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Dial v. Navajo-Hopi Relocation Commission: Relocation Benefits

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RECENT DEVELOPMENTS

ADMINISTRATIVE LAW

In *Dial v. Navajo-Hopi Relocation Commission*, 10 I.L.R. 3012 (D. Ariz., Jan. 12, 1983), the district court reviewed the denial of relocation benefits by the Navajo-Hopi Relocation Commission even after a hearing officer recommended to the Commission that plaintiff was eligible for relocation benefits.

To be eligible for relocation benefits, plaintiff had to be a resident of the Joint Use Area who had moved away between December 22, 1974 and August 30, 1978.¹ Residency was defined in the Commission's regulations as either "current occupancy" or "maintenance of substantial recurring contacts within an identifiable homesite although the individual is temporarily away for any of the following reasons," including "education or job training."² The facts showed that plaintiff was a resident of the Joint Use Area living off the reservation in pursuit of an education and had moved from the Joint Use Area during the appropriate period of time.

The reasons stated by the Relocation Commission for reversal of the recommendation were that plaintiff had not relocated because of passage of the Administrative Procedure Act.³ Additionally, plaintiff was not a member of a family prevented from living in the Former Joint Use Area who could have benefited from the regulations. Plaintiff also had not met the requirement of "substantial and recurring contacts within the intent of Commission's regulations."

The district court decided that the affidavits stating the reasons for denial of relief benefits were an inadequate explanation of the Commission's decisions. The affidavits failed to explain why the findings of fact were inadequate to show "substantial recurring contacts." The district court held that plaintiff was a resident who was eligible for relocation benefits under regulations of the Commission. The district court also found the Commission's decision that Dial was not a resident of the Joint Use Area from 1972 to 1976 was "arbitrary, capricious, and an abuse of discretion."

1. 25 C.F.R. § 700.147.

2. 27 C.F.R. § 700.97.

3. 5 U.S.C. §§ 701-706 (1976).

JURISDICTION

In the consolidated cases of *Ahboah v. Housing Authority of the Kiowa Tribe* and *Saumty v. Housing Authority of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983), the Housing Authority brought an action in forcible entry and detainer against allottees of the Kiowa and Wichita tribes who occupied housing on Indian country allotment land. Allottees' motions to dismiss for lack of jurisdiction, to quash summonses, and to join the United States as a necessary party were denied, and judgment was entered for the Housing Authority by the District Court of Caddo County. Allottees appealed.

Allottees argued that because individual trust allotments constituted Indian country under 18 U.S.C. § 1151 (1976), they were subject to federal and tribal jurisdiction rather than state jurisdiction. They also argued that the state of Oklahoma had not met the requirements of Public Law 280¹ as a prerequisite to assuming jurisdiction. In addition, they claimed that state process served in Indian country had not brought allottees within authority of state courts.

The Housing Authority argued that the trust allotments were not in Indian country and subject to federal or tribal jurisdiction because the cession of tribal lands by the Treaty of October 21, 1882² extinguished tribal title to land subsequently allotted. The Kiowa Tribe, as *amicus curiae*, asserted tribal jurisdiction over the actions and argued that state jurisdiction would infringe the tribal right of self-government.

On appeal, the district court's order was found void and was reversed for want of jurisdiction. The Supreme Court of Oklahoma based its decision on *United States v. Nice*,³ where the Supreme Court decided that only Congress had the power to terminate tribal relations and divest the federal government of jurisdiction over trust allotments. The enactment of the General Allotment Act of 1887⁴ contained provisions that continued federal supervision over allotted lands. Therefore, no congressional intent to terminate tribal relations was demonstrated. Trust allotments remained under the exclusive jurisdiction of Congress. It was not necessary for trust allotments to be within a continuing

1. Act of Aug. 15, 1953, 67 Stat. 588.

2. Ratified June 6, 1900, 31 Stat. 676.

3. 241 U.S. 591 (1916).

4. Act of Feb. 8, 1887, ch.119, 24 Stat. 32.

reservation in order to retain their Indian character. Moreover, that the allotment had been leased did not change the Indian character of the land.

Public Law 280 gave express congressional consent to state assumption of jurisdiction over Indians in Indian country if certain conditions were met.⁵ Under the original law, states were divided into mandatory states, which were required to assume civil and criminal jurisdiction, and optional states, which voluntarily assumed jurisdiction by "affirmative legislative action." The *Ahboah* court found that Oklahoma, an optional state, did not take the legislative action to assume jurisdiction before Public Law 280 was amended in 1968 by the Indian Civil Rights Act.⁶ The amendment removed the affirmative legislative action requirement but substituted a requirement for consent by a tribal referendum before state jurisdiction could be assumed. The Kiowa Tribe had never given such consent. The court therefore concluded that Public Law 280 had not authorized state assumption of jurisdiction over disputes involving Indian trust property.

LEGISLATION

The Indian Tribal Government Tax Status Act of 1982¹ provides that Indian tribal governments will be treated as states under certain circumstances. These circumstances include the determination of whether a contribution to or for the use of a tribal government is deductible under section 170 of the Internal Revenue Code, which relates to income tax deduction for gifts, and to charity under sections 2055 and 2106(a)(2), concerning estate tax deductions for transfers of public, charitable, and religious uses, and section 2522, concerning gift tax deductions.

Tribal governments will also be treated as states for purposes of excise taxes imposed by chapter 31 (taxes on special fuels), chapter 32 (manufacturers' excise tax), subchapter B of chapter 33 (communications taxes), and subchapter D of chapter 36 (motor vehicle use taxes). Other purposes for the treatment of a tribal government as a state include the taxation of colleges and

5. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, amended by Pub. L. 90-284, Act of Apr. 11, 1968, 82 Stat. 80.

6. 25 U.S.C. § 1302 (1976).

1. Pub. L. 97-473 (Jan. 14, 1983), 96 Stat. 2605.

universities that are agencies or instrumentalities of governments or subdivisions, public retirement systems, scholarship and fellowship grants, taxation of excess expenditures to influence legislation, and taxation of private foundations. In order to be eligible for excise tax exemptions, the transaction must involve a government function that is essential to the Indian tribal government.

The Act also lists requirements for tax-exempt bonds issued by Indian tribal governments. It provides that there are no exemptions for certain private-activity bonds, such as industrial development bonds, scholarship bonds, and mortgage subsidy bonds.

The Act also provides that a subdivision of an Indian tribal government shall be treated the same as a subdivision of a state only if the Secretary of the Interior and the Secretary of State determine that the governmental functions of the Indian tribal government have been delegated to the subdivision.

The amendments apply to taxable years beginning after December 31, 1982, and to obligations and estates of decedents dying after December 31, 1982 and before January 1, 1985. As to taxes imposed by subchapter D, the amendments apply after January 1, 1983 and before December 31, 1984.

RIGHT-OF-WAY AND EASEMENTS

In *Southern Pacific Transportation Co. v. Watt*, 10 I.L.R. 2096 (9th Cir. 1983), the Ninth Circuit reversed a district court decision that had allowed Southern Pacific to have right-of-way across the Walker River Paiute Reservation without tribal consent. The Southern Pacific Railroad had operated on the Walker River Indian Reservation since 1882 without a valid right-of-way. After the Ninth Circuit held that Southern Pacific had no valid right-of-way across the reservation,¹ Southern Pacific applied for a railroad, telegraph, and telephone right-of-way with the Western Nevada Agency of the Bureau of Indian Affairs under the provisions of an 1899 Act of Congress.² The application was denied because there was no evidence that the tribe had consented to the right-of-way. Southern Pacific appealed the decision within the agency and later sought review in federal district court where

1. *United States v. Southern Pac. Transp.*, 543 F.2d 676, 679 (9th Cir. 1976).

2. Act of Mar. 2, 1899, 25 U.S.C. §§ 317-318 (1976).

the tribe intervened as a party defendant. Summary judgment was entered in favor of Southern Pacific by the district court.

On appeal, the Ninth Circuit held that the 1899 Act was not an eminent domain statute and authorized the Secretary to establish grant preconditions by regulations. Tribal consent was one of these grant preconditions.³ The court's review was therefore limited to determining the reasonableness of the Secretary's interpretation of the 1899 Act. The Ninth Circuit held that the Secretary's interpretation of the 1899 Act was reasonable and met the obligation to construe the Act favorably to the tribe. The appeals court also decided that it was not necessary to determine whether the 1899 Act was a grant *in praesenti* (grant at the present time, subject only to expressly specified conditions precedent and subsequent) because *in praesenti* grants did not limit the right of the United States to put conditions on the grant.

SOVEREIGNTY

In *Bruette v. Knope*, 554 F. Supp. 301 (E.D. Wis. 1983), members of the Menominee Indian Tribe brought a civil rights action against seventeen county and tribal officials in their official and individual capacities for injuries arising from a car chase, collision and arrest. Plaintiffs sought damages and injunctive relief against future unlawful conduct that threatened plaintiff's civil rights. The defendants made motions to dismiss for failure to state a cause of action. The defendants included the Menominee tribal police chief and policemen, the chairman of the Menominee Indian Tribal Law and Order Committee, tribal prosecutors, the Shawano County Sheriff's Department, Shawano County, the sheriff of Shawano County, the chief deputy sheriff of Shawano County, Shawano County deputy sheriffs, Menominee County, the Menominee County Sheriff's Department, and the sheriff and deputy sheriff in their individual capacities.

The district court held that tribal officials are immune from suit under *Santa Clara Pueblo v. Martinez*.¹ The complaint against them was dismissed. The Indian Civil Rights Act² allowed

3. 25 C.F.R. § 161.3(a) (1981).

1. 436 U.S. 49 (1978).

2. 25 U.S.C. § 1302 (1976).

only tribes and governmental subdivisions to be sued, not individuals. Dismissal as to nontribal defendants was denied. The claim against the deputy sheriffs of Shawano County was not dismissed because they had a duty not to fail to stop other officers from punishing someone in their presence. If defendant owed plaintiff a duty to act, a purposeful nonfeasance could serve as a basis for intentional tort. Failure to provide adequate training was an insufficient claim. Plaintiff's allegation that a "history of police brutality" existed was a sufficient complaint because a specific incident that deprived plaintiff of a constitutionally protected interest was alleged, along with the allegation of a specific similar incident.

In *Wisconsin v. Baker*, 10 I.L.R. 2077 (10th Cir. 1983), the state of Wisconsin and the Chippewa Indians of Lake Superior and the Mississippi River both claimed exclusive jurisdiction to regulate fishing and hunting by the general public in certain lakes in Wisconsin. The district court granted declaratory and injunctive relief to Wisconsin and declared that the state had exclusive jurisdiction to regulate hunting and fishing of nonband members on navigable waters on the reservation. Defendants, the officials of the tribe, appealed from the final judgment and Wisconsin cross-appealed on four findings in the opinion.

The Tenth Circuit held that the district court had proper original subject matter jurisdiction because the claim that defendants had infringed property rights held in trust for the public arose under federal law. The appellate court concurred with the district court's holding that defendants had immunity from suit only if a treaty made in 1854 conferred the power to restrict public fishing in lakes. The treaty had not conferred this power. Wisconsin had been given power to regulate fishing in navigable lakes with statehood. The Treaty of 1854 did not clearly divest Wisconsin of part of its sovereignty over non-Indians. Therefore, the court concluded the state alone had the authority to regulate fishing by nonband members on navigable waters on the reservation.

With respect to the state's cross-appeal, the court held it was not necessary to decide whether the boundaries of the reservation encompassed navigable lakes because defendants lacked jurisdiction to restrict fishing in them.

In *Navajo Tribe v. Bank of New Mexico*, 700 F.2d 1285 (10th Cir. 1983), the Bank of New Mexico appealed a district court

judgment that Navajo tribal funds had been improperly held by the bank in satisfaction of a debt of the Navajo Housing and Development Enterprise (NHDE). The Navajo Tribe had created NHDE in early 1972. In March 1974 and December 1975, NHDE acquired loans from the Bank of New Mexico. NHDE defaulted on the loans, which amounted to \$283,518.96 in November of 1976. The bank deducted that amount from a six-month certificate of deposit with a maturity date of November 22, 1976 belonging to the Navajo Tribe.

The issue on appeal was whether the NHDE was essentially the same legal entity as the Navajo Tribe since the tribe had established NHDE in conformity with tribal law. The bank argued that the tribe did not have the capacity to create a semigovernmental entity. Alternatively, the bank argued the operation of NHDE by the tribe estopped the tribe from claiming that NHDE and the tribe were separate entities. The second issue was whether the bank had the legal right to offset the NHDE debt against the Navajo tribal funds. The third issue was whether the trial court erred in awarding prejudgment interest.

The Tenth Circuit concurred with the district court's conclusion on the issue of separateness of the tribal enterprise and found that the tribe had the power to create a semigovernmental entity that was separate from the tribe. The appellate court also decided the bank had no right to set off the debt of NHDE against the tribe because there was no debtor-creditor relationship. The debts of NHDE were independent of the debts of the tribe. Prejudgment interest was awarded at a rate of 6% per annum.

TREATIES

In *Swim v. Bergland*, 10 I.L.R. 2034 (9th Cir. 1983), the rights of non-Indian permittees and the Shoshone-Bannock tribes to graze cattle on federal land in the Caribou National Forest in Idaho were at issue. Non-Indians who had been issued grazing permits in 1976 and 1977 initiated a declaratory judgment action against the Secretary of Agriculture on April 5, 1978. The non-Indian permittees sought to enjoin implementation of a memorandum of understanding executed by the tribes on February 27, 1978. The memorandum provided the maximum head of cattle that could be grazed annually by the tribes within the ceded area of the Caribou National Forest and that annual permits could be issued by the Forest Service to non-Indians for any grazing capacity not used by the tribe. The district court upheld the memorandum of

understanding and held that the Forest Service could modify or cancel grazing permits of non-Indians because only they had revocable grazing privileges.

The non-Indian permittees appealed the district court's ruling that permitted grazing to be continued by the tribes. They argued that the Agreement of February 5, 1898, article IV, 31 Stat. 674, reserved temporary tribal grazing rights that had been extinguished by executive action. The tribes and the Secretary of Agriculture cross-appealed the district court's holding that the tribe's reserved rights included a "fair proportion" of grazing capacity on the ceded land. They claimed the Fort Bridger Treaty of July 3, 1868 between the United States and the Eastern Band of Shoshone and Bannock tribes, ratified February 24, 1869, 15 Stat. 209, and the Agreement of February 5, 1898 between the United States and the Shoshone-Bannock tribes, ratified by the Act of June 6, 1900, 31 Stat. 672, reserved priority to the land for the tribes.

The Ninth Circuit held that the tribes had continuing grazing rights on the ceded portion of the Caribou National Forest. The court also held that the Shoshone-Bannock tribes had priority grazing rights that were reserved by the Fort Bridger Treaty of 1868 and the Agreement of 1898. Because there was no language in the 1898 Agreement that granted or reserved rights in the grazing lands to the non-Indians, the Indian treaty was not read to grant the rights to non-Indians.

WATER RIGHTS

In *Cherokee Nation v. Muskogee City-County Port Authority*, 10 I.L.R. 3021 (E.D. Okla. 1983), the Cherokee Nation sought partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure to affirm their title to the bed of the Arkansas River that flowed through Muskogee, Oklahoma. The Cherokee Nation also sought to establish liability of the Muskogee City-County Port Authority for trespass caused by construction of wharves and piers by defendants without consent of the Cherokee Nation. Plaintiffs claimed ownership of the bed and banks of the Arkansas River on the basis of *Choctaw Nation v. Oklahoma*,¹ which confirmed the Cherokee Nation's title.

The district court affirmed the Cherokee Nation's title for the Arkansas riverbed under the doctrines of *stare decisis* and *res judicata*. Because the state did not own the riverbed of the

1. 397 U.S. 620 (1969), *reh'g denied*, 398 U.S. 945 (1970).

Arkansas River where it flowed through Muskogee, it had no authority to grant riparian rights to the Muskogee City-County Port Authority. The court granted plaintiff's motion for partial summary judgment and denied defendant's motion for partial summary judgment. The court stayed the action pending appeal.

