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Cases and Developments

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RECENT DEVELOPMENTS

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I. Diversity Jurisdiction & Indian Nations

The United States Supreme Court has never addressed whether Indian tribes are citizens of states for diversity jurisdiction purposes.[1] However, in recent years a number of lower federal courts have addressed this issue, and in so doing, have determined that Indian tribes are not citizens of states for diversity purposes.[2] These holdings are important because they foreclose the possibility of tribes suing or being sued under diversity jurisdiction in federal court.

In 1972, the Second Circuit, in *Oneida Indian Nation v. County of Oneida*,[3] was the first court to address whether tribes were citizens of states for diversity jurisdiction purposes.[4] In *Oneida*, the Oneida tribe of New York and the Oneida tribe of Wisconsin sued two New York counties in New York federal court alleging that the sale of tribal lands violated certain treaties.[5] After the *Oneida* court had dismissed the tribes' claim of federal question jurisdiction, the court evaluated the tribes' argument that the tribes were citizens of a state for diversity jurisdiction purposes.[6] In so doing, the *Oneida* court determined that the Oneida tribe of New York was "surely not a citizen of a state *different* from New York;" therefore, the court concluded that the tribe's "lack of citizenship in a state other than New York . . . defeated diversity jurisdiction."[7]

Two years later, the Eight Circuit, in *Standing Rock Sioux Tribe v. Dorgan*,[8] addressed whether tribes were citizens of states for diversity

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1. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 317 n.286 (Rennard Strickland et al. eds, 1982).

2. See Romanella v. Hayward, 114 F.3d 15 (2nd Cir. 1997); Gaines v. Ski Apache, 8 F.3d 726 (10th Cir. 1993); Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974); Oneida Indian Nation v. County of Oneida, 464 F.2d 916 (2nd Cir. 1972), *rev'd and remanded on other grounds*, 414 U.S. 661 (1974); Calvello v. Yankton Sioux Tribe, 899 F. Supp. 431 (D.S.D. 1995); Weeder v. Omaha Tribe of Nebraska, 864 F. Supp. 889 (N.D. Iowa 1994).

3. 464 F.2d 916 (2nd Cir. 1972), *rev'd and remanded on other grounds*, 414 U.S. 661 (1974).

4. *Id.* at 923.

5. *Id.* at 918-19.

6. *Id.* at 922-23.

7. *Id.* at 923 (emphasis added).

8. 505 F.2d 1135 (8th Cir. 1974).

jurisdiction purposes. In *Standing Rock Sioux*, the issue before the court revolved around an action brought by the Standing Rock Sioux Tribe against the North Dakota Tax Commissioner for the recovery of state sales and use taxes illegally collected from the tribe's members.[9] The *Standing Rock Sioux* court held that the Eleventh Amendment[10] barred the tribe from suing the state.[11] In so holding, the court explained that the Eleventh Amendment prevented the court from entertaining a monetary suit against a nonconsenting state.[12]

In an effort to circumvent the Eleventh Amendment, the tribe argued, among other things, that it was not a citizen of any state, and therefore, it was outside the reach of the Eleventh Amendment.[13] The court, citing the Second Circuit's decision in *Oneida*, noted that "it is clear that an Indian tribe is not a citizen of *any* state and cannot sue or be sued in federal court under diversity jurisdiction."[14] Nevertheless, the *Standing Rock Sioux* court concluded that this reasoning is not controlling because "different policy decisions come into play" in Eleventh Amendment decisions.[15]

Within the last ten years, a number of courts have considered whether tribes are citizens of *any* state for diversity purposes.[16] These courts, relying on *Standing Rock Sioux* and *Oneida*, have all held that a tribe is not a citizen of *any* state for diversity purposes, and therefore, determined that a tribe can not sue or be sued in federal court based on diversity jurisdiction.[17] For example, in *Romanella v. Hayward*,[18] a cashier of a tribal casino, domiciled in Rhode Island, brought a personal injury action in federal court against Mashantucket Pequot Tribal Nation of Connecticut, and the district court, in dismissing the suit, held that Indian tribes are not citizens of any state and cannot be sued in federal court under diversity jurisdiction.[19] The Second Circuit affirmed the decision and, in so doing, stressed that an Indian tribe is not a citizen of any state for diversity purposes.[20]

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9. *Id.* at 1137.
10. The 11th Amendment provides:
    The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

11. *Standing Rock Sioux*, 505 F.2d at 1138.
12. *Id.*
13. *Id.* at 1140.
14. *Id.* (emphasis added).
15. *Id.* at 1141.
16. *See infra* notes 18-28 and accompanying text.
17. *See supra* note 2.
18. 114 F.3d 15 (2nd Cir. 1997).
19. 933 F. Supp. 163, 165-67 (D. Conn. 1996).
20. *Romanella*, 114 F.3d at 15-16.

Similarly, in *Gaines v. Ski Apache*,[21] the Tenth Circuit also held that Indian tribes are not citizens of any state for purposes of diversity jurisdiction.[22] In *Gaines*, the plaintiff, a resident of Texas, was forbidden from bringing a diversity suit against a ski resort owned and operated by the Mescalero Apache Tribe of New Mexico.[23] As a result, the plaintiff was unable to recover for injuries he had received when he had been struck in the back of the head by a chairlift.[24]

Finally, in *Calumet Gaming Group Kansas v. Kickapoo*,[25] a federal district court in the Tenth Circuit also held that a tribe is not a citizen of any state for purposes of diversity jurisdiction.[26] In *Calumet*, a gaming consultant brought an action against the Kickapoo Tribe of Kansas for breach of its consulting agreement and for failure to repay its loan.[27] However, since tribes are not citizens for diversity purposes, the federal court was unable to exercise diversity jurisdiction and was forced to dismiss the claim.[28]

II. The Navajo Nation's Aneth Extension & The Utah Navajo Trust Fund

The Navajo Nation's Aneth Extension is a 52,000-acre tract of land, located in southeastern Utah, that was added to the Navajo Nation by a congressional act in 1933.[29] Under the act, Congress provided that if oil and gas were found on the Aneth Extension, the State of Utah would receive 37.5% of the royalties to be administered on behalf of the Aneth Extension residents for the "payment of the tuition of Indian children in white schools, and/or the building or maintenance of roads across the lands . . . for the benefits of Indians [residing on the Aneth Extension]."[30] In 1968, Congress amended the 1933 Act by enlarging the class of recipients entitled to benefits to all Utah Navajos, and by requiring that Utah use the royalty proceeds to provide "for

21. 8 F.3d 726 (10th Cir. 1993).
22. *Id.* at 729.
23. *Id.*
24. *Id.*
25. 987 F. Supp. 1321 (D. Kan. 1997).
26. *Id.* at 1324.
27. *Id.*
28. *Id.*
29. For a discussion of the Navajo Nation's Aneth Extension, see Richard J. Ansson, Jr., *The Navajo Nation's Aneth Extension and the Utah Navajo Trust Fund: Who Should Govern the Fund After Years of Misuse*, 14 T.M. COOLEY L. REV. 555 (1997) [hereinafter Ansson, *Navajo Nation's Aneth Extension*]; *see also* Richard J. Ansson, Jr., *Protecting Profits Derived from Tribal Resources: Why the State of Utah Should Not Have the Power to Tax Non-Indian Oil and Gas Lessees on the Navajo Nation's Aneth Extension: Texaco, Exxon, and Union Oil v. San Juan County School District — A Case Study*, 21 AM. INDIAN L. REV. 329 (1997).
30. *See* Act of Mar. 1, 1933, ch. 160, 47 Stat. 1418, 1418-19 (as amended by Pub. L. No. 90-306, 82 Stat. 121 (1968)).

the health, education, and general welfare of the Navajo Indians residing in San Juan County."[31]

During the middle 1950s, plentiful amounts of oil and gas were discovered on the Aneth Extension.[32] Between 1960 and 1990, the State of Utah's records disclosed that the state received $61 million in royalty proceeds.[33] However, the state failed to spend the monies on behalf of the Utah Navajos and has subsequently confessed that it recklessly squandered $52 million.[34] In 1991, five Utah Navajos filed a class-action lawsuit against the state of Utah for breach of its duties as the trust's fiduciary.[35] The Utah Navajos, which number around 7500, are claiming $100 million in damages because their experts estimate that if the state of Utah had properly managed the fund, the trust should have grown to over $100 million.[36]

In *Pelt & the Navajo Nation v. Utah*,[37] the federal district court, per Judge David Sam, held that the beneficiaries could not maintain a cause of action against the State of Utah because the 1933 and 1968 Acts did not create a private cause of action.[38] In 1996, the 10th Circuit reversed this holding and remanded the case back to the district court for further proceedings.[39] In so doing, the 10th Circuit found that the Utah Navajo's could assert a breach of fiduciary claim.[40]

In early April 1999, the federal district court, per Judge David Sam, held that the Utah Navajos may proceed with their breach of fiduciary trust claim against the State of Utah.[41] The State of Utah had asserted that its liability, if any, "should be governed by the state's own statute of limitations, or extending only as far back as 1988."[42] However, the district court held that the state's statute of limitations would not govern.[43] As a result, the court's decision opens the possibility for a massive judgment if the Utah Navajos can prove mismanagement.[44]

Mismanagement of the fund should be fairly easy to prove. Indeed, as early as 1961, the Utah Navajos sued the State of Utah for improper use of

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31. *Id.*

32. *See* Florence Williams, *Utah Freezes Navajo Trust Fund as Report Details Scandal; American Indians: An Audit Alleges State, as Trustee, Looked the Other Way as Oil Royalty Trust Account Was Plundered*, L.A. TIMES, Jan. 12, 1992, at A18.

33. *Id.*

34. *Id.*

35. Paul Foy, *Navajos Claim Utah Wasted $100M*, SEATTLE TIMES, Apr. 8, 1999, at A8.

36. *Id.*

37. 104 F.3d 1534 (10th Cir. 1996).

38. *Id.* at 1540.

39. *Id.* at 1545.

40. *Id.* at 1544.

41. Foy, *supra* note 35, at A8.

42. *Id.*

43. *Id.*

44. *Id.*

funds in *Sakezzie v. Utah Indian Affairs Commission.*[45] At this time, the State had already made numerous improper expenditures including: a $78,000 expenditure to pipe water to a white man; a $27,000 expenditure for an airport; a $7750 payment to commission employees; a $3990 expenditure to pay employees' travel expenses; and a $347 expenditure to pay for employees' telephone calls, printing, and incidental expenses.[46] The *Sakezzie* court held, among other things, that the State of Utah must use the fund for authorized purposes only.[47] Two years later, the Utah Navajos again brought suit against Utah for the state's failure to expend the monies on the beneficiaries behalf, and the court once again reiterated the State's trusteeship role.[48] In response, the State claimed that it was spending the funds as discerningly as possible.[49]

For the next thirty years, the State of Utah continued to mismanage the fund. During this period, the Utah Navajos brought suit in the mid-1970s alleging that the state of Utah mismanaged their royalty proceeds.[50] The suit was terminated after the State agreed to give an accounting of how the funds were spent.[51] In the years after this suit, however, the funds collected never reached the Utah Navajos. In 1991, an audit revealed:

> [T]he Utah Navajo Fund was used by various individuals for personal use. These individuals used the funds to purchase new cars, finance businesses that failed, pay credit card debts, grant cash bonuses, and employ family members. The audit also revealed that the State had spent money on various enterprises that failed shortly after opening. The State had revealed that it had opened a tribal boat marina at Lake Powell, a shopping mall in West Jordan, and a government social services office seventy miles off the reservation. Finally, the audit revealed that the State had used certain royalty proceeds to build a garment factory in New Mexico that never opened.[52]

In the current suit, Utah will have to provide a complete accounting of the monies received or earned by the Navajo Trust Fund.[53] Fortunately, previous suits brought by the Navajos will help document the State's utter failure to expend the trust fund monies on behalf of the Utah Navajos. The Assistant Attorney General of Utah has asserted that Utah should only be liable for its

45. 198 F. Supp. 218 (D. Utah 1961).
46. *Id.* at 220-221
47. *Id.* at 224.
48. Sakezzie v. Utah State Indian Affairs Comm'n, 215 F. Supp. 12, 14-16 (D. Utah 1963).
49. *Id.*
50. Bigman v. Utah Navajo Development Council, Inc., No. C-77-0031, slip. op. at 4 (D. Utah, Sept. 25, 1978).
51. *Id.*
52. Ansson, *Navajo Nation's Aneth Extension, supra* note 29, at 585-86.
53. Foy, *supra* note 35, at A8.

failure to appropriate monies for reservations roads, health care, and education.[54] However, the Navajos have maintained that the State of Utah should be accountable for its failure to invest the trust funds, which Navajo experts claim should have grown to over $100 million.[55]

In this author's estimation, the State of Utah should be liable for $100 million based upon Utah's utter neglect of the Utah Navajo's. Essentially, the Utah Navajos own the dubious distinction of being the poorest residents in the State of Utah and in the Navajo Nation.[56] Even today, many homes do not have running water or electricity.[57] In evaluating the poverty of the Utah Navajos, one commentator recently found:

> The 20th century has come to the Navajo Nation in uneven strides. Comfortable manufactured homes dot the reservation, with nice cars and pickups parked nearby. Yet running water and telephones are scarce on this desert of canyons and mesas in southeastern Utah. Less than a year from the 21st century, the last residents are getting electricity. For those who live by the light of kerosene lamps and keep food in coolers, the coming of power lines is life-changing.[58]

Unfortunately, these conditions should not have been allowed to remain this long — after all the State of Utah has received an abundant amount of monies from the trust fund which should have been used by the State on these residents behalf. Hopefully, in light of the most recently legal developments, the Utah Navajos may finally receive their trust fund monies, and hopefully, these monies will be used on their behalf.

III. State Taxation of Non-Indian Contractors and Blaze Construction Co.

Blaze Construction Company was incorporated under the laws of the Blackfeet Tribe of Oregon.[59] Starting in the mid-1980s, Blaze Construction Company contracted with the Bureau of Indian Affairs to provide road-paving, grading, drainage, overlayment, marking, and bridge-building services on a number of Indian reservations in a number of different states.[60] Blaze was

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54. *Id.*

55. *Id.*

56. Florence Williams, *Utah Freezes Navajo Trust Fund as Report Details Scandal; American Indians: An Audit Alleges State, as Trustee, Looked the Other Way as Oil Royalty Trust Account Was Plundered*, L.A. TIMES, Jan. 25 1992, at A18.

57. Phil Sahm, *Isolated Navajos Finally Flip the Switch on Eve of 21st Century, Power Lines Begin to Change Lives in Remote Areas*, SALT LAKE TRIB., Mar. 21, 1999, at A1.

58. *Id.*

59. Blaze Constr. Co. v. New Mexico Taxation & Revenue Dep't, 884 P.2d 803, 804 (1994), *cert. denied*, 514 U.S. 1016 (1995).

60. *See* Arizona Dep't of Revenue v. Blaze Constr. Co., 947 P.2d 836, 837 (Ariz. Ct. App. 1997), *rev'd*, 119 S. Ct. 957 (1999).

not only required to hire local reservation Indians to work on each project, but it was also required to plan the developments with local reservation officials.[61] The states in which these reservations were located did not participate or regulate any aspect with regard to these infrastructure improvements.[62] Finally, the road-improvement projects were solely funded with Federal Highway Administration Funds.[63]

Beginning in the late 1980s, Arizona and New Mexico imposed their nondiscriminatory taxes on Blaze Construction Company.[64] The states alleged that Blaze Construction Company was a federal government contractor subject to state taxes under *United States v. New Mexico*.[65] In *United States v. New Mexico*, the United States Supreme Court held that the state may tax private or corporate entities that contract with the federal government.[66] Here, since Blaze contracted with the BIA, Arizona and New Mexico assumed that they could tax this corporate entity under *United States v. New Mexico*.[67]

Blaze Construction Company argued that it was not subject to state taxes because the Indian preemption doctrine preempted the imposition of state taxes.[68] Under the doctrine of federal regulatory preemption if the subject matter is a non-Indian activity within a reservation, the Supreme Court held in *Williams v. Lee*[69] that the state has power within the reservation unless such power violates either a governing act of Congress or interferes with the tribes right of self-government.[70] Several years later, the Supreme Court held in *McClanahan v. Arizona Tax Commission*[71] that if the subject matter is Indian and within an Indian reservation, then the state has no power, and that

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61. *See* Richard J. Ansson, Jr., *Protecting Tribal Sovereignty: Why States Should Not Be Able to Tax Contractors Hired by the BIA to Construct Reservation Projects for Tribes: Blaze Construction Co. v. New Mexico Taxation and Revenue Department: A Case Study*, 20 AM. INDIAN L. REV. 459 (1995-96) [hereinafter Ansson, *Protecting Tribal Sovereignty*].

62. *See, e.g., Blaze*, 947 P.2d at 837. For example, the *Blaze* court found:

> The State of Arizona did not participate in planning or developing any of Blaze's projects on reservations in Arizona. It issued no permits. It provided no inspection services related to employment, construction, quality or safety. It provided no maintenance or regular law-enforcement services on any of the reservation roads on which Blaze worked.

Id.

63. *Id.*

64. *See Blaze*, 947 P.2d at 837-38; Blaze Constr. Co. v. New Mexico Taxation & Revenue Dep't, 884 P.2d 803, 805 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

65. 455 U.S. 720, 735 (1982).

66. *Id.* at 734.

67. *See supra* note 65.

68. *See, e.g.*, Arizona Dep't of Revenue v. Blaze Constr. Co., 947 P.2d 836 (Ariz. Ct. App. 1997), *rev'd*, 119 S. Ct. 957 (1999).

69. 358 U.S. 214 (1959).

70. *Id.* at 216-19.

71. 411 U.S. 164 (1973).

power may only be obtained in a way specified by Congress.[72] Here, Blaze Construction Company, a nonmember Indian company, is considered to be a non-Indian for federal regulatory preemption purposes;[73] and hence, Blaze falls within the guise of the *Williams v. Lee* test. Under the *Williams v. Lee* test, the Supreme Court in *Ramah Navajo School Board v. Board of Revenue*[74] and *White Mountain Apache Tribe v. Bracker*[75] held that the preemption doctrine held that the preemption doctrine should apply whenever the tribe directly contracts with the non-member Indian or non-Indian contractor.[76]

In 1986, the New Mexico taxation department levied a nondiscriminatory gross receipts tax on Blaze. Blaze brought suit and argued that the preemption doctrine should preempt the tax. The New Mexico Court of Appeals agreed with Blaze, and in so doing, rejected the Department's argument that Blaze was a federal government contractor subject to state taxes under *United States v. New Mexico*.[77] The Department appealed, and the New Mexico Supreme Court reversed, holding first that the state could tax Blaze under *United States v. New Mexico* and second that federal law did not preempt the imposition of the state tax.[78] The United States Supreme Court subsequently denied certiorari, and as a result, Blaze was required to pay the state of New Mexico's gross receipts tax.[79]

In 1993, the Arizona taxation department issued a tax assessment of contracting privileges taxes against Blaze for the audit period of June 1, 1986, through August 31, 1990.[80] The Arizona Court of Appeals for Taxation, the final court of appeal for taxation issues, held that federal law preempted the imposition of the state tax.[81] The United States Supreme Court granted certiorari, and held that Blaze would be subject to state taxation under *United States v. New Mexico*.[82]

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72. *Id.* at 173.

73. Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

74. 448 U.S. 136 (1980).

75. 458 U.S. 832 (1982).

76. *Ramah*, 458 U.S. at 838-39; *Bracker*, 448 U.S. at 152.

77. Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't, 871 P.2d 1368, 1369 (N.M. Ct. App. 1993), *rev'd*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

78. Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't, 884 P.2d 803 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995). For a thorough discussion of this case, *see* Ansson, *Protecting Tribal Sovereignty*, *supra* note 61.

79. Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't, 115 S. Ct. 1359 (1995).

80. Arizona Dep't of Revenue v. Blaze Constr. Co., 947 P.2d 836, 837 (Ariz. Ct. App. 1997), *rev'd*, 119 S. Ct. 957 (1999).

81. *Id.* at 846.

82. Arizona Dep't of Revenue v. Blaze Constr. Co., 119 S. Ct. 957, 960-61 (1999).

> Interest balancing in this setting would only cloud the clear rule established by our decision in *New Mexico*. The need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations.[83]

Hence, under the Court's holding, all contracts between the BIA and non-Indian parties will be subjected to nondiscriminatory state taxes. The Court went on to explain that this does not undermine tribal governmental development because the federal government, not the tribe, had contracted for services.[84] The irony in this result is that Blaze was required to work with each individual tribe to plan and develop each tribe's respective infrastructure — all the BIA did was initiate the contract. Consequently, the United States Supreme Court's holding does undermine tribal governmental development. Nevertheless, in light of this holding, tribes will have to contract with non-Indian parties before courts will employ the preemption doctrine.

83. *Id.*
84. *Id.*