, the Forest Service did not erroneously fail to consider the most environmentally-preferable alternative and, finally, the Forest Service did not violate a trust obligation owed by federal agencies to Indian tribes.

In Yukon-Kuskokwim Health Corp. v. NLRB, No. 99-1440 (D.C. Cir. 2000), the Yukon Kuskokwim Health Corporation ("Yukon"), a nonprofit organization controlled by Alaska Native Tribes, challenged the National Labor Relations Board's ("Board") assertion of jurisdiction over a hospital operated by Yukon. The D.C. Circuit Court of Appeals rejected Yukon's claim that it was exempt from the National Labor Relations Act

("NLRA") as an Indian tribe acting in a governmental capacity. The Court held that the Board erred, however, by not considering Yukon's argument that it was exempt under § 2(2) of the NLRA because the Indian Self-Determination Act authorizes it to act as an arm of the United States government, sharing the government's exemption. The case was remanded to the NLRB.

The case of Cermak v. Babbitt, No. 00-1098 (Fed. Cir. 2000) involved "Indian land certificates" issued in 1944 by the Department of the Interior to a member of the Shakopez Mdewakanton Sioux Community. The certificates acknowledged assignment of 25 acres to the member, John Cermack, and certified that he and "his heirs" would be entitled to possess the land for as long as they would use the land. After Cermack died, however, DOI refused to probate his will and cancelled the certificates, noting that the land in question was not an individual allotment but, rather, was tribal trust land. The DOI ruled that Indian land certificates conveyed only a "life use" and could not be inherited. Cermack's heirs sued in federal court pursuant to 28 U.S.C. § 1346, alleging that a property interest had been taken by the federal government. After the case was transferred to the Federal Court of Claims, it was dismissed for lack of subject matter jurisdiction. The court found no jurisdiction pursuant to 28 U.S.C. § 1353, relating to civil actions involving the right of any Indian person, or descendant, to "any allotment of land under any act of Congress or treaty." According to the Court of Claims, the land certificates did not relate to an allotment. The Court rejected the heirs' argument that the land certificates had the effect of conveying an allotment to them.

Three recent appellate cases address the issue whether a certain gaming device qualifies as class II or class III for purposes of the Indian Gaming Regulatory Act. In Di amond Game Enterprises v. Reno, No. 98-5516 (D.C. Cir. 2000), the D.C. Circuit held that the "Lucky Tab II), an electromechanical device that dispenses paper pull tabs and displays their contents on a video monitor, is a Class II "aid." In United States v. 162 Megamani a Gambling Devices, 231 F.3d 713 (10th Cir. 2000), the Tenth Circuit Court of Appeals held that the "megamani a" machine was essentially an electronic bingo game and, therefore, properly classified as Class II under the Indian Gaming Regulatory Act. The 9th Circuit later reached the same conclusion.

In Old Person v. Cooney, No. 98-36157 (9th Cir. 2000), the 9th Circuit Court of Appeals (Judge Canby) reversed a district court decision dismissing claims by American Indian plaintiffs under the Voting Rights Act of 1965. The 9th Circuit concluded that the district court improperly relied in part on the electoral success of Indian candidates in majority Indian house districts when it concluded that white bloc voting in majority white house districts was not legally significant and, further, that the district court improperly concluded that, under Montana's 1992 redistricting plan, American Indians were proportionately represented. The matter was remanded to the district court for a determination whether, in light of the totality of the circumstances, dilution of American Indian votes occurred.

In Bowen v. Doyle, 230 F.3d 525 (2nd Cir. 2000), plaintiff members of the Seneca Nation sued the elected

president of the Nation in state court, alleging that Bowen had violated various provisions of Seneca law. The plaintiffs sought a state court declaration and injunction preventing Bowen from taking certain actions relating to affairs of the Nation. Bowen, President of the Seneca Nation, commenced an action in the Nation's peacemaker's court against Ross for declaratory and injunctive relief relating to Ross' capacity to serve on the Nation's council. Bowen informed the state court of the peacemaker court action and argued that the state court had no jurisdiction. Nonetheless, the state court issued rulings adjudicating the intra-tribal dispute. Bowen appealed first to the state appellate court and then to the United States District Court, challenging the state court's jurisdiction. The federal district court issued a preliminary injunction enjoining state court judges from exercising jurisdiction over the tribal dispute, citing the Nation's right of self-government and exclusive jurisdiction over its internal affairs, the pendency of the peacemaker's court action, and the doctrine of tribal sovereign immunity. The Second Circuit Court of Appeals affirmed, rejecting the state court judges' argument that the district court should have refrained from exercising its jurisdiction until the plaintiffs had first exhausted state court remedies.

In Morrison v. Garraghty, No. 00-6540, (4th Cir. 2001), a prisoner rights case, the Fourth Circuit court of Appeals held, based on the Equal Protection Clause, that a prison could not deny Native American religious articles to inmates professing belief in "Native American Spirituality" based on the inmates' inability to demonstrate tribal membership or a blood relationship to an Indian tribe.

In Baraga County v. State Tax Commission, No. 220473 (2001), a case addressing the taxability of tribally owned fee lands, Baraga

County had issued into a consent judgment with the Keweenaw Bay Indian Community ("KBI C") in 1994 pursuant to which 123 parcels of land owned by members of the KBI C were exempt from taxation. The State Tax Commission argued that, as a nonparty to the 1994 agreement, it was not bound. The Michigan Court of Appeals disagreed, concluding that Baraga County had "substantial identity of interests" with the State Tax Commission. Acknowledging that res judicata does not bar litigation where a subsequent change in the law alters the legal principles on which the subsequent case is to be resolved, the Court refused to nullify the 1994 agreement based on the U. S. Supreme Court's decision in Minnesota v. Leech Lake Band of Chippewa Indians: "We read Leech Lake to hold merely that states and their political subdivisions may only impose ad valorem property taxes on reservation land made available by Congress, sold to non-Indians, and later repurchased by the tribe. . . . Nothing in the opinion supports defendant's sweeping conclusion that 'lands owned in fee simple by Indian communities or by individual members of Indian communities are NOT exempt from property taxation,' or that 'lands located within the boundaries of an Indian reservation and owned by people who are not Indians are also assessable.'"

In State v. Daniels, 2001 WL 40988, (Wash. App. 2001), a criminal jurisdiction case, Daniels was charged with attempted first degree theft committed on land of the Confederated Tribes of Colville. Daniels argued that he was a Canadian Indian related to federally-recognized U. S. tribes and, therefore, jurisdiction was properly in tribal court. The Washington Court of Appeals rejected the argument on the grounds that Daniels had not demonstrated sufficient affiliation with a tribe recognized by the United States.

In Jefferson v. Commissioner of

Revenue, 2001 WL 46248 (Minn. Tax Ct. 2001), the Minnesota Tax Court rejected an argument that enrolled members of the Prairie Island Indian Community, residing off-reservation, were exempt from state income tax with respect to income earned from gaming on the reservation.

Team Pro Bono is always recruiting new members.

And, there really are no prerequisites to joining. As long as you're admitted to practice or attending law school, you'll be drafted, and you'll get to play right away. None of the more typical "team" things—like experience, gender, or age—matter on Team Pro Bono. And, you don't have to join the team as a player. There are many other important positions that need to be filled. Regardless of the position you fill, though, there are a number of benefits to joining.

Join the team, or get more information

Call the State Bar's pro bono coordinator, Deborah Kilbury Tobin, at (608) 250-6177 or 800-444-9404, extension 6177, or send an email to dtobin@wisbar.org



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May Annual Convention Features New Schedule and Events

Indian Law Section

CLE Program

Wednesday, May 2, 2001
1:30 – 4:20

Indian Country – Ten Years Hence

A Non-Indian Perspective
Charles G. Curtis, Jr., Foley &
Lardner, Madison

A Tribal Perspective
John Echshawk, Native American
Rights Fund, Boulder, Colorado

A State Perspective
Clay Smith, Attorney General's
Office, State of Montana, Helena,
Montana

If you've been planning your calendar, you may have noticed a big hole in January; no convention. Last spring, the Board of Governors voted to hold one convention a year. The State Bar 2001 Annual Convention is slated for May 2-4 at the Grand Geneva Resort and Spa at Lake Geneva.

• New Schedule

The Annual Convention will kick off on Wednesday with CLE programs beginning in the afternoon and an opening reception that evening in the exhibit hall. The convention concludes Friday afternoon after the Members' Recognition Luncheon.

• Presidential Showcases

The presidential showcases on Thursday and Friday mornings, modeled after the ABA's national convention, will feature presentations on relevant topics of general interest affecting the legal profession.

On Thursday nationally acclaimed DNA evidence experts Barry Scheck and Peter Neufeld, coauthors of *Actual Innocence*, will lead a panel discussion on the growing recognition that persons charged with crimes, whether pretrial or post-conviction, should have access to available scientific and forensic tools to determine innocence.

At Friday's presidential showcase, State Bar President Gary Bakke will moderate a presentation that will present results of the "Seize the Future" conference, a special State Bar initiative to increase awareness of critical issues facing the future of the legal profession.

• Social Events

The swearing in of the 46th State Bar president, Gerald M. Morris, will take place during a ceremonial reception on Thursday evening. Following the reception, the artistic creations of attorneys, judges, legal staff, and their families will be on display at "2001 – An Art Odyssey – a Gala Featuring the Creative Talents of the Wisconsin Legal Community."

• Members' Recognition Luncheon

Attorneys who have practiced law for 50 years will be honored during the Members' Recognition Luncheon on Friday. In addition, the fifth annual State Bar Judge of the Year and Lifetime Jurist awards will be presented.

• And Much, Much More ...

As usual, attendees will have access to comprehensive CLE programming, vendor exhibits, and networking opportunities throughout the three-day event.

Convention registration materials will be mailed to State Bar members in January. Program detail and registration and housing forms are available online at www.wisbar.org/convention, or call the State Bar, (800) 728-7788.



What Will You Enter in 2001: An Art Odyssey?

Wisconsin's legal community will have a chance to showcase its artistic talents at the very first Legal Art Show held during the State Bar of Wisconsin Annual Convention on May 2-4 at the Grand Geneva Resort at Lake Geneva.

"Lawyers not only work all day to help people in need and to protect the rights granted in the Constitution, but we raise families, do public service, and have meaningful hobbies. This is the perfect chance to show our creative abilities", says Convention & Entertainment Committee Chairperson Timothy O'Brien.

Categories & Eligibility

Artwork in a variety of categories may be submitted. All attorneys, judges, legal staff, and their families are eligible to participate. Find complete details at www.wisbar.org/convention.

How To Enter

To enter the Legal Art Show fill out the registration form found at www.wisbar.org/convention. Forms must be received by Monday, April 2, 2001. Any questions can be directed to Donna Kinney at 608-250-6108 or 800-444-9404, ext. 6108, or at dkinney@wisbar.org.



A Gala Featuring the Creative Talents of the Wisconsin Legal Community



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