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RECENT DEVELOPMENTS

UNITED STATES SUPREME COURT

JURISDICTION: Right to Regulate Environmental Landfill Site

South Dakota v. Yankton Sioux Tribe, No. 96-1581, 118 S. Ct. 789 (U.S. Jan. 26, 1998)

South Dakota claims the right to regulate a landfill constructed on non-Indian fee land even though that land falls within the boundaries of the original Yankton Reservation.[1] Conversely, the Yanktons argue that federal environmental regulations should be applied to the landfill site because it is located within Indian country as proscribed by the 18 U.S.C. § 1151(a).

In the early 1800s, the Yankton Sioux Tribe (Yankton) freely roamed its territory consisting of 13 million acres of land between the Des Moines and Missouri rivers. When the United States needed more land to offer white settlers, it entered into a Treaty[2] with the Yanktons, taking most of their 13 million acres. The Yanktons were left with 430,405 acres located in the southeastern part of Charles Mix County, South Dakota.[3] In exchange for this land, the federal government promised the Yanktons protection from white people, and agreed to pay the Yanktons a sum of money, provide livestock and agricultural equipment, and to construct houses and schools.[4] However, with passage of the Dawes Act in 1887,[5] members of the Tribe were allotted individual tracts. The government then negotiated for the cession of over 168,000 acres which were opened to white settlement over the strong protests of the Yanktons.[6]

An agreement ratified by the Congress in 1894 paid the Yanktons $600,000 to cede, relinquish, and sell to the United States all of its unallotted lands.[7] Article XVII of this agreement, known as a saving clause, explained that nothing in the 1894 agreement would abrogate the 1858 Treaty, and all provisions of the Treaty would be in full force and effect.[8] The State argues that it has jurisdiction over the unallotted lands because the Act of 1894

1. South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789, 793 (U.S. Jan. 28, 1998).
2. Treaty of Apr. 19, 1858, United States-Yankton Sioux, 11 Stat. 743.
3. South Dakota v. Yankton Sioux Tribe, 118 S. Ct. at 794.
4. *Id.*
5. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 (1994)).
6. South Dakota v. Yankton Sioux Tribe, 118 S. Ct. at 796.
7. *Id.*
8. *Id.*

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diminished the reservation freeing said unallotted lands from federal overview.[9]

The Yanktons claim that because the proposed landfill is located within the boundaries of the Yankton Reservation as set out in the 1858 Treaty, federal environmental regulations should be applied.[10] The location of the landfill project corresponds to the land allotted to individual Indians on the Yankton Sioux Reservation. Although the land was deeded to a non-Indian as a homestead under the Homestead Act of 1904, the land retained its restrictions and was inalienable under the Dawes Act for a twenty-five-year period.

In a suit brought by the Yankton Sioux Tribe, the district court held that the Tribe itself could not assert regulatory authority over non-Indian activity on fee lands.[11] Additionally, the activity (regulating a landfill) did not affect "the political integrity, the economic security, or the health or welfare of the Tribe."[12] Consequently, the Yankton Tribe was precluded from invoking its inherent sovereignty under the exceptions of *Montana v. United States*.[13] However, the district court did find that the landfill site was within the boundaries of the Reservation according to the 1858 Treaty, and therefore subject to federal environmental regulations.[14]

The Eighth Circuit Court of Appeals in a divided decision held that, while Congress intended for the Yanktons to sell their surplus lands to the government under the 1894 Act, it did not intend for the Yanktons to relinquish authority over their lands.[15] The Supreme Court granted certiorari to determine whether unallotted, ceded lands were severed from the Reservation, thereby relinquishing the Tribe's authority over those lands.

The Court found that the Act of 1894 was a negotiated agreement providing for complete surrender of the unallotted lands in exchange for compensation.[16] Relying on its decision in *Rosebud Sioux Tribe v. Kneip*,[17] the Court states that when Congress compensates an Indian Tribe for the cession of its lands, or any part thereof, an "almost insurmountable presumption of diminishment arises."[18] Additionally, the savings clause contained in the 1894 Act cannot be interpreted too literally because to do so would be to "impugn the entire sale."[19] Instead the Court explains that a sensible construction must be given to the savings clause. The payments and annuities owed by the

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9. *Id.* at 791.
10. *Id.* at 796.
11. *Id.* at 797.
12. *Id.* (citing Montana v. United States, 450 U.S. 544, 566 (1981)).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 798.
17. 430 U.S. 584 (1977).
18. South Dakota v. Yankton Sioux Tribe, 118 S. Ct. at 798.
19. *Id.* at 799.

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government to the Yanktons under the 1858 Treaty should continue to be paid.[20] However, all other portions of the 1858 Treaty, especially those clauses favorable to the Yanktons, can be ignored because the "precise cession and sum certain language contained in the 1894 Act plainly indicates diminishment, and a reasonable interpretation of the saving clause does not conflict with a like conclusion in this case."[21]

In a result oriented decision, the Court held that Congress diminished the Yankton Sioux Reservation by application of the 1894 Act.[22] Thus, the State has jurisdiction over all unallotted lands because these lands no longer constitute Indian country.[23] Based on this decision, the State can apply its environmental regulations to the landfill site.[24]

JURISDICTION: Sovereign Immunity

Kiowa Tribe v. Manufacturing Technologies, Inc., No. 96-1037, 1998 WL 260001 (U.S. May 26, 1998)

In *Kiowa Tribe v. Manufacturing Technologies, Inc.*, the Kiowa Industrial Development Commission entered into an agreement with Manufacturing Technologies to buy stock. The Tribe executed a promissory note. The note was signed off of tribal lands in Oklahoma City. The Tribe then reneged on its commitment to pay the note. Suit was brought in Oklahoma state court. The trial court denied the Tribe's motion for dismissal on grounds of sovereign immunity. The Oklahoma Court of Appeals affirmed the decision and the Oklahoma Supreme Court declined to review the decision.[25]

The United States Supreme Court reversed the decision,[26] stating that sovereign immunity applies regardless of where the business is conducted. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred."[27] The Court further stated, "As a matter of law tribal immunity is a matter of federal law and is not subject to diminution by the States."[28]

In this decision, the Court upheld and clarified the concept of tribal sovereign immunity. However, the Court all but requested action by Congress to repeal sovereign immunity. The Court noted instances where those ignorant

20. *Id.*
21. *Id.* at 800.
22. *Id.* at 805.
23. *Id.*
24. *Id.*
25. Kiowa Tribe v. Manufacturing Techs., Inc., 1998 WL 260001, at *2.
26. *Id.*
27. *Id.* (citations omitted).
28. *Id.* at *3.

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of sovereign immunity or those who have no choice, such as in tort cases,[29] would be victimized by immunity. The majority opinion stated, "These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule."[30] The Court did not change the old rule nor did it institute a new one. Instead, the Court deferred this to Congress.[31]

Most tribes will welcome the decision of the Court to uphold tribal sovereign immunity. However, with power comes the responsibility not to abuse it. Cases such as this one can only help opponents of tribal sovereign immunity in their quest to destroy or severely limit it. When tribal sovereign immunity is used to shield a tribe against unethical actions by the tribe, that tribe opens the door to attack against all the others. The dissenting opinion of Justice Stevens sums it up when he refers to the rule as "unjust . . . [to those] who have no opportunity to negotiate for a waiver of sovereign immunity . . . . Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct."[32]

POWER TO TAX: Tribal Government Taxation Power in Its Territory

Alaska v. Native Village of Venetie Tribal Government, No. 96-1577, 1998 WL 75038 (U.S. Feb. 25, 1998)

In 1943, a reservation was created for the Neets'aii Gwich'in Indians from lands surrounding the village of Venetie and another tribal village.[33] This land remained a reservation under the supervision of the Secretary of the Interior for approximately eighteen years until Congress passed the Alaska Native Claims Settlement Act (ANCSA).[34] With passage of ANCSA, Congress sought to remove all claims, restrictions and supervision from reservations. As consideration for extinguishment of claims, restrictions and supervision, Congress transferred $962.5 million and 44 million acres to state-chartered private business corporations as tenants in common, whose shareholders comprised only of Alaska Natives.[35] Subsequently, two native corporations transferred title in fee simple lands to the Native Village of Venetie Tribal Government (the Tribe).[36]

In 1986, Alaska entered into a joint venture with a private contractor to build a public school within the Village of Venetie. The Tribe assessed taxes

29. *Id.* at *5.
30. *Id.*
31. *Id.* at *6.
32. *Id.* at *10.
33. Alaska v. Native Village of Venetie Tribal Gov't, No. 96-1577, 1998 WL 75038, at *1 (U.S. Feb. 25, 1998).
34. *Id.* at *3 (citing Alaska Native Claims Settlement Act, ch. 33, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1628) (1994)).
35. *Id.*
36. *Id.*

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in the amount of $161,000 against the contractor for conducting business on tribal lands.[37] In an attempt to collect the tax, the Tribe pursued its claim in tribal court. The State sought an injunction in federal district court against the Tribe's collection of the taxes.[38] The district court held that the Tribe's land failed to meet the definition of Indian country as set out in 18 U.S.C. § 1151(b).[39] Therefore, the Tribe lacked the power to tax any non-tribal members. The Ninth Circuit Court of Appeals disagreed holding that ANCSA did not eliminate Indian country in Alaska and that it may still exist.[40] The Supreme Court granted certiorari to determine whether the court of appeals correctly determined that the Tribe's land is Indian country.[41]

The Court relied on a statutory interpretation of Indian country in conjunction with its decisions set out in *United States v. Sandoval*,[42] *United States v. Pelican*,[43] and *United States v. McGowan*.[44] The Court explained that to meet the requirements of Indian country two general factors must be met. First, the lands must be set aside for the use of Indians, and, second, the Native inhabitants must be under federal superintendence.[45] The federal set-aside requirement guarantees that the land in question is occupied by an Indian community, while the supervision requirement confirms that the community is sufficiently dependent on the federal government.[46]

The Court explained that the Tribe's ANCSA lands met neither of the restrictions. ANCSA revoked all existing Alaska reservations set aside by governmental order for use by Indians or Natives, thus failing to meet the federal set-aside restriction.[47] Additionally, the lands failed to meet any set-aside restrictions because the lands were transferred to private corporations with no restraints on alienation or use restrictions attached.[48] The Court further explains that because any protections the federal government may currently extend to Alaska Natives does not approach the level of active federal control and stewardship over Indian lands in other parts of the country, the federal superintendence requirement is not met.[49] The Court points out that

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at *3, 4.
41. *Id.* at *4.
42. 231 U.S. 28, 46 (1913), *cited in* Alaska v. Native Village of Venetie Tribal Gov't, 1998 WL 75038, at *5.
43. 232 U.S. 442, 449 (1914), *cited in* Alaska v. Native Village of Venetie Tribal Gov't, 1998 WL 75038, at *6.
44. 302 U.S. 535, 538 (1938), *cited in* Alaska v. Native Village of Venetie Tribal Gov't, 1998 WL 75038, at *6.
45. Alaska v. Native Village of Venetie Tribal Gov't, 1998 WL 75038, at *7.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at *8.

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the primary purpose of ANCSA is to promote Native self-determination — a goal shared by the Tribe.[50] The Court reversed the judgment of the court of appeals, and left the modification of Indian country as a question for Congress.[51]

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GAMING: An Interpretation of the Indian Gaming Regulatory Act

United States v. Santee Sioux Tribe, No. 97-1546, 1998 WL 30158 (8th Cir. Jan. 29, 1998)

The Indian Gaming Regulatory Act (IGRA)[52] allows an Indian Tribe to conduct gaming activities on Indian country provided that the State, in which the Tribe is located, permits gaming.[53] The Santee Sioux Tribe of Nebraska (the Tribe) negotiated with the State of Nebraska (the State) for a gaming compact to allow the Tribe to operate class III gaming on the Tribe's lands.[54] The Tribe elected to open a gaming facility even though negotiations with the State failed. The gaming facility, opened to tribal members and the general public, offered video slot machines, video poker machines and video blackjack machines.[55]

The Tribe filed suit in district court against the State for failure to negotiate in good faith.[56] However, the district court, relying on the United States Supreme Court decision in *Seminole Tribe v. Florida*,[57] dismissed the Tribe's suit and denied its motion for a new trial. Subsequently, the Chairman of the National Indian Gaming Commission (NIGC) notified the Tribe that it had violated the IGRA and ordered a temporary closure of the Tribe's facility.[58] The Tribe closed its facility, and appealed the Chairman's order; however, it reopened its gaming facility a short time later. The United States then filed a complaint against the Tribe for conducting a class III gaming facility in violation of federal and state law.[59]

In a multitude of filed and dismissed charges between the Tribe, the NIGC and the United States, the district court ultimately determined that a civil

50. *Id.*
51. *Id.*
52. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721 (1994); 18 U.S.C. §§ 1166-1168 (1994)), *cited in* United States v. Santee Sioux Tribe, No. 97-1546, 1998 WL 30158, at *1 (8th Cir. Jan. 29, 1998).
53. United States v. Santee Sioux Tribe, 1998 WL 30158, at *1.
54. *Id.*
55. *Id.*
56. *Id.*
57. 517 U.S. 44 (1996).
58. United States v. Santee Sioux Tribe, 1998 WL 30158, at *1.
59. *Id.* at *2.

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injunction could not be utilized to prevent the Tribe from engaging in illegal activities.[60] Additionally, because the Tribe's activities had not been determined to be a nuisance under state law, the court did not have the authority to enjoin the Tribe's activities. Further, the district court interpreted the IGRA as restricting the United States Attorney General to criminal prosecution only, and disallowing any civil injunctive relief.[61] The United States appealed the district court's refusal to (1) enjoin the Tribe's activity and (2) enforce the NIGC's closure order against the Tribe.[62]

The court of appeals determined that even though the IGRA is silent on the right to enforce the NIGC's closure orders, it could assume that Congress intended for the Attorney General to conduct enforcement procedures on behalf of the NIGC.[63] The court based its findings on 28 U.S.C. § 516 which gives the Attorney General exclusive authority and plenary power over litigation involving the United States.[64] Additionally, the court relied on a Supreme Court decision in *United States v. Republic Steel Corp.*[65] which set forth a test to decide "whether the United States has an interest to protect or defend."[66]

The court pointed out certain undisputed facts, such as the use of class III gaming devices by the Tribe, and the lack of a tribal-state gaming compact.[67] Subsequently, the court determined that the Tribe acted in violation of the IGRA because its gaming activities conflicted with Nebraska laws. IGRA incorporates by reference all State laws pertaining to gambling or its prohibition.[68] Thus, the court held that IGRA incorporates both statutory and case law of the State of Nebraska, and because Nebraska law[69] allows for injunctive relief to halt illegal gambling activities, such relief is available to the Attorney General to enforce the closure orders of the Chairman of NIGC.[70] In closing, the court found that because the State prohibited gambling, it was under no duty to negotiate with the Tribe for a gambling compact.[71]

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60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at *3. The court determined that because the Tribe failed to complain about the Attorney General's appearance, it was somehow barred from pursuing this argument. *Id.* This seems a nefarious statement in view of the fact that the Tribe did not name the United States as a defendant.
64. *Id.*
65. 362 U.S. 482, 492 (1960).
66. United States v. Santee Sioux Tribe, 1998 WL 30158, at *3.
67. *Id.*
68. *Id.* at *6.
69. *Id.* (citing Spire v. Strawberries, Inc., 473 N.W.2d 428, 435 (Neb. 1991)).
70. *Id.*
71. *Id.*

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDIAN HEALTH CARE IMPROVEMENT ACT: What Constitutes a "State"

United States v. Bering Strait School District, No. 96-35827, 1998 WL 106108 (9th Cir. 1997)

The United States brought action for reimbursement for the reasonable expenses incurred by both the United States and Norton Sound Health Corporation. Under the Indian Health Care Improvement Act (the Act),[72] a nongovernmental health insurer is required to reimburse the United States for health care provided by the United States to Indians and Alaskan Natives who were covered by a health insurance plan.[73] Only an entity qualifying as a "state" under the Act is exempt.[74] At issue is whether the Bering Strait School District (the District) qualifies as a "state."[75]

The court distinguished between entities that are agencies of the State and thus exempt under the Act and entities which are merely arms of the state and thus, not exempt. The court stated that "a local government unit, though established under state law, funded by the state, and ultimately under state control, with jurisdiction over only a limited area, is not a 'State.'"[76] Using this description, the court held that the District is not a "state" and is not entitled to the exemption under the Act.[77]

SUPREME COURT OF KANSAS

SOVEREIGNTY: Recognition of Sovereign Powers

State v. Wakole, No. 77330, 1998 WL 272713 (Kan. May 29, 1998)

In 1996, Priscila Wakole was driving a van bearing Sac and Fox tribal plates on a Kansas highway.[78] She was stopped, arrested, and convicted[79] of driving an illegally registered vehicle, a misdemeanor.[80]

Wakole appealed the conviction to the Court of Appeals of Kansas, which overturned the conviction.[81] In its decision, the court held that the Kansas

72. 25 U.S.C. § 1621e (1994).

73. United States v. Bering Strait Sch. Dist., No. 96-35827, 1998 WL 106108, at *1 (9th Cir. 1997).

74. *Id.*

75. *Id.* at *2.

76. *Id.* at *3.

77. *Id.*

78. State v. Wakole, No. 77330, 1998 WL 272713, at *2 (Kan. May 29, 1998).

79. *Id.*

80. KAN. STAT. ANN. § 8-142 (1995).

81. *Wakole*, 1998 WL 272713, at *7.

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statute[82] defining "state" included Indian nations.[83] It was on this holding that the court reversed the conviction.[84] The state petitioned for review.[85]

The Supreme Court of Kansas held that the Sac and Fox tribal plate was legal in the State of Kansas because the plates are recognized under Oklahoma law.[86] However, the Supreme Court of Kansas specifically disapproved of the opinion of the Court of Appeals recognizing the sovereignty of a tribe.[87] Instead, the Supreme Court of Kansas relied on Oklahoma recognition of the plates for its decision.[88]

The message from Kansas and its supreme court is clear. Native Americans traveling in Kansas with tribal plates on their vehicles make themselves a target for law enforcement. In addition, the state clearly showed its feelings toward Native Americans by petitioning for review of a conviction that was ludicrous from the beginning. Finally, in its decision, the Supreme Court of Kansas made it clear that the sovereignty of tribes is not recognized in Kansas. In this case, the Sac and Fox tribe was not considered to be a sovereign nation but rather, in the words of Priscila Wakole, "a subentity of the State of Oklahoma, a mere subdivision . . . ."[89] From the initial arrest, through the conviction and the ultimate reversal by the Supreme Court of Kansas, it is quite clear that Native Americans are not welcome in the Great State of Kansas.

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82. KAN. STAT. ANN. § 8-138a.
83. *Wakole*, 1998 WL 272713, at *2.
84. *Id.* at *7.
85. *Id.* at *1.
86. *Id.* at *5.
87. *Id.* at *6.
88. *Id.*
89. *Id.* at *2.

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