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Federal Recent Developments

FEDERAL RECENT DEVELOPMENTS

UNITED STATES SUPREME COURT

CRIMINAL JURISDICTION: Major Crimes Act

Negonsott v. Samuels, 122 L. Ed. 2d 457 (1993).

Negonsott, a member of the Kickapoo Tribe and a resident of the Kickapoo Reservation in Kansas, was convicted in a Kansas district court of aggravated battery for shooting another Indian on the Kickapoo Reservation. However, the trial judge set aside the conviction on the grounds that the federal government had exclusive jurisdiction to prosecute Negonsott for the shooting under the Indian Major Crimes Act.[1] The Kansas Supreme Court reinstated the conviction, by holding that the Kansas Act[2] granted Kansas jurisdiction to prosecute "all crimes committed by or against Indians on Indian reservations located in Kansas."[3] Negonsott filed a petition for a writ of habeas corpus, which was dismissed by the federal district court.[4] Negonsott appealed to the Court of Appeals for the Tenth Circuit, which affirmed the district court.[5]

The United States Supreme Court affirmed the district court and the court of appeals, by holding that the Kansas Act validly limits the federal jurisdiction conveyed in the Indian Major Crimes Act.[6] The Court stated that the Indian Major Crimes Act was a valid act passed by Congress, which extended federal jurisdiction to exclusivity in certain delineated areas of crimes committed by Indians in Indian country.[7] However, Congress has

1. 18 U.S.C. § 1153 (1988) (granting exclusive federal jurisdiction over thirteen enumerated felonies committed by an Indian against anyone, if the felony is committed within Indian country).

2. 18 U.S.C. § 3243 (1988). The Act provides in full:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian Reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

Id.

3. State v. Nioce, 716 P.2d 585, 588 (Kan. 1986).

4. 696 F. Supp. 561 (D. Kan. 1988).

5. 933 F.2d 818 (10th Cir. 1991); *see also* Federal Recent Developments, 17 AM. INDIAN L. REV. 325, 329 (1992).

6. Negonsott v. Samuels, 122 L. Ed. 2d 457 (1993).

7. *Id.* at 463.

plenary power to extend or limit federal jurisdiction.[8] The Court held that the Kansas Act is a valid limitation of federal jurisdiction from exclusive, as under the Indian Major Crimes Act, to concurrent with the State of Kansas.[9]

Negonsott claimed that the United States had exclusive jurisdiction because of the second sentence of the Kansas Act, which states, generally, that nothing in this Act shall deprive the United States of jurisdiction over offenses involving federal law.[10] But the Court interpreted the second sentence of the Kansas Act to mean that the United States will retain jurisdiction over offenses relating to federal statutes or claims, whereas Kansas courts shall have jurisdiction to try persons for the same conduct when it violates state law.[11] The Court rejected Negonsott's argument and held that the Kansas Act confers concurrent jurisdiction with Kansas state courts and federal courts.[12] Therefore, the United States Supreme Court affirmed the dismissal of Negonsott's habeas corpus petition, leaving the State sentence standing.[13]

TAXATION: Income and Motor Vehicles

Oklahoma Tax Commission v. Sac & Fox Nation, 113 S. Ct. 1985 (1993).

The State of Oklahoma taxes the income of all Oklahomans, including tribal members. The State also taxes motor vehicles through an excise tax, based on the value of the vehicle at the time of transfer of legal ownership as well as upon the use of any vehicle registered in the State. The State also assessed a vehicle registration fee annually based on a percentage value of the car. The purpose of both motor vehicle taxes is to provide funding for general governmental functions.[14] The taxes are not directly tied to the use and maintenance of roads.[15]

The Oklahoma Tax Commission (the Commission) argued that the State had complete tax jurisdiction over Sac and Fox tribal members' income because the Sac and Fox Reservation had been disestablished, thereby, according to the Commission, no formal reservation existed.[16] The Commission also argued that the motor vehicle taxes were the equivalent of sales

8. *Id.* at 464 (quoting Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 470-71 (1979)).

9. *Id.* at 465.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 468.

14. Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985, 1989 (1993) (citing Oklahoma Vehicle License and Registration Act, 47 OKLA. STAT. ANN. § 1103 (West Supp. 1990)).

15. *Id.*

16. *Id.*

taxes on transactions occurring outside Indian country, and the registration fees were imposed on all vehicles using Oklahoma roads.[17]

The district court and the Court of Appeals for the Tenth Circuit found that the State could not tax the income of tribal members who worked in tribal employment on trust lands.[18] However, neither court based its holding on where a tribal member lived.[19] The district court also held that the State could not tax a vehicle upon its sale, by demanding that all taxes unpaid during the time that the vehicle was registered with the Tribe instead of the State be paid in full, thereby reducing the value of the vehicle.[20] The court of appeals rejected the Commission's argument that the vehicle taxes were assessed "for the privilege of using state roads because the State had offered no such evidence."[21]

The United States Supreme Court held that the test in *McClanahan v. Arizona*[22] determined whether a state could tax the income of tribal members. In *McClanahan*, the Supreme Court held that a "state could not subject a tribal member living on the reservation whose income derived from reservation sources to a state income tax absent express authorization from Congress."[23] In this case, the Court rejected the Commission's argument that the *McClanahan* test applied only in situations where a formal reservation existed and not to those tribal members living on government allotted lands.[24] The Court held that a tribal member need only reside in Indian country, as defined by 18 U.S.C. § 1151.[25] Indian country includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."[26] The Court stated that in *McClanahan* the Court based its decision on the doctrine favoring Indian sovereignty, "which historically gave state law no role to play within a tribe's territorial boundaries."[27] The Court remanded the case for the district court to determine whether the relevant tribal members live in Indian country as defined by 18 U.S.C. § 1151.[28] "If the tribal members do live in Indian country, our cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty. Unless Congress expressly

17. *Id.*
18. *Id.* at 1989-90.
19. *Id.* at 1990.
20. *Id.*
21. *Id.*
22. 411 U.S. 164 (1973).
23. *Id.* at 176.
24. Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985, 1991 (1993).
25. *Id.* (citing 18 U.S.C. § 1151 (1988)).
26. *Id.*
27. *Id.*
28. *Id.* at 1992 (citing 18 U.S.C § 1151 (1988)).

authorized tax jurisdiction in Indian country, the *McClanahan* presumption counsels against finding such jurisdiction.[29]

When addressing the motor vehicle taxes, the Court cited two of its earlier decisions, in which it had found that such taxes were also prohibited.[30] The Court held that the Oklahoma taxes were no different.[31] The excise tax and registration fees are imposed in addition to any sales tax, and both taxes are imposed for vehicle usage on and off Indian country.[32] The registration fees assessed annually are a personal property tax which, absent authorization by Congress, are prohibited.[33]

TRIBAL AUTHORITY OVER NONMEMBERS: Regulation of Land Use

South Dakota v. Bourland, 113 S. Ct. 2309 (1993).

The Fort Laramie Treaty in 1868[34] established the Great Sioux Reservation, by providing that it be held for the absolute and undisturbed use and occupation of Sioux tribes.[35] Through the Flood Control Plan of 1944,[36] Congress authorized the establishment of a comprehensive flood control plan in a part of the Great Sioux Reservation known as the Cheyenne River Reservation and mandated that all project lands be open for the general public's recreational use. The Cheyenne River Sioux Tribe conveyed under the Cheyenne River Act[37] all interests in 104,420 acres of former trust lands to the United States for the Oahe Dam and Reservoir Project.[38]

The Tribe reserved the right to free access to the taken lands. It also enforced its game and fish regulations against non-Indians as well as Indians.

29. *Id.*

30. *Id.* (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976)).

31. *Id.* at 1993.

32. *Id.*

33. *Id.*

34. Fort Laramie Treaty, Apr. 29, 1868, U.S.-Great Sioux Tribe, 15 Stat. 635.

35. The Tribe's right to exclude non-Indians from reservation lands is implicit in its right of absolute and undisturbed use and occupation. South Dakota v. Bourland, 113 S. Ct. 2309, 2311 (1993).

36. Ch. 665, 58 Stat. 887 (1944) (codified at 16 U.S.C. § 460d (1988)). This legislation passed after severe floods devastated the lower Missouri River basin in 1943.

37. Congress required the Tribe to relinquish the land for the Oahe Dam and Reservoir Project. Cheyenne River Act, ch. 665, 68 Stat. 1191 (1954) (pursuant to the Flood Control Act of 1944)

38. As stated in *Bourland*:

> The Tribe received a total of $10,644,014 in exchange for the 104,420 acres of land and interests therein taken by the United States. This amount included compensation for the loss of wildlife, the loss of revenue from grazing permits, the costs of negotiating the agreement, and costs of complete rehabilitation of all resident members and the restoration of tribal life.

Bourland, 113 S. Ct. 2309, 2314 n.2 (1993); *see* Cheyenne River Act, 68 Stat. at 1191-94.

The Tribe accomplished this by accepting only tribal hunting and fishing licenses and refusing to recognize state hunting and fishing licenses. The State of South Dakota filed this action seeking to enjoin the Tribe from excluding non-Indians from hunting on the taken lands, on which the Tribe had reserved the right of free access, and the State also sought a declaration that the federal taking of tribal land reduced tribal authority to concurrent from exclusive in the regulation of the use of the land by non-Indians.[39]

The district court concluded that the Tribe's authority was abrogated by the taking of the reservation land and granted a permanent injunction against the Tribe's exertion of authority over non-Indians. However, the Court of Appeals for the Eighth Circuit reversed, stating that the "Tribe had authority to regulate non-Indian hunting and fishing on the 104,420 acres because the Cheyenne River Act did not clearly reveal Congress' intent to divest the Tribe of its [original] treaty right to do so."[40] The court of appeals admitted that Congress has the power to abrogate Indians' treaty rights.[41] However, this power can only be used if Congress has clearly expressed its intent to do so.[42] The Court of Appeals for the Eighth Circuit held that Congress did not clearly express its intent to abrogate the Indians' treaty rights.[43]

The Supreme Court on review, in an opinion written by Justice Clarence Thomas, reversed the court of appeals, by holding that Congress clearly intended in the Flood Control and Cheyenne River Acts to abrogate the Tribe's right under the Fort Laramie Treaty to regulate non-Indian hunting and fishing on lands taken by the United States.[44] The majority stated that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, except that the tribe may regulate nonmembers who enter consensual relationships with the tribe, and a tribe may also regulate the conduct of nonmembers within its reservation when such conduct threatens the integrity, security, health, or welfare of the tribe.[45]

The district court already made the determination that neither of the two exceptions applied in regards to the land taken from the Cheyenne River Sioux Tribe, but the Court remanded to determine if the same conclusion

39. *Bourland*, 113 S. Ct. at 2309.

40. *Id.* at 2311.

41. *Id.* at 2315 (interpreting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977)).

42. *Id.* (citing Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968)).

43. *Id.*

44. The majority stated that the Act's grant of open use by the public clearly abrogate the Tribe's absolute and undisturbed use and occupation of these lands in issue, and thereby deprived the Tribe of the power to license non-Indian users of the land. *Bourland*, 113 S. Ct. at 2309, 2324.

45. *Id.* at 2325 (interpreting Montana v. United States 450 U.S. 544 (1981); Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408 (1989)).

applies to land taken by the United States from non-Indian fee simple holders of former tribal land.[46]

Justice Harry Blackmun, joined by Justice David Souter, stated in the dissent that in order for Congress to abrogate the Indians' treaty rights, "there must be clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[47] Blackmun suggested that the majority did not even point to a scrap of evidence to prove their assertion that Congress actually considered the possibility that by taking the land in question it would deprive the Tribe of authority granted it by the original treaty establishing the reservation.[48] The dissent claimed that the majority failed to establish clear evidence of intent and instead relied upon implicitly finding intent by the fact that Congress deprived the Tribe of the exclusive right to use the land. This, according to the dissent, is not adequate.[49]

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTION: Sovereign Immunity

Maynard v. Narragansett Indian Tribe, 984 F.2d 14 (1st Cir. 1993).

Kenneth L. Maynard appealed the district court's dismissal of his claim for injunctive relief against the Narragansett Indian Tribe, and the Court of Appeals for the First Circuit affirmed the dismissal, because the Tribe possessed sovereign immunity from the suit.[50] Maynard's claim arose out of a boundary dispute with the Tribe. The Tribe acquired the land adjacent to Maynard's property as part of a settlement of the Tribe's claim against the United States and the State of Rhode Island. The Tribe claimed that they possessed superior aboriginal title to 3200 acres in Rhode Island.[51] Maynard sought an injunction against tribal officials from trespassing on his land.[52]

The court stated that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[53] "Although sovereign immunity may be waived by the tribe, or abrogated by Congress"[54] the loss of sovereign immunity "cannot be

46. *Id.*

47. *Id.* at 2327 (Blackmun, J., dissenting) (quoting United States v. Dion, 476 U.S. 734, 740 (1986)).

48. *Id.*

49. *Id.*

50. Maynard v. Narragansett Indian Tribe, 984 F.2d 14, 15 (1st Cir. 1993).

51. *Id.* at 16.

52. *Id.*

53. *Id.* at 15 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

54. *Id.* (quoting Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S.

implied but must be unequivocally expressed."[55] It is clear that the Tribe neither waived its sovereign immunity nor did Congress abrogate it.[56] Maynard asserted without any precedent in support that the court should infer a waiver or abrogation of the Tribe's sovereign immunity.[57] Maynard based this assertion on the settlement agreement, which gave the Tribe title to the land adjacent to Maynard's land.[58] He claimed a waiver or abrogation of tribal immunity existed based upon the fact that the Tribe agreed to extinguish any claim to any nonsettlement land and that the settlement lands would be "subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."[59] The court noted that Maynard's "proposed inferential leap is impermissible."[60] Not only does the settlement agreement not infer a waiver or abrogation, it does not, as required, explicitly show a waiver or abrogation of the Tribe's sovereign immunity.[61] Therefore, the court held that the Tribe's sovereign immunity barred Maynard's action.[62] However, the court did not state whether an action naming individual members of the Tribe rather than the Tribe as an entity in whole would be barred by sovereign immunity.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REAL PROPERTY: Restricted Tribal Land Transactions

Altheimer & Gray v. Sioux Manufacturing Corp., 983 F.2d 803 (7th Cir. 1993).

The Devils Lake Sioux Tribe, a federally recognized tribe, created the Sioux Manufacturing Corporation (SMC) in an attempt to reduce the forty-five percent tribal unemployment rate. SMC is a wholly owned tribal corporation and is also a governmental subdivision of the Tribe. SMC was originally created to manufacture and market camouflage cloth for military helmets. In an attempt to expand their business the Tribe and SMC negotiated with Medical Supplies & Technology, Inc. (MST), an Illinois corporation, to manufacture and market medical latex gloves at SMC's plant located on the Devils Lake Sioux Reservation.[63]

505, 509 (1991)).

55. *Id.* (quoting United States v. Testan, 424 U.S. 392, 399 (1976)).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (quoting Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1705(a), 1708 (1988)).

60. *Id.* at 16.

61. *Id.*

62. *Id.*

63. Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 806 (7th Cir. 1993).

MST and SMC signed a letter of intent, whereby MST would provide technology, expertise, and know-how for the production and marketing of the products in exchange for thirty percent of the net profits and other fees, and SMC would provide investment capital, facilities, labor, and business operations.[64] The provisions of the letter of intent in controversy provided in part that the Tribe or SMC would pay MST's legal fees if the transaction was not consummated within sixty days, that the Tribe would waive all sovereign immunity in regards to contractual disputes, and that the laws of the State of Illinois would be applied to any dispute.[65]

The deal between MST and SMC was never consummated, and MST's law firm, Altheimer & Gray, filed suit against SMC in federal district court in Illinois.[66] The district court granted summary judgment for SMC on the grounds that the contract was null and void under 25 U.S.C. § 81.[67] "[This] statute requires contracts concerning Indian lands to be approved by the Secretary of Interior. Contracts without the Secretary's approval are of no effect."[68] Altheimer & Gray filed motion to vacate, which was denied by the district court. Altheimer & Gray then appealed to the Court of Appeals for the Seventh Circuit, which reversed the district court and remanded for trial. The court of appeals in de novo review held that 25 U.S.C. § 81 did not apply to the letter of intent between MST and SMC because it was not a contract concerning Indian lands and the Tribe waived its sovereign immunity.[69] The court stated that it is an important principle to allow the Tribe to waive its sovereign immunity, because if contracting parties cannot trust the validity of clauses waiving sovereign immunity the Tribe may find itself unable to enter into any transactions in the future, thereby crippling the Tribe's effort to gain economic advantage.[70]

The court reasoned, that in order to determine whether a contract is valid, a three-part inquiry must be made: (1) one or more parties must be a tribe of Indians, (2) the nature of the contract must involve Indian tribal land, and (3) the contract must be approved by the Secretary of Interior.[71] Both parties admit the contract was not approved by the Secretary of Interior, and the court ruled that SMC was a tribal entity and not an independent entity; however, the

64. *Id.* at 806.

65. *Id.* at 807.

66. The law firm had provided MST with legal services in connection with the negotiations with SMC and based its suit on the assertion that the firm was an intended third party beneficiary of the letter of intent. Altheimer sought damages in the amount of $167,593.77 plus interest and costs.

67. 25 U.S.C. § 81 (1988).

68. *Altheimer*, 983 F.2d at 803 (quoting *In re* Sanborn, 148 U.S. 222, 227 (1893)).

69. *Id.* at 808, 812.

70. *Id.* at 815.

71. *Id.* at 808.

court held that 25 U.S.C. § 81 did not void the contract because the nature of the contract did not involve Indian land.[72]

The district court stated that the phrase "'relative to Indian lands' must be 'liberally interpreted to effectuate its purpose of protecting Indian interests,' and that this court interprets section 81 as covering 'nearly all transactions relating to Indian lands.'"[73] The appellate court agreed with the district court, but even liberally interpreting the contract the appellate court held that it was not relative to Indian Land.[74] The court further stated that the following factors are determinative of whether a contract relates to Indian lands:

> (1) Does the contract relate to the management of a facility to be located on Indian lands? (2) If so, does the non-Indian party have the exclusive right to operate the facility? (3) Are the Indian parties forbidden from encumbering the property? (4) Does the operation of the facility depend upon the legal status of an Indian tribe being a separate sovereign?[75]

The court in applying the above test stated that according to the letter of intent MST would not have exclusive control, and unlike bingo the business received no special benefit from being located on the reservation.[76] In sum the Tribe did not cede any right, interest, or control of Indian land to MST.[77] Therefore, the letter of intent did not relate to Indian lands, did not require the approval of the Secretary of Interior in order to be valid, and is not null and void.[78]

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GAMING: Indian Gaming Regulatory Act

Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179 (10th Cir. 1993).

Citizen Band Potawatomi Indian Tribe of Oklahoma appealed a district court order granting summary judgment to John E. Green.[79] The district court held that the importation of video lottery terminals onto the Tribe's land would

72. *Id.*

73. *Id.* at 810 (quoting Altheimer & Gray v. Sioux Mfg. Corp., 780 F. Supp. 504, 509 (N.D. Ill. 1991)) (interpreting Wisconsin Winnebago Business Comm. v. Koberstein, 762 F.2d 613 (7th Cir. 1985).

74. *Altheimer*, F.2d at 806, 810.

75. *Id.* at 811.

76. *Id.* at 811-12.

77. *Id.*

78. *Id.* at 812.

79. John E. Green is the former United States Attorney for the Western District of Oklahoma.

violate the Johnson Act.[80] The Court of Appeals for the Tenth Circuit affirmed the district court, by holding that the Johnson Act would prohibit the importation of video lottery terminals onto the Tribe's land and that the limited waiver provisions provided for in the Indian Gaming Regulatory Act[81] do not apply because gambling devices are not legal in the State of Oklahoma.[82]

The Tribe and the State of Oklahoma entered into the Potawatomi-Oklahoma Gaming Compact of 1992.[83] This compact allowed the Tribe to import and use video lottery terminals on tribal land located within Oklahoma. However, the compact further provides that the Tribe shall not import video lottery terminals until either (1) the United States Attorney for the Western District of Oklahoma issues a letter assuring that the importation would not violate the Johnson Act, or (2) a federal court shall have declared that the importation does not violate the Johnson Act.[84]

The Johnson Act prohibits the possession or use of "any gambling device" within Indian country.[85] The Act defines a gambling device as:

> Machine or mechanical device . . . designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may be entitled to receive, as the result of the application of an element of chance, any money or property. . . .[86]

The Tribe conceded that the video lottery terminals it sought to import satisfied both prongs (A) and (B) of the definition of a gambling device. The Tribe, however, argued that the Indian Gaming Regulation Act (IGRA) provides for a limited waiver of Johnson Act liability under certain circumstances.[87] The IGRA expressly provides that section 1175 of the Johnson Act shall not apply to any gaming conducted under a tribal-state compact that "(A) is entered into . . . by a State in which gambling devices are legal, and (B) is in effect."[88] The court stated that "Oklahoma clearly prohibits the possession of and dealing in gambling devices . . . . It also prohibits persons from

80. 15 U.S.C. §§ 1171-1178 (1988).
81. 25 U.S.C. §§ 2701-2721 (1988).
82. Citizens Band Potawatomi Indian Tribe v. Green, 995 F.2d 179, 184 (10th Cir. 1993).
83. Tribal-State Class III Gaming Compact, Aug. 27, 1992, Citizen Band Potawatomi Indian Tribe of Oklahoma-State of Oklahoma (on file with the *American Indian Law Review*).
84. *Green*, 995 F.2d at 180 (citing the Tribal-State Class III Gaming Compact).
85. 15 U.S.C. § 1175 (1988).
86. *Id.* § 1171(a)(2).
87. *Green*, 995 F.2d at 182.
88. 25 U.S.C. § 2710(d)(6) (1988).

permitting others to install gambling devices on their premises."[89] The court held that because gambling devices in Oklahoma are not legal that the IGRA's waiver of the Johnson Act does not apply and the Potawatomi/ Oklahoma Gaming Compact of 1992 can not be enforced.[90]

TAXATION: Restriction of Alienation and the Definition of Indian Country.

Buzzard v. Oklahoma Tax Commission, 992 F.2d 1073 (10th Cir. 1993)

The tribal charter of the United Keetoowah Band (UKB) permits it to purchase land in fee simple but restricts the sale of the land by requiring the approval of the Secretary of the Interior. The UKB argued that the State of Oklahoma could not tax the sale of tobacco sold in smokeshops because the smokeshops were in Indian country.[91] The UKB also argued that the restriction of alienation "amounted to sufficient involvement by the federal government to make UKB land validly set apart for the use of the Indians as such, under the superintendency of the government."[92] The Court of Appeals for the Tenth Circuit concluded that in order to find Indian country, the federal government must take some definitive action to set land aside for the use of Indians.[93] This includes land held in trust by the government, or land designated as an Indian colony.[94]

The UKB could show no active involvement by the government other than the restriction on alienation.[95] The court concluded that to consider such land as Indian country would be to effectively allow the UKB the right to unilaterally determine what land would become Indian country without the federal government having any say in the matter, since the Tribe had the right to purchase land in fee simple.[96] The court stated that the restriction on alienation requiring government approval "may show a desire to protect the UKB from unfair dispositions of its land, but does not itself indicate that the federal government intended the land to be set aside for the UKB's use."[97]

89. *Green*, 995 F.2d at 183 (quoting 21 OKLA. STAT. §§ 21, 983-985 (West 1983)).
90. *Id.* at 184.
91. Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073, 1075 (10th Cir. 1993).
92. *Id.* (citing Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505 (1991)).
93. *Id.* (citing Potawatomi and U.S. v. McGowan, 302 U.S. 530, 535 (1938)).
94. *Id.*
95. *Id.*
96. *Id.* at 1077.
97. *Id.* at 1076.

STATE COURTS

CRIMINAL JURISDICTION: State Jurisdiction

Washington v. Schmuck, 20 Indian L. Rep. (Am. Indian Law. Training Program) 5084 (Wash. May 6, 1993).

A Suquamish tribal police officer commissioned by the Suquamish Indian Tribe to enforce tribal laws within the Port Madison Reservation, which is located within the State of Washington, stopped a motorist within the reservation for speeding. The motorist was a non-Indian, so the officer detained the suspect until the Washington State Patrol could respond. The suspect was charged with driving while under the influence of intoxicating liquor.[98] Judgment was entered against the defendant in district court and affirmed in Kitsup County Superior Court.[99]

Defendant then appealed to the Washington Supreme Court, claiming that the tribal officer had no authority to stop and detain a non-Indian who allegedly violates state and tribal laws while traveling on a public road.[100] The Supreme Court of Washington affirmed the lower courts by holding that a tribal officer does have the authority to detain a non-Indian on the reservation.[101]

The court noted that while it is clear that Indian tribal courts do not have jurisdiction to try and punish non-Indians who commit crimes on their land,[102] it is equally clear that the Tribe did have the power to stop and detain the defendant.[103] Indian tribes are limited sovereigns which retain the power to prescribe and enforce internal criminal and civil laws. By virtue of these powers it necessarily includes the authority to stop and investigate any possible violation of tribal law and determine whether the actor is an Indian, thereby being subject to tribal jurisdiction.[104]

In 1855, the Tribe entered into a treaty with the United States.[105] Article 9 of the treaty provided that the Tribe shall deliver to the proper authorities all non-Indian violators of the laws of the United States.[106] This type of treaty provision has never been overturned and has been upheld in two United States Supreme Court cases[107] and in a Court of Appeals for the Ninth Circuit case.[108]

98. The defendant was charged under WASH. REV. CODE § 46.61.502 (1991).

99. Washington v. Schmuck, 20 Indian L. Rep. (Am. Indian Law. Training Program) 5084 (Wash. May 6, 1993).

100. *Id.* at 5084.

101. *Id.*

102. *Id.* at 5085 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978)).

103. *Id.*

104. *Id.*

105. Treaty of Point Elliott, Jan. 22, 1855, Suquamish Tribe-U.S., 12 Stat. 927.

106. *Id.*

107. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Duro v. Reina, 495 U.S. 676 (1990).

108. *See* Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975).