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Federal Recent Developments

FEDERAL RECENT DEVELOPMENTS

ALLOTMENTS: Alaska

In *Shields v. United States, 10 I.L.R. 2033 (9th Cir. 1982)*, the Ninth Circuit decided that Congress' intent, according to the legislative history of the Alaska Native Allotment Act,[1] was to limit allotment to individuals who personally occupied land prior to its withdrawal by the United States for national forests rather than allowing allotment to be based on ancestral occupancy. The Alaska Native Allotment Act authorized the Secretary of the Interior to grant up to 160-acre allotments to Alaska natives. Section 2 of the Act provided: "Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes."[2]

Appellants, a class of two hundred allotment applicants, argued that only ancestral occupancy was required by section 2. Otherwise, the requirements for five years' use and continuous occupancy would be meaningless. The court did not accept this argument. The court affirmed the district court's decision to grant the motion for summary judgment made by the government and held that applicants for allotments within a national forest under the Alaska Native Allotment Act are required to establish personal use and occupancy prior to land becoming part of a national forest.

CLAIMS: Ancient Indian Land Claims Bill

The Ancient Indian Land Claims Settlement Act of 1982 (S. 2084, H.R. 5494) was introduced by Senators D'Amato (R.-N.Y.) and Thurmond (R.-S.C.) and Congressmen Lee (R.-N.Y.), Holland (D.-S.C.), and Wortley (R.-N.Y.). The bill was a response to lawsuits brought by eastern tribes who claimed title to land on the theory that they had been displaced by agreements that had not been approved by the federal government as the Non-Intercourse Act of 1970 required. If enacted, the bill would eliminate all existing and future eastern Indian land claims by

1. Pub. L. No. 171, 34 Stat. 197 (passed 1906, amended 1956, and repealed 1971).
2. *Id.* § 2.

ratifying all transfers of natural resources or land located in South Carolina or New York made prior to January 1, 1912, by any Indian tribe.

The bill contains no provision for the direct transfer of land. It provides only for monetary relief, which is limited to the difference between the fair market value of the land at the time the questionable transaction was made and the amount paid at that time. The tribes would also be entitled to 5% interest where the case is based on recognized title and 2% interest in cases based on aboriginal title.

Because land transfers are to be ratified retroactively and compensation is limited to less than the current value of the land, the bill faces constitutional challenges. In order to limit these constitutional attacks, the bill provides that all constitutional attacks must be brought in the federal district court in the district where the land is located.

Many tribes have already opposed the bill. Hearings were held by the Senate Select Committee for Indian Affairs and House Committee on Interior and Insular Affairs on June 6, 1982. Passage was recommended. No further action on the bill has been taken since these hearings.

CONSTITUTIONAL LAW: Religion

In *South Dakota v. Brave Heart, 10 I.L.R. 5008 (S.D. 1982)*, the South Dakota Supreme Court affirmed appellants' conviction for burning an open fire in the Black Hills without a permit, which had been applied for and denied. Appellants claimed they had the right to engage in religious activities on land granted by the 1868 Fort Laramie Treaty.[1] The court held that the United States Court of Claims has exclusive subject matter jurisdiction over all Indian treaty claims.

Appellants' argument that the conviction under South Dakota law was invalid because South Dakota permit laws were preempted by federal fire permit laws was not accepted by the state supreme court. The Cooperative Fire Control Agreement and a federal regulation, which required Forest Service officers to cooperate with the state to enforce fire laws, allocated the duty to issue permits to each protecting agency.[2] South Dakota laws were not preempted by federal fire permit laws.

1. 15 Stat. 635.
2. 36 C.F.R. § 211.3.

As to appellants' first amendment claim that the enforcement of the open fire law prevented the free exercise of religion, the court held the appellants had not met the burden of showing that the statute prevented the free exercise of religion. No evidence was presented that proved open fires were necessary to perform the sweat lodge and pipe ceremonies. They could have been performed using stoves or spark-proof incinerators. Therefore the first amendment claim was held invalid.

INDIAN LANDS: Indian Land Consolidation Act

The Indian Land Consolidation Act, H.R. 5856, was introduced by Congressman Morris Udall (D.-Ariz.) on March 16, 1982. On passage of the bill, tribes would be allowed to consolidate tribal land holdings and sell tribal lands in order to eliminate undivided fractional heirship interests. Under prior law, allotments could not be sold unless all the owners and the United States gave consent. Some of the property had undivided interests so small that the heirs were not even aware of their interest.

The Indian Land Consolidation Act would allow tribes to purchase tracts of trust or restricted land for fair market value if they have the consent of the owners of more than 50% of the undivided interests. If an owner of 50% or more of the total interest in the tract failed to give consent, the tract could not be purchased. An individual Indian owning and in possession of an undivided interest could purchase the other undivided interests of the tract if he matched the offer made by the tribe.

Tribal governments would be authorized to enact legislation under Title II of H.R. 5856 which would allow only the tribe, its members, or other Indians to be entitled to inherit an interest in trust or restricted lands. The Act also would have provisions to protect non-Indian spouses' interests. The Act would allow tribes to prohibit very small fractional interests from being inherited and to make provisions for those interests to escheat back to the tribe.

Hearings were held on H.R. 5856 in May 1982 before the House Committee on Interior and Insular Affairs. Because S. 503 and H.R. 5856 dealt with the same subject matter, the Committee consolidated the two bills into one bill with two titles. H.R. 5856 applied to all tribes and S. 503 applied only to the Devils Lake Sioux Reservation. The bill was approved on January 12, 1983 and became Public Law 97-459.

JURISDICTION

Bingo Operations on Reservations

In *Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982)*, the Tribal Council of the Barona Group of the Capitan Grande Band of Mission Indians authorized the operation of bingo games on the reservation on April 20, 1981. On June 25, 1981, the tribal representatives were informed that the tribe's bingo games would be a violation of the county bingo ordinances and that participants would be cited or arrested at the entry of the reservation. The Barona Tribe requested declaratory and injunctive relief to prevent enforcement of the county and state laws regulating the operation of bingo games. A summary judgment was entered for the county on March 26, 1982 and the Barona Tribe appealed.

The Court of Appeals for the Ninth Circuit held that the case was suitable for a summary judgment because there was no issue of material fact, but reversed because of the legal issues. The test for deciding whether the county and state laws applied to the bingo operations on the reservation was whether the laws were classified as civil/regulatory or criminal/prohibitory. If the county or state laws were civil/regulatory, they could not be enforced on the reservation. The circuit court held that the bingo laws were civil/regulatory and therefore could not be enforced on the reservation. The court's reasoning was that the California statute authorized the operation of bingo games by certain tax-exempt organizations. Also, in an authorized game, the public was allowed to play bingo at will. Thus bingo operations were not against public policy. The circuit court stated that the purpose of the bingo games, which was to make money for the promotion of programs to benefit the tribe, was similar to charitable purposes stated by authorized bingo operations of other organizations. The court also cited several rules by the Supreme Court favoring tribal self-government in order to support its decision.

Consent to Application of State Laws

In *Cabazon Band of Mission Indians v. City of Indio, 694 F.2d 634 (9th Cir. 1982)*, the Cabazon Band of Mission Indians sought to prevent enforcement of the city of Indio's gambling ordinances on the Cabazon Reservation. The reservation was legally owned by the United States in trust for the Cabazon Band. The city of Indio conducted proceedings between January and May of 1970

to annex part of the reservation along with privately owned lands. The former California Government Code entitled "Annexation of Territory Owned by the Federal Government"[1] was in effect at the time of the proceedings. This authorized a municipality to annex federally owned land if there was consent by the federal government or agency owning the land. Before the end of the proceeding, the Cabazon Band objected to the annexation. The Bureau of Indian Affairs advised the city that they did not recognize the validity of the annexation because the city did not have the consent of the Cabazon Band and the United States.

On May 24, 1980, the Cabazon Band enacted a tribal ordinance that authorized gambling on card games. The Indio police came onto the reservation on October 18, 1980, and issued citations for violation of the Indio regulation against gambling. The band applied for a temporary restraining order and preliminary injunction. The band also filed suit for declaratory and injunctive relief to prevent enforcement of Indio's ordinance. The motion for preliminary injunction was granted, but the temporary restraining order was denied by the district court. The court considered the motions for summary judgments made by both parties. Judgment was granted for defendants and the injunction was dissolved. The Cabazon Band filed a motion for vacation of judgment, which was denied. A motion for restoration of the injunction pending appeal was granted because the band argued it would have no source of income to operate its tribal government without the funds from the gambling.

The Ninth Circuit Court of Appeals held that federal consent was a condition precedent to city annexation of federal land. Because Indio failed to get consent, the annexation was void *ab initio*. There was no statute of limitations within which the Cabazon Band had to take action to show invalidity of the annexation because the annexation was void *ab initio*. The court also held that federal Indian rights may not be barred by statutes of limitations. The Cabazon Band's arguments for preemption and infringement were not considered by the court because the annexation was void.

1. CAL. GOV'T CODE §§ 35470-71 (West 1968) (repealed in 1977 as part of Municipal Organization Act, ch. 1253, § 8, 1977).

TAXATION

Immunity, Exemption of Tribal Property

In *Confederated Tribes of Warm Springs Reservation v. Kurtz, 691 F.2d 878 (9th Cir. 1982)*, the tribe brought suit to recover taxes paid in relation to the operation of a sawmill owned and operated by the confederation of tribes. The tribe claimed that it was exempt from taxes under the provision of the Internal Revenue Code of 1954 that created an exemption for states and political subdivisions of states because the tribe was recognized as a government entity by the United States. The tribe also argued that the tribe's treaty with the United States, as well as other federal statutes, exempt the tribe from federal excise taxes.

The Ninth Circuit Court of Appeals held that the state government exemption is not applicable to the confederated tribe simply because it is recognized as a government entity. Tribes are different from states because tribes are dependent on and subject to the power of Congress. Moreover, tribes derive no authority from states so they are not subdivisions of states, and they therefore do not qualify for exemption from excise taxes under the state government tax exemption. At the time this decision was made, there was no express statutory exemption in the Code. The government will not imply an exemption without statutory guidance.

The court also considered the treaty and federal regulatory scheme and found that the tribe's treaty with the United States said nothing about a tax exemption. An implied immunity from taxation is not created by silence on the subject. "Express exemptive language" must be found in a statute or treaty before an exemption from federal taxes may be implied.

Finally, the tribe argued that federal excise taxes obstruct the federal policy favoring efficient land use on Indian reservations. The court held that such a policy does not create a federal tax exemption. In the absence of an explicit tax exemption, the tribes must pay the taxes and address Congress for relief.

Mineral Rights

In *Blackfoot Tribe of Indians v. Groff, 10 I.L.R. 2045 (9th Cir. 1982)*, the Blackfoot Tribe was beneficiary of mineral rights held in trust by the United States. The tribe sought equitable relief against taxation by the state for oil and gas production on the reservation by the tribe's lessees. The lessees were non-Indians. The tribe admitted they had not paid the state taxes. The tribe

claimed that the producers paid the taxes and deducted the tribe's share of the taxes from its royalties. Both the tribe and the state moved for summary judgment, which was granted to the state. The Court of Appeals for the Ninth Circuit affirmed the summary judgment granted to the state.

Usually the state is limited in its power to tax Indian or non-Indian concerns in Indian country. The court held that the state may tax interests in Indian country only when expressly authorized by Congress. The court found this authorization in the Act of May 29, 1924.[1] The 1924 Act provided that the production of oil and gas and other minerals could be taxed by the state in which the restricted land is located just like unrestricted land. The Act of May 11, 1938[2] did not repeal the Act of 1924, as claimed by the tribe. The court found they may coexist. The 1938 Act applied the procedures for oil and gas leasing outlined in the Act of 1924 to all leases.

WATER RIGHTS

In *Gila River Pima-Maricopa Indian Community v. United States, 695 F.2d 559 (Fed. Cir. Ct. App. 1982)*, the Gila River Pima-Maricopa Indian Community appealed from an October 8, 1982 judgment in the United States Court of Claims, which denied its claim for water rights to the Salt River. Appellants' claim was based on *Winters v. United States*.[1] There it was held that the federal government reserves, by implication, enough water to accomplish the purpose designated for land withdrawn from the public domain by the federal government. Appellants claimed the United States must reserve enough water to irrigate all "practically irrigable" land on the Gila River Reservation in order to comply with the *Winters* doctrine.

The Court of Claims held that the Indians were not entitled to monetary compensation for pre-August 1946 injuries resulting from failure of the federal government to supply enough water to irrigate all the practically irrigable portion of the reservation because only 7,000 to 8,000 acres were actually being used. The Indian Claims Commission Act only grants monetary compensation for damages that were actually inflicted before August 1946. The

1. 43 Stat. 244.
2. 52 Stat. 347, *codified at* 25 U.S.C. §§ 396a-396g.

1. 207 U.S. 564 (1908).

court of appeals affirmed this portion of the Court of Claims' decision because appellants had not established they had been deprived of water that could actually be put to use. The appellate court reversed the Court of Claims decision to dismiss appellants' claim for water rights for irrigation of 1,490 acres known as the Maricopa District because it was not necessary for damages to be proved at this stage.

Papago Indian Water Rights

President Reagan vetoed the Southern Arizona Water Rights Settlement Act of 1982 (H.R. 5118) on June 1, 1982, because the federal government had not participated in the negotiations between the Papago Tribe and other parties. The bill provided that the Papago Tribe would dismiss pending lawsuits in return for an annual supply of water for farming, improvements in irrigation systems on the reservation, and interest from a $15 million trust fund for water development set up by the federal government. It was estimated that the settlement could have cost the government more than $112 million.

A new negotiating team, which included both the executive and legislative branches, renegotiated the settlement and attached it to S. 1409. Both the House and the Senate passed S. 1409 during the week of August 16, 1982. The new agreement would appropriate $39,750,000 of federal funds, which would be held in a trust fund. Federal liability for future Indian claims for damages because of nondelivery of water was limited to a specific amount in the Senate version of S. 1409. The bill was approved on October 12, 1982 and became Public Law 97-293.