

## OPINION

### ■ WHY IT'S IMPORTANT ■

# Indian law and bar exams

By *Gabriel S. Galanda* SPECIAL TO THE NATIONAL LAW JOURNAL

**B**Y NOW, ANOTHER 35,000 citizens have successfully transitioned through the legal profession's summer rite of passage—the state bar examination—and most will have learned of their results. Bar takers must stand prepared to analyze principles fundamental to the Anglo-American legal system, such as business law, family law, real property, torts and state and federal constitutional law.

However, there is an age-old, ever-evolving and increasingly prevalent body of law that is not tested on the bar exam. The seeds of these laws were planted throughout the country long before the 1776 signing of the Declaration of Independence, the 1803 Louisiana Purchase or Meriwether Lewis' and William Clark's journey to the Pacific Northwest in 1806. This code of law was so obviously prevalent in Colonial America that the Founding Fathers wrote the framework for the law into the plain text of the interstate commerce clause to the U.S. Constitution.

Although inextricably interwoven into the fabric of our federal and state legal systems, this area of law remains amiss from every state bar exam, with one exception: New Mexico recently became the first state to test this legal subject on its bar exam. The majority of the United States should act quickly to follow that precedent. The unique blend of tribal, state and federal law is commonly known as "Indian law."

Instructed by nearly two centuries of U.S. Supreme Court precedent, beginning in 1832 with *Worcester v. Georgia*, national and local government alike recognize Indian tribes as "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. By 1886, the high court reiterated in *U.S. v. Kagama* that tribes are a

"separate people, with the power of regulating their internal and social relations," and in the 1959 case of *Williams v. Lee*, the court made abundantly clear that tribes possess "the right...to make their own laws and be ruled by them."

#### A growing economic force

Over the past decade, the more than 550 federally recognized tribes have exercised their inherent sovereignty to become an influential economic, legal and political force. In union with corporate America, the tribes are now engaged in real estate development, banking and finance, telecommunications, wholesale and retail trade, and tourism:

■ In 2002, gaming tribes contributed \$32 billion in revenue, \$12.4 billion in wages and 490,000 jobs to the U.S. economy.

■ Tribal businesses, although not generally subject to state and federal taxation, have generated annually more than \$246 million in tax revenue for states and counties, and \$4.1 billion for the federal government.

■ Indian tribes occupy more than 55 million acres of land in 30 states.

A corollary to the dramatic rise in tribal economic development is the increased interaction of Indian tribes and non-Indians seeking business, employment or recreation on reservations. A wide array of legal matters arise, interjecting Indian law issues into almost every area of law.

Indian law principles underlie every business transaction involving Indians and their land. Attorneys doing deals with tribes must have a basic understanding of Indian law. Indian lands within Washington are now being developed by *Fortune* 500 companies, including Wal-Mart, AT&T, Home Depot, Verizon and Bank of America.

The federal circuit courts of appeals are split on whether federal employment laws apply to tribal employers. The 8th and 10th circuits refuse to apply Occupational Safety and Health Administration standards and laws such as the Employee Retirement Income Security Act to tribes, in deference to longstanding notions of

tribal self-governance. The 2d, 7th and 9th circuits disagree. Until the Supreme Court resolves this conflict, business and employment attorneys alike must understand precisely how Indian law affects the droves of U.S. citizens who work for Indian tribes.

In addition, litigation involving the adoption of an Indian child, the probate of real property on tribal lands or an auto accident on the reservation could involve complex jurisdictional issues. Enforcement of a judgment in a consumer-collection matter involving a tribal member or his reservation property presents procedural obstacles that do not exist under state law.

A slip-and-fall case arising in a tribal casino will implicate, as a threshold issue, the unique defense of tribal sovereign immunity. The applicability of state taxes on the sale to non-Indians, from a ticket to witness the WNBA's Connecticut Sun play basketball on the Mohegan Reservation to household goods at the Wal-Mart on the Tulalip Reservation in Washington, requires a detailed reading of both taxation law and federal Indian common law.

Even the development of non-Indian-owned land near reservations or waterways may implicate tribal treaty-based rights.

The general practitioner or public lawyer in America will no doubt become involved in a case requiring an analysis of Indian law. It is in the best interest of U.S. citizens that every lawyer licensed to practice in the 30-plus states with a large presence of Indians and/or reservation lands—New York, Connecticut, California and Arizona, to name a few—understand basic Indian law. What better forum to educate lawyers and ensure that the legal rights of all Americans—Indian or non-Indian—will be adequately protected, than through the state bar exam? **NLJ**

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