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FEDERAL RECENT DEVELOPMENTS

UNITED STATES SUPREME COURT

SOVEREIGNTY: Sovereign Immunity: State

Blatchford v. Native Village of Noatak and Circle Village, 111 S. Ct. 2578 (1991).

In 1980, Alaska enacted a revenue-sharing statute that provided $25,000 per year to each unincorporated native village government. Acting upon an opinion by the Alaska Attorney General that the statute was unconstitutional because it was based upon racially exclusive organizations, the state enlarged the program to include all unincorporated communities, whether native or not. The Alaska Legislature repealed the statute and replaced it with one that reflected the expanded program. As a result, the Native Village of Noatak (the Village) never received the $25,000 per year it felt the state owed under the original statute.

The Village filed suit in federal district court on equal protection grounds and sought an order requiring the Commissioner of Alaska's Department of Community and Regional Affairs to pay the money that the village would have received.[1] The district court initially issued the injunction but then dismissed the suit as violating the Eleventh Amendment. The Court of Appeals for the Ninth Circuit reversed, first on the ground that 28 U.S.C. § 1362 constituted a congressional abrogation of Eleventh Amendment immunity;[2] and then, upon reconsideration, on the ground that Alaska had no immunity against suits by Indian tribes.[3] The Supreme Court granted certiorari[4] and reversed and remanded.[5]

The Village presented arguments that the eleventh amendment did not bar suits brought against states by Indian tribes[6] and,

1. Native Village of Noatak v. Hoffman, No. CV-85-503-AJK (D. Alaska 1985) (unreported).

2. Native Village of Noatak v. Hoffman, 872 F.2d 1384 (9th Cir. 1989) (later withdrawn).

3. Native Village of Noatak v. Hoffman, 896 F.2d 1157 (9th Cir. 1989).

4. Hoffman v. Native Village of Noatak & Circle Village, 111 S. Ct. 37 (1990).

5. Blatchford v. Native Village of Noatak & Circle Village, 111 S. Ct. 2578, 2586 (1991).

6. *Id.* at 2581.

in the alternative that even if it did, the adoption of 28 U.S.C. § 1362 eliminated the constitutional bar to suit.[7] The Court answered that the states enter the federal system with their sovereignty intact and that they are not subject to suit absent their consent, either expressly or in the "plan of the convention."[8] The Court found no consent to suit by Indian tribes.[9] In resisting the Village's argument that § 1362 abrogated the state's immunity to suit, the Court applied a narrow construction to the statute by stating that it only modifies the minimum amount in controversy as defined by 28 U.S.C. § 1331.[10]

The Village's final argument was that even if the Eleventh Amendment barred their suit for damages, it would not bar their claim for injunctive relief.[11] The Court remanded this issue to the appeals court for determination.[12] The judgment of the Ninth Circuit was accordingly reversed and remanded for further proceedings.

Justice Blackmun, joined by Justices Marshall and Stevens, delivered a dissenting opinion expressing his disagreement with the Court's preclusion of the case on the constitutional grounds and narrow construction of the statute.[13]

SOVEREIGNTY: Sovereign Immunity: Tribal

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905 (1991).

The Citizen Band Potawatomi Indian Tribe of Oklahoma (Tribe) owned and operated a convenience store within the state of Oklahoma for many years on land held in trust for it by the federal government. The store has never collected Oklahoma's cigarette tax on sales of cigarettes at the store. In 1987, the Oklahoma Tax Commission served the Tribe with an assessment letter demanding that the Tribe pay the state $2.7 million in cigarette taxes owed from 1982 through 1986.

The Tribe filed suit in the United States District Court for the Western District of Oklahoma to enjoin the assessment.[1]

7. *Id.* at 2583.
8. *Id.* at 2581.
9. *Id.* at 2582.
10. *Id.* at 2583.
11. *Id.* at 2586.
12. *Id.*
13. *Id.* at 2586-90 (Blackmun, J., dissenting).

1. Citizen Bank Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, No. CIV-87-0338-W (W.D. Okla. 1987).

The state counterclaimed asking the court to enforce the assessment and enjoin the Tribe from future sales unless the state cigarette tax was collected and remitted to the state. The district court denied the Tribe's motion to dismiss the counterclaim on the grounds of sovereign immunity because the Tribe had not consented to the suit. The court held that the Tribe is immune from suit to collect past unpaid taxes since Oklahoma lacks the authority to tax the on-reservation sales of cigarettes to tribal members or to tax the Tribe directly.[2] The district court ordered the Tribe to collect taxes on sales to nontribal members and to comply with all statutory recordkeeping requirements.[3]

The United States Court of Appeals for the Tenth Circuit reversed[4] and held that the district court erred in entertaining the state's counterclaims because the Tribe is absolutely immune from the suit and had not waived its sovereign immunity by filing an action for injunctive relief.[5] The court further held that the state lacks the authority to impose any tax on sales that occur on the reservation, regardless of whether the sales are to tribal or nontribal members.[6]

The Tenth Circuit noted that the store was located on land "over which the Potawatomis retain sovereign immunity,"[7] and that Congress had not granted Oklahoma an independent jurisdictional grant of authority to tax the store's transactions.[8] The court of appeals ordered the district court to grant the Tribe's request for an injunction.[9] The United States Supreme Court granted certiorari "to resolve an apparent conflict with its precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands."[10]

The State urged the Court to construe narrowly or abandon the doctrine of sovereign immunity of Indian tribes and presented the argument that the Tribe waived its immunity when it filed an action for injunctive relief.[11] The unanimous opinion,

2. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 111 S. Ct. 905, 908 (1991).

3. *Id.*

4. Citizen Band Potawatomi Tribe v. Oklahoma Tax Comm'n, 888 F.2d 1303 (10th Cir. 1989).

5. *Id.* at 1305.

6. *Id.* at 1306-07.

7. *Id.* at 1306.

8. *Id.* at 1307.

9. *Id.*

10. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 111 S. Ct. 905, 909 (1991).

11. *Id.*

delivered by Justice Rehnquist, explained that Congress has the power to modify or eliminate the doctrine of sovereign immunity of Indian tribes but Congress chose instead to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[12] Because the land upon which the cigarette sales occurred was land that was held by the federal government for the benefit of the Indians, it qualified as a reservation for tribal immunity purposes.[13] As the Tribe possesses sovereign immunity against direct suit, it also possesses immunity from cross-suits.[14]

The Supreme Court reaffirmed *Washington v. Confederated Tribes of Colville Reservation*[15] and *Moe v. Confederated Salish and Kootenai Tribes*[16] and reversed the Tenth Circuit. The Court held that Indian retailers on an Indian reservation may be required to collect state taxes on sales to non-Indians.[17]

The state complained that the Court's position left it with a right but without a remedy. The Court offered alternatives to the state by which it might collect the taxes without bringing suit directly against the Tribe: bringing suit against individual agents or officers of a tribe, collecting the sales tax from wholesalers, or entering into agreements with the tribes for the collection of the taxes.[18] The decision of the court of appeals was accordingly affirmed in part and reversed in part.

Justice Stevens filed a concurrence in which he stated that the unanimous opinion implicitly limits the sovereignty of Indian Tribes.[19] The concurring Justice further opined that it was unnecessary for the Court to decide the question of the Tribe's prospective liability for state taxes since the question was only properly presented in the state's counterclaim.[20]

On remand, the Tenth Circuit Court of Appeals affirmed its previous opinion except for that language that conflicted with the decision of the Supreme Court.[21] The court then remanded

12. *Id.* at 910 (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).

13. *Id.* (citing United States v. John, 437 U.S. 634, 649 (1978)).

14. *Id.* at 909 (following United States v. Fidelity and Guaranty Co., 309 U.S. 506, 511-12 (1940)).

15. 447 U.S. 134 (1980).

16. 425 U.S. 463 (1976).

17. *Citizen Band Potawatomi*, 111 S. Ct. at 911 (citing *Moe*, 425 U.S. at 483).

18. *Id.* at 912.

19. *Id.* at 912-13 (Stevens, J., concurring).

20. *Id.*

21. Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, 932 F.2d 1355 (10th Cir. 1991).

to the district court with directions to dismiss the defendants' counterclaim and enter an injunction prohibiting the Tax Commission from enforcing the challenged assessment against the Tribe.[22]

The district court recognized that its Judgment entered on January 4, 1990, already complied with the Tenth Circuit's directions.[23] The court therefore adopted that portion of the Judgment of January 4, 1990, and proclaimed it to be in force and effect.[24]

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RELIGION: Customs, Traditions and Culture

Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).

The Peyote Way Church of God, Inc. (Peyote Way) was created by a former member of the Native Americam Church (NAC). The majority of its approximately 150 members were not of Native American descent. While Peyote Way subscribed to many similar tenets, it was not affiliated with NAC. Both Federal and Texas statutes criminalized unprescribed possession and distribution of peyote.[1] However, bona fide religious use of peyote by members of the NAC was exempted from the statutes.[2] Peyote Way sued for a declaratory judgment that the federal and Texas laws prohibiting peyote possession by anyone other than NAC members were unconstitutional and requested the district court to enjoin the Attorneys General of the United States and Texas from enforcing the peyote laws against Peyote Way or its members.[3]

The district court found that: 1) the intent of Congress to exempt the use of peyote by the NAC is clear; 2) there is no free exercise or implied privacy right to use peyote under the U.S. Constitution; and, 3) the exemption of the NAC does not

22. *Id.*

23. Order of Dismissal and Entry of Injunction, Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, No. CIV-87-0338-W (July 31, 1991), at 2.

24. *Id.*

1. 21 U.S.C. §§ 812, 841, 844 (1988); TEX. HEALTH & SAFETY CODE ANN. §§ 481.101-481.130 (Vernon 1991).

2. 21 C.F.R. § 1307.31 (1991); TEX. HEALTH & SAFETY CODE ANN. § 481.111 (Vernon 1991).

3. Peyote Way Church of God v. Meese, 698 F. Supp. 1342 (N.D. Tex. 1988).

violate the equal protection or establishment clauses.[4] The Fifth Circuit conducted a de novo review of the district court's conclusions of constitutional law.[5]

In addressing Peyote Way's contentions that they should be afforded treatment equal to that given to the NAC, the court noted that the Commissioner of Food and Drugs first promulgated the NAC exemption in March of 1966 with apparent congressional approval.[6] The court further noted that prior cases in district courts were in conflict on the issue of whether Congress intended to exempt only members of NAC.[7] The court concluded, however, that the federal and Texas laws unambiguously exempt only NAC members.[8]

An analysis of NAC and Peyote Way convinced the court that NAC represented a political classification whose preferential treatment could be rationally tied to the fulfillment of Congress' fiduciary obligation to the Indians.[9] Peyote Way was found to not represent a political classification.[10]

In addressing arguments concerning the establishment clause, the court found that the protection of NAC by federal statute is not an establishment of religion contravening the first amendment.[11] It is actually the protection of the culture of quasi-sovereign Native American Tribes.[12]

In turning its attention toward the Texas exemption of NAC from its criminal drug statutes, the court explained *Employment Division, Department of Human Resources v. Smith*[13] as holding that states have a choice of conforming or not conforming with

4. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991).

5. *Id.*

6. *Id.* at 1214. The Drug Enforcement Regulation is now codified at 21 C.F.R. § 1307.31, which provides in pertinent part: "The listing of peyote as a controlled substance [under federal law] does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church. . . ." 21 C.F.R. § 1307.31 (1991) (citing as authority 21 U.S.C. §§ 821, 822(d), and 871(b)). The regulation first appeared in 31 Fed. Reg. 4679 (1966).

7. *Peyote Way*, 922 F.2d at 1214.

8. *Id.*

9. *Id.* (utilizing an analysis of Morton v. Mancari, 417 U.S. 535 (1974)). *See also Peyote Way*, 922 F.2d at 1216 (the government's unique obligation was one of cultural preservation).

10. *Peyote Way*, 922 F.2d at 1216.

11. *Id.* at 1217.

12. *Id.*

13. 110 S. Ct. 1595 (1990).

the federal NAC exemption.[14] Therefore, the court had before it an issue that had not yet been addressed by American courts: "[W]hether states may enact laws beneficial to tribal Native Americans in exercise of the federal government's trust power pursuant to implied congressional authorization."[15]

Finding that Congress had not expressly authorized states to adopt the federal NAC exemption, the Fifth Circuit found that it would be preposterous to attribute any other intent to Congress than to let the states decide whether or not to adopt the NAC exemption.[16] It also emphasized that in passing 21 U.S.C. § 903, Congress left intact the states' drug enforcement structures.[17] Therefore, under congressional policy and *Smith*, states may refuse all exemptions, exempt only NAC members, or exempt all religious use of peyote.[18] Thus, as a proper exercise of the federal trust power, the NAC exemption present in Texas law withstands challenges under the equal protection and establishment clauses.[19] The decision of the district court to deny Peyote Way declaratory and injunctive relief was affirmed.[20]

A dissenting opinion was filed to disagree with the majority on the issue of the establishment of a religion.[21] The dissenting justice opined that the NAC exemption was unconstitutional because it was strictly a religious exemption.[22]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RIGHTS-OF-WAY AND EASEMENTS: Railroads

TAXATION: Real Property

Burlington Northern Railroad Co. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991).

The Burlington Railroad Company uses rights of way across the reservations of the Blackfeet, Assiniboine and Sioux Tribes pursuant to agreements created in 1886 and 1887. In 1986, the

14. *Peyote Way*, 922 F.2d at 1218.
15. *Id.*
16. *Id.*
17. *Id.* ("States may regulate drugs concurrently with Congress unless there is a 'positive conflict' between federal and state law.").
18. *Peyote Way*, 922 F.2d at 1218.
19. *Id.* at 1219-20.
20. *Id.* at 1220.
21. *Id.* at 1220-21 (Clark, C.J., dissenting).
22. *Id.* at 1220.

Blackfeet Tribe imposed a tax on all nonexempt possessory interests on their reservation. In 1987, the Assiniboine and Sioux Tribes imposed a tax on all nonexempt utility property within Fort Peck Reservation. Both taxes were approved by the Secretary of the Interior in 1987 and were applied to the Appellant railroad company.

The railroad company brought separate suits against the Tribes, their governing bodies, and various tribal officials, seeking declaratory judgment that the Tribes lacked sovereign power to tax the on-reservation rights of way and an injunction barring the application of such taxes.[1] The district court denied the Tribes' motion to dismiss on grounds of sovereign immunity but granted the Tribes' motion for summary judgment on the merits.[2] The cases were consolidated on appeal.[3]

In addressing the Tribes' motion to dismiss on grounds of sovereign immunity, the Ninth Circuit concluded that the doctrine of sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.[4] In other words, suit may be brought against tribal officers to test the constitutionality of the taxes they seek to collect.[5] Turning to the merits, the court held that: 1) a right-of-way grant does not extinguish a tribe's property interest;[6] 2) the railroad company received benefits from the tribes for which it may be taxed;[7] and, 3) the Railroad Revitilization and Regulatory Reform Act of 1976 (4-R Act) did not divest the Tribes of their authority to tax railroad companies.[8] Rejecting the railroad company's arguments that the tribal taxation of the railroad company violated the 4-R Act and the commerce clause, the court dismissed the Tribes, and their legislative and executive bodies on grounds of sovereign immunity, and affirmed the district court's decision as to the other defendants.[9]

1. Burlington N. R.R. v. Fort Peck Tribal Executive Bd., 701 F. Supp. 1493 (D. Mont. 1988).

2. *Id.* at 900.

3. Burlington N. R.R. v. Blackfeet Tribe, 924 F.2d 899, 900 n.1 (9th Cir. 1991).

4. *Id.* at 901 (citing California v. Harvier, 700 F.2d 1217, 1221, 1224 (9th Cir. 1983) (Norris, J., dissenting)).

5. *Burlington*, 924 F.2d at 901-02 (citing Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984); Wisconsin v. Baker, 698 F.2d 1323, 1332-33 (7th Cir. 1983)).

6. *Id.* at 904 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-42 (1982)).

7. *Id.*

8. *Id.* at 905.

9. *Id.* at 905-06.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

ABORIGINAL TITLE: Extinguishment and Recognition of

Cayuga Indian Nation of New York v. Cuomo (Cayuga IV), 58 F. Supp. 107 (N.D.N.Y. 1991).

The Cayuga Indian Nation of New York and the Seneca-Cayuga Nation of Oklahoma, as plaintiff-intervenor (Tribes), sought recovery of 64,000 acres and damages in the form of fair rental value for almost 200 years, and other monetary and protective relief.[1] This is the fourth action concerning these claims.

In *Cayuga I*,[2] the court held that the Tribes could present evidence to support their claims.[3] The court denied both parties' motions for summary judgment in *Cayuga Indian Nation v. Cuomo [Cayuga II]*.[4] In *Cayuga III*, the Tribes' motion for partial summary judgment was granted and the court held that the agreements between New York and the plaintiff Tribes entered into in 1795 and 1807 (purporting to convey the Tribes' interest in the land to the state) were invalid.[5] In the instant action, the court granted the Tribes' motion for partial summary judgment. The court held that the defense of abandonment is insufficient as a matter of law because the Treaty of Canandaigua conferred recognized title of the land to the Tribes.[6]

Utilizing an analysis of the differences between aboriginal and recognized title to Indian land,[7] the court determined that the 1794 Treaty of Canandaigua contains unambiguous language which conveyed recognized title to the land to the Cayuga Nation.[8] As the court recognized the title that was conveyed by the Treaty, abandonment is not a defense to the Tribes' claims since only Congress can divest the Tribes of their title to the land.[9]

1. Cayuga Indian Nation of New York v. Cuomo, 758 F. Supp. 107, 109 (N.D.N.Y. 1991) (*Cayuga IV*).

2. Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297 (N.D.N.Y. 1983) (*Cayuga I*).

3. *Id.* at 1330.

4. Cayuga Indian Nation v. Cuomo, 667 F. Supp. 938, 949 (N.D.N.Y. 1987) (*Cayuga II*).

5. Cayuga Indian Nation v. Cuomo, 730 F. Supp. 485, 493 (N.D.N.Y. 1990) (*Cayuga III*).

6. *Cayuga IV*, 758 F. Supp. at 118.

7. *Id.* at 110.

8. *Id.* at 115.

9. *Id.*

In addressing New York's claim that the Treaty deprived it from a property interest in the land, the district court found that the state only possesses, at most, a right of preemption regarding the purchase of the land after Congress had extinguised the recognized title in the Tribes.[10] Accordingly, the Tribes' motion for partial summary judgment was granted.[11]

ABORIGINAL TITLE: Extinguishment and Recognition of

Cayuga Indian Nation of New York v. Cuomo (Cayuga V), 762 F. Supp. 30 (N.D.N.Y. 1991).

This is the fifth memorandum-decision issued by the court concerning the instant case and the preceeding case summary is incorporated herein by reference. For a brief summary of the most recent action, *Cayuga IV*,[1] the court granted the Tribes' motion for partial summary judgment and held that the defense of abandonment is insufficient as a matter of law because the Treaty of Canandaigua conferred recognized title to the land to the Indian Tribes.[2] In this action, Defendant Consolidated Rail Corporation (Conrail) moved for summary judgment dismissing the Tribes' complaint as against it.[3] Conrail asserted that the Regional Rail Reorganization Act (RRR Act),[4] which created Conrail, established the Special Railroad Reorganization Court (Special Court) which had original and exclusive jurisdiction to hear claims challenging title to the lands granted it under the RRR Act.[5]

The court listed three questions before it: whether, 1) the property at issue was conveyed to Conrail under the RRR Act;[6] 2) such conveyance should be set aside or annuled; and, 3) the Special Court had exclusive jurisdiction to hear the Tribes' claims against Conrail.[7] The court concluded that the property had been conveyed to Conrail under the RRR Act because the land in question had been given to Conrail by the Special Court

10. *Id.* at 116.
11. *Id.* at 118.

1. Cayuga Indian Nation v. Cuomo, 758 F. Supp. 107 (1991) (*Cayuga IV*).
2. *Id.* at 118.
3. Cayuga Indian Nation of New York v. Cuomo, 762 F. Supp. 30, 31 (N.D.N.Y. 1991) (*Cayuga V*).
4. 45 U.S.C. §§ 701-797 (1988).
5. *Cayuga V*, 762 F. Supp. at 32.
6. Especially, 45 U.S.C. § 743(b) (1988).
7. *Cayuga V*, 762 F. Supp. at 32.

"free and clear of liens and encumbrances" on March 25, 1976.[8]

Turning to the second question, the Tribes presented arguments that the legislative history of the RRR Act did not show that its passage was intended to extinguish any rights which the Cayugas had to their reservation lands.[9] The Tribes further argued that any conveyance of their lands would be subject to the Non-Intercourse Act[10] and Conrail's claims were void *ab initio* because the purported conveyances were not approved by the Secretary of the Interior.[11] The court found, however, that the lands in question had not yet been adjudicated as being Indian lands.[12] Therefore, the Special Court did not need explicit congressional authorization to convey the lands and the conveyances were not subject to the Non-Intercourse Act.[13] Since the Tribes' challenge asked the court to find the conveyances void *ab initio*, it concerned the central function of the Special Court which had jurisdiction over the matter.[14] The remaining question for the court was whether this jurisdiction was exclusive or concurrent.[15]

Noting that the language of the RRR Act was plain and unambiguous[16] and looking again to the legislative history of the RRR Act,[17] the court found that jurisdiction over the Tribes' claims as to Conrail rests exclusively in the Special Court.[18] Accordingly, the Tribes' claims against Conrail were dismissed.[19]

STATE COURTS

INDIAN CHILD WELFARE ACT: Tribal Intervention

In re Guardianship of Q.G.M., 808 P.2d 684 (Okla. 1991).

A full-blood Seminole child whose father had died lived most of his life with his mother and his "Indian Grandmother" who

8. *Id.*
9. *Id.*
10. Specifically, 25 U.S.C. § 177 (1988).
11. *Cayuga V*, 762 F. Supp. at 33.
12. *Id.*
13. *Id.*
14. *Id.* at 34-35.
15. *Id.* at 35.
16. "[L]awsuits which seek to set aside or annul conveyances made under the RRR Act shall be within the original and exclusive jurisdiction of the Special Court". *Id.*
17. *Cayuga V*, 762 F. Supp. at 35.
18. *Id.*
19. *Id.* at 36.

was in fact his great aunt. The child's paternal grandparents filed a petition for guardianship and temporary custody in an Oklahoma court on May 17, 1989. The case presented issues under the Indian Child Welfare Act (ICWA) since the child was Indian and the case did not present either of the two exceptions defined by the ICWA.[1] The Seminole Tribe received notice of the proceeding on July 10, 1989 and first responded on October 16, 1989, through a letter to the trial court's secretary. The letter was treated as a motion to intervene which the court denied. Four days later, the court issued letters of guardianship to the grandparents.

The mother appealed and the Oklahoma Supreme Court recognized two issues: "1) whether the tribe can wait to intervene until the dispositional stage of the proceeding; and, 2) whether the mother may challenge the failure of the trial court to allow intervention even though the tribe did not appeal."[2]

The majority opinion recognized that the purpose of the ICWA is to prevent the removal of Indian children from their culture.[3] Because placement of the child in an Indian community is the focal point of the ICWA, the court concluded, the mother has the right to raise the issue on appeal.[4]

Quoting 25 U.S.C. § 1911(c),[5] the court held that a tribe does not waive its right to intervene because it waits until the dispositional stage before it intervenes.[6] Therefore, the trial court erred when it refused to allow the tribe to intervene and the case was reversed and remanded.[7]

A dissenting opinion disagreed with the holding that a mother can raise the rights and interests of a tribe on appeal.[8] Furthermore, the dissent argued that the ICWA does not apply to intra-family disputes.[9]

1. *In re* Guardianship of Q.G.M., 808 P.2d 684, 688 (Okla. 1991). The two exceptions are custody provisions of a divorce decree and delinquency proceedings. 25 U.S.C. § 1903(1) (1988); *In re* Custody of S.B.R., 719 P.2d 154 (Wash. App. 1986).

2. *Q.G.M.*, 808 P.2d at 687.

3. *Id.*

4. *Id.* at 688.

5. Title 25 U.S.C. § 1911(c) provides in pertinent part: ". . . and the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c) (1988).

6. *Q.G.M.*, 808 P.2d at 689.

7. *Id.*

8. *Id.* at 689-91 (Simms, J., dissenting).

9. *Id.* at 690-91.

An opinion concurring in part, dissenting in part concurred that the trial court erred in not allowing the tribe to intervene.[10] However, the Justice argued that a mother does not have the capacity to raise an issue on appeal where the tribe does not appeal or join the mother's appeal.[11]

JURIES: Fair-Cross-Section

Sellers v. Oklahoma, 809 P.2d 676 (Okla. Crim. App. 1991).

The defendant was convicted of three counts of Murder in the first degree and sentenced to death on each count. On direct appeal he alleged, inter alia, that the jury did not fulfill the fair-cross-section requirement.[1]

The court applied guidelines established by the Supreme Court in *Duren v. Missouri*,[2] and held that a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.[3]

The court found that the Defendant failed to establish the second prong of the *Duren* test and affirmed his conviction.[4]

TAXATION: Cigarettes

Oklahoma Tax Commission v. City Vending, 62 Okla. B.J. 1377 (1991).

City Vending was a cigarette wholesaler whose client list included Indian nations such as the Citizen Band Potawatomi Tribe. The Citizen Band Potawatomi Tribe had previously been recognized by the Oklahoma Tax Commission (Commission) as

10. *Id.* at 689 (Hodges, V.C.J., concurring in part, dissenting in part).
11. *Id.*

1. Sellers v. Oklahoma, 809 P.2d 676, 681 (Okla. Crim. App. 1991). Fair-cross-section requires that a jury represent, in reasonable fractions, the racial make up of the community in which it sits. U.S. CONST. amend. VI (as interpreted in Duren v. Missouri, 439 U.S. 357 (1979)).
2. 439 U.S. 357 (1979).
3. *Sellers*, 809 P.2d at 681-82 (quoting *Duren*, 439 U.S. at 364).
4. *Id.* at 692.

being exempt from sales tax.[1] City Vending had not purchased state tax stamps for the cigarettes that it sold to Indian tribes, claiming that such sales were exempt from taxation under the Indian Commerce Clause. The Indian Tribes serviced by City Vending resold the cigarettes in retail outlets or smokeshops.

On May 31, 1985, the Commission assessed taxes and interest in the amount of $83,794.45 against City Vending for cigarettes that it had sold to the tribes without tax stamps. The Commission held a hearing before an administrative law Judge to determine whether it could revoke City Vending's wholesale license on July 24, 1985, and City Vending raised arguments based upon the Indian Commerce Clause.[2] The judge held that he did not have the authority to decide constitutional questions, but under Oklahoma law, the taxes could be collected and City Vending's wholesale license could be revoked. The Commission instantly revoked the license.[3]

City Vending paid the assessment under protest but continued to sell cigarettes without tax stamps or a wholesale license. On October 30, 1985, the Commission filed suit in an Oklahoma district court seeking a permanent injunction against such practices. In spite of City Vending's arguments concerning the Indian Commerce Clause, the district court granted the requested relief and issued a permanent injunction on November 27, 1985.[4] The Court of Appeals upheld the district court's decision in an unpublished opinion, and the Oklahoma Supreme Court granted certiorari on March 2, 1990.[5]

Meanwhile, on November 20, 1985, City Vending filed suit in federal district court raising the Indian Commerce Clause question. The federal district court agreed with the Commission's argument that the suit represented an appeal of the administrative hearing and that it was filed out of time. The case was dismissed.[6]

City Vending then filed a similar action in Oklahoma County District Court. The district court found that the Commission's order was void *ab initio* for lack of jurisdiction.[7] The Commis-

1. Letter from Oklahoma Tax Commission to Citizen Potawatomi Tribe (May 3, 1978).
2. Oklahoma Tax Comm'n v. City Vending, 62 OKLA. B.J. 1377, 1377 (1991).
3. *Id.*
4. *Id.*
5. *Id.* at 1378.
6. *Id.* at 1377.
7. *Id.* at 1377-78.

sion sought a writ of prohibition against the district court and the Oklahoma Supreme Court assumed jurisdiction and granted the writ on March 17, 1986.[8]

Since City Vending had raised a constitutional issue, the Oklahoma Supreme Court described the issue as that of subject matter jurisdiction.[9] Citing *California v. Cabazon Band of Mission Indians*,[10] the court stated that in the area of state taxation of tribal activities and members, taxation is not allowed unless jurisdiction is expressly ceded to the state by Congress.[11] However, a narrow exception to this general rule exists when the state asserts jurisdiction over particular tribal activities involving non-tribal members and non-Indians.[12] The exception provides that the special area of taxation of cigarette sales is separate and distinct from general taxation.[13] Drawing upon *Washington v. Confederated Tribes (Colville)*[14] and the recently decided *Oklahoma Tax Commissiion v. Citizen Band Potawatomie Indian Tribe*,[15] the court held that the state may tax cigarettes sold by a tribal smokeshop to non-Indians and non-tribal members as long as such taxation is not preempted by federal law.[16]

In order to escape federal preemption, state jurisdiction must not interfere with, or be incompatible with federal or tribal interests, unless the state interests at stake are sufficient to justify the assertion of state authority.[17] The court found that the state's interest in a tax assessment is at its strongest while the Tribe's interest is less significant as the Tribe is merely trying to market an exception.[18] The court stated that *Colville* is "indistinguishable", and that the tax burden is passed on to the ultimate consumer. Therefore, the court concluded that the state cannot tax sales to tribal members and sales to non-tribal members or non-Indians in a like manner and the Commission's order was

8. *Id.* at 1378.

9. *Id.*

10. 480 U.S. 202 (1986).

11. *City Vending*, 62 OKLA. B.J. at 1380.

12. *Id.* (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1986); Washington v. Confederated Tribes, 447 U.S. 134 (1980) (*Colville*); Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976)).

13. *Id.* at 1381.

14. 447 U.S. 134 (1980).

15. 111 S. Ct. 905 (1991).

16. *City Vending*, 62 OKLA. B.J. at 1382.

17. *Id.* (citing New Mexico v. Mescalero Apache Indian Tribe, 462 U.S. 324, 334 (1983)).

18. *City Vending*, 62 OKLA. B.J. at 1383.

void on its face.[19] Accordingly, the order of the Oklahoma Court of Appeals was vacated, the order of the Commission was vacated as being void *ab initio*, the judgment of the district court was reversed and the cause was remanded for vacation of the permanent injunction that had been granted to the state.[20]

In an opinion to specially concur,[21] greater depth was given to the United States Supreme Court's treatment of the cigarette taxation question through *Potawatomie*, *Colville*, and *Moe*. The opinion described the question as one for Congress - not the judiciary.[22] In the interim, "ambiguities in taxation laws concerning federal consent to tax are, as a rule, resolved in favor of tribal independence."[23]

Two dissenting Justices opined[24] that the tax assessment was valid and should have been left undisturbed and treated as a final agency action.[25]

19. *Id.* at 1383.
20. *Id.*
21. *Id.* at 1384-85 (Kauger, J., concurring specially).
22. *Id.* at 1385.
23. *Id.*
24. *Id.* at 1386-88 (Opala, C.J., dissenting).
25. *Id.* at 1387.