

**INDIAN LAW SECTION**

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**Nominations for Indian Law Section Board**

Are any of you interested in being on the Indian Law Section Board, or can you recommend someone to be nominated for the Board? The nominating committee for the Indian Law Section Board is looking for candidates.

Nominees must be members of the State Bar in good standing and preferably a member of the Indian Law Section. If elected, a board member's term is three years. Please contact Jennifer Carleton at jcarleto@oneidanation.org if you are interested in running for the Board or would like to nominate someone.

**New U.S. Medicare Bill Will Affect Indian Country**

On December 8, 2003, President Bush signed into law the new prescription drug benefit. Features of the bill relevant to Indian health programs (1) increase reimbursement rates for rural ambulance services, (2) authorize reimbursement to IHS and tribal health facilities for emergency services provided to undocumented aliens, (3) require Medicare-participating hospitals that provide inpatient hospital services to accept rates comparable to Medicare as payment in full when providing services to IHS beneficiaries referred for services, (4) authorize for five years reimbursement for increased Medicare Part B services provided by a hospital or ambulatory care clinic operated by the IHS or a tribe, and (5) change critical access hospital reimbursement rates to rural hospitals.

**Mark Your Calendar!****Plan to attend the Indian Law CLE Program at the State Bar Annual Convention in Madison.**

Thursday, May 6,  
1:15 – 5:05 p.m.  
Monona Terrace Convention Center

**Featuring Nationally Recognized Lecturer, Atty. John E. Jacobson**, named the first “Superlawyer” in Minnesota focusing on Indian Law, by *Minnesota Law and Politics*.

**Topics covered:**

- Annual Indian Law Update
- *Lara* Decision
- *Teague v. Bad River Band*
- Lac du Flambeau Tribal Court
- Future of Tribal Courts in Wisconsin

**To register call (800) 728-7788 or visit [www.wisbar.org/convention](http://www.wisbar.org/convention).**

**Selected Court Decisions**

In *Artichoke Joe's California Grand Casino, et al. v. Norton, et al.*, 2003 WL 22998116 (9<sup>th</sup> Cir. 2003), card clubs and charities in California sued federal and state officials who approved gaming compacts permitting tribes, but not the plaintiffs, to engage in certain gaming activities. According to plaintiffs, the compacts violated (1) the **Indian Gaming Regulatory Act** (“IGRA”) requirement that Class III gaming conducted by tribes be in a state that “permits such gaming for any purpose by any person, organization, or entity,” and (2) the plaintiffs’ rights to equal protection guaranteed by the 14<sup>th</sup> Amendment of the U.S. Constitution. The Court upheld the compacts, concluding that (1) the requirements of IGRA were satisfied by a State Constitutional amendment that expressly authorizes the State to enter into compacts with tribes for certain Class III games, and (2) the state law framework that permits tribes, but not other parties, to engage in certain gaming activities, is based on the political relationship between the tribes and the federal government and, consistent with the Supreme Court’s decision in *Morton v. Mancari*, 417 U.S. 535 (1974), does not constitute racial discrimination in violation of the 14<sup>th</sup> Amendment.

In an unpublished Order in *Gonzalez v. Litscher*, 79 Fed. Appx. 215, 2003 WL 22429350 (7<sup>th</sup> Cir. 2003), the Seventh Circuit affirmed the District Court’s decision denying an American Indian prisoner’s challenge to Wisconsin Secure Program Facility’s restrictions on his possession of certain traditional Indian religious articles, including a medicine bag, ceremonial drum, smoking pipe and feathers. The Court ruled that the restrictions on the **prisoner’s**

**religious rights** are reasonably related to a legitimate penological objective.

*City of Roseville v. Norton*, 348 F.3d 1020 (C.A.D.C. 2003) addresses with the Auburn Indian Band’s acquisition of 49 acres of land outside of the Band’s last recognized reservation pursuant to the Auburn Indian Restoration Act. Plaintiffs argued that under section 20(b)(1)(B)(iii) of the Indian Gaming Regulatory Act (“IGRA”), the Tribe’s acquisition did not qualify as “restoration of lands” and, therefore, that the Secretary of Interior was required to make a finding that gaming would not be “detrimental to the surrounding community” before taking the land into trust. The D.C. Circuit ruled in favor of the Secretary of Interior: “[I]n light of IGRA’s language, structure, and purpose, that the Auburn Tribe’s land qualifies as the ‘restoration of lands’ under IGRA § 20(b)(1)(B)(iii) even though the land is not located on the Tribe’s former reservation as of the time the Auburn Tribe lost federal recognition and is being put to a different use than the lands on the former reservation, the Rancheria.” (Emphasis supplied.)

In *Oti Kaga, Inc. v. South Dakota Housing Development Authority*, 342 F.3d 872 (8<sup>th</sup> Cir. 2003), Oti Kanga, Inc., the Housing Authority for the Cheyenne River Sioux Tribe, brought a claim of **racial discrimination** against the South Dakota Housing Development Authority (“SDHDA”), alleging that SDHDA improperly denied Oti-Kanga **low-income housing tax credits and HOME funds**. The court ruled that the claim for low-income housing tax credits was time-barred. In assessing the HOME funds claim, the court ruled that Oti Kaga, Inc., as a corporation, could assert racial

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## Selected Court Decisions

(from cover)

discrimination on the basis that the recipients of its services were a racial minority. However, the court ruled that Oti Kaga, Inc. failed to show any discriminatory treatment by SDHDA in awarding access to HOME funds.

In *Confederated Salish and Kootenai Tribes v. United States*, 343 F.3d 1193 (9<sup>th</sup> Cir. 2003) the Tribes argued that the Flathead Act of July 18, 1968, Pub.L. 90-402, 82 Stat. 356 (“Act”) made **mandatory all trust acquisitions** on the Flathead Reservation in Montana. The Court ruled that Section One of the Act makes certain transactions mandatory while Section Two merely authorizes certain acquisitions, but does not make them mandatory.

In *Anderson, et al. v. Evans, et al.*, 2003 WL 22803569 (9<sup>th</sup> Cir.), animal rights groups challenged the federal government’s approval of a quota for **treaty-guaranteed whale hunting** by the Makah Indian tribe, alleging violations of both the National Environmental Policy Act (“NEPA”) and the Marine Mammal Protection Act of 1972 (“MMPA”). The Court ruled that the federal government violated NEPA by failing to prepare an Environmental Impact Statement (“EIS”) before approving the whaling quota for the Tribe. The Court held further that, while MMPA did not abrogate the Tribe’s treaty rights, the Tribe was required to “comply with the process proscribed in the MMPA for authorizing a ‘take’ because it is the procedure that ensures that the Tribe’s whaling will not frustrate the conservation goals of the MMPA.”

In *United States v. Hess*, 348 F.3d 1237 (10<sup>th</sup> Cir. 2003), the United States sued on behalf of the Southern Ute Tribe to establish ownership of gravel located on land acquired by landowners through an **exchange patent** from the United States which reserved “all minerals” in trust for the Tribe. The 10<sup>th</sup> Circuit Court of Appeals, relying on Colorado property law, held that the reservation of “all minerals” for the benefit of the Tribe did not include gravel.

In *Payer, et al. v. Turtle Mountain Tribal Council*, et al., 2003 WL 22339181 (D.N.D.) the court ruled that petitioners’ removal from the Ojibwa Indian School (“OIS”) Board and

revocation of their authority over OIS funds by the Turtle Mountain Tribal Council was not sufficient to bring a habeas corpus action under the **Indian Civil Rights Act**. The Court construed “detention,” as used in 25 U.S.C. § 1303, to mean “severe actual or potential restraint on liberty.”

In *State of North Dakota v. Centers for Medicare and Medicaid Services*, 286 F. Supp. 2d 1080 (D.N.D. 2003), the State of North Dakota (“State”) challenged the Department of Health and Human Services’ (“HHS”) interpretation of 42 U.S.C. § 1396d(b), arguing that the phrase “services which are received through an Indian Health Service facility” entitles the State to 100% **Medicaid reimbursement**, regardless of whether the services were provided by an IHS facility, a tribal health care facility, or a non-IHS facility to which an Indian had received a referral. HHS interpreted the statute to mean that only services actually received at an IHS facility or tribal facility were eligible for 100% reimbursement. The court agreed with the State.

In *Morris v. Tanner*, 2003 WL 22439854 (D. Mont.), plaintiff challenged his prosecution by the Confederated Salish and Kootenai Indian Tribal Court on the basis that, as a **non-member Indian** he was not subject to the Court’s criminal jurisdiction. On remand from the Ninth Circuit, the trial court rejected plaintiff’s claim, adopting reasoning similar to *U.S. v. Enas*, 255 F.3d 662 (9<sup>th</sup> Cir. 2001) and *U.S. v. Lara*, 324 F.3d 635 (8<sup>th</sup> Cir. 2003) *cert. granted* (Sept. 30, 2003).

*Prescott v. Little Six, Inc.*, 284 F. Supp. 2d 1224 (D. Minn.) addresses several issues related to plaintiff’s **ERISA** claims against the Little Six, Inc. (“LSI”) the casino owned by the Shakopee Mdewakanton Sioux. According to the federal district court: (1) ERISA applies to LSI because none of the exceptions to the *Tuscarora* rule apply, (2) whether an ERISA plan exists is a question of federal law which is reviewed de novo, (3) LSI does, in fact, have ERISA plans, (4) LSI’s articles of incorporation waived LSI’s sovereign immunity as to tribal members, and (5) language in the Summary Plan Descriptions of the various ERISA plans waived LSI’s immunity from suit by stating that upon the occurrence of certain events, plan participants “may file suit in federal court.”

In *United States v. Fredericks*, 273 F. Supp. 2d 1032 (D.N.D.), Fredericks was arrested by a BIA officer and charged in tribal court with possession with intent to distribute methamphetamine and subsequently charged federally with a similar violation of federal law. Fredericks moved to suppress various evidence including her statements and narcotics found in her bedroom. The court held that the (1) BIA police officer was acting in his capacity as a tribal officer when he obtained a tribal search warrant from the tribal judge after working with the tribal prosecutor; (2) **tribal judge met the requirement that a warrant be issued by a neutral and detached judicial officer**; and (3) *Miranda* requirements were met by tribal warnings.

In *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y.), the court granted the State’s request for a preliminary injunction prohibiting the Shinnecock Indian tribe from proceeding with plans to build a casino on its lands. The Court found that the State would suffer irreparable harm if the casino were constructed without complying with local and state requirements for development and that the State was likely to succeed on the merits because the Tribe is not federally recognized and the land in question is not in trust.

In *Ward v. The State of New York, et al.*, 2003 WL 22700607 (W.D.N.Y.), the plaintiffs, enrolled members of the Seneca Indian Nation and owners of a cigarette shop located on the Seneca reservation, brought an action for a temporary restraining order to prevent the enforcement of a New York State law that generally barred the shipment or transport of cigarettes within the State of New York other than to a licensed wholesaler or retailer. The plaintiffs alleged that the Statute (1) was preempted by the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”), (2) regulated Indian commerce in violation of the Indian commerce clause, and (3) interfered with tribal sovereignty. The Court rejected plaintiffs’ preemption argument and plaintiffs’ argument that the **Indian Commerce Clause** has a “dormant” or negative aspect that prevented the State from regulating Indian commerce. However, the Court held that the State regulation of on-reservation commerce between members infringed upon tribal

sovereignty, notwithstanding the State’s assurances that it would not enforce the law within the boundaries of the reservation. The Court found that the plaintiffs were likely to succeed on the merits of the claim, and granted a temporary restraining order enjoining the enforcement of the Statute.

In *Native American Arts, Inc. v. The Waldron Corporation*, 2003 WL 22595268 (N.D. Ill.), the Court held that the damages available under the **Indian Arts and Crafts Act** of 1990 and the Indian Arts and Crafts Enforcement Act of 2000 were limited to the greater of treble damages, or \$1,000 per day that the products were offered for sale. The plaintiff had sought \$1,000 per day *per type of product offered*. The Court reasoned that such an interpretation was contrary to the plain language of the statute, and would lead to astronomical damages not contemplated by Congress.

In *Wide Ruins Community School v. Stago*, 281 F. Supp. 2d 1086 (D. Ariz. 2003), an employee of the Wide Ruins Community School sued after she was denied a promotion. The district court held that BIA schools, like Wide Ruins, that are divested of BIA control under the **Tribally-Controlled Schools Act** of 1999, become subject to tribal law, including tribal preference laws.

In *Carciari v. Norton*, 2003 WL 22480578 (D.R.I.), the State of Rhode Island, its Governor and a town brought an action challenging the final determination of the Secretary of the Department of the Interior to accept a 31-acre parcel of the land into trust for the benefit of the Narragansett Indian Tribe. The plaintiffs argued that the Secretary violated multiple provisions of § 706 of the Administrative Procedure Act, as well as the non-delegation doctrine, the enclave clause, the admissions clause, and the 10<sup>th</sup> Amendment of the U.S. Constitution. The Court rejected the plaintiffs’ constitutional arguments and upheld the Secretary’s action finding that her determination to take **fee land into trust** was not arbitrary or capricious, that she acted within her delegated authority, and that her decision was supported by substantial evidence as required by § 706.

In *Kirkpatrick v. Kirkpatrick*, 282 F. Supp. 2d 613 (N. D. Ohio), a non-Indian husband and his Seneca Indian Nation member wife had received a divorce through the Tribe’s Peacemaker’s Court in July of 2000. During

the pendency of tribal appellate court proceedings over child custody, the husband filed a motion for a temporary restraining order in federal court. The Court dismissed on the ground that it lacked jurisdiction. The Court noted that the husband’s alleged increasing difficulty in tribal court did not constitute “futility” sufficient to defeat the general rule that **tribal court remedies must be exhausted** before relief may be sought in another forum.

In *Houle v. School District of Ashland*, 2003 WI App 214, 671 N.W.2d (Wis. App.), the Bad River Tribe appealed a denial of its claim in a personal injury case where a tribal member had been injured and received treatment at the Tribe’s health care facility. The Court held that provisions of the **Indian Health Care Improvement Act**, 25 U.S.C. §§ 1621e and 1682 do not override the state-law rule in *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263 (1982) that one who claims subrogation rights is barred from recovery unless and until the injured party is made whole. Houle settled for \$120,000 and the court found at the *Rimes* hearing that he had not been made whole.

In an unpublished decision in *Dark-Eyes v. Commissioner of Revenue Services*, 2003 WL 22709023 (Conn. Super. 2003), a Connecticut Superior Court ruled that the petitioner’s privately-purchased residence, while located within the settlement lands under the Mashantucket Pequot Indian Land Claims Settlement Act (“Act”), was not located on land taken into trust by the United States. Therefore, the petitioner owed State **income taxes** for tax years 1996, 1997, and 1998. Under the provisions of the Act, only that land that the Tribe purchased with settlement funds could be considered Indian country for state income tax purposes

In *In re Emerald Outdoor Advertising, L.L.C.*, 300 B.R. 775 (Bankr. E.D. Wash.), The Court was asked to determine who had priority between two parties who both had recorded interests in the same parcel of trust property. The first had recorded a deed of trust with the county in 1994. The second party recorded billboard leases with the BIA in 1995. Noting that there was no federal or tribal law with respect to the priority of liens on trust land, the Court concluded that State law applied. Under the Washington Statutes, a properly recorded deed or conveyance is

prior in right to any later recorded deed or conveyance. Therefore, the Court held the **deed of trust recorded with the county 1994 had priority over the 1995 BIA recording**.

In *Cayuga Indian Nation of New York v. Village of Union Springs*, 2003 WL 22849882 (N.D.N.Y. 2003), the Cayuga Tribe sued county and municipal governments for a declaration that certain land was Indian country and not subject to the zoning authority of the municipality and county. The district court held that (1) there was **federal question jurisdiction**; (2) tribal sovereign immunity did not preclude the local governments’ counterclaims; (3) the Tribe failed to establish that it would suffer irreparable harm sufficient to warrant preliminary injunction, and (4) the Village failed to establish that it would suffer irreparable harm sufficient to justify a preliminary injunction.

In *Cupo v. Seminole Tribe of Florida*, 2003 WL 22908224, (Fla. App. 1 Dist. 2003), the plaintiff filed a petition for **worker’s compensation** benefits based on an alleged injury sustained during the course of his employment with the Seminole Tribe. When the trial judge dismissed his petition based on lack of jurisdiction over the tribe, the plaintiff contended the ruling violated his right to contract under the United States Constitution. The Florida appellate court affirmed the dismissal of the trial court, finding that there was no unmistakable waiver of the tribe’s sovereign immunity or abrogation of the tribe’s immunity by Congress.

In *State v. LaRose*, 2003 WL 22952750 (Minn. App. 2003), the appellant, LaRose, was convicted in state court for a fifth degree controlled substance felony, after being arrested on the Leech Lake Indian Reservation by tribal law enforcement officers. The Minnesota Appellate Court rejected his appeal, holding that (1) marijuana possession is a criminal/prohibitory matter under Minnesota law and, therefore, within the state’s jurisdiction under **Public Law 280**; and (2) a “cooperative agreement” between the Leech Lake Band and local law enforcement officers for enforcement of state criminal laws did not violate provisions of Public Law 280 relating to **retrocession** of state jurisdiction to the federal government. ■