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The White Earth Reservation Land Settlement Act of 1985 or WELSA

ref. http://welsa.org

Background

The White Earth land claims controversy involved the individual property rights of Indian people who had received allotments of land to be held in trust status by the United States government. The land claims in White Earth involved over 100,000 acres of allotments to individuals, which were illegally transferred during the early 1900's. The illegal land transfers were acquired through various means including the use of liquor, falsified affidavits, sales by minor children, and illegal tax forfeitures by the counties. After litigation commenced and the extent of the claims became apparent, the federal government decided a negotiated political settlement would be the best option to settle the land claims controversy. The Result was the White Earth Reservation Land Settlement Act of 1985, Public Law 99-264 (100 Stat. 61), amended by Public Law 100-153 (101 Stat. 886) and Public Law 100-212 (101 Stat. 1433) (hereinafter WELSA and codified at 25 U.S.C. 331 note).

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The Fostering Connections to Success and Increasing Adoptions Act of 2008 Offers Help to Children Raised by Relatives

The Fostering Connections to Success and Increasing Adoptions Act (H.R. 6893/P.L. 110-351) will help children in foster care and will offer new support to many children who are being raised by their grandparents and other relatives because their parents cannot care for them.

• The Fostering Connections to Success and Increasing Adoptions Act helps different groups of relative care families in various ways.

The Act offers:

1. Notice to Relatives When a Child is about to Enter Care. State child welfare agencies must provide notice, within 30 days of the removal of any child from the custody of the child's parents, to all adult grandparents and other relatives of the child. There are exceptions in situations of family or domestic violence. This notice allows grandparents and other relatives to get involved early in the child's care, as sometimes these relatives can prevent the child from going into foster care. The Act also allows child welfare agencies to obtain state and federal child support data, including information to help locate children's parents and other relatives.

2. Grants for programs to Engage Family Members. New Family Connection Grants will connect children in or at risk of entering foster care to family. $5 million of the $15 million in annual guaranteed funding for the grants is reserved for Kinship Navigator programs. These programs will help link relative caregivers, both in and out of foster care, to services and supports for the children. It also will help agencies more effectively and efficiently serve kinship care families. State agencies, agencies serving large metropolitan areas, Indian tribal organizations, and private nonprofit organizations with experience serving children in foster care or kinship care may apply for the competitive grants. Funding can also be used for intensive family-finding efforts, family group decision making meetings, and residential family substance abuse treatment programs, all of which help get family members involved.

3. Federal Support to States for Kinship Guardianship Assistance. State child welfare agencies will have the option to use federal funds for relative guardianship assistance to help children leave foster care to live permanently with relatives. The law states that for this provision to apply, children must have been cared for by prospective relative guardians in foster care for six consecutive months and the children must be eligible for federal foster care payments in the home of the relative caregiver. Before offering kinship guardianship assistance, state agencies must also determine that reunification and adoption are not appropriate options for these children. Also, they must document efforts to discuss adoption with the relatives and kinship guardianship with the child's birth parent, and children ages 14 and older must be consulted about guardianship arrangements. Children living with relative guardians will be eligible for Medicaid and a cash payment that may not exceed the foster care payment. Generally, children are eligible to receive guardianship assistance to age 18. However, in certain circum-

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Procedure

The WELSA office in Bemidji, Minnesota determines which allotments have claims; gathers and submits all legal documents regarding potential heirs and potential compensation; and requests payment from the United States Treasury for those heirs. The following types of claims concerning the original allotments are covered by WELSA: sales of illegally tax forfeited lands; sales by minors without government approval; sales by "full bloods" without government approval; and sales by court appointed guardians or probate administrators without government approval. Heir determinations pursuant to the Act are initially probated by the Department of Interior, Office of Hearings and Appeals, WELSA Division. 43 C.F.R. § 4.350, et seq.

All claims are probated under the Minnesota inheritance law that was in place at the time of the passage of WELSA, as provided in the technical amendments to WELSA. WELSA probates are more determinations of heirship and compensation for the settlement of the land claims than full probates. These heirship determinations and compensation determinations follow the dictates of WELSA and the relevant contemporaneous Minnesota inheritance laws. The application of the inheritance laws that existed in Minnesota in 1986 to make determinations has caused problems regarding legitimacy of heirs, paternity of heirs, adoptions in and out of the families of heirs and claimants, and other problems.

The WELSA probate process begins with the Probate Clerk gathering file information concerning births, marriages, and deaths. That information is submitted to an Administrative Judge who issues a Preliminary Heirship Determination Order. 43 C.F.R. § 4.351. The Preliminary Heirship Determination can be appealed within forty (40) days. 43 C.F.R. § 4.352 (b)(1). A Final Order Determining Heirs is signed by the Judge and can be appealed within thirty (30) days. 43 C.F.R. § 4.352 (b)(3). The heirship determination process is not closed at this point. If there is a need for further heirship determination (for example, if an identified heir died after the original allottee) the OHA Judge may issue an order for further probate actions. Following final orders in these WELSA probates, notices of compensation are sent out to the determined heirs. If the forms are signed and returned, the indicated compensation will be disbursed to the heirs. If the heir disagrees with the information contained in the Notice, instructions are included in the Notice as how to file suit in U.S. District Court. In terms of the character of the compensation itself, Section 16 of WELSA states: "None of the moneys which are distributed under this Act shall be subject to Federal or State income taxes or be considered as income or resources in determining eligibility for or the amount of assistance under the Social Security Act or any other federally assisted program."

A party aggrieved by a final order of an administrative judge under 43 C.F.R. § 4.352, or by a final order upon reconsideration of an administrative judge under 43 C.F.R. § 4.354, may appeal to the Interior Board of Indian Appeals (IBIA). 43 C.F.R. § 4.356. The notice of appeal must be filed with the Board no later than thirty (30) days from the date on which the final order of the administrative judge was mailed, or, if there has been a petition for reconsideration or rehearing filed, no later than thirty (30) days from the date on which the final order upon reconsideration of the administrative judge was mailed, untimely filings are dismissed. 43 C.F.R. § 4.356 (b). The Board may issue a decision affirming, modifying, or vacating the final order or final order upon reconsideration and a decision on appeal by the Board either affirming or modifying the final order or final order upon reconsideration shall be final for the Department of the Interior. 43 C.F.R. § 4.356 (e).

Appeals of IBIA decisions to the Federal District Courts typically occur via the Administrative Procedure Act, 5 U.S.C. § 704, as requests for relief from a Department of the Interior agency final decision for which there is no other adequate remedy. Questions of heirship determinations, compensation calculations, and constitutionality of WELSA have been litigated in the federal courts. See e.g., Littlewolf v. Lujan, 887 F.2d 1058, 1066 (D.C. Cir. 1989); Manypenny v. United States, 948 F.2d 1057 (8th Cir. 1991), Shangreau v. Babbitt, 68 F.3d 208 (8th Cir. 1995); and Smith v. Babbitt, 96 F.Supp. 907 (D.Minn. 2000). The application of the Minnesota inheritance laws has resulted in hardship to many potential (and likely rightful) heirs as evidenced by the Court's language in Smith v. Babbitt in reluctantly affirming the IBIA decision:

> The Court notes, however, that it arrives at this conclusion with a great deal of reluctance. In reaching his initial heirship determination in this case, the ALJ described the Minnesota intestacy laws of 1986 which Congress, through WELSA, has frozen in time, as "archaic." The Court wholeheartedly agrees with this characterization. Apparently even the Minnesota legislature concurs, since soon after the enactment of WELSA it amended the laws at issue. The usurpation of individual rights on the basis of illegitimacy is distasteful, especially in circumstances such as these, in which such rights are denied in the face of the long-standing traditions and customs of native people. The result in this case is even more unpalatable, given that it appears to arise from the unfortunate happenstance of WELSA's enactment just a few months too early. Although a simple amendment to WELSA would lead to more just result, it is not the province of this Court to enact legislation. The remedy for this injustice lies with the Congress of the United States.

It may appear that a settlement act from 1985 is not relevant to any current litigation issues or that the probates under WELSA have been resolved in this intervening time period. This is not the case though as the WELSA office, the OHA WELSA Division, and the IBIA still deal with these probate/claim issues that arise from the United States Government's attempt to compensate those wronged by the illegal land sales and to quiet title to the land for the current landowners.

Potential heirs still face legal barriers such as proof of parentage and wrongful adoptions out of their families (adoptions that would today be barred by the Indian Child Welfare Act), that serve to prevent their compensation under WELSA. Potential heirs often go through the process of challenging these determinations pursuant to WELSA without counsel or any expertise in dealing with OHA or federal law. As long as there are allotments that are identified or heirs that remain to be identified, the WELSA probate actions will continue to be heard by the OHA.

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stances, children may be eligible to continue to receive guardianship assistance to wage 21. Currently 37 states and the District of Columbia have subsidized guardianship programs. Federal support for such programs will help them reach more children. All children receiving support for subsidized guardianship payments and services in a state under a federal child welfare waiver on September 30, 2008 will be automatically eligible to continue this support if the state decides to provide kinship guardianship assistance under the act.

4. Keeping Siblings Together. State child welfare agencies must make reasonable efforts to place siblings in the same foster care, kinship, or adoptive home or to maintain connections among siblings, unless it would be contrary to their safety or well being to do so. Siblings may be covered by kinship guardianship assistance even if not all are eligible individually.

5. Helping to Keep Children in School. State child welfare agencies must assure that every school-age child in foster care or receiving kinship guardianship or adoption assistance is enrolled full time in school. In addition, while making placement decisions for a child in foster care, child welfare agencies must help to keep the child in his or her original school, when it is in the child's best interest, or assist with a prompt transfer to anew school.

6. Eligibility for Independent Living Services and Education and Training Vouchers. For the first time, children who leave foster care after age 16 for kinship guardianship will now be eligible for education and training vouchers for higher education or other vocational training. (Currently only children who remain in foster care or are adopted at age 16 or older from foster care are eligible for this help.) The law also states that these children will be eligible for independent living services.

7. Clarifies That States May Waive Non-Safety Related Licensing Standards for Relative Homes On a Case-by-Case Basis. Currently certain licensing standards applied to all foster parents create special barriers for foster parents who are related to the child.Most often these rules are related to physical conditions in the home, such as requirements that there be a separate bedroom for each child or a certain amount of square footage in the home. Current guidance clarifies that such standards can be waived in individual cases, but now it is explicit in this new law. The new law also requires the Department of Health and Human Services to report to Congress on the use of licensing waivers and recommendations for increasing the percentage of relative foster family homes that are licensed.

HRI v. Environmental Protection Agency: The last stand for the community of reference test in dependent Indian community analysis?

The definition of Indian Country, codified in 18 U.S.C. § 1151, includes "all dependent Indian communities within the borders of the United States…" (18 U.S.C. § 1151(b)). 1151 as a whole includes "all lands within the limits of any Indian reservation under the jurisdiction of the United States government…" and "all Indian allotments, the Indian titles to which have not been extinguished." (1151 (a) and (c)). 1151 (b) allows for land outside of reservations and non allotted land to potentially be considered Indian Country.

The concept of dependent Indian communities did not originate with Congress, but instead was first recognized by the United States Supreme Court in the 1913 decision of United States v. Sandoval (231 U.S. 28). In Sandoval, the Court recognized that the "intent of Congress, as elucidated by [court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." The Court also stated, "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments." Congress codified dependent Indian communities in 1948, relying primarily on language from the United States Supreme Court in Sandoval, and United States v. McGowan (302 U.S. 535).

Over the subsequent 40 + years, courts developed various tests to determine whether land at issue qualified as a dependent Indian community. While federal circuit courts adopted slightly different tests, courts generally agreed that the analysis required looking at such factors as the amount of federal superintendence of the area, the nature of the community in question, the relationship of the community to a tribe, the relationship of the community to the federal government, whether there is an element of cohesiveness within the community manifested by common interests, needs of the inhabitants as supplied by that locality, and whether the land was set apart for the use, occupancy, and protection of Indian peoples. (see 19 Fed. Proc. L. Ed. § 46:1087, and U.S. v. South Dakota., 665 F.2d 837 (8th Cir. 1981), Pittsburg and Midway Coal Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995), Narragansett Indian Tribe v. Narragansett Electric Company, 89 F.3d 908 (1st Cir, 1996), United States v. Cook, 922 F.2d 1026 (2nd Cir. 1991), and Alaska v. Native Village of Venetie, 101 F.3d. 1286 (9th Cir. 1996)). While each of the courts that issued the above decisions looked at slightly different factors, a common theme running through all of the decisions was an examination of the community in question in order to make the determination.

In 1998, the United States Supreme Court revisited the issue of dependent Indian communities, and set forth a far more restrictive test than what had been previously employed in the federal district and circuit courts. Justice Thomas, writing for the majority, adopted a two part test, considering only 1) whether the land in question was set aside by the federal government for the use of Indian peoples, and 2) whether there is federal superintendence over the land in question. Furthermore, in Footnote 7 of the decision, Justice Thomas appears to imply that analyzing and affording significant weight to the nature of the community in determining whether the new two prong test is met is improper, as it reduces the two remaining factors to "mere considerations." (Alaska v. Venetie, 522 U.S. 520 (1998)).

This decision, which arguably failed to appropriately consider canons of Indian law construction and misapplied prior decisions by the United States Supreme Court, has thrown the dependent Indian community analysis into disarray. The vast majority of state and federal courts that have employed the dependent Indian community analysis post-Venetie have abandoned any real attempt to consider the community itself, and look only to whether the land in question has been set aside for the use of Indian peoples, and whether there is sufficient federal superintendence over the area. (see Alyeska v. Kluti Kaah, 101 F.3d 610 (9th Cir. 1996), New Mexico v. Frank, 52 P.3d 404 (N.M. 2002), State v. Owen, 729 N.W.2d 356, 369 (S.D. 2007), Dark-Eyes v. Commissioner of Revenue Services, 887 A.2d 848, 864-865 (Conn. 2006), U.S. v. Papakee, 485 F.Supp. 2d 1032 (N.D. Iowa 2007)).

One notable exception to this is the 10th Circuit Court of Appeals, which has continued to engage in a community of reference analysis in determining whether land constitutes a dependent Indian community. For example, the Court in HRI v. EPA held that, "because Venetie does not speak directly to the issue, barring en banc review by this court…Watchman continues to require a "community of reference" analysis prior to determining whether land qualifies as a dependent Indian community." 198 F.3d. 1224 (10th Cir. 2000). The Court reiterated their support for the community of reference test when the case came back in front of them recently in a decision dated April 17th, 2009 (Hydro Resources, Inc. v. U.S. E.P.A., 562 F.3d 1249, 1262.).

While the 10th Circuit has recently made it clear that the community of reference remains relevant to the dependent Indian community analysis post-Venetie, it is unclear whether this holding will survive en banc review. On August 24th, 2009 the 10th Circuit agreed to rehear this case en banc to, among other things, determine whether the community of reference test survives Venetie.

It is important to note that several circuits that previously employed the community of reference analysis prior to the Venetie decision have not had the occasion to reconsider their test in light of Venetie. What is certain, however, is that essentially every state court and federal district court that has considered this issue post-Venetie has held that the Venetie decision has limited the analysis to only two factors, set aside and superintendence. The 10th Circuit Court of Appeals is the only court to have held that Venetie did not abrogate the community of reference test. Many will presumably be paying close attention to the en banc decision of the 10th Circuit to see how they rule on this issue. It will likely be very persuasive to other circuit courts that have not yet had an occasion to reconsider their dependent Indian community analysis factors in light of Venetie.

Minnesota Indians and Jurisdiction: A brief discussion

For most Minnesotans, the local county court is the place to resolve legal disputes. For Indians it is not so simple. Indians may end up in tribal court, state court or federal court – depending on the legal issue, the parties involved and the location where the action occurred.[1]

Jurisdiction as used in this article refers to a court's power to decide a case and issue a decree. (Black's Law Dictionary, Ninth Edition.)

Tribal Courts:

A. Civil Jurisdiction:

In general, tribal courts assert civil jurisdiction over all Indian residents of the reservation and non-Indians who live or conduct business[2] on the reservation.

Cases often heard in tribal court include: Indian Child Welfare Act (ICWA) cases, Children in Need of Protection or Services (CHIPS) cases, landlord-tenant disputes, including tribal housing, contract disputes, traffic code violations, divorce, child custody, child support, civil commitments, personal injury and property damage, harassment, domestic violence, hunting-fishing-gathering violations, to name a few.

B. Criminal Jurisdiction:

In general, Indian tribes have criminal jurisdiction over their own members for offenses committed within the boundaries of the reservation;[3] **Indians** charged with tribal offenses are prosecuted in tribal court.

In 1978, the U.S. Supreme Court determined, in the case of Oliphant v. Suquamish Indian Tribe,[4] that Indian tribes lack criminal jurisdiction over **non-Indians** who violate tribal laws on the reservation. Criminal violations that occur outside the boundaries of a reservation are prosecuted in state courts – even the perpetrator or victim is an Indian.

As explained below, Congress gave the State of Minnesota authority to enforce its criminal laws on Indian reservations in 1953. The Red Lake and Bois Forte reservations are exempt from Public Law 280.

State Courts:

A. Civil Jurisdiction:

In general, Indians can go to the local county court to resolve general legal disputes - just like any other citizens.[5] Reservation Indians, however, often have the option to go to tribal court to resolve civil disputes.

There are good reasons for going to tribal court. For example, the judges are usually Indian and familiar with the tribal culture and traditions. The tribal courts are more accessible to Indians who lack transportation. Further, the filing fees at tribal court are generally less than for state court matters. Some Indians believe they are treated better in tribal court.

B. Criminal Jurisdiction:

Reference Data:

[1] For an excellent source on Indian law issues, see The Rights of Indians and Tribes by Stephen L. Pevar, an American Civil Liberties Union Handbook, published by the New York University Press.

[2] See, e.g., the first exception described in Montana v. U.S., 450 U.S. 544, 565-66 (1981). Cf. Nevada v. Hicks, 121 S. Ct. 2304 (2001).

[3] See, e.g., U.S. v. Wheeler, 435 U.S. 313 (1978).

[4] 435 U.S. 191 (1978).

[5] Indians became citizens of the United States and the state of their residency in 1924. See, 8 U.S.C. Sec. 1401 (a) (2).

[6] See, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).

[7] 18 U.S.C. Sec. 1162 (a).

[8] 18 U.S.C. Sec. 1153.

[9] See, U.S. v. Wheeler, supra.

[10] See, U.S. v. Wheeler, supra.

[11] Id.

Minnesota Indians charged with state crimes committed outside the boundaries of a reservation are prosecuted in state court.[6] But until 1953, the state lacked jurisdiction to enforce its criminal laws *within the boundaries* of a reservation.

In 1953, Congress enacted Public Law 280[7] and gave the state of Minnesota authority to enforce its criminal laws within the boundaries of the Indian reservations, except for the Red Lake reservation (and later, the Bois Forte reservation). With the above exception, Indians charged with committing state law violations within the boundaries of a reservation are prosecuted in state court. Indians convicted in state court may be sentenced to a Minnesota prison.

1. The exemptions.

The Red Lake and Bois Forte reservations are exempt from Public Law 280, so crimes committed by Indians on those reservations are prosecuted in either federal court or tribal court, depending on the crime. Pursuant to the Major Crimes Act[8] (Act), Indians charged with any of the crimes listed in the Act will be prosecuted in federal court. The Act includes murder, rape, kidnapping and other "major" crimes. Most other crimes committed by Indians on the Red Lake and Bois Forte reservations are prosecuted in tribal court.

2. Concurrent jurisdiction.

P.L. 280 does not prohibit the tribal governments from exercising criminal jurisdiction over its own members for crimes committed on the reservation[9] and most Minnesota Bands have a criminal code enforced in tribal court.

As a result of Public Law 280, it is possible for an Indian in Minnesota to be prosecuted in both state court and tribal court for the same behavioral incident. For example, a reservation Indian gets involved in a fight and is charged in state court with Assault and Battery. He is later prosecuted in tribal court for violating the tribe's Disorderly Conduct statute. In that situation, the Double Jeopardy Rule does not apply. Why? In the above scenario, it would be single jeopardy twice, once by each sovereign, not double jeopardy.[10]

Federal Courts:

A. Civil Jurisdiction:

Indians and tribes can go to federal court like any other citizens or business entities. Typical claims brought in federal court include such things as treaty rights, hunting-fishing-gathering claims, challenges to state taxation and regulation, trespasses on Indian lands, claims involving a violation of federal civil rights and tort claims.

B. Criminal Jurisdiction:

Federal courts have exclusive jurisdiction over certain matters that occur on Minnesota Indian reservations. For example, at the Red Lake and Bois Forte reservations, violations of the Major Crimes Act can only be heard in federal court.[11] Indians convicted in federal court may be sentenced to federal prison. Most other crimes are prosecuted in tribal court.