



The University of New Mexico

School of Law Library
MSC11 6080
1 University of New Mexico
Albuquerque, NM 87131-0001
Telephone (505) 277-0939
FAX (505) 277-0068

This document was scanned pursuant to the express permission of its author and rights holder.

The purpose of scanning this document was to make it available to University of New Mexico law students to assist them in their preparation and study for Law School exams.

This document is the property of the University of New Mexico School of Law. Downloading and printing is restricted to UNM Law School students. Printing and file sharing outside of the UNM Law School is strictly prohibited.

NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is no to be "used for any purpose other that private study, scholarship, or research." If the user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

AMERICAN INDIAN LAW 584

Semester I, 2003-2004

UNM School of Law
Final Examination
Three Credits

Prof. Valencia-Weber
Thursday, December 18, 2003
9:00 a.m. to noon

INSTRUCTIONS

TIME ALLOWED FOR THIS CLOSED EXAM: THREE (3) HOURS

TOTAL NUMBER OF POINTS: 200

THIS EXAM HAS ONE PROBLEM WITH THREE (3) REQUIRED QUESTIONS. Clearly state the number of the question for each answer.

****YOU MUST ANSWER BOTH QUESTIONS 1 AND 2 (Each is worth 60 points)**

****YOU MUST ANSWER EITHER QUESTION 3 OR 4 (Each is worth 60 points)**

****20 POINTS:** For a well-organized memo format, grammar, and writing style that strengthen the overall quality of the answer. Also, for thoughtful answers that offer insightful or innovative approaches.

- 1. This exam is a closed book exam. No books, notes, or any materials may be used during the exam.**
- 2. Writing Instructions.** For blue books, please SKIP A LINE between each written line. If you can remember, write on the page on the right side, leaving the left side for your additions, corrections. If typing, please double space.
- 3. Think and plan before you write. Potential credit for an outline or a checklist for each answer.** If the outline or checklist for the problem is handed in with your answers, it could improve your grade if it shows specific knowledge of the problem's issues that you were unable to draft in your answer.
- 4. Use the law studied in this class.** While you may have knowledge from other courses whose subject matter relates to Indian Law, your primary analysis and discussion should be based on the law studied in this course.
- 5. Use the facts of the problem and analyze.** that is, state the law and apply to the facts. Insufficient use of facts and failure to relate them to the law will cost points.
- 6. Return this exam to the test monitor**

Exam begins on next page.

ALL PROBLEMS ARE BASED ON THE FOLLOWING SITUATION.

Questions 1 and 2 are required (each is worth 60 points).

Then you must choose either Question 3 or 4 (each is worth 60 points).

Recently the ABC tribe (ABC, Tribe), a federally recognized tribe, finally prevailed against the Department of Interior (DOI, Federal Government) in a lawsuit charging the DOI for failing in its trustee duty. The Federal Court found that DOI had not managed the ABC's timber operation in accord with the standards imposed by federal law. Consequently, the Court granted the remedy the Tribe requested: \$20 million for lost income and the cessation of any further timbering on ABC lands.

Under the option included in the Indian Trust Fund Management Reform Act of 1994 (Trust Act), the ABC seek to control their own trust funds. To exercise this provision of the Trust Act, a tribe must establish a trust management organization that meets requisite professional standards. Then the Tribe must reach an accord with DOI on the dollar value of the trust funds to be transferred. When these conditions are met, a tribe can assume control of its own trust funds.¹ The ABC Tribal Council has authorized the establishing of a proper trust management unit, but it will not be operative until sometime in 2004. Meanwhile, DOI; the ABC Chairman, Sam Buffalo; and Tribe's attorney have discussed the short-term placing of the judgment money from the timbering lawsuit in a trust account in DOI. When the ABC's trust office is fully established and operating, the trust funds can be immediately transferred. This arrangement would save the ABC the contracting and fees of a Wall Street type investment firm. One senior Tribal Council member, Joe Lone Horse, much involved in the protracted lawsuit, is not happy about this interim proposal. A respected leader, Lone Horse demands protection and assurances that the ABC will not be into another "loser deal" like the timber operation.

In stopping further timbering on their lands, the ABC decided to use their lands to return to a customary activity: breeding and selling Great horses. Historically, the ABC were known for their Great horses that had unusual strength, speed, and endurance. The horses were a primary factor in the ABC's military strength and in trade relations as Indians and non-Indians sought these horses. The ABCs started their breeding program five years ago and now plan to put several million from their timber judgment into accelerating their program for the Great Horse Project. Now the ABC offer recreational riding on the horses at the Tribe's resort and it is expanding into specialized training for individuals who want to learn the horsemanship for competitions. At the most recent Horse Fair in West Dakota, the state in which the ABC Tribe is located, the Tribe initially showed its Great horses. The horses and some ABC members who competed in the horsemanship contests made an impressive first showing, winning a number of the top prizes.

Since the Horse Fair, West Dakota (WD or State) has developed a West Nile virus outbreak. Over 50 cases have occurred with eight deaths among some elderly citizens and one child. A similar pattern has occurred in some neighboring states, following the first national outbreak of the virus in the northeast part of the U.S. The states free from the virus have embargoed any travel or trade in horses from states with outbreaks. In response to these events, the Governor declared an emergency and ordered that all horses in the state be vaccinated immediately. Some virus cases occurred among horses exhibited at the Horse Fair so the State ordered as highest priority that all horses exhibited at that event must be tested ASAP for the virus. Horses found to be carriers must be destroyed; all others must be vaccinated.

When the State inspectors asked to test the ABC's horses, the Tribe responded that it was already taking care of testing and vaccinating its own horses. In cooperation with the U.S. Department of Agriculture since the

¹ This option is a provision in the Indian Trust Management Reform Act of 1994. Assume for this exam that the ABC Tribe could meet the requirements to obtain control of any existing or future trust accounts.

Exam 122005
beginning of the Great Horse Project, the ABC hired professionals who manage and monitor the breeding. The breeding standards, including the veterinary medicine and care, were developed with a federal grant. To date, the Tribe has refused entry to the reservation to the State's agents.

The Governor of WD is not happy about this situation. She feels that the State must assure the public that all necessary measures are being implemented as new cases of virus continue to arise. The Chair of the State's Veterinary Board stated that during the Horse Fair, the ABC Project included a "cultural" additive in the Great horses' diet. State law allows only specific drugs and additives for competitive horses and prohibits all others. What the Project used is not on the permitted list. The Project was open about the diet regime. During the Fair it explained to reporters that it was not "doping" horses. The diet included an ABC customary, non-narcotic herb to protect the horses.

For this exam you must answer three questions.

Required Questions: 1 and 2.

Your Choice: Either Question 3 or 4.

1. You are the ABC Tribal Attorney. (Required; 60 points)

Chairman Sam Buffalo asks you to draft a concise memo he can use to respond to Council member Joe Lone Horse. IF the ABC make the interim arrangement with DOI for a trust account, what Federal responsibilities and ABC rights will exist? What could prevent a "loser deal" like the timber?

2. You are an assistant attorney for the Attorney General of West Dakota. (Required; 60 points)

The Governor called an emergency meeting on the West Nile virus and the ABC refusal to allow state agents on the Tribe's land. Television commentators have urged the Governor to file an action in federal court against the Tribe. Your supervisor asks you for a first draft of a concise memo on whether the state can lawfully enter on the ABC reservation to test their horses. The Governor has stated: "Some way must be found to assure the State's alarmed citizens on this matter."

Questions 3 and 4 are on the next page.

Choose One Question from Question 3 and 4. Each is worth 60 points.

These facts apply to both questions.

Max (a member of the Rio Tribe) and Bob (a non-Indian) are partners in a small horse breeding business. Almost half of their horses were destroyed when the State's inspectors found that the horses were West Nile virus carriers. The two were upset about this big financial loss, which is pushing them to bankruptcy. They became angrier when they heard the news that the ABC Tribe refused to allow the State to test the Tribe's horses. On Saturday evening they decided to investigate for themselves what the ABCs were doing, so they sneaked into a large stable of the ABC Great Horse Project. A stable manager found them and told Max and Bob they would be arrested. The manager blocked the stable exit. Max and Bob grabbed the manager and pushed him into some large metal equipment. The Tribal policemen arrived and, under a joint-use agreement, had Max and Bob removed and detained in the County jail. The stable manager is in the hospital, still unconscious on Monday morning.

The State Bar Service has referred Max and Bob to you, a new attorney.

On late Monday morning, you meet with them at the County Jail. Max and Bob ask the same questions:

"Can the Tribe arrest and prosecute me? What can happen if the stable manager does not regain consciousness?"

Choose Question 3 or 4 (each worth 60 points). State the number you chose with your answer.

Your answer to Max (60 points).

4. Your answer to Bob (60 points).

End of the exam. Enjoy the Holidays Thank you for being a lively class.

Question #1

Indian Law
584-001
FALL 2003

1. For Council Member Joe Lone Horse
Memo: Re: What are the basic tribal rights and federal responsibilities operative in the Indian law trust relationship?

A. Question: What are the basic elements of this trust relationship?

The Indian law trust is a special, unique relationship between federally recognized tribes, whose inherent aboriginal rights have not been entirely ceded or extinguished by the Indians Congress, and the federal government. The "seeds" of this trust relationship are rooted in the early 19th century Marshall trilogy of cases - McIntosh (1823), Cherokee Nation (1831), and Worcester (1832) - in which it was affirmed that the Indian tribes are politically separate, distinct "nations", whose rights occupancy of their lands is as "sacred" as the

fee" of white colonists and later settlers. Because of European based international law and the doctrine of discovery

Great Britain, Spain, France, and now the United States

laid claim to sovereign title to lands "discovered" and

developed, and the indigenous peoples necessarily

were divested of many of their rights. They could no

longer alienate their lands to anyone, or to each other,

but, because the land now belonged to the "conqueror,"
their remaining rights

could only cede or sell to the sovereign, the U.S.

govt.

The

~~Because~~ tribes were considered "domestic, de-

pendent nations" because it was established that

Congress had plenary power to deal with commerce

with them, and the Executive had ~~the~~ the power

to enter into treaties in them (Constitutional articles
While the Indian right to occupancy was generally upheld
& we considered to be at the grace of Congress
in the sense that Congress has the power to abrogate
treaties ~~manage~~ and make ultimate decisions about the
management and use of the land. The inevitable
westward expansion of the US the resulting land
hunger and population increase drove Congress to try
to re make deals acquire Indian occupied lands
open them for settlement. Many tribes lost a huge
part of their land base and the hunting and fishing
resources that went with them. Many tribes became
poor and diseased, and in exchange for ceding
their remaining lands they received food blankets

medicine, etc. Provision for tribes was attempted thru establishing reservations, and distributing allotted land. Many tribes were "removed" to reservations against their wishes, but they had little power. "From their very helplessness . . . arises the duty of protection and with it, the power." Lone Wolf (1903)

This "duty of protection" was the basis of the trust relationship and has developed into the modern Indian law trust which is largely analogous to the common law trust model. The elements of the trust are the trustor, trustee, (perhaps) fiduciaries, ~~then~~ the res corpus (assets consisting of land, resources, stocks, funds of money, other property), and the beneficiary. The trustee, in this case, the U.S

govt. is responsible for the management and husbandry of the res corpus, for the ultimate benefit of the tribe, the beneficiary. It was confirmed in Shoshone Tribe and other cases (Pyramid Lake) that tribes' occupancy rights included, unless expressly contradicted by Congress, the beneficial use of timber, mineral, and other resources, therefore these things become part of the res corpus held in trust by the govt., for the management of which they are responsible.

B: Question: What rights and responsibilities exist between the parties to ensure that the interim arrangement with DOI will be safe and not be another "loser"?

The government would be required by common law to make sure that the trust funds (the res corpus) are safely invested, insured, at market rates.

in something guaranteed like Treasury bonds. The trustee must try to make the funds productive (earn interest on interest) by perhaps reinvesting the return in other property such as stocks or real estate. A good case to look at to understand the ^{fiduciary} requirements is Cheyenne Arapahoe. Keep abreast of market trends ← The trustee is required to be loyal and to devote itself to the interests of the beneficiary, and not to try to balance or accommodate the interests of other parties, ~~the~~ Pyramid Lake.

The ABC's should ~~a~~ negotiate an agreement, detailed with statutes and regulations really spelling things out, that is explicit as to where the funds will be invested, how managed, what return is to be expected relative to market conditions at time of investment, and whether disturbance to

the to be or remain trust of income will take place

The tribe should acquiesce to the Mitchell I ^{the}

II ^{for Indian law} which establishes the difference be

tween a bare trust based on Indian-managed and

controlled allotment parcels and the full blown

trust/beneficiary relationship in which "super

vision and control of the res corpus is in the

hands of the govt the trustee Following the line

of Mitchell II, the tribe should be able to nego

tiate an agreement that provides both law

(damages) and equity (injunctive relief) protections

2. Whether the state can lawfully enter on the ABC

reservation to test the horse depend on several ~~the answer~~

questions

Question #2

Question #2

whether the state can lawfully enter ABC territory to test horses for West Nile virus depends upon the balancing and weighing of competing interests, whether preemption exists, and whether Montana applies to this situation.

The state's interest in this situation is compelling - it is the state's police power to protect the public's health and welfare.

The tribe's interest is with its economic development, and maintenance of control over their horses, and their horse project.

The Federal government's interest seems allied with the tribe's because of their grant of funds to run the horse project and

their cooperation via the DOA

While each of these interests ^{are protected} ~~are affected~~ by each sovereign's

various powers there is a limit to the exercise of their

authorities. The first obstacle ~~is~~ in front of the state

Both preemption and Infringement seem like strong cases for the ABC tribe due to their Federally funded horse project, and the fact that the tribe is exerting its authority over its property. However, as already mentioned, the non Indian contact and off preservation effects create a sufficient nexus with the state's compelling interest in protecting public health to overcome those defenses. The final avenue where the state ~~could~~ may assert its authority over the tribe's horses is through the Montana line of cases.

Under Montana, A tribe may assert its jurisdiction over non members via 2 exceptions: consensual relationships and/or to protect the health, welfare, and/or economic security of the tribe. This second exception has

horses, and has given money to the tribe to develop its horse project. It would seem that the management of the horse enterprise would preclude the states altogether from enforcing any type of regulatory authority over the tribe's horses.

This situation is similar to Mesoleo where the State sought to regulate the tribe's hunting + fishing enterprise but was prohibited from doing so because there was no state contribution to the enterprise. However, ~~the~~ ^{the} court also emphasized the low state interest in regulating reservation hunting and fishing. In WTD's case, the interest is akin to its police power and very compelling, so much so, that it may overcome an argument of preemption. The tribe may maintain however that it already has professional who

The state's authority may also be limited by infringement,
a test emanating from a case ~~where~~ that involved Indians and
non-Indians in a debtor dispute. The Ct concluded that where
the state sought to enforce its jurisdiction, it was inappropriate
because it infringed upon the tribe's right to make laws and
be ruled by them. (Williams). Should the tribe seek to
defend its position by invoking its sovereignty and the
infringement test, it is a weaker defense after
McClanahan, where the court instead seeks to rely on
preemption. However in this case, the presumption of
tribal sovereignty is at its strongest where the tribe is
regulating on reservation activities and its own members -
the state interest in this situation is low. Here, WD
seeks to vacinate + test Horses - this is property. These

belong to ABC and reside on its reservation. This situation is similar to Brian v. Itasca where the state was precluded from taxing on on-reservation property. In order to jump this hurdle, WD must establish a significant off-reservation effect - one that affects non-Indians. ABC breeds and sells its horses ^{to persons off} the reservation; presumably non-Indian. ^{ABC} Also raises its horses in WD contests, and ~~the~~ after one such contest ~~where the supervising authority~~ some horses were found to be infected. This situation affects off-reservation persons and places. The tribal business ~~is~~ prospers through off-reservation and non-Indian sales. This connection to the state is significant because the horses pose a threat to state public health and may be endangering non-Indians who choose to ride

and train on ABC property. The State's regulatory interest

is tailored enough for the problem at hand to deal

specifically with a health crisis. Although despite

these compelling interests, the tribe is already providing ^{health} health

+ vaccination services to its horses, which are a tribal

resource. Thus the tribe's interest is great, like it was

in Merrison where the Ct approved a tribal tax upon a

non Indian extracting gas and precluded the state because

of the significant tribal resources that went into the

project, as well as the tribal ownership of the gas.

not precluded
see Cotton
Petroleum

Both preemption and Infringement seem like strong cases for the ABC tribe due to their Federally funded horse project, and the fact that the tribe is exerting its authority over its property. However, as already mentioned, the non Indian contact and off reservation effects create a sufficient nexus with the state's compelling interest in protecting public health to overcome those defenses. The final avenue where the state ~~may~~ may assert its authority over the tribes horses is through the Montana line of cases under Montana, A tribe may assert its jurisdiction over non members via 2 exceptions: consensual relationships and/or to protect the health, welfare, and/or economic security of the tribe. This second exception has

been tightened up by Strate which required
compelling tribal interest. The Montana case extended
to other jurisdiction cases such as zoning when
a tribe was precluded from zoning non-Indian land the
Reservation because it was characterized as being located
off area of land the Reservation that lost its Indian
character (Brendale). In a way the state might
try to assert its authority via Brendale especially
after Hicks which asserted that status of the land
is not dispositive of jurisdiction. However as Hicks
the state officials entering tribal land assert
some form of state jurisdiction (here it is health reg.)
police power of the state combined with the off
Reservation effects of the ABC tribes mobile property

may subject it to state regulation. The tribe however, is not seeking to regulate non-Indians, it is seeking to exclude state agents, ~~and power from~~ the state must connect the horses with non-Indians or off-res effects, to gain jurisdiction - if it goes down the Montana route. Here, the state's argument is weakest, as only when they did, at Horse Fair horses go off-res may they be subject to state regulatory authority. ^{or when non-Indians enter the res to ride the} The best bet for WD jurisdiction is ~~arguing to be~~ advocating their police power which may overcome both preemption and infringement.

In the alternative, the state and tribal/Red interest is not all that different. The state seeks to protect the health + welfare of its citizens, just like the tribe. Both the state + tribe ~~do~~ have an economic interest

especially after the embargo. The tribe and state
have already sought to vaccinate horses and
monitor them for outbreaks. It would be best to
create some cooperative agreement between the tribe
and state that would protect each entity's
Sovereignty and protect health + welfare, and
economic development.

Question #3

~~Common and negotiating, in good faith, an amenable solution.~~

③ I will discuss the question with respect to Max

With respect to civil jurisdiction when a

Indian and another Indian are involved ^{in an activity on Indian Country} the

tribe has jurisdiction. After the "Duro fix"

the court ruled that a nonmember Indian

is to be treated as a member Indian for

jurisdiction purposes. Since Max was on

the reservation and had committed a wrong

(trespass and assault/battery) the tribal

court does have the jurisdiction to prosecute

him. This exercise of jurisdiction would

be consistent with allowing tribe to
exercise self-governance a controlling interest
relat this outcome would also be
consistent with the appropriate exercise of
exhaustion in tribal court since we are
working with the Indians

If the state may (presumably) take
unable to regain consciousness that intention
may rise to the enumerated crimes under the
major crimes act and jurisdiction would
lie the federal courts if the state
may not Indian then there might
be the possibility for concurrent tribal
or federal jurisdiction since the event

occurred ~~on~~ the reservation

~~the~~

A tribes exercise of jurisdiction over

Indians is consistent with its inherent

sovereign power and the federal government's

policy of self determination. When tribes

are able to set their own rules and

be governed by them the spirit of choosing

their destiny and independence is ~~fulfilled~~

fulfilled when the tribe exercises jurisdiction

over Indians

It has been said that tribal jurisdiction

extends to the extent of tribal legislation. In ^{power}

this case the ABC tribe has the power to

legislate what happens on the reservation

Since Max (a nonmember Indian) acted on the reservation he should be subject to ABC's jurisdiction

Valid considerations here would be whether the ABC tribe has the resources to prosecute Max and whether the State is a PL 280 state If the state does have

PL 280 agreement prosecution ^{could} may go to the state. It would be interesting to learn why Max was taken to a county jail and not the ABC jail. (OK, joint agreement)

since we have no evidence that the ABC has given up any power to exercise jurisdiction

by way of treaty, statute, or due to its

dependent relationship with the FG and both

members are presumably Indian ABC should

have the authority to prosecute Max

The exercise of the tribal policeman

arresting Max is also permissible for the same

reasons the ABC tribe can assert jurisdiction

over him. The mere existence of Tribal policemen

coupled with their exercise of arrest authority

suggests the arrest was legitimate

The joint use agreement goes to the housing

of sites and would not impact the

arresting authority by Tribal police officers on

the reservation. Indeed the exercise of authority

by Tribal police officers on the reservation

is consistent with AI sovereignty

When analyzing AI jurisdiction it is always

important to ask yourself who did what to

whom and where? Also ~~also~~ keep in

mind the most important Indian Law course/consideration

is civil procedure Thank you for a great

Semester and class !!