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FEDERAL RECENT DEVELOPMENTS

EMPLOYMENT: Preference for Indians

In *Moore v. McCabe*, 11 I.L.R. 3068 (D.N.M. 1984), the court held that appointment of a non-Indian to a temporary promotion at the Southwest Indian Polytechnic Institute was violative of the Indian preference in employment statutes.¹ The Indian preference statutes provide for an absolute preference for qualified Indians to fill vacancies in Bureau of Indian Affairs facilities, which include the Institute.

Defendants argued that “pursuant to the BIA Merit Promotion Plan . . . a detail to a higher graded position for a period not to exceed 120 days is a noncompetitive action”² and is therefore an exception to the competitive promotion procedures and is one to which the Indian preference laws do not apply.

Rejecting the BIA’s technical argument that Indian preference is not applicable to the “detail of an employee into a position for 120 days or less,” the New Mexico District Court ruled that the BIA cannot change the name of a personnel action to circumvent Indian preference and ordered that the plaintiff be appointed to an equivalent position with full seniority and benefits.

The court dismissed the plaintiff’s claim for monetary damages, finding that the Indian Preference Act does not contain an express waiver of sovereign immunity to sue the United States government for monetary damages.

RELIGION: Exemption From Use of Social Security Number Where Contrary to Religious Belief

In *Roy v. Cohen*, 11 I.L.R. 3069 (M.D. Pa. 1984), the plaintiffs prevailed in a challenge to the defendant welfare department’s requirement that a Social Security number be provided for his 3-year-old daughter as a condition of welfare eligibility. The plaintiff’s argument was that participation in a computer personal numbering system, e.g., Social Security, was contrary to his family’s Abenaki religious beliefs and that such a requirement was violative of their right to freedom of religion.

On a finding that the plaintiff’s belief was sincerely held and that the use of a Social Security number would “rob the spirit” of his daughter, Little Bird of the Snow, the district court concluded that (1) the plaintiff’s refusal to provide a Social Security

1. 25 U.S.C. §§ 472, 472(a) (1976).

2. 11 I.L.R. 3068 (D.N.M. 1984).

number for Little Bird of the Snow is based upon a religious belief; (2) by requiring the plaintiff Roy to violate his religious beliefs as a condition of receiving welfare benefits, the defendants place a substantial burden upon Roy's free exercise of religion; (3) the defendants' interests can be satisfied by reasonable and less restrictive means that do not infringe upon Roy's religious beliefs; and (4) the defendants' denial of cash assistance and medical assistance, and threatened denial of food stamps, for Little Bird of the Snow violate Roy's rights under the first, fifth, and fourteenth amendments to the United States Constitution.

Although the government's interest in requiring individuals to use a Social Security number is great, that interest is "outweighed" by rights under the first amendment in the absence of a showing of concrete harm that would result by the grant of such an exemption.

WATER RIGHTS: Reserved Water Rights

In *United States v. Anderson*, 11 I.L.R. 2136 (9th Cir. 1984), the Ninth Circuit adjudicated the water rights in the Chamokane Basin, which involved lands removed from the Spokane Indian Reservation through allotment or homesteading, then reacquired by the tribe and returned to trust status.

In its decision the court held that (1) lands allotted and sold to non-Indians retain a priority date as of the creation of the reservation because *Winters* rights¹ appurtenant to an allotment pass with the title, in accordance with the congressional policy of ensuring an Indian allottee the full economic benefit of the allotment, and (2) under case law, homesteaders acquire no federal water rights, and thus homestead with perfected water rights are considered analogous to newly created federal reservations with *Winters* rights arising at the time of reacquisition by the tribe.

The court also ruled the state, not the tribe, may regulate the use of excess basin water by non-Indian fee title holders. The court based its decision on the fact that the interest of the state in exercising its jurisdiction will not infringe on tribal sovereignty nor impact on tribal economic interests that have been quantified and protected by the federal water master.

1. *Winters v. United States*, 207 U.S. 564 (1908).