

## **Federal Indian Law Preliminary Questions**

**Fall 2015**

**Fletcher**

As I explained in class, I will select four of these 12 questions for the final exam. Each of the final exam questions will be worth 25 percent of the final grade. See you at the review on December 11, 2015.

1. Larry McMertry is a writer that lives on the Waabigwan Indian Reservation in the State of Malcontent, a non-Public Law 280 state. He was married to a tribal member, Manny McMertry, who owned an allotment, held in trust by the Interior Secretary. But Manny walked on some years ago, and under tribal law Larry remains on the trust allotment, effectively owning a life estate that cannot be alienated to anyone except a tribal member or the tribe through escheatment.

Larry, who is not a member of the Waabigawan Indian Nation, a federally recognized tribe, writes highly successful novels about reservation life from the point of view of non-Indians. Many tribal members are jealous of his success and consider his novels to be monetizing their private and public lives. In fact, Larry learned about the personal foibles of numerous tribal members from his now-deceased husband, who was a gossip sort, and based his novels on them, lightly fictionalized. His most recent novel immediately shoots to the top of the *New York Times* bestseller list, and he embarks on a year-long national book tour.

After he departs, the Waabigwan Tribal Council on behalf of itself and the entire tribal membership files suit against McMertry in Waabigwaan Tribal Court for violations of privacy of each tribal member that can be identified from the novel, seeking money damages. The Council also sues under the Waabigwan common law principle of *mino biimadziwin*, which is loosely translated as “living life in a good way.” Violation of that principle, traditionally, meant banishment from tribal lands, but the Tribal Council instead seeks Larry’s eviction from the trust allotment.

Larry, on tour, never receives the summons from the Tribal Court, and never appears to defend the suit. After waiting for an appropriate time under tribal law, the Tribal Court hears the evidence presented by the Tribal Council and numerous tribal members, and issues a default judgment against Larry. The court finds that Larry's previous novel included lengthy dissertations by the characters on the meaning and significance of *mino biimadziwin*, and that one character had been banished by the tribe for bad acts. The Court orders Larry to pay to the Tribal Council 75 percent of the proceeds of the sale of his novel and, if the novel is optioned to be made into a film, 100 percent of Larry's film proceeds. The Court also orders Larry's eviction from the trust allotment, and banishes him from the reservation as well.

While Larry is on tour, the Tribal Council sues his publisher in Malcontent state court, seeking the enforcement of the Tribal Court judgment on Malcontent State Supreme Court Rule 2.615, which states:

(a) The judgments decrees, orders, warrants, subpoenas, records, and other judicial acts of a tribal court of a federally recognized Indian tribe are recognized, and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of any court of record in this state, subject to the provisions of this rule.

(b) A judgment, decree, order, warrant, subpoena, record, or other judicial act of a tribal court of a federally recognized Indian tribe is presumed to be valid. To overcome that presumption, an objecting party must demonstrate that

(1) the tribal court lacked personal or subject-matter jurisdiction, or  
(2) the judgment, decree, order, warrant, subpoena, record, or other judicial act of the tribal court

(A) was obtained by fraud, duress, or coercion,  
(B) was obtained without fair notice or a fair hearing,  
(C) is repugnant to the public policy of the State of Malcontent, or  
(D) is not final under the laws and procedures of the tribal court.

Larry eventually intervenes in the state court suit to defend. What are Larry's chances of stopping the enforcement of the tribal court default judgment, both in terms of the money damages and the eviction/banishment? What are the strengths and weaknesses of his claims?

2. In 1836, the Matchimanitou Band of Chippewa Indians negotiated and executed a treaty with the United States. The Senate ratified the treaty, with amendments, and the President declared the treaty the same year. The treaty established the Matchimanitou Reservation, a reservation of about 25,000 acres within the State of Elation. The reservation shares a border with Canada. The treaty includes the following language:

The United States hereby agree to set apart for the exclusive use, ownership, and occupancy the said reservation to the said Chippewas.

The reservation was never allotted or diminished by federal action, but in 1954 the State of Elation asserted civil and criminal jurisdiction over the reservation in accordance with Section 7 of Public Law 280. Congress later repealed Section 7, and now requires tribal consent to state assertions of jurisdiction over Indian country under Public Law 280. The same year the State asserted Public Law 280 jurisdiction, the Band established a tribal court by tribal statute. For decades, the tribe and the state asserted concurrent jurisdiction over the reservation.

In 2015, the State entered the reservation with a state court-issued search warrant and searched the home of a tribal member named Enrico Palazzo. Enrico had been buying untaxed and unstamped cigarettes in Canada, and walking them over the border to the reservation. The tribe imposed a small fee on reservation businesses like Enrico, but imposed no taxes. Enrico sold 10,000 cartons of smokes to nonmember, non-reservation residents before the State caught on. The State confiscated 25,000 cartons of Enrico's unsold smokes and arrested Enrico for violation of a state law that criminalized the sale of smokes within the territory of the state without a state issued stamp evidencing the payment of state taxes on smokes.

Enrico retains you to defend. He is a law school dropout, but took Federal Indian Law and believes that Public Law 280 can be interpreted to get him off the hook, and alternatively that Public Law 280 works a compensable taking of treaty rights. Do you agree? Are there other ways for Enrico to prevail?

3. In 2013, the Dakota Indian Nation of East Dakota, a federally recognized tribe, chartered a Corporation in accordance with tribal law. The charter authorized the Corporation to “sue and be sued in a court of competent jurisdiction.”

In 2014, the Corporation entered into a contract with the Lansing Loogies, a minor league baseball team in the State of East Dakota. The contract provided that the team would name its stadium “Dakota Stadium” and that the Corporation would pay the team \$100,000 a year for the naming rights. The parties went around and around on the question of whether the Corporation enjoyed sovereign immunity, whether the Nation’s sovereign immunity covered the Corporation, and whether individual officers of the Corporation could be liable for breach and whatnot. In the end, the parties never reached agreement on the question, figured it wasn’t worth the attorney time to negotiate it, and left immunity issues out of the contract.

Shortly after the stadium naming announcement, the Dakota Indian Nation, the owner of the Corporation, purchased \$100,000 worth of advertising from the baseball team. Everyone had a great 2014.

In 2015, the State of East Dakota legalized marijuana sale and consumption. The Lansing Loogies immediately announced plans to sell marijuana at baseball games held at Dakota Stadium. The Dakota Indian Nation’s political branch objected to the sale of marijuana and did not want the Nation’s name associated with the sale of “Loogies Doobies,” and canceled the naming and advertising contracts.

The Loogies retain you to determine whether sovereign immunity prevents a viable suit to recover \$200,000 (the naming rights fee and the lost advertising revenues) from the Dakota Indian Nation and the Corporation.

4. A rare and incredible species of wolf lives on the Mai’ingan Indian Reservation in the State of Contentment, a non-Public Law 280 state. At least, that’s what Mai’ingan Indian Nation members and many others believe. No one has ever seen this wolf, alive or dead. The entire reservation is trust land, that is, land owned by the Interior Secretary in trust for the benefit of the tribe.

In 2000, the Mai'ingan Indian Nation council enacted a ban on the hunting and harvesting of the Mai'ingan wolf. A week later, the Legislature of the State of Contentment authorized the hunting and harvesting of Mai'ingan wolves by state citizens with a state permit, anywhere within the exterior boundaries of the State. For 15 years, no one ever successfully hunted and harvested a Mai'ingan wolf. However, state citizens armed with state Mai'ingan wolf hunting permits occasionally encroach on the Mai'ingan Indian Reservation, creating ugly, unresolved, but occasional conflicts.

In 2015, Evel Knevel, a state citizen with a valid Mai'ingan wolf hunting permit issued by the state, accidentally wanders onto the Mai'ingan Indian Reservation. He is detained by Mai'ingan tribal police. He is ticketed for trespass, a violation of the tribe's civil offenses laws, and his gun is confiscated in accordance with tribal civil forfeiture laws.

Knevel retains counsel. Through counsel, he sends a demand letter to the tribe and states he wants to have the ticket voided, and he wants his gun back. The State of Contentment's Attorney General argues in the press that he can and will sue the tribal council officials for a declaratory judgment that tribal law is preempted by the state's Mai'ingan wolf hunting laws. You're counsel for the tribe. Are the tribe's opponents right?

5. Title VII of the 1964 Civil Rights, which generally bars employment discrimination on the basis of several immutable characteristics, defines covered employers as follows, in relevant part:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, *an Indian tribe*, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service.... [42 U.S.C. § 2000e(a), (emphasis added)]

In the unlawful employment practices section, the statute provides that:

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation. [42 U.S.C. § 2000e-2(i)]

Andrew Zhiigaawe is a member of the Animosh First Nation in Canada. He works for the Gigoon Indian Nation, a federally recognized Indian tribe in the United States. He applies for a job with the Gigoon Indian Nation's economic development arm, a corporation chartered by the federal government in accordance with 25 U.S.C. § 477. He is qualified for the job, which requires a college degree and some experience working for an Indian nation. But a member of the Gigoon Indian Nation is hired over Andrew, despite the fact that the Gigoon tribal member has not yet completed his college degree and has never worked a day in his life.

Andrew wants to know whether he has a decent chance of succeeding in a Title VII action against the tribal enterprise or, failing that, whether Title VII's exemptions in relation to tribal employment pass constitutional muster. You're his attorney. Give him the straight scoop.

6. The Manoomin Indian Nation, a federally recognized Indian tribe, is located on an island in Lake Michigan. The Nation has always resided there, from time immemorial, and has never entered into any treaties with European, American, or any other nations. No federal statute or regulation has dealt directly with the Nation or its island. There is no outsider presence on the island in any way.

The United States wants the island the Manoomin people call home for military purposes, and proposes to exercise eminent domain over the island in accordance with a general federal statute that allows the military to do so. However, federal lawyers are unsure whether the Fifth Amendment requires due process and just compensation for the taking of the island, or even whether the federal statute, which is silent as to its applicability to tribally owned lands, authorizes the taking. The Manoomin Indian Nation will not consent to the taking under any circumstances.

You work for the United States Attorney General. Resolve the issues for the federal lawyers, and whether the military will prevail in court if it proceeds.

7. Kylo Ren is a drug dealer by day and a high-stakes casino patron by night. He drives a Ford Super Duty Pickup truck wherever he goes. After a long day dealing drugs, Kylo drives onto the Fort Tatooine Indian Reservation to do some high-stakes gambling. While inside the Cantina, the name of the Fort Tatooine Indian Nation's Star Wars-themed casino, Kylo drinks several blue milks, a potent alcoholic beverage, while gambling. Sometime around midnight, Kylo passes out, falling to the ground in the middle of the casino gambling floor.

Casino security, deputized to enforce tribal, federal, and state law, arrive. They pick up Kylo and call for an ambulance to take him to the tribal hospital for examination. They also confiscate his truck keys, which is casino policy, to ensure he does not somehow attempt to drive before sobering up. After the ambulance takes Kylo away, casino security locates Kylo's truck in the parking lot. Looking through the windshield, they see a large duffel bag with what appears to be a large gun inside. The doors to the truck are unlocked, and casino security opens the truck to examine the bag.

Inside the bag is a gun. Also inside the bag is cash in the amount of \$255,908, two hundred rounds of ammunition for the gun, drug paraphernalia, and several baggies of illegal drugs. Casino security confiscates the gun, the money, and the drugs, as well as Kylo's truck. Tribal law acknowledges that the tribe does not enjoy criminal jurisdiction over non-Indians like Kylo, but asserts civil jurisdiction over all persons on its territory.

In accordance with the Indian Reorganization Act, the Interior Secretary acquired land in trust and declared the establishment of the Fort Tatooine Indian Reservation in 1945 after the conclusion of World War II. Dozens of American Indian war veterans from around the country had petitioned the Interior Secretary for a small homeland from which to build their lives. All of the Indian vets were verifiably "full blood Indians," according to Interior Department documents, but for weird reasons of history were not eligible for membership in any Indian nation acknowledged by the United States at that time. Some had been banished from their own tribal

communities for petty crimes before joining the military. Many others were the children of Bureau of Indian Affairs employees, the so-called “BIA brats”; since the BIA prohibited Indian employees from working on their own reservations, they worked on other tribes’ reservations and sometimes became romantically involved with other nonmember Indians working for the BIA, leading to a scenario where their children were Indian, but without enough blood quantum or the ability to establish residency at any given Indian nation from which they descended.

You represent Kylo, and wonder whether the Fort Tatooine Indian Reservation was ever validly established. If not, perhaps Kylo’s legal troubles with the tribe would be over. Examine the relevant legal theories.

8. The Rhythm Nation Council of 1814, an unusually named federally recognized Indian tribe, came into existence in 1814 when six disparate but neighboring Indian communities speaking four different languages agreed to the terms of a treaty with the United States in 1814, validly ratified by the Senate and proclaimed by the President. While the treaty on paper may have dealt with the six different Indian nations as one, the individual communities did not then and do not now think of themselves as united.

Since 1814, the six tribal communities have coalesced into six separate tribal villages. The tribal constitution, approved by the Interior Secretary in accordance with the Indian Reorganization Act in 1935, established six local governments and one national tribal government. Each village would govern itself except for relations with the federal or state governments, and those relationships would be handled by the national tribal government. Each village elects one resident to represent the village in the national council, the governing body of the Rhythm Nation.

One quirk of the tribal constitution is that each village determines its own membership criteria, and once a person is enrolled by a particular village, that person becomes a member of the Rhythm Nation eligible for services from the national tribal government and the specific village government, but not other villages. Since the enactment of the 1935 constitution until recently,

all of the villages have adopted membership requirements that are basically the same – one-quarter blood quantum. Each village maintained a membership of about 250 persons.

In 2000, one of the six villages (named after a legendary tribal leader whose name loosely translates as “Diff’rent Strokes for Diff’rent Folks”) adopted new membership criteria that allowed any person, regardless of blood quantum, who is a descendant of any person that was a tribal member in 1814 to become a member. Within five years, the Diff’rent Strokes village membership swelled to just under 5000 members, dwarfing the membership of the other villages. There is constant political uproar at the national tribal council level between Diff’rent Strokes and the other villages.

Janet Jackson is a new member of the Diff’rent Strokes village, and therefore the Rhythm Nation. Her Indian blood quantum is  $3/256$ . The national tribal council, voting 5-1, disenrolls Janet as a tribal member via resolution. Pending are disenrollment resolutions for all other Diff’rent Strokes members that do not meet the blood quantum requirement established by the other five village governments.

Janet asks you for legal help. What legal and political strategies may she pursue in order to undo her disenrollment and restore her membership? What are the chances of success in each instance?

9. It is a truth universally acknowledged that Elizabeth Bennett was bad news. Elizabeth married Fitz Darcy, a member of the Derbyshire Indian Nation, a federally recognized Indian tribe. Together, they had three children over three years, but Elizabeth slipped a terrible but untraceable poison into Fitz’s afternoon tea one day and became a widow. She was never charged with the murder of Fitz, and eventually moved the three children to an apartment off the reservation within the State of Immortality.

One year after moving off the reservation, Elizabeth committed a few petty crimes such as shoplifting, assaulting an old lady, and grand theft auto. She was charged with those crimes, and quickly pled guilty. The three kids were placed in foster care after an emergency hearing. After being properly noticed in accordance with the Indian Child Welfare Act (the children are not

enrolled but are eligible for membership by virtue of their one-eighth Indian blood quantum), the Derbyshire tribe intervened in the state court proceedings. The tribe quickly moved the state court to transfer the proceedings to Derbyshire tribal court in accordance with 25 U.S.C. § 1911. The state objected and suggested that an off-reservation foster placement would be appropriate. The tribe objected to the off-reservation placement as likely violating 25 U.S.C. § 1915, and represented to the court that there was a tribe-certified Indian foster family residing on the reservation that was ready to accept the children.

The state court denied the tribe's motion to transfer and granted the state's placement motion, suggesting without analysis that the Indian Child Welfare Act was unconstitutional. The Bennett-Darby children were quickly placed in a foster home outside the reservation with non-Indian foster parents.

You represent the tribe. The tribal client wants to know if it is worth pursuing an appeal to bring home the Bennett-D'Arcy kids if the state appellate court, and then perhaps later, the United States Supreme Court will declare ICWA unconstitutional. Advise.

10. In 2016, Congress amends the Indian Civil Rights Act to extend jurisdiction to federal courts to review all tribal court civil judgments, criminal judgments already being covered by 25 U.S.C. § 1303. The statute provides:

The United States district courts shall have jurisdiction over any civil cause of action initiated by a person under tribal jurisdiction to enforce the Indian Civil Rights Act upon the exhaustion of tribal court remedies.

The Marshall Indian Nation, a federally recognized Indian tribe in the State of Scotus immediately repeals the statute creating its tribal court after the amendment to the Indian Civil Rights Act. The Marshall tribal council then enacts a statute banishing and disenrolling all members of the tribe with the last names of "Johnson," "Baldwin," and "McLean." The Marshall council then enacts a statute prohibiting any members of the tribe that are not descendants of the Marshall, Thompson, and Story families from holding tribal elected office.

Owen Johnson, Emmett Baldwin, and Loretta McLean, all banished and disenrolled, complain bitterly and extensively to the Marshall tribal council but are denied in their political petitions. They approach you for advice on whether to bring suit in federal court. They don't have a whole lot of money, and wonder whether they have a chance of prevailing by bringing a suit under the newly amended Indian Civil Rights Act. Advise.

11. Midway upon the journey of his life, Dante Alighieri found himself within a dark forest in Beatrice County in the State of Purgatorio for his straightforward pathway had been lost. Being resourceful, he stopped, thought, and built a log cabin. In the months that followed, he fished and farmed, and lived quietly by himself in the dark forest.

Little did Dante know that he had planted his roots literally and figuratively in 2005 on a parcel of land once allotted to a Infierno Indian Nation tribal member in 1899. The federal statute providing for the allotment allowed for a 25 year trust period in which no state tax could be assessed against the allotment. In 1920, Congress enacted a modification on the Infierno allotment act that cut short the allotment period. The United States Supreme Court later held that legislation to be unconstitutional and unenforceable. The parcel upon which Dante has built his log cabin and farm is an allotment that was illegally assessed by Beatrice County in 1921, with the original Indian owner abandoning the land after receiving the illegal tax assessment (plus seeing a couple of Beatrice County deputy sheriffs with shotguns wandering around his front yard). Until Dante, no one ever did anything with that land. It was sorta forgotten.

After ten years or so of excellent farming and fishing, and restoring his mental health, Dante announces his presence to Beatrice County and to the Infierno Indian Nation. The county doesn't threaten to evict him or anything, but instead tells him to start paying county property taxes. The tribe does the same thing.

Dante doesn't want to pay taxes to two different governments. He wants you, his distant-cousin-who-is-a-lawyer, to advise him on which government he should pay his taxes to.

12. Exebeche (which means “He Who Talks Loud, Says Nothing”; his friends just call him Nobody) is a member of the Shinob Indian Nation, a federally recognized Indian tribe. He lives on the Shinob Indian Reservation. His best friend is a nonmember Indian named William Blake, who also resides on the Rez and is married to another Shinob tribal member.

Cole Wilson is a terrible, awful person that wanders on the reservation and starts a bad ruckus in a restaurant on the reservation where Exebeche and William Blake are eating dinner. Imagine a bad scene involving a spilled iced tea, a pair of forks, filthy language, a couple lunging punches, a bloodstained napkin, some stabbing, and elevator music. In the end, Cole and Exebeche are dead and William Blake is arrested by tribal police.

After a bit, the tribal prosecutor indicts William Blake for assault on Cole Wilson. There is no tribal criminal code, and the prosecutor generally borrows from the Model Penal Code or simply invokes unwritten tribal common law. Here, he does both. William Blake (stupidly) represents himself, despite the offer of legal counsel paid for by the tribe. William Blake pleads guilty and is sentenced by the tribal court to 120 days in tribal jail. He files an appeal (continuing to stupidly represent himself) but the appeal is rejected for failure to conform with tribal appellate rules regarding the size of paper required in filing briefs.

On the day he is released from tribal jail, the federal government indicts William Blake for felony murder, assimilating state law under 18 U.S.C. § 13. William Blake’s first thought is “Wait! Didn’t I already go to jail for this?” His second thought is to call you, hoping for some good legal advice.

What do you tell William Blake?

## Indian Law PLSI 2015

### Midterm Exam

#### Instructions:

Answer the following essay question the allotted time. If you think there is more than one right answer, tell me which one is best and why. If there are opposing arguments, tell me what they are and explain why they are less persuasive.

The Chewbacca Band of Mukwa Indians is a party to a treaty with the United States negotiated, executed, and ratified by the Senate in 1836. In the treaty, the Chewbacca Band ceded its aboriginal title interests to what are now ten counties, including Shananagona County, the United States. The treaty includes the following provision:

**The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.**

The 1836 treaty also created a reservation for the Chewbacca Band, which is located in Mukwa County. The American treaty negotiators promised multiple times that Mukwa hunters and gatherers would have access to Shananagona County for hunting and gathering, so long as the land was not required for settlement. American treaty negotiators described “settlement” as the presence of farming, residences, or mining activities. In Mukwamowin, the language of the Mukwa Indians, “settlement” means “living on the lands in accordance with Mukwa traditional ways.”

Today, Shananagona County is land-locked and almost completely deserted. Nearly 99 percent the land in the county is federal or state public land. The state allows the public to purchase permits for limited day access, and the federal government bars all persons (excepting Mukwa Indians) from entering the federal lands.

From 1836 to 1900, Mukwa hunters and gatherers entered Shananagona County at will, with no interference whatsoever from any private person or government entity, to exercise treaty rights. There were no houses, no farms, no nothing on the land but virgin timber and woodland

resources valuable only to Mukwa Indians. In 1900, the Department of Interior authorized private timber interests to clear cut the entire county. That job was completed by 1901. Timber companies barred Mukwa hunters and gatherers for the entire time the clear cutting was ongoing. In 1902, after the timber companies left, the Interior Department banned everyone from entering the county. There were no valuable trees left, and the detritus from the clear cutting created a significant fire hazard. In 1903, the Chewbacca Band sued the Interior Secretary to allow Mukwa hunters and gatherers access to Shananagona County but the court dismissed the suit on federal sovereign immunity grounds.

In 1910, the Interior Department sold one-half of the county land to the State of New Arizona, which immediately opened its properties to non-Indian hunters, barring all Indians from its lands. From 1910 to 1970, both the State and the Interior Department opened up Shananagona County lands to public sale at multiple times, but could find only a few buyers. In 1970, both the State and the federal government agreed to create state and national parks out of the remaining unsold lands within Shananagona County. Other than five or six small parcels of private land, the entire county remains state and federal public lands.

Throughout the period beginning in 1910, Mukwa hunters and gatherers entered Shananagona County to engage in their treaty rights without permission from state or federal officials. State and federal officials described these incursions as trespass but rarely prosecuted the offenders. In 2015, the Interior Department finally recognized Mukwa treaty rights to Shananagona County and allowed Mukwa hunters and gatherers to enter federal public lands at will. State officials refuse to honor treaty rights and continue to ban Mukwa Indians from entering state public lands without a state permit.

The United States has sued the state in *United States v. State of New Arizona*, claiming that Mukwa treaty rights are extant in the state-owned lands in Shananagona County and that the State's ban is illegal. The state claims that Shananagona County was settled long ago when the federal government sold the land to the state and asserts its continued ban on Mukwa treaty hunter and gatherers is perfectly legal. The state has now stepped up its enforcement of its ban, and has begun to arrest and vigorously prosecute treaty hunters and gatherers. Explain the arguments of both sides, and opine on which side is likely to prevail.

## Indian Law PLSI 2015

### Midterm Exam

#### Instructions:

Answer the following essay question in the allotted time. If you think there is more than one right answer, tell me which one is best and why. If there are opposing arguments, tell me what they are and explain why they are less persuasive. There are multiple issues.

Larry and Steve Boogit are members of the Mshkiki Band of Odawak Indians, a federally recognized tribe. Together, they own 80 acres of land in fee within the boundaries of the Chewbacca Indian Reservation, home to the Chewbacca Band of Mukwa Indians, also a federally recognized tribe.

On that land Larry has marked off 40 acres of heavily forested land. It is well known in the community (because Larry has a big mouth) that he plans to clear-cut the land. He estimates that he will earn \$750,000 from the timber sales as the timber is rare, virgin white pine. Chewbacca Band members traditionally have ranged on and off the 40 acres of forested land now marked off by Larry to gather special materials for important, world-cleansing ceremonies every four years. The ceremonies are held on lands nearly adjacent to the fee land owned by Larry and Steve, and occasionally range onto the forested area marked off by Larry.

On the other 40 acres, which is mostly wet, swampy land, Steve plans to allow a landscaping company to drain the water from the swampy areas and to fill in the area with waste concrete and gravel from the landscapers business. Steve plans to earn \$50,000 from his arrangement. He also has a big mouth, and the tribe unofficially learns of his plans by word of (big) mouth.

The Chewbacca Band treats areas like that on Larry and Steve's land as ecologically significant, and by statute barred the destruction of forested and swampy lands long before Larry and Steve purchased the land. The statute listed several parcels of land on the reservation that are protected, including Larry and Steve's acreage.

Relying upon their cultures and traditions for legal support, the Tribal Council files a suit in the Chewbacca Tribal Court against Larry and Steve seeking to enjoin the clear-cutting and the destruction of the swamp on their land. The Council argues that the clear-cutting of the virgin timber stand planned by Larry and the filling of the swamp by Steve violates the unwritten traditions of the Mukwa Indians, which unequivocally bar the development of the Mukwa homelands in this way. The Tribal Council also sues Larry and Steve under the tribal statute protecting forested and swampy lands to prevent the destruction of Larry and Steve's land.

The tribal marshal attempts to serve the lawsuit on Larry and Steve on their property, but the Larry sees the tribal police car approaching and fires off a series of wild potshots from his air-powered pellet gun, driving off the marshal. The tribal court mails the notice instead. Meanwhile, the tribal prosecutor files civil charges against Larry arising from his attack on the tribal marshal. The tribe has no relevant code provisions, requiring the prosecutor to rely upon unwritten tribal customs and traditions to justify the civil citation.

Two years later, the tribal court of appeals affirms an injunction issued by the tribal court preventing Larry and Steve from pursuing their plans. Larry and Steve properly appeal to federal court to challenge the tribal court's jurisdiction over them. They also bring a Fifth Amendment takings claim against the Chewbacca Band, asserting money damages to the tune of \$800,000 for the tribe's alleged taking of their property rights.

At the same time, the tribal court of appeals affirms Larry's tribal court conviction for assaulting a tribal police officer. Larry files a petition for a writ of habeas corpus under the Indian Civil Rights Act and challenges the jurisdiction of the tribal court to issue a civil citation.

At all times during the tribal court proceedings Larry and Steve were represented by competent counsel. Moreover, the tribal court juries consisted of a random mix of Chewbacca Band members and nonmember Indians.

You're the tribal attorney for the Chewbacca Band. Assess the likelihood that the Band will prevail in the various federal court actions.

Exam ID No.: \_\_\_\_\_

**2011 Federal Indian Law Exam**  
**University of Michigan Law School**  
**Prof. Fletcher**

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This examination consists of 7 pages. Check **now** to make sure that your copy of the exam has all of the pages.

Use your assigned Exam ID number for this course to identify yourself.

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Length of exam: 3 Hours.

This is an open book examination.

There are three questions. They are equally weighted. Keep that in mind, since at least one of the questions is a little longer and more complicated than the others (hint: number 3).

## Question #1

Handley LaMarr and Efram MacKenzie were, until recently, members of the Skull Mountain Indian Tribe (SMIT) located in the State of Walpole (a non-Public Law 280 state). The men operated a highly successful smokeshop and gas station, a business that recently went south with the establishment of a competing tribally-owned smokeshop and gas station. Both men began to agitate against the tribal government; specifically, appearing at tribal government meetings to complain bitterly about the government's business dealings. After their first appearance at a tribal government meeting, they both received official notice in regular mail that such agitation is not permitted by the SMIT. Open verbal hostility against tribal leadership, the notice stated, violated the customary and traditional rules of political and public discourse accepted in the SMIT. The notice stated that additional appearances in that manner would compel the tribal government to "banish and expel them in accordance with tribal customs and traditions." LaMarr and MacKenzie were unfazed, and instead of quieting down, they were even louder and more disruptive than in the first meeting.

A few weeks after that second meeting, the SMIT tribal government voted to strip LaMarr and MacKenzie of their membership in the tribe. All of their real property interests in tribal lands would escheat to the tribal government. The tribal government confiscated the buildings that LaMarr and MacKenzie constructed to house their business operations, along with the assets (cash, smokes, gasoline, etc.) associated with the business (collectively valued at \$250,000). Moreover, both men have been banished from the reservation forever, on pain of imprisonment should they ever return.

SMIT is a federally recognized Indian tribe, and is the beneficiary and primary signatory to a treaty with the United States, executed by the tribe, ratified by the Senate, and proclaimed by the President in 1870. The 1870 treaty provides in relevant part:

The United States agree to reserve for a home, and for the sole use and occupation of said tribe as an Indian reservation, the entirety of Skull Mountain.

The Skull Mountain Reservation, approximately 100,000 acres in size, has never been allotted by Congress, nor opened up for settlement in any manner. With

the exception of a few acres sold by SMIT to the United States for weather monitoring, all of the Reservation remains in the ownership of SMIT. SMIT allocates surface land interests to tribal members, allowing tribal members to build homes and operate businesses but not to own the land. The situation makes it difficult for tribal members to borrow money from outside banks that they could use to construct better homes or develop their business interests.

SMIT's membership includes about 500 Indians, nearly all of whom reside on the Reservation. Anyone who can trace an ancestor to one of the 1870 treaty signatories is eligible for membership, regardless of blood quantum. An additional 250-300 people live on the Reservation as well, mostly persons who have married into the community and are nonmembers.

SMIT has a tribal court system that handles a robust civil and criminal docket, but the tribal council has expressly stripped the court's jurisdiction to hear all membership disputes, reasoning that such decisions are inherently political and not suitable for resolution in an American-style adversarial court system. The tribal council has not agreed to waive its immunity in state or federal courts.

LaMarr and MacKenzie, now living off-reservation, retain you to assess the possibility to suing in federal court to (1) force the restoration of their tribal membership, and (2) recover their assets. What are their best arguments; what are the tribe's best defenses; and what are the overall chances that LaMarr and MacKenzie will prevail.

## **Question #2**

Dickie Dare is a member of the Lake Matchimanitou Indian Tribe, located in the State of Peninsula. He frequently travels to a tribally-owned casino on the Walpole Island Chippewa Community (WICC) reservation, also located in Peninsula. On a recent visit to the casino (which is located on federal trust land), he physically assaulted a security guard, breaking the guard's arm. While being arrested by tribal police inside the casino, Dare resisted arrest and broke another arm, this time attached to a tribal police officer.

Tribal police eventually successfully arrested Dare and held him over the weekend for a hearing before the tribal judge, Zuka Chippewa (a Michigan Law School-trained lawyer, but not a member of the WICC), the next Monday afternoon. On Monday, the tribal prosecutor charged Dare with two counts of felony physical assault (a tribal crime), and sought the maximum punishment allowable under tribal law – a one year prison term and a \$5000 fine for each offense. WICC is *not* a tribe that asserts additional criminal punishment authority under the Tribal Law and Order Act of 2010.

Dare was indigent, possibly as a result of the frequency of his casino visits, and could not afford law-trained counsel. He requested counsel repeatedly, but since the Walpole Island Chippewa Community had no resources to fund a defender program, they did not appoint a lawyer for him. As such, he never received the advice of a lawyer. Instead, the tribal court afforded Dare access to a non-law-trained lay advocate. A jury trial of four WICC tribal members and two nonmember Indians living on the WICC reservation convicted Dare of both counts. Judge Chippewa sentenced Dare to a \$10,000 fine and two one-year prison terms, to be served consecutively.

Since there was no tribal appellate court, Dare immediately filed a petition for a writ of habeas corpus in federal district court for the District of Peninsula, seeking his immediate release.

The court appoints you to represent Dare in his federal habeas proceeding. You plan to challenge the Duro fix, the Act of Congress that purports to reaffirm inherent tribal authority to prosecute nonmember Indians. What are Dare's best legal theories to strike down the Duro fix and compel his release? Will they be successful?

### **Question #3**

It turns out that the most recent invasive species to wreck the ecosystems of the Great Lakes – Asian carp – is as valuable as a source of motor fuel as it is invasive and destructive. For the time being, there is absolutely no federal law that

governs the Asian carp. As a general matter, the states surrounding the western Great Lakes regulate the fishing industry there.

In the 1840s and 1850s, the *Anishinaabeg* (Indian people) of Walpole Island, located on the northernmost point of Lake Huron (on the American side), completely dominated the Lake Michigan and Lake Huron seaways, terrorizing any and all that did not pay a fee to the Tribe for the right to safe passage. The Walpole Islanders, powerful, expert fishers, also dominated and controlled the Lake Michigan and Lake Huron fisheries. Walpole Islanders had become the richest and most powerful people of the entire Great Lakes, for a time. In 1854, the United States Army invaded Walpole Island and subjugated its people militarily. The Walpole Island *ogemaag* (leaders) executed a treaty with the United States in 1855 that reserved the island for the exclusive use and benefit of the Tribe and its members, as well as access to the Lake Michigan and Lake Huron fisheries for what the treaty termed “usual subsistence and commercial purposes.” The 1855 treaty terms expressly state that no provision in the treaty may be modified without the express, written consent of 90 percent of the adult members of the Walpole Island community. Despite these terms, the 1855 treaty served as the functional end of the Walpole Islanders’ external power in the Great Lakes.

The 1855 treaty created the Walpole Island Tribe, and as a term of the treaty, the President of the United States had final authority to appoint the *ogema* (chief executive) of the Tribe. Since 1900, the WIT tribal membership held semi-annual elections to nominate an *ogema*, and the Secretary of Interior (as the President’s designee) routinely approved the nomination without comment or actual review. The *ogema*, despite holding significant authority under the tribal constitution, held no real power under the traditional (and unwritten) form of government that continued to exist at Walpole Island. The tribal general council (a body consisting of the entire adult membership of the tribe that met four times a year) held all the actual power, and routinely met to immediately reverse a decision made by the *ogema* unpopular with the membership.

In 2005, the states and the Tribe, after many decades of acrimonious legal and political fighting, entered into a federal court consent decree that divides the Lake Michigan and Lake Huron whitefish stock 50-50, with the Tribe disclaiming

all rights to the other fish and shellfish then present in the Lakes. The United States never participated in this consent decree.

With the arrival of the Asian carp “menace” into Lake Michigan and the imminent arrival of the Asian carp into Lake Huron, the WIT government funded and empowered a massive fishing fleet consisting mostly of WIT tribal members (and a few other nonmember Indians). This fleet began sweeping Lake Michigan and harvesting thousands of tons of Asian carp and selling the fish to the highest bidder (a Canadian billionaire obsessed with sustainable energy). Within a few months of fishing and selling its catch to the Canadian billionaire, the WIT and its members became rich and powerful once again. The Walpole Islanders’ fishing prowess has all but eliminated any others from entering the Asian carp fishing market.

Congress is holding special hearings to determine how to best allocate the Asian carp fishery, and openly talks of terminating the tribe. The American President is threatening the WIT *ogema* with removal from power if the WIT fishing fleet does not disband. The Secretary of Interior claims to have the “requisite consent” from the membership under the terms of the 1855 treaty to eliminate the fishing rights reserved in the treaty. The state governments surrounding the western Great Lakes threaten to sue in federal court, and seek an injunction against the WIT from continuing to fish the Asian carp under the terms of the 2005 consent decree.

You are the general counsel for the WIT general council (try not to get those confused). At a special meeting of the general council, the council’s speaker asks you a series of questions. First, can Congress terminate the WIT and, if so, what would be the result? Second, assuming WIT tribal member has “consented” at all, what is the legal import of the Secretary’s claim to possessing the “requisite consent” to amend the treaty? Third, can the President or Congress abrogate the 1855 treaty, assuming the “requisite consent” does not exist? Fourth, assuming the states are correct that the 2005 consent decree prohibits the WIT from authorizing its members to fish the Asian carp, can the Tribe successfully challenge the validity of the consent decree itself?

No one cares if the President removes the *ogema* – no one likes him anyway.

Take a deep breath, Counselor, and give it your best shot. Remember, you're talking to non-law-trained people.

**Federal Law and Indian Tribes**

**Fall 2009**

**Profs. Fletcher & Tweedy**

**Final Exam**

**Instructions**

Below are three essay questions. This is an open book exam and you must rely upon materials either discussed or prepared for class.

## Question 1

Jason Adams is an enrolled member of the Red Rock Tribe, a federally recognized tribe located in the State of Centoka. He practices a Native religion which requires its adherents to ingest two types of flowers periodically to facilitate mystical religious experiences. Adams lives on the Catalina Rancheria's reservation in the State of North Renton. Catalina Rancheria is also a federally recognized tribe. North Renton is not a Public Law 280 State. Catalina Rancheria's laws prohibit the exercise of Adams' religion on the grounds that it is not a traditional religion of its people and that the flowers contain dangerous substances which could be poisonous in large quantities. The federal government also effectively prohibits the practice of Adams' religion because it regulates drugs found in the flowers and it prohibits dispensing or ingesting the drugs without a prescription. Adams has nonetheless continued to practice the religion on the reservation where he lives. The Catalina Rancheria has decided to charge him with a criminal misdemeanor for his practice of the religion and it has also instituted a civil action for fines against him. Assume that the tribal Code supports institution of both civil and criminal actions. The federal government has also criminally charged him with misdemeanor violations of its drug laws. Adams feels that his First Amendment rights have been violated, and he calls you, an attorney in private practice, to better understand how he might fight these prosecutions, both on First Amendment and other grounds. Explain what you will tell him.

## Question 2

Getches, Wilkinson, and Williams LLC (GWW), an Indian owned company incorporated in the State of West Michigan, purchases 80 acres of land in fee from a member of the Lake Matchimanitou Band of Ottawa Indians (LMB). Each of the three principals are nonmember Indians (members of federally recognized tribes, but not members of LMB). The land is located within the Lake Matchimanitou Indian Reservation, and has not been owned under a restriction of alienation (e.g., trust or reservation land) since the 19th century. GWW begins to prepare the land for the purpose of storing spent nuclear fuel as solid waste. GWW's engineers believe with great certainty that the storage facility is extremely safe because of the special geologic characteristics of the reservation. The federal government and the State of West Michigan do not disagree with their scientific assessment.

GWW's land is located next to a tribal housing development, the tribal casino, and the tribal resort and golf course. The Band believes the nuclear waste facility is unsafe, and even it were safe, the bad publicity from the existence of the facility will destroy its economic development projects related to tourism. Ninety-five percent of the Band's governmental revenue derives from the tourism industry.

The Band's Tribal Council sues GWW in Tribal Court, seeking an injunction. GWW hires you to defend. Assess the theories for defending GWW and the likelihood of success.

### **Question 3**

The State of Michio enacts a statute banning all forms of abortion in all circumstances and providing for criminal and civil penalties for offenders. The Rabbit River Band of Ottawa Indians is located within the exterior boundaries of the State of Michio. The Band enacts a statute legalizing abortion with none of the limitations present in the state statute so long as the abortion is performed by a state-licensed physician with the patient's consent at the tribal health clinic.

The Attorney General for the State of Michio, Mike Coxswain, brings suit against the Band, the Tribal Council, and the tribal health clinic and its officers seeking an injunction preventing abortions from being performed on the Rabbit River Indian Reservation.

Assess the likelihood of success for the Attorney General's suit.

# **Federal Law and Indian Tribes**

**Fall 2006**

**Prof. Fletcher**

## **Final Exam – Preliminary Questions**

### **Comments on the Preliminary Questions**

Below are twelve essay questions. On the final exam, you will be asked to answer four essay questions. The four final exam questions will be taken from the following twelve. One or possibly two of the questions on the final exam will be policy questions and the remainder will be issue spotting questions. This is an open book exam and you must rely upon materials either discussed or prepared for class. Do not rely upon outside materials in your answers.

Because you will have the potential questions before the final exam date *and* because it is an open book exam, I will expect better answers than I would have expected in normal exams.

I value creativity. I would hope that you will be able to provide a creative answer to some of the questions below. With a few possible exceptions, each of the issue-spotting questions is a question of first impression in Federal Indian Law. Offer me arguments based on the cases and statutes we studied in class, but make policy arguments. I expect arguments to be made on both sides in each answer, with the student making a selection of which side is the better solution. None of this advice should be

particularly new to you, but due to the exam format, I expect a great deal.

Please do not ask me any questions about the exam, except in regards to the information contained in this comments section. I will not discuss anything about the questions that follow. Assume any ambiguities to be intentional. Even assume that any typos are intentional (they're not – 😊).

### **Question 1**

Milt Wilcox, a citizen of Canada residing legally in the United States, is arrested by law enforcement officers for drunk driving on a road located on a highway maintained by the Lake Matchimanitou Band of Ottawa Indians and located within the Lake Matchimanitou Indian Reservation. Wilcox is a non-Indian male and married to a member of the Band. They have two children and the entire family resides on the reservation. Wilcox is also employed by the Band as a children's boxing instructor.

At Wilcox's arraignment before the Lake Matchimanitou Tribal Court, he is represented by counsel. His attorney argues that the Band has no jurisdiction over him. After pleading not guilty, Wilcox's attorney files a motion to dismiss on the basis of jurisdiction. The Band files a prompt response.

You are the tribal court judge. Decide whether the Band has criminal jurisdiction over Wilcox. Write an opinion explaining why or why not.

### **Question 2**

The ogemuk (leaders) of what would become the Lake Matchimanitou Band of Ottawa Indians entered into a treaty in 1864 with the federal government (that was ratified by the Senate unchanged). The treaty set aside 20,000 acres of land in what would become Ogemaw County, Michigan as the reservation for the Band. The treaty stated: "All reservation lands shall be set apart and surveyed and marked out for their [Indians] exclusive use; nor shall any non-Indian be permitted to reside upon the same without permission of the tribe and the Bureau of Indian Affairs superintendent and the Indian agent."

In late 2006, the Department of Defense published a notice in the Federal Register stated that it intended to exercise the power of eminent domain over 5000 acres of the Band's reservation as part of a project to expand its missile testing ranges and, potentially, house non-citizen enemy combatants in the Global War on Terror. The statutory language the Department relies upon comes from a 1990 Omnibus Defense Appropriations Bill that provides, "The Defense Department is granted the power of eminent domain over private landowners and state and local governments to the extent reasonably necessary to further the Nation's defense, provided that the Department pay just compensation as required under the Fifth Amendment." The Federal Register notice states that the Department intends to pay just compensation in accordance with standard federal practice.

The Band's Tribal Council Chairman asks you to prepare a memorandum identifying any potential causes of action arising out of Federal Indian Law that could be brought against the Department of Defense and the United States to prevent the taking of reservation lands, including an assessment of the likelihood of success for each theory.

### **Question 3**

John Wockenfuss, the Housing Department's Maintenance Manager of the Lake Matchimanitou Band of Ottawa Indians, reads in the Tribal Newsletter that the Band's Tribal Council has decided to enact an income tax on all income derived from reservation sources. He then receives a notice from the Band's Department of Tax that his income will be taxed at a five percent rate.

Wockenfuss is incensed. He is an Indian enrolled with another tribe, but not a member of the Band. Moreover, he lives ten miles off the reservation in a local urban community. Outside

of work, he spends little or no time on the reservation and could not be said to utilize much of the Band's governmental services, including without limitation public safety or snowplowing services. He does not want to pay the tax.

Wockenfuss hires you to sue the Band in federal court over this issue. Assess his legal theories and the likelihood of success.

#### **Question 4**

The Tribal Council of the Lake Matchimanitou Band of Ottawa Indians, after heated and spirited democratic debate during the Band's annual meeting, decides to initiate proceedings in Tribal Court that would result in the disenrollment of 50 tribal members. These 50 tribal members are descendants of a woman who died many years ago who claimed to be a full-blooded Ottawa Indian, but indisputable historical and genealogical evidence indicates that, at most, she only had one-quarter blood. As a result of the new evidence, the 50 tribal members are not eligible for membership with the Band under the tribe's constitution.

Many of the 50 tribal members subject to the disenrollment proceedings are elderly and have lived their entire lives believing they are eligible for membership. They and their families have been active in community activities and have intermarried with several other tribal member families. Some of them have even been prosecuted by the tribal prosecutor for criminal offenses.

Canby Pevar, one of the tribal members subject to the disenrollment proceedings, hires you to sue the Band in federal court over this issue. Assess all plausible legal theories and the likelihood of their success.

#### **Question 5**

Assume the State of West Michigan enacts a statute banning all forms of abortion in all circumstances and providing for criminal and civil penalties for offenders. The Lake Matchimanitou Band of Ottawa Indians is located within the exterior boundaries of the State of West Michigan. The Band enacts a statute legalizing abortion with none of the limitations present in the state statute so long as the abortion is performed by a state-licensed physician with the patient's consent at the tribal health clinic.

The Attorney General for the State of West Michigan, Mike Coxswain, brings suit against the Band, the Tribal Council, and the tribal health clinic and its officers seeking an injunction preventing abortions from being performed on the Lake Matchimanitou Indian Reservation.

Assess the likelihood of success for the Attorney General's suit.

### **Question 6**

Provide a short memorandum rejecting the following argument from Professor Joe Singer:

The Supreme Court finds itself in a similar, but different, double bind. The Court cannot seem to live with Indian nations; those nations do not fit easily into the constitutional structure and their place in the federal system appears obscure and anomalous. Yet the Supreme Court cannot live without them either; much as the Court would like to limit tribal sovereignty, it is neither equipped nor inclined to erase tribal sovereignty entirely. Indian nations are not only mentioned in the Constitution, but are also the subject of an entire Title of the United States Code. Writing Indians out of the Constitution and deleting Title 25 of the U.S. Code

would appear to be beyond the legitimate powers of the Court. [Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1, 1 (2005).]

### **Question 7**

Provide a short memorandum supporting or rejecting the following argument from Professor Angela Riley:

I suggest that well-settled principles of federal Indian law and the history of Indian tribal sovereignty situate Indian tribes beyond the standard ... analysis. ...

I do not always agree with the outcomes reached by tribal courts and tribal council[s] in ... matters [such as *Santa Clara Pueblo v. Martinez*]. But I nevertheless advocate against further expansions of ICRA or similar laws that would impede tribal self-governance.... [Angela R. Riley, *Sovereignty and Illiberalism*, 95 CAL. L. REV. \_\_ (forthcoming 2007).]

### **Question 8**

Justice Thomas's concurrence in *United States v. Lara* began with the following paragraph:

[T]he time has come to reexamine the premises and logic of our tribal sovereignty cases. It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. ... Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws

against their own members. ... These assumptions, which I must accept as the case comes to us, dictate the outcome in this case, and I therefore concur in the judgment. [United States v. Lara, 541 U.S. 193, 214-15 (2004) (Thomas, J., concurring).]

Provide a memorandum responding to Justice Thomas's charges that these two principles are "largely incompatible and doubtful."

### **Question 9**

The State of West Michigan enacts a statute prohibiting all forms of affirmative action and racial preferences. A statute enacted by the State Legislature in 1978 provides state recognition of the Lake Matchimanitou Band of Ottawa Indians, a non-federally recognized Indian tribe. The statute also provides certain health care benefits to members of the Band that are equivalent to what members of federally-recognized Indian tribes receive from the Indian Health Service, an agency of the United States Public Health Service. Benefits include reduced-fee prescription drugs, annual checkups, and eye and dental care.

The Attorney General of the State of West Michigan, Mike Coxswain, issues a formal opinion asserting that the new statute prohibiting all forms of affirmative action and racial preferences operates to invalidate the statute providing state recognition to the Band, and any related statutes including the health care provisions. He files suit against the state agencies charged with implementing the Band's recognition statute and seeks an injunction prohibiting the agencies from taking any action in accordance with the statute.

The Band and its members hire you to oppose the Attorney General's suit. Assess any theories you have and their chances of success.

### **Question 10**

Getches, Wilkinson, and Williams LLC (GWW), a non-Indian owned company incorporated in the State of West Michigan, purchases 80 acres of land in fee from a member of the Lake Matchimanitou Band of Ottawa Indians. The land is located within the Lake Matchimanitou Indian Reservation, but has not been classified as trust land since 1860, when the federal government issued a patent to a tribal member in accordance with an allotment act. GWW begins to prepare the land for the purpose of storing spent nuclear fuel as solid waste. GWW's engineers believe with great certainty that the storage facility is extremely safe because of the special geologic characteristics of the reservation. The federal government and the State of West Michigan do not disagree with their scientific assessment.

GWW's land is located next to a tribal housing development, the tribal casino, and the tribal resort and golf course. The Band believes the nuclear waste facility is unsafe, and even it were safe, the bad publicity from the existence of the facility will destroy its economic development projects related to tourism.

The Band's Tribal Council sues GWW in Tribal Court, seeking an injunction. GWW hires you to defend. Assess the theories for defending GWW and the likelihood of success.

### **Question 11**

The United States Congress, concerned about the difficulties of enforcing its criminal laws in Indian Country, enacts a statute known as the *Oliphant* fix, intending to reverse the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe* in the same manner as it attempted to reverse the Court through a *Hicks* Fix.

After the enactment of the *Oliphant* Fix, Ellis Short, a non-Indian and managing partner of the law firm Berkman, Deloria, Goldman, and Petoskey, is arrested by the tribal police of the Lake Matchimanitou Band of Ottawa and Chippewa Indians on suspicion of destruction of private property and, upon his arrest, of resisting arrest and striking a tribal police officer.

Short hires you to defend him on the theory that the *Oliphant* Fix is unconstitutional, even after *United States v. Lara*. Prepare a memorandum highlighting the best arguments in favor striking down the *Oliphant* Fix and their likelihood of success.

### **Question 12**

Compare the following quotations and assess which side has the better of the other and why:

1. Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 ARIZ. ST. L. J. 55, 55 (2002):

I've been saying for a number of years that we should take the word sovereignty and put it on the shelf for about ten years because it is a very confusing concept to a lot of people. It makes me feel bad to go to a meeting and see some unfortunate person's soul so transfixed by the word sovereignty that they can't think their way through the simplest problems. And if that's the case, this is what comes to mind: if we think of sovereignty as a strictly political and governmental concept, people get transfixed with that because they think in terms of absolutes. They mourn the fact that our sovereignty is not unlimited, as if it ever was. Let me tell you right now, there's no sovereignty on this earth that is unlimited. The United States at its most powerful does

not have unlimited sovereignty. It has a constitution that limits its sovereignty and structures it, but more important than that, it has political and economic reality that limits its sovereignty. And so, sometimes we get people standing up with quivering voices saying, “Our sovereignty is limited.” Of course it is, everybody’s is limited.

2. Robert Odawi Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L. J. 75, 91-92 (2002):

Over the years, the displacement of Indigenous conceptions of sovereignty has been facilitated by those in the greatest position to harm Indigenous peoples—their own lawyers. My own experience in assessing this phenomenon first arose in the context of a conversation I had with a former president of the Seneca Nation when I first became our nation’s Attorney General. For some reason, we were talking about the nation’s sovereignty and I must have said something along the lines of, “of course we can do that, we’re a sovereign nation.” The president, at that point, was very quick to disagree with me. “No,” he said, “we’re not a sovereign nation. We’re quasi-sovereign.” This struck me as quite odd coming from one of our nation’s former presidents, since the only time I had ever heard that term before was when I had read it in some United States Supreme Court opinion. As politely as I could, I asked him, “Why do you think that is so? What’s the difference?” He said that he had been advised of that definition by the nation’s attorney some years ago and that it meant that the nation was not fully sovereign—that there were things that we just could not do because the United States would not allow it.

I've been thinking about the significance of that exchange for years. What was that lawyer thinking? Could he have been deliberately malicious? Certainly not. But what would possess him to use words that would have the disastrous effect of limiting his client's own conception of sovereignty? Surely he was only trying to give his client an accurate understanding of the "law." But I still shudder when I calculate the number of times over the years that our nation's former president must have passed on that "wisdom" to other Senecas. Coming from the nation's own attorney, this "advice" must have seemed especially authoritative to him. To me, however, it was more insidiously transformative than any edict emanating from the mouth of some BIA official. Because it was rendered by one in a position of trust to a client who had his defenses down, there was simply no way for our former president to know that this attorney was destroying his own uniquely Seneca conception of sovereignty by passing on as gospel the anti-Indian sovereignty views of the United States Supreme Court. Had I not by that time already become suspicious of what the Supreme Court had been saying about the sovereignty of our nations, I myself, probably would have just blindly accepted this crabbed view of my nation's sovereignty.

END

**Indian Law Midterm Exam - PLSI**  
**Professor Matthew Fletcher**  
**7/2/2010**

**Please read the following fact pattern carefully and answer the question accordingly. You have one hour to complete this exam.**

Several Black Eagle Tribe members residing on the Black Eagle Reservation sued Acme Resources, Inc., a non-Indian operated mining company, in the Black Eagle tribal court seeking money damages and an order enjoining continued operations at Acme's mining coal bed methane located under reservation land. The Tribe members claimed that the mining activities have begun to contaminate their sacred reservoir and prevent them from fully practicing their spiritual cleansing ceremonies as they have for generations. The plaintiffs also claim that Acme's mining activities have spread beyond the areas where Acme may mine.

Acme has a contract with the Black Eagle Tribal Council authorizing mining operations away from the sacred site areas in accordance with a tribal statute. The statute authorizes Tribe members to sue in tribal court to challenge alleged violations of the contract or the statute.

The tribal court, later affirmed by the tribal supreme court, held that it had jurisdiction under tribal law over the tribal member claims. The tribal court relied upon two provisions in Acme's contract that provided:

Article XIII. Acme Resources, Inc. and the Tribe agree that any disputes between the parties may be resolved in a court of competent jurisdiction.

Article XI. Acme Resources, Inc. and the Tribe agree that the governing law of this contract is the law of the Black Eagle Tribe.

There is no mention of the tribal judiciary or of tribal civil jurisdiction in the contract.

After the bench trial requested by the parties, the tribal court awarded the plaintiffs \$100,000 in damages under tribal statutes prohibiting interference with sacred sites on reservation land. The tribal court also enjoined the continued operation of the Acme mining activities and terminated Acme's contract, a remedy authorized by tribal statute, as a result of Acme's violation.

Acme sues in federal district court seeking to enjoin the enforcement of the tribal court judgment on grounds that the tribal court did not have jurisdiction over it under federal Indian law.

You are a law clerk to the federal district court judge, who asks you to draft a memo regarding whether the tribal court had civil jurisdiction over Acme Resources, Inc.

Instructions: You may use any materials you choose in answering these questions.

### **Question 1**

In 1836, the ogemuk (leaders) of the Rabbit River Band of Anishinaabe Indians (RRB) entered into a treaty with the United States that established the Rabbit River Reservation in Allegan County, Michigan covering about 10,000 acres. The treaty further provides that the local Indian agent may “lease or rent reservation lands to non-Indians with the permission of the Rabbit River Band.”

Starting in 1865, with the passive, informal, and unwritten permission of the Michigan Indian agent, Hank Schoolzone, a group of 100 or so non-Indians settled on 2500 acres of the southwest corner of the Rabbit River Reservation. The Rabbit River ogemuk protested to Schoolzone but he responded in writing that if RRB continued to object, he would recommend that Congress abrogate the 1836 treaty and terminate the reservation altogether. Schoolzone did promise that if the ogemuk backed off, he would negotiate a fair market rental rate for the land. The ogemuk believed his threats and promises and backed off.

And since 1865, non-Indians have resided on that portion of the reservation, living and acting as if it were not a part of the reservation at all. They have enjoyed a windfall of sorts, because they do not pay property taxes to either the Band or the local units of government, based on a loosely-worded opinion letter from the Michigan Attorney General’s Office dating back to 1870 asserting that neither the Band nor the county may tax the acreage. And they pay nothing in rent, either. Schoolzone died in a fiery cart crash in 1875, having never negotiated the rental rate or making any effort to collect on rent.

Each year since 1875, RRB sends formal notice to the non-Indian residents in this corner of the Reservation demanding rent at the fair market rate. On several occasions between 1875 and 2010, RRB sued the non-Indian residents claiming trespass damages and seeking the eviction of the trespassers, sometimes in state court and sometimes in federal court. All of the suits are dismissed by the various courts on grounds not relevant to this exam.

In 2010, worried about liability for Schoolzone's failure to negotiate a rental agreement with the non-Indians, the United States Department of Justice relents and finally joins RRB in suing the non-Indian residents of that portion of the reservation, seeking back rent and/or trespass damages, as well as future rent to be negotiated between the parties. The plaintiffs also seek to evict the residents.

Who will prevail, and why, if the defendants raise the equitable defenses of laches and acquiescence? Assume RRB and the United States can prove conclusively that the non-Indians are trespassers and that the \$50 million damages estimate is accurate.

## **Question 2**

The Ojibwa (leaders) of what would become the Lake Matchimanitou Band of Ottawa Indians (LMB) entered into a treaty in 1864 with the federal government. The treaty set aside 20,000 acres of land in what would become Ogemaw County, Michigan as the reservation for the Band. The treaty stated: "All reservation lands shall be set apart and surveyed and marked out for their [Indians] exclusive use; nor shall any non-Indian be permitted to enter upon the same without permission of the tribe and the Commissioner of Indian Affairs and the Indian agent."

The Ogemaw Band now owns and operates a mildly successful gaming operation under the Indian Gaming Regulatory Act on the Lake Matchimanitou

Reservation. The casino is the leading source of jobs for Band members; about 75 percent of the employees at the casino are Band members. However, the casino market in Ogemaw County is weak, and the casino barely breaks even in any given year. As a result, the casino employee wages and benefits are substandard. About half of the casino employees earn less than seven dollars an hour. The federal minimum wage is \$7.25 and the State of Michigan's minimum wage is \$7.40.

Ten employees of the casino petition the Band's casino management for a raise, threatening to complain to the United States Department of Labor's Wage and Hour Division in accordance with the federal Fair Labor Standards Act (FLSA). The FLSA, enacted in the 1930s when Indian tribes rarely employed anyone, is silent as to whether it applies to Indian tribes and their business enterprises.

Casino management does not respond for a week, and in the interim the Band's tribal council enacts legislation establishing a \$5.00 minimum wage on the Lake Matchimanitou Reservation that applies to all current and future employees.

Following the enactment of this legislation, the Band's casino management informs the ten employees that their request for a raise is denied, and that any further effort to seek raises or file complaints with the federal government will be met with immediate termination of employment. The letter informing the ten of this threat notes that casino management is sympathetic to the concerns of the employees, but that the costs to management of increasing wages would effectively render the casino unprofitable, and perhaps would force the closure of the casino.

The ten employees ignore the threat and complaint with the federal Wage and Hour Division. Casino management terminates the employment of all ten as soon as it receives notice of the complaints, an act that alone would subject the casino to significant financial liability under the FLSA, assuming it applies.

Does the federal government have jurisdiction over the LMB casino?

# **Federal Law and Indian Tribes**

**Fall 2008**

**Prof. Fletcher**

## **Final Exam – Preliminary Questions**

### **Comments on the Preliminary Questions**

Below are twelve essay questions. On the final exam, you will be asked to answer four essay questions. The four final exam questions will be taken from the following twelve. One or possibly two of the questions on the final exam will be policy questions and the remainder will be issue spotting questions. This is an open book exam and you must rely upon materials either discussed or prepared for class. Do not rely upon outside materials in your answers.

Because you will have the potential questions before the final exam date *and* because it is an open book exam, I will expect better answers than I would have expected in normal exams.

I value creativity. I would hope that you will be able to provide a creative answer to some of the questions below. With a few possible exceptions, each of the issue-spotting questions is a question of first impression in Federal Indian Law. Offer me arguments based on the cases and statutes we studied in class, but make policy arguments, too. I expect arguments to be made on both sides in each answer (even three or sides, if you see them), with the student making a strong argument about which side is the better solution. None of this advice should be particularly new to you, but due to the exam format, I expect a great deal.

Please do not ask me any questions about the exam, except in regards to the information contained in this comments section. I will not discuss anything about the questions that follow. Assume any ambiguities to be intentional.

## **Question 1**

Several months after a recent election, held on November 4, 2008, one that was perhaps the most hotly-contested election in recent memory, the new Chairman (Mary Green) of the Lake Matchimanitou Band of Ottawa Indians files suit on behalf of the Band in state court against the outgoing Chairman (Elizabeth Red), and several former key employees (Bob Lawyer, Sean Lawman, and Enid Innocent). Lawyer, a resident of the Band's reservation, is not a citizen of the Band. Lawman, who is a citizen, is not a resident of the reservation, while Red and Innocent are both Band citizens and reservation residents.

In the early morning following the election (November 5), the lame-duck Chairman Red held one last staff meeting with her key employees, Lawyer (the Attorney General for the Band), Lawman (the lead attorney for the Band's gaming enterprise), and Innocent (the tribal manager, the leading staff person for the Band's government), at a Denny's a few minutes from the Band's headquarters. At that meeting, Chairman Red fired each of the key employees, paying each a \$250,000 in severance. She anticipated that the incoming administration would fire them anyway.

Chairman Green's suit alleges a host of tort and contract claims that could be based in either tribal law or state law, since the Band has adopted state law for all practical purposes. Each of the four defendants is expected to file separate motions to dismiss on jurisdictional grounds based in federal Indian law. You are the new attorney for the Band. Assess the likely arguments to be raised by each defendant, and their likelihood of success.

## **Question 2**

After a series of unfortunate events, including the collapse of the United States economy, the tribal gaming enterprise of the Lake Matchimanitou Band of Ottawa Indians closes. Bank of North America, the primary investor in the Band's gaming enterprise, sues to collect on its failed investment. The Bank sues the Band in federal court, and separately sues the Band's outside counsel, Berkman Deloria Goldman & Petoskey, located in Seattle, Washington, in the Band's tribal court.

The Bank's separate suits rest on the loan documents, which allow for a suit to recover in the event of a default on loan payments, in a "court of competent jurisdiction."

What are the possible federal Indian law-related jurisdictional defenses that the Bank and the Band could raise?

### **Question 3**

Jesus Torres y Martinez, a Mexican national residing legally on the Lake Matchimanitou Indian Reservation, is charged in the Lake Matchimanitou Tribal Court with aggravated reckless driving, a criminal misdemeanor under tribal law. The tribal prosecutor serves notice that she intends to seek jail time if Torres y Martinez is convicted. The defendant is represented by counsel, and has requested a bench trial.

What are the legal and policy arguments for and against tribal court jurisdiction, and which of these arguments should prevail?

### **Question 4**

Allegan Western Railroad Company, a non-Indian-owned company based off-reservation, owns a right of way that runs parallel to much of the Lake Matchimanitou Indian Reservation. The right-of-way runs within 100 yards of the reservation's southern border for a ten mile stretch, and crossing into the reservation at the southwest corner for about 100 yards. The Secretary of Interior, with the Band's consent, approved the right-of-way over a century ago.

Allegan Western's most profitable freight is spent nuclear waste, with the occasional nuclear missile. Internally produced documents, recently made public, demonstrate that Allegan Western made an explicit choice to run its nuclear freight past (and slightly into) the reservation, as opposed to a shorter route that would take the freight further around the reservation. Allegan Western made this decision on the grounds that its insurance company made an actuarial determination that the lives of American Indians were less valuable in case of a major accident than the lives of the non-Indians living near the second route. Both routes would take the nuclear freight near the same number of persons.

The Lake Matchimanitou Band wants to assert the authority to regulate the railroad under tribal law, conceding that it cannot stop the railroad from transporting its nuclear freight. What are its chances? Assess the legal claims and defenses.

## Question 5

The Lake Matchimanitou Band of Ottawa Indians holds a referendum in accordance with the Band's constitution. The referendum passes, amending the Band's constitution to read:

No person who is of African descent may be a citizen of the Band absent the express consent of the Band's tribal council. Any citizen of the Band may sue in tribal court to compel the disenrollment of any other citizen to enforce this provision. Persons who are disenrolled in accordance with this provision will be immediately banished from the reservation.

You represent a class of citizens who are citizens of the Band, but expect to be disenrolled in tribal court because they are Black Indians. What are their potential legal defenses or remedies, and can they expect to prevail? What if the referendum was conducted by the Secretary of the Interior in accordance with the Band's constitution, and in accordance with federal regulations on Secretarial elections?

## Question 6

Odawa Gas (OG), a tribally-owned, tribally-chartered business corporation, doing business on the Lake Matchimanitou Indian Reservation, imports petroleum from a company owned by a First Nation in Canada, the Anishinaabe Gas Company (AGC). Half of the imported gas is shipped directly over the Great Lakes from AGC to OG, while the other half is shipped over land in the State of Leelanau.

OG refines the imported petroleum in an on-reservation facility into kerosene and natural gas. It sells the kerosene and natural gas exclusively to residents of the Lake Matchimanitou Indian Reservation, about half of which are non-Indians, some of whom live on tribal trust land and some of whom live on non-Indian-owned fee land within the reservation.

OG also manufactures gasoline that it sells at a gas station on trust land on two reservations, the Lake Matchimanitou Indian Reservation and the Northern Anishinaabe Indian Reservation, located in an adjoining State.

The State of Leelanau, where the Lake Matchimanitou Band is located, seeks to tax the sales of kerosene, natural gas, and gasoline. The State's tax laws state that the legal incidence of such taxes are on the retailer (the seller). Can it?

The State of Menominee, where the Northern Anishinaabe Indian Reservation is located, seeks to tax the gasoline sold by OG on that reservation. That State's tax laws indicate that the legal incidence of the tax is on the manufacturer. Can it?

Assume tribal sovereign immunity is not an issue.

## Question 7

The United States Congress, concerned about the Supreme Court's federal Indian law jurisprudence, enacts a statute known as the *Montana* fix, intending to reverse the Supreme Court's decision in *Montana v. United States* in the same manner as it attempted to reverse the Court through a *Duro* Fix.

After the enactment of the *Montana* Fix, Ellis Short, a non-Indian and managing partner of the law firm Berkman Deloria Goldman & Petoskey, is assessed a \$1000 tax bill by the Lake Matchimanitou Band of Ottawa Indians' Internal Revenue Service. The Band's Internal Revenue Code authorizes a flat tax on any person that earns income on the reservation. Short had represented a tribal member who sued the Band under the Band's tort claim act and earned over \$100,000 in attorney fees from the suit.

Short hires you to defend him on the theory that the *Montana* Fix is unconstitutional. Prepare a memorandum highlighting the best arguments in favor striking down the *Montana* Fix and their likelihood of success.

## Question 8

The ogemuk (leaders) of what would become the Lake Matchimanitou Band of Ottawa Indians entered into a treaty in 1864 with the federal government (that was ratified by the Senate unchanged). The treaty set aside 20,000 acres of land in what would become Ogemaw County, Michigan as the reservation for the Band. The treaty stated: "All reservation lands shall be set apart and surveyed and marked out for their [Indians] exclusive use; nor shall any non-Indian be permitted to

reside upon the same without permission of the tribe and the Commissioner of Indian Affairs and the Indian agent.”

Starting in 1865, with the passive and informal permission of the Michigan Indian agent, Hank Schoolzone, a group of 100 or so non-Indians settled on 2500 acres of the southwest corner of the Lake Matchimanitou Indian Reservation. The ogemuk protested to Schoolzone but he responded in writing that if the Band continued to object, he would recommend that Congress abrogate the 1864 treaty and terminate the Band’s reservation altogether. The ogemuk believed his threats and backed off.

And since 1865, non-Indians have resided on that portion of the reservation, living and acting as if it were not a part of the reservation at all. They have enjoyed a windfall of sorts, because they do not pay property taxes to either the Band or the local units of government, based on a loosely-worded opinion letter from the Michigan Attorney General’s Office dating back to 1870 asserting that neither the Band nor the county may tax the acreage.

In the 1970s, after an Indian Claims Commission determination, the Band recovered a small amount of money from the United States for the loss of this land. But this was insufficient relief.

In late 2008, the United States and the Band jointly sue the non-Indian residents of that portion of the reservation, seeking back rent and/or trespass damages, as well as future rent to be negotiated between the parties. The plaintiffs do not seek to evict the residents.

Who will prevail, and why?

## **Question 9**

Based on a law review article written by a University of Utah law professor, the Lake Matchimanitou Band of Ottawa Indians enacts an ordinance purporting to tax the income of tribal members who reside outside the boundaries of the Lake Matchimanitou Indian Reservation.

Joaquin MacGillicuddy, a tribal citizen who lives far from the Reservation, is unusually wealthy. His wealth derives from income he receives as author of a series of mystery novels based on the reservation, but he has not visited the reservation since he was a child.

Joaquin is angry about the tax, and vows to fight in federal court. Assess his chances, assuming he receives a tax assessment notice from the Band that authorizes him to challenge the tax in tribal court.

## **Question 10**

Justice Kennedy's concurrence in *United States v. Lara* includes the following paragraph:

Lara, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both. ... Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe. ... The majority today reaches beyond that limited exception.

Provide a memorandum responding to Justice Kennedy's charges, or agreeing with his conclusion.

## **Question 11**

The Lake Matchimanitou Band of Ottawa Indians leases much of its trust land to non-Indian-owned apple and cherry growers, as well as vineyards that make high-quality, northern Michigan wine. Each summer, these non-Indian leaseholders bring in dozens, and sometimes hundreds, of migrant workers. All of these workers are legal aliens, and the leaseholders appear to be complying with federal law.

But the Band is concerned with the presence of these workers, of whom they know practically nothing. The Band's tribal council decides to enact an ordinance requiring the leaseholders to register the names and other relevant personal information about the summer migrant workers with the tribal government.

The leaseholders object to this ordinance, and refuse. Can the Band force the leaseholders to comply by suing them in tribal court? Assume the federal immigration laws have no preclusive effect on the Band's ordinance.

## **Question 12**

Finding that the health of urban Indians in its metropolitan areas is appalling due to a wide variety of social and legal reasons, the State of West Michigan enacts a statute that purports to extend free health care to American Indians residing within the State if they can prove that they are either (1) one-quarter Indian blood or (2) a member of federally recognized Indian tribe.

Assuming there are no state constitutional restrictions, assess the constitutionality of the statute under federal law.

# **Federal Law and Indian Tribes**

**Fall 2009**

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## Question 1

The Kalamazoo Band of Potawatomi Indians (KBPI) is non-federally recognized tribe. They are currently engaged in the Federal Acknowledgment Process and have received notice from the Department of Interior that they have been granted preliminary approval. KBPI expects final approval in the next year or so.

Confident that they have federal recognition wrapped up, KBPI's tribal council enters into a gaming management contract with a Section 17 corporation owned by the Ogemaw Band of Chippewa Indians, located in Ogemaw County, Michigan. The Ogemaw Band's corporation, known as Ogemaw Holdings Corp. (OHC), loans the Kalamazoo Band \$10,000,000 in cash for the purpose of starting up the Band's governmental and economic infrastructure in accordance with the contract. In six months, OHC promises to loan KBPI an additional \$10,000,000.

Relations between the parties sour quickly, and OHC sues in the Ogemaw Band of Chippewa Indians Tribal Court – the venue named in the contract should a dispute arise. KBPI counterclaims in tribal court with its own contract breach claims, and defends on the grounds of tribal sovereign immunity. OHC also raises its sovereign immunity.

The contract is silent as to each parties' immunity. The federal charter for the OHC provides:

The Corporation is expressly authorized and empowered to conduct any lawful business included but without limitation the following:

To sue and be sued in its Corporation name in courts of competent jurisdiction within the United States including the courts of the State of Michigan, the United States of America, and the Ogemaw Band of Chippewa Indians.

Assuming the Indian Gaming Regulatory Act is inapplicable, assess whether the KBPI and the OHC will succeed in their respective immunity defenses.

## Question 2

Robby McBurglar is a citizen of the Lake Matchimanitou Band of Ottawa Indians, a federally recognized tribe located in Michigan. The State of Michigan convicted Robby of multiple counts of attempted larceny and sentenced him to 20 years in the state slammer.

While in the state pen, Robby's health begins to decline. The Michigan Bureau of Prisons (MBP) has a serious budget crunch and provides terrible health care to prisoners. Robby suggests to the warden that he be allowed to travel, under guard, to the nearby Ogemaw Indian Reservation, where the Ogemaw Band of Chippewa Indians operates an Indian Health Service (IHS) clinic. Under federal law, IHS clinics cannot refuse services to citizens of federally recognized tribes (like Robby). After much bureaucratic wrangling irrelevant to this question, the MBP and the Ogemaw Band agree on how to transport Robby to Ogemaw and how to provide security, and so on.

While at the IHS facility located in Indian Country, Robby escapes from the joint custody of the Ogemaw Band and the MBP. Escape from custody is a violation of the criminal laws of the State, the United States, and the Ogemaw Band.

Which sovereign or sovereigns, if any, has jurisdiction to prosecute Robby for escape?

### **Question 3**

The Lansing Band of Anishinaabek, a federally recognized tribe, enacts a statute authorizing same-sex marriages to be recognized within its jurisdiction.

Congress, enraged for some reason, enacts a statute flatly prohibiting the Band from enacting any same-sex marriage-related statute. The Band has never agreed to allow Congress to legislate in the Band's internal, domestic affairs.

Is Congress's statute valid under principles of federal Indian law?

### **Question 4**

An Indian treaty between the United States and the Indiana Band of Indiana Indians (Indiana Band), a federally recognized tribe, that was never ratified by the Senate is introduced in the legislature of the State of Indiana. The state's governor

executes the document, with the consent of the Indiana Band, and the state legislature ratifies the document in accordance with its legislative process as ordinary legislation.

The only provision of interest in the treaty-slash-state statute is the guarantee of a reservation near Indianapolis. The federal government never took action to effectuate that guarantee and the lands in questions are wholly owned by the State of Indiana's Department of State Parks. The state legislature, in accordance with the terms of the agreement, turns over the lands to the Indiana Band.

Concurrently, the state legislature enacts a statute granting a casino gaming monopoly to the Indiana Band, authorizing all forms of gaming that would be authorized under the Class III definition of gaming under the Indian Gaming Regulatory Act (IGRA) on these lands in exchange for 30 percent of the net win. The state statute also sets out other provisions that would be sufficient to conclude a Class III gaming compact under IGRA. The Indiana Band agrees to these terms, and begins gaming operations immediately.

Jealous Competitive Gaming Corp. (JCGC) sues both the State's governor and the Indiana Band in federal court, alleging that the state legislature's statute violates the Fourteenth Amendment. Assuming the federal court has jurisdiction (meaning no sovereign immunity defenses are viable), assess whether the claim will be victorious.

## **Question 5**

Congress enacts the Oliphant Fix, recognizing the authority of Indian tribes to prosecute all criminal perpetrators in their respective jurisdictions.

The Rabbit River Band of Ottawa Indians in Allegan County, Michigan initiates the first prosecution of a non-Indian in accordance with the statute, Hamilton Murderer, or Ham. Ham is accused, perhaps not surprisingly, of the murder of four people.

In accordance with the Indian Civil Rights Act (ICRA), the Band does not guarantee paid counsel for indigent defendants. Ham, a citizen of the O'Hare Band of Illiniwek, a federally recognized Indian tribe with a lucrative gaming operation on the edges of O'Hare Airport in Chicago, can afford expensive defense counsel. Ham demands a jury, and although the Band attempted in good faith to call both

tribal members and nonmembers in accordance with both tribal statute and tribal court rule, only tribal members appeared for the jury voir dire.

The prosecution proceeds with the jury trial, with the tribal court complying completely with the Michigan rules of criminal procedure. Ham is convicted, and sentenced to four years in jail – four one-year jail terms to be served concurrently. Ham appeals to the Rabbit River tribal court of appeals, and loses his appeal on the merits.

Ham then files a petition for a writ of habeas corpus in federal court in accordance with ICRA. Assess Ham's potential claims on appeal (assuming they are all preserved for federal habeas review) and whether they will prevail.

## **Question 6**

Leroy Fuego likes fire. A lot. He is known to say "Fire! Yeah!" at random moments of conversation. Although he is not a tribal member, he lives with his mother (who is a tribal member) on tribal trust lands located within the Hog Island Indian Reservation in Lake Michigan. The reservation on Hog Island encompasses about one-half of the entire land mass of the island; the rest of the island is state land. About 250 tribal members and their relatives live there. There are no non-Indians on any part of the island, except for the stray Michigan Department of Natural Resources personnel who periodically come to the island to maintain the state lands there.

Leroy, a precocious teenager, has a history of burning things, and sets fire to the leaves he has raked into a large pile on his mother's property one fall. The Hog Island Tribe's fire department puts it out without much damage, and warns Leroy and his mother that next time they might take legal action.

The Tribe immediately enacts a statute providing for civil and criminal penalties for arson.

The next year, Leroy (now 18) sets fire to his raked leaves. This time, his fire burns down his mother's house and three more houses in the neighborhood, all on tribal trust lands.

For political reasons, the Tribe's prosecutor pursues a *civil* claim against Leroy for the fire on behalf of the victims. It turns out Leroy has deep pockets. He is a citizen of his father's tribal nation, the Waasamowin Band of Ojibwa Indians

that recently won a large land claim against the federal government, and has a tribal trust fund account that he can access for educational and other purposes.

Leroy challenges the validity of the civil arson statute in federal court. While the Hog Island Tribe has a tribal court, it consists entirely of the tribal council sitting as the court, so his lawyer sees no reason to proceed in “tribal court.”

Can Leroy challenge the tribal statute directly in federal court? If so, will his claims succeed?

## **Question 7**

The Waanaaby Indian Nation, a federally recognized Indian tribe, owns and operates a gravel pit on its reservation. The Nation has no other businesses. About half of the Nation’s governmental budget consists of revenue from the pit, with the rest of the budget from federal appropriations and grants. The Nation provides minimal public services, including public safety, housing, and utilities, but is very underfunded. Most reservation residents are very poor.

Given that the Nation’s reservation is located far from non-Indian communities, 99 percent of the Nation’s labor force consists of tribal members and nonmember Indians. As such, gravel pit employees are entirely Indian, with about 75 percent of the employees members of the Nation, and the rest are nonmember Indians hired under the tribally-enacted Indian preference in employment ordinance.

Working in the gravel pit is hard and dangerous. While the Nation makes every effort to compensate the employees well and ensure safe working conditions, the economy has hit the reservation hard. Accidents are frequent, and the Nation has no choice but to drop the health insurance coverage it previously provided to the gravel pit employees.

Unified Gravel Laborers, Inc. (UGLI) recruits several employees to begin a labor union at the Waanaaby pit. The Nation’s gravel pit management threatens to fire all employees involved in organizing, an act that UGLI charges is a violation of the National Labor Relations Act. UGLI brings an unfair labor charge to the National Labor Relations Board, which holds in accordance with its own precedents that the Act applies to the Nation and its gravel pit. The Board orders a union election.

The Nation challenges the Board's holding in the Fourteenth Circuit Court of Appeals. Will it prevail in asserting that the Act is inapplicable to the gravel pit?

## Question 8

Lily Littlebo is a member of the Anazasi Indian Tribe, a federally recognized tribe in the State of Anazasi. She is a single mom and lives on her tribe's reservation with her daughter Alice, a precocious ten-year-old. While Alice is enrolled in the Tribe, she is only one-sixteenth Indian blood.

Alice is walking home from school on a street that serves as the reservation border when state police pick her up for underage smoking and loitering. The State of Anazasi Department of Social Services initiates a protection action in state court against Lily, looking to eventually terminate her parental rights. The Anazasi Indian Tribal Attorney's Office files a motion to transfer the case to the Anazasi Tribal Court.

Anazasi's Attorney General, William Foxnewsworthy, has been looking for a test case to challenge tribal treaty hunting and fishing rights to satisfy his anti-Indian constituents, but has been unable to find one. He jumps at the chance to assert a claim in *In the Matter of Alice L.* He personally files an objection to the Tribe's motion to transfer the case to tribal court on behalf of the State, arguing that the Indian Child Welfare Act is unconstitutional under the Fifth and Tenth Amendments.

Assess the viability of the constitutional challenges to ICWA.

## Question 9

The La Jolla Indian Rancheria of the State of Cocobanana, a federally recognized Indian tribe located in (you guessed it) the State of Cocobanana, files suit in federal court to enjoin the imposition of state income taxes on its members.

La Jolla has very little tribal land, with most of its trust land occupied by the La Jolla Casino and Resort. While the Rancheria has attempted over many years to acquire more trust land for housing and governmental purposes, the State of Cocobanana objects and has effectively vetoed these trust acquisitions through various political and legal means. As such, all tribal members live on fee lands.

Moreover, 90 percent of the tribal members are technically unemployed, entirely living off of their gaming revenue per capita distributions. All of these tribal members testify that they would move to tribal trust lands if they could, and they do live on fee lands owned by the Rancheria near the casino.

The Cocobanana Department of Revenue imposes its income tax on these tribal members, leading to the lawsuit noted above.

Assess whether La Jolla's will prevail in its request for an injunction, assuming that the federal court has jurisdiction.

## **Question 10**

The Neen-Nghoos Band of Fishing Indians resides on an Indian reservation in East Dakota, on the Rust River of the North. Neen-Nghoos Band's members are very poor, and rely primarily on the plentiful, fatty, and downright scrumptious fish they procure from the Rust River, something the tribe has been doing since time immemorial.

However, the quantity and quality of the fish is declining rapidly. The number of fish in the river is declining because of the pollution reaching the Band's reservation from East Dakota towns upstream. The fish that are caught and consumed by the Indians are becoming unhealthy and infested with pollutants, likely causing an increase in cancer and high infant mortality amongst Neen-Nghoos Band members.

The Band enacts a water quality ordinance in accordance with the Clean Water Act, approved by the United States Environmental Protection Agency, which has bestowed "treatment as a state status" upon the Band, also in accordance with the Clean Water Act. The ordinance purports to limit the amount of sewage and other pollutants that upstream river users dump in the Rust River.

Upstream towns and private companies bring suit, challenging the authority of the Neen-Nghoos Band to regulate nonmember conduct. Assess the viability of that argument.

## **Question 11**

The tribal council of the Green Lake Tribe of Seattle Indians, a federally recognized tribe, disenrolls and banishes four tribal members because the council learns that each of them has an African-American grandparent. The disenrollment and banishment are all conducted in accordance with tribal law that denies membership to any otherwise eligible person if they have one-quarter African-American blood and further requires the immediate physical removal from the reservation any person found to be in violation of this law.

The four banished Indians file suit in federal court against the individual members of the tribal council as well as the tribe, claiming that their disenrollment and banishment violates multiple federal statutory and constitutional provisions. All of these claims are dismissed on grounds of sovereign immunity, and the Indians eventually file a petition for a writ of certiorari before the United States Supreme Court.

You are a Supreme Court clerk, and your Justice is interested in the reasons for the Green Lake Tribe's actions. Explain the *public policy* reasons for and against the exercise of tribal sovereign immunity in this context, and whether or not the Supreme Court should grant certiorari with an eye toward reversal.

## Question 12

On January 1, 2010, a statute enacted by the Mamagona Band of Anishinaabek Indians, a federally recognized Indian tribe located in the State of Upper Michigan, will go into effect. The statute authorizes the tribal police department to begin enforcing tribal criminal laws against non-Indians by utilizing civil enforcement penalties. In other words, tribal cops can arrest suspected criminals, investigate the crime, and charge the defendant with a civil offense. Penalties are limited to fines, although those who refuse to comply with a valid tribal court order can be subject to civil contempt, which includes up to 60 days in the tribal jail.

On January 2, 2010, a non-Indian male – Dwight Gluten – parks his oversized truck at the Mamagona Band casino parking lot, located on trust land. He enters the building, begins gambling and drinking, and eventually engages in fisticuffs with casino security. The security guards hold Dwight until the tribal cops arrive. Before issuing a civil citation to Dwight for brawling, the tribal police look inside Dwight's truck and sees two shotguns, ammunition, and an open shopping bag full of what looks like marijuana. After opening the truck, the tribal police confirm that it is marijuana. Under the civil offenses statute, the tribal police

confiscate the drugs, the guns, the ammunition, and the truck. They also cite Dwight for drug possession and trafficking. After Dwight calms down, they call him a taxi and he leaves.

Dwight, of course, refuses to pay the civil citations he received from the tribal police, and he decides to challenge the tribal police department's authority to seize his property – the truck, the guns, and the ammunition. On advice of counsel, he chooses not to claim the drugs as his own property.

The tribal court and then the tribal court of appeals affirm the Band's authority to seize Dwight's property, including the drugs. They also affirm his civil offense convictions.

Dwight appeals to federal district court, challenging the Band's authority to seize his property and to convict him for civil offenses.

Will he succeed? Assume the tribal police had probable cause to search his truck and that the Band will decline to assert immunity defenses.