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Examination No. _____
AMERICAN INDIAN LAW 584-001

Semester I, 2004-2005

UNM School of Law
Final Examination
Three Credits

Prof. Valencia-Weber
Monday, December 13, 2004
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)**

10 POINTS POSSIBLE: For an "outline" for each answer. Do this first. See #3 below.

10 POINTS POSSIBLE: 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. These are bar exam conditions.**
- 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. Note credit possible for an outline or a checklist (in any form) for each answer.** The outline or checklist for the problem 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. Conclusions alone and insufficient use of facts and failure to relate them to the law will cost points.**
- 6. Return this exam to the test monitor.**

End of Instructions. Exam begins on the next page.

OUTLINE FIRST (10 points possible)

QUESTIONS 1 AND 2 (Both required; each is worth 60 points)

After the September 11, 2001 attacks on the Pentagon and World Trade Towers, materials for weapon manufacturing were more in demand. Instability in certain African countries further aggravated shortages of certain minerals, including oxenite.¹ The ABC Tribe, a federally recognized tribe whose reservation is in West Dakota, discovered its luck as a portion of its reservation pervasively contained this material. Its presence had prevented that land from being productive for either farming or cattle grazing. West Dakota (W.D. or State) is a state in the U.S.A.

Upon reviewing the assays of the samples from the ABC land, the Federal Government ordered the Department of Interior (Interior) to immediately assist the ABC Tribe to set up a project to extract the oxenite. The extraction and specialized processing requires special equipment and facilities. The ABCs have no natural resources so this is an economic windfall. To expedite the startup, the Tribe's funds will be matched by federal funds and any gaps will be covered by federal loans. The Federal Government is not concerned about loan repayment as, for national security reasons, the ABC operation can only sell to the U.S. Department of Defense (Defense). Moreover, there is a world market with a shortage of oxenite that can provide pricing data.

The ABC Council just met and approved the oxenite project contracts binding the Tribe, the Canadian mining company with the specialized expertise to do the extraction and processing, and the Departments of Interior and Defense. At the Council meeting where the action was taken, Samuel Eagle Feather, a member who is a second-year law student, questioned the speed with which the project decisions were made. He targeted the lack of clarity on how the ABCs' interests will be fully protected. Eagle Feather reminded, "We have already lost much in our treaty and other dealings with the Federal Government. What will be different this time?" Someone dismissed Eagle Feather as a "smart mouth." However, ultimately, the Council was persuaded that the income from this project would allow the ABCs to meet some critical needs, such as a new health center and a waste treatment facility.

The W.D. Government learned of the pending federal and tribal agreement. It informed the ABC and Federal Governments that W.D.'s longstanding mineral and mining laws should apply to the tribal oxenite project. The State's regime imposes standards for construction, working conditions, and environmental impact as well as a severance tax. The construction and operation of the ABC facility will involve employment of nonmembers, including W.D. residents. W.D.'s regulations and enforcement already apply to other tribes with oil in the State. According to the Governor's office, "The ABC project is no different from oil."

The W.D. Tax Commission has projected state revenue from the severance tax, based on world market prices, will be at least twenty-five (25) million dollars per year

¹ Shortages of different minerals and substances have occurred that affect manufacturing such as chrome for autos and some military needs. This exam uses a fictional resource to focus on the Indian law issues.

once ABC production begins. Moreover, the presence of oxenite on ABC land raises the possibilities that other lands in W.D., non-Indian lands, could provide similar opportunities to develop and generate tax revenue. While oxenite is not among the resources that W.D. has ever regulated or taxed, from the State's perspective that is not determinative.

The Tribe objects to the W.D. claim to regulate and to tax, a new intrusion for the ABCs. The Tribe claims that oxenite itself is not a usual mineral nor yielded by usual mining procedures encompassed in State law. The contracts with the Departments of Interior and Defense are subject to some of the federal statutes, regulations, and case law that apply when natural resources are developed for tribes. Greater control of the enterprise operations will come from special national security legislation and regulations. Defense determined that only the Canadian company can perform the work required, so the usual Interior competitive approach with tribal oil contracts did not apply. Moreover, national security procedures will apply throughout this enterprise's operations.

Both the ABC and W.D. Governments have pressed the Federal Government for an opinion from Interior's Solicitor General on how oxenite fits into the established state and federal regimes when Tribes develop resources on reservation land. The Federal Government has been more interested in expediting the necessary contracts and starting the "on the ground" work of the project. Only silence to date from the Solicitor's office. Meanwhile, the State and the ABC Tribe prepare their arguments for whatever forum that arises.

For this exam you must answer three questions. Required Questions: 1 and 2. Your Choice: Either Question 3 or 4 on the following pages.

Question 1 (Required, 60 points)

You are an attorney in the W.D. Office of the Attorney General (AG). You are told to draft a memo to the AG. This memo will be the basis for the advice to be given to the Governor, an oil company executive before being elected. Your supervisor asks you:

1. What is the strongest argument that W.D. can present to regulate and impose a severance tax on the ABC oxenite enterprise with the concurrence of the Federal Government?

Question 2 (Required, 60 points)

You are the Attorney for the ABC Tribe. Disturbed by Samuel Eagle Feather's questions, the Council withheld delivering the Council's approval of the oxenite contracts until it got some legal advice on how to protect the ABC interests. The ABC Governor asks you:

2. What is the strongest argument for the ABC Tribe to protect what it has at stake from the State's demand to regulate and tax, while obtaining affirmative protection, not harm, from the Federal Government?

QUESTIONS 3 AND 4: CHOOSE ONE (Each worth 60 points)**Question 3 (60 points):**

Jim Oldshield, a member of the Rio Tribe and a Viet Nam veteran, was traveling on his new big Harley through W.D. He knew that some Tribes were holding special ceremonies for members who were being deployed to and returning from Iraq. Jim's adjustment after service in Viet Nam had been somewhat rocky so he was interested in what indigenous people could do to help their members deal with combat service. At the Indian Cultural Center he heard that the ABC Tribe would have special warrior ceremonies at the weekend. Unfortunately, he got off to a late start on Saturday morning.

To make up for lost time Jim sped excessively on the state highway. As he approached the ABC Tribal lands a police car began following him, with the lights flashing. He spied an open area near where the crowd was gathered for the ceremonial dance. His Harley roared into the pathway reserved for kiva members as a group of men and boys emerged from the kiva and walked on the pathway to the dance area. His motorcycle could not stop quickly and rolled over, hitting one male adult and one child. Jim was immediately arrested by the ABC police officers and taken to the County Jail, where the Tribe has a use-agreement.

On Monday morning Jim learned that the ABC Tribe was charging him with creating public danger, trespassing in an area prohibited to all but kiva members, and was awaiting the report on the extent of the injuries to the adult and child. The adult is conscious, but injured in the hospital and the child still has not regained consciousness. The Federal Attorney has been notified of the situation. Tribal police confiscated Jim's motorcycle in accord with ABC laws approved under their "638" grant and authority.

On Monday morning, you are the newly appointed public defender who meets with Jim at the County Jail.

Draft what you would say when he asks:

"What's going on here? What can happen to me? Even if I injured some people, I did not mean harm. Also, I need to get my new motorcycle back and will sue the Tribe if that's what it takes to retrieve it."

Question 4 (60 points):

The ABC Tribe held special ceremonies for two members being deployed to Iraq. In addition to the two days of ceremonies in which all members had some part, there was also a separate Native American Church (NAC) ceremony for one family's member. All the ABC children were included in the tribal ceremonies, but only the suitably mature children (13-17 years old) were taken into the NAC ceremony to secure blessings and protection for their relative.

On Monday morning many of the ABC children were sleepy at school after the late night or all night events. Teachers at their school, off the reservation in a nearby town, alerted the Principal, Dr. Cotton Mather of what had occurred. She had recently moved to W.D. from the Massachusetts because of her commitment to educating children in areas lacking the resources of affluent communities. Dr. Mather was in her first year as the principal.

Upon questioning some ABC children, Dr. Mather learned about the extensive day activities and late nights entailed in the tribal ceremonies and accompanying socializing. She was most upset to learn that some of the older children were present when peyote was used by adults in the NAC ceremony. The children's fatigue and inability to focus on school work were obvious to Dr. Mather, who sent them home.

Then she phoned the District Attorney and asked for an immediate appointment. She wants to discuss immediate enforcement action, at minimum, for parental neglect that warrants intervention from the State's Child Protection Services. Given the young age of some of the children involved, if this experience is a parental pattern, perhaps temporary removal from the parents is warranted. Dr. Mather also wants to discuss any criminal violations arising when the older children were exposed to adults using hallucinogenic drugs, peyote, in all night ceremonies.

You are the Assistant District Attorney meeting with Dr. Mather this morning.

As Dr. Mather enters your office, she tells you that she knows you will do your duty as a State officer and enforce the W.D. law to protect these ABC children.

Draft your explanation of what you can tell her the State can do, not do, and why in this situation of the ABC children.

End of Exam. Have an enjoyable holiday.