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Federal Recent Development

FEDERAL RECENT DEVELOPMENTS

UNITED STATES COURT OF APPEALS

CIVIL JURISDICTION: Amendment of Tribal Code

Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians, 911 F.2d 137 (8th Cir. 1990).

Ernest Parisien, a Turtle Mountain Band tribal member, subcontracted with Twin City, a non-Indian general contractor working on the reservation. A dispute arose between Parisien and Twin City over unsatisfactory work and untimely payments. After Parisien notified Twin City that work would be suspended until spring because of extreme cold weather, Twin City hired another subcontractor to complete the work. Parisien filed suit in the Turtle Mountain Tribal Court for payment of work performed and damages.

The Turtle Mountain Tribal Court held that it lacked jurisdiction over Twin City because Twin City had not submitted to the court's jurisdiction as required by the tribal code.[1] The tribal appellate court found there was jurisdiction and remanded the case.[2]

Twin City challenged the assertion of jurisdiction in federal district court by seeking declaratory and injunctive relief to prohibit the tribal court proceeding. The district court held that there was no jurisdiction and entered a permanent injunction.[3]

On appeal to the Eighth Circuit, a divided panel reversed the lower court, holding there was tribal court jurisdiction. But on rehearing, en banc, the court affirmed the judgment of the district court.[4]

While the case was pending appeal in the Eighth Circuit, the Turtle Mountain Band amended its tribal code to provide for

1. Turtle Mountain Tribal Code, tit. 2, § 2.0102(1) (1976) provided:
> [The] Tribal Court shall have civil jurisdiction over non-Indians in any particular case where they submit themselves to the jurisdiction of the court by instituting an action against an Indian and filing cash bond in the amount of the damages asked, or by submitting himself to the Court's jurisdiction.

2. Parisien v. Twin City Constr. Co., No. 66-86 (Turtle Mountain Tribal App. Ct. June 6, 1986).

3. Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, No. A2-86-124 (D.N.D. Aug. 24. 1987).

4. Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 866 F.2d 971 (8th Cir.) (en banc), *cert. denied*, 109 S. Ct. 2110 (1989).

jurisdiction over parties such as Twin City.[5] Seeking relief from the judgment of the district court, Parisien filed a rule 60(b)(5) motion.[6] However, the district court did not entirely dissolve its injunction against Parisien, so he filed a rule 59(e) motion.[7] The district court found that the basis on which the permanent injunction was issued no longer existed because the tribal code amendment provided for jurisdiction in all pending cases.[8]

The issue before the Eighth Circuit was whether the permanent injunction should be lifted in its entirety because the district court abused its discretion in failing to explain the denial of Parisien's motion.

The Eighth Circuit found that there was abuse of discretion by the district court because the lower court had not explained the denial of Parisien's motion.[9] In reviewing the district court's conclusions, the court found no reason why the permanent injunction should not be entirely dissolved.[10]

The Eighth Circuit reversed the district court's decision and remanded to dissolve the permanent injunction so that Parisien could proceed with his tribal court action.[11]

5. The amended Turtle Mountain Tribal Code, tit. 2, § 2.0102(1)(a)(b) (1987) provides, in pertinent part:

> [The Tribe shall have jurisdiction over]
> (a) Business transactions conducted within the territorial jurisdiction of the Tribal Court as defined in Section 2.0102(3) of this Code; and
> (b) Contracts to be performed within the Court's territorial jurisdiction, including contracts to insure any person, property or risk, located within the Court's territorial jurisdiction.

6. Rule 60(b)(5) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
> . . . .
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . .

FED. R. CIV. P. 60(b)(5).

7. Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 911 F.2d 137, 139 (8th Cir. 1990). Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment." FED. R. CIV. P. 59(e).

8. *Id.*

9. *Id.* at 137.

10. *Id.* at 139.

11. *Id.* The court clarified that its decision was not a determination of tribal court jurisdiction.

CRIMINAL JURISDICTION: Dependent Indian Community

Blatchford v. Sullivan, 904 F.2d 542 (10th Cir. 1990), *cert. denied*, —— S. Ct. —— (Jan. 7, 1991).

A New Mexico state court convicted Charles Blatchford, a Navajo Indian, of accessory to criminal sexual penetration of a child and accessory to the kidnapping of a second child. Both of the children involved were Navajo. The crimes occurred at a rural community, Yah-Ta-Hey, which is not on reservation land but is surrounded by the Navajo Reservation. The court sentenced Blatchford to 10 to 50 years on the first court, and life imprisonment on the second count.

After Blatchford unsuccessfully appealed in state courts, he filed a writ of habeas corpus in federal court on the grounds that the state lacked jurisdiction to prosecute him for the offenses. Blatchford contended that the federal court had exclusive jurisdiction of the case under the federal Major Crimes Act[1] because the situs had reservation status, or in the alternative, was a dependent Indian community pursuant to 18 U.S.C. § 1151.[2] However, the district court held that Yah-Ta-Hey was not a dependent Indian community.[3]

The issue before the Tenth Circuit was whether the community, Yah-Ta-Hey, was Indian Country or a dependent Indian community.[4]

First, the court concluded that there was no reservation status pursuant to section 1151(a) relying on an earlier decision of the court.[5] The court then reviewed the history and case law of "dependent Indian community."[6] It agreed with the lower court's

1. The Major Crimes Act provides, in pertinent part:

> Any Indian who commits against the person or property of another Indian or other persons any of the following offenses, namely . . . kidnapping, rape . . . , within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153 (1982).

2. Indian Country, for the purposes of the Major Crimes Act, is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, . . . all dependent Indian communities within the borders of the United States . . . , [and] all Indian allotments . . . ." 18 U.S.C. § 1151 (1982).

3. There is no record that the court considered the issue of whether Yah-Ta-Hey had reservation status.

4. Blatchford conceded that the situs was not an Indian allotment under section 1151(c).

5. Blatchford v. Sullivan, 904 F.2d 542, 544 (10th Cir. 1990). *See* Pittsburgh & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) (reservation status lost when executive orders 1000 & 1284 were issued in 1988).

6. Blatchford v. Sullivan, 904 F.2d 542, 544-47 (10th Cir. 1990).

use of the guidelines set out in *United States v. Martine*[7] and *United States v. South Dakota*.[8] The court determined that Yah-Ta-Hey was not born out of a public need to provide land for occupancy, use, and protection of a dependent people, but instead for private, commercial gain. The factors the court considered were: (1) local merchants bought Navajo goods for distribution elsewhere, (2) the Yah-Ta-Hey community was a non-Indian commercial intersection, and (3) the Yah-Ta-Hey community was characterized as a suburb of Gallup, New Mexico.[9] Furthermore, the court stated, there was no indication that Congress intended to include communities like Yah-Ta-Hey under the Major Crimes Act.[10]

The Tenth Circuit affirmed the district court's decision that Yah-Ta-Hey was neither a dependent Indian community for purposes of the Major Crimes Act nor a community located within the Navajo Reservation, and dismissed Blatchford's habeas corpus petition.[11]

CRIMINAL JURISDICTION: State Jurisdiction

Ross v. Neff, 905 F.2d 1349 (10th Cir. 1990).

Ronnie Ross, a Cherokee, was at a ballpark known as the Greasy Ballpark, located on Cherokee tribal trust land. The ballpark was leased to the South Greasy Community Park Association for five years. The president of the South Greasy Community Park Association, also a Cherokee tribal member, called the county sheriff's department requesting a patrol of the ballpark because people were speeding, loitering, and drinking alcohol.

7. 442 F.2d 1022 (10th Cir. 1971). Factors considered in determining the status of a dependent Indian community were:

(1) the nature of the area in question;

(2) the relationship of the inhabitants of the area to Indian tribes and to the federal government; and,

(3) the established practice of government agencies toward the area.

Id. at 1023.

8. 665 F.2d 837 (8th Cir. 1981) (Sisseton-Wahpeton Sioux tribal housing project was a dependent Indian community).

9. *Blatchford*, 904 F.2d at 548-49. The court also determined that Yah-Ta-Hey was not a housing project community. *Id.* at 549. In addition, the court stated that mere presence of Indians in a particular area does not convert the area in to a dependent Indian community. *Id.*

10. *Id.* at 549.

11. *Id.*

Deputy McLemore went to the park and attempted to arrest Ross for public intoxication. During the arrest, the Deputy shot Ross in the leg.[1]

Ross filed two fourth amendment[2] claims pursuant to 42 U.S.C. § 1983[3] against the deputy, the county sheriff, and the county. The first claim alleged Ross' arrest was illegal because the ballpark was tribal trust land, that is, in Indian Country, and state peace officers have no jurisdiction in Indian Country. The second claim was that McLemore used excessive force in arresting Ross.[4]

The district court directed a verdict in favor of the county.[5] The first trial had ended in mistrial, but a subsequent jury trial resulted in a verdict in favor of the deputy.[6]

On appeal, the Tenth Circuit separated the section 1983 claim and the jurisdictional claim. The issues before the Tenth Circuit were (1) whether the district court erred as a matter of law in holding that Deputy McLemore acted within his jurisdictional limits when he arrested Ross; (2) whether the defendants were entitled to qualified immunity;[7] and (3) whether the defendants were liable for use of excessive force.

The appellate court determined that Greasy Ballpark was Indian country pursuant to 18 U.S.C. § 1151.[8] Therefore, the

1. Ross' leg eventually had to be amputated because of medical complications. At this writing, it is unknown whether Ross has a civil action pending.

2. The fourth amendment provides: "The right of the people to be secure in their persons, . . . shall not be violated, . . . but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

3. Title 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, . . . or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1982).

4. Ross v. Neff, 905 F.2d 1349, 1351 (10th Cir. 1990).

5. *Id.* at 1351. The court rejected Ross' claims that the county (1) allowed its officers to make arrests in Indian country, and (2) failed to supervise and train McLemore.

6. *Id.*

7. Qualified immunity is a defense if it is shown a police officer could not have reasonably known that the challenged actions violated the law. *Id.* at 1354.

8. Title 18 U.S.C. § 1151 defines Indian country as "any Indian reservation under the jurisdiction of the United States Government, . . . all dependent Indian communities . . . , [and] all Indian allotments . . . ." 18 U.S.C. § 1151(a)-(c) (1982).

state had no criminal jurisdiction in the ballpark.[9] The court agreed that the deputy's actions were made outside his jurisdiction, and thus were violative of the fourth amendment and actionable under section 1983.[10] However, the court added that Deputy McLemore was entitled to qualified immunity because a reasonable peace officer would not know he did not have jurisdiction on Indian tribal trust land.[11] As a result, the jury verdict in favor of the deputy was not affected by the lack of jurisdiction.[12] The Tenth Circuit concluded that the lower court erred in directing a verdict in favor of the county; the Tenth Circuit remanded this claim to the lower court because the county was not entitled to qualified immunity.[13]

On the separate issue of use of excessive force, the Tenth Circuit affirmed the lower court's ruling in favor of the county.[14] The court remanded the section 1983 claim against the county for retrial without any liability for use of excessive force.[15]

CRIMINAL CONVICTION UNDER THE FOREST ALLOTMENT ACT OF 1910

United States v. Kent, 912 F.2d 277 (9th Cir. 1990).

In 1984, Lavon Kent, a Karuk Indian, moved to Sandy Bar Creek after receiving a certificate of eligibility from the Department of the Interior for an allotment pursuant to the Forest Allotment Act of 1910.[1] Kent moved a trailer (which she used as her living quarters) to the site and planted a garden.

9. *Ross*, 905 F.2d at 1352-53.
10. *Id.* at 1353-54.
11. *Id.*
12. *Id.* at 1355.
13. *Id.* at 1354-55.
14. *Id.* at 1355.
15. *Id.*

1. Title 25 U.S.C. § 377 states, in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided . . . .

25 U.S.C. § 377 (1983). Kent's certificate of allotment, dated January 18, 1982, provided, in relevant part, that "Kent . . . is eligible as an Indian to receive land . . . in a national forest under Section 31 of the [Forest Allotment Act]." United States v. Kent, 912 F.2d 277, 278 n.2 (9th Cir. 1990).

In 1987, the federal government filed charges against Kent pursuant to 16 U.S.C. § 551[2] and 36 C.F.R. § 261.10(b).[3] The district court found her guilty of unauthorized residential occupancy and sentenced her to 30 days in jail and fined her $25. Kent appealed her conviction to the Ninth Circuit.

The issues before the Ninth Circuit were whether the district court erred in holding Kent did not have aboriginal rights to occupy the land at Sandy Bar Creek,[4] and whether Kent possessed the requisite mens rea to violate 36 C.F.R. § 261.10(b).[5]

Although the district court did not consider whether Kent had aboriginal rights to occupy the site, the Ninth Circuit found no error. The Ninth Circuit determined that the lower court had correctly held that any such rights were extinguished by Kent's failure to show that her lineal ancestors had continuously occupied the land before it was withdrawn from entry.[6]

The appellate court examined the statutory language of the Act and found that the government failed to prove that Kent had the mens rea necessary for her conviction.[7] The court also held that Kent's conviction could not stand because due process required that she have sufficient notice that her conduct might be unlawful.[8] The court then ruled that there were questions on what was allowed under 25 U.S.C. § 337, and whether the dispute between Kent and the Forest Service should be resolved

2. This section requires the Secretary of Agriculture to regulate the occupancy and use of national forests, and further provides that violation of the regulation shall be punishable by a fine of not more than $500 or imprisonment of not more than six months, or both.

3. Title 36 C.F.R. § 261.10(b) prohibits "[t]aking possession of, occupying, or otherwise using National Forest System lands for residential purposes without a special-use authorization, or as otherwise authorized by Federal law or regulation." 36 C.F.R. § 261.10(b) (1990).

4. Kent's great-grandmother lived at Sandy Bar Creek until her death in 1870, and Kent's mother was born one mile from Sandy Bar Creek and lived there until 1939. No other blood relatives of Kent lived at Sandy Bar Creek from 1870 to 1984. *Kent*, 912 F.2d at 278. *See* United States v. Dann, 873 F.2d 1189 (9th Cir. 1989) (aboriginal title can only be extinguished by Congress or by authorization of Congress). Thus, an individual could show that lineal ancestors held and occupied a particular tract of land from time immemorial and that the title was never extinguished. *Id.* at 1196.

5. The lower court also determined whether Kent intended to violate 36 C.F.R. § 261.10(b). The district court held she did possess the necessary mens rea. United States v. Kent, 679 F. Supp. 985 (E.D. Cal. 1987).

6. *Kent*, 912 F.2d at 277, 278.

7. *Id.* at 278-79.

8. *Id.* at 279-81. The court rejected the government 's argument that the Act was a strict liability offense. *Id.* at 280.

through a civil action.[9] The court rejected the district court's conviction.[10]

The dissent agreed with the majority that the district court correctly decided that Kent did not have aboriginal title to the land.[11] However, the dissent disagreed with the majority on the issues (1) that 36 C.F.R. § 261.10(b) did not create a strict liability offense; (2) that the requisite scienter was knowledge on the part of the violator that he conduct was unlawful; and (3) whether Kent lacked the requisite knowledge was a question of fact.[12]

PRISONER'S RIGHTS

Iron Eyes v. Henry, 907 F.2d 810 (8th Cir. 1990).

Iron Eyes, a Standing Rock Sioux Indian, had very long hair. He believed that his hair was a gift from the Great Spirit and that to cut his hair (except to symbolize grief for the loss of a loved one) would offend the Creator. In fact, Iron Eyes had cut his hair only five times in 27 years: three times in mourning, and twice at the order of prison officials, pursuant to prison regulations.

In 1987, Iron Eyes was incarcerated in Missouri's Farmington Correctional Center. Iron Eyes protested the cutting of his hair, arguing that it was against his Native American religious beliefs. The prison officials stated the prison records did not indicate whether Iron Eyes was Native American, and subsequently ordered him to conform to prison regulations. When Iron Eyes refused to voluntarily cut his hair, the prison officials moved him to disciplinary segregation and shackled and handcuffed him while the prison barber cut his hair. Three months later, on March 3, 1988, Iron Eyes filed a pro se complaint in federal court under 42 U.S.C. § 1983,[1] alleging a civil rights violation.

9. *Id.* at 280-82.
10. *Id.* at 281.
11. *Id.* at 282 (Canby, J., dissenting).
12. *Id.*

1. Title 42 U.S.C. § 1983 provides, in relevant part:
> Every person who, under color of any statute, ordinance, regulation, . . . or any State . . . , subjects, . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1982).

In September 1988, the prison officials once again ordered Iron Eyes to cut his hair. Iron Eyes obtained a temporary restraining order from the federal district court that barred the prison officials from again cutting his hair. He then filed a second amended complaint for injunctive relief and compensatory and punitive damages.[2]

The prison regulations provided an exception which allowed Native Americans to grow and keep long hair.[3] Iron Eyes sought to invoke the exception before the prison officials. A hearing was held and Iron Eyes submitted proof of Native American descent. However, the prison zone director denied Iron Eyes the exception. Following the prison's denial of the exception, the district court entered an order for the prison officials and denied a temporary injunction pending Iron Eyes' appeal to the Eighth Circuit.

Iron Eyes then filed a similar motion for a temporary injunction in the U.S. Court of Appeals for the Eighth Circuit to prevent his hair from being cut. Pending the decision on the motion, the prison officials again gave Iron Eyes the choice of cutting his hair or facing disciplinary segregation. Rather than face unwarranted punishment, Iron Eyes cut his hair. He then appealed the district court's decision earlier order denying his temporary injunction request.

The issue before the Eighth Circuit was whether Iron Eyes' right to long hair, as an exercise of freedom of religion, was outweighed by the soundness of the prison regulation. The circuit court stated that prison inmates have valid constitutional rights, including first amendment rights, even though they are incarcerated.[4] The court first addressed the sincerity of Iron Eyes'

2. Iron Eyes v. Henry, 907 F.2d 810, 812 (8th Cir. 1990).

3. Div. Rule 116.050(3), MO. ADMIN. CODE tit. 14, div. 20, ch. 16. The rule provides, in pertinent part:

> (3) Hair will be clean, neatly groomed and no longer than the base of the rear of the shirt collar. Neither extremely long hair . . . will be permitted with the exception indicated below . . . .
>
> > (A) Those inmates belonging to an indian [sic] tribe, who have received a court ruling permitting them to grow long hair, will be allowed to do so. Other inmates who claim to belong to an indian [sic] tribe must present written documentation of such to the institution head. The institution head will submit the item to the zone director for a final decision . . . .

Id., quoted in Iron Eyes, 907 F.2d at 811 n.3.

4. *Iron Eyes*, 907 F.2d at 812.

religious reason for wearing his hair long.[5] After the court concluded that Iron Eyes' belief was sincere, the court applied a four-factor test, as set forth in *Turner v. Safley*,[6] to determine the reasonableness of the prison regulation.

In finding that the prison regulation was legitimate and neutral, the court examined the security objectives of curtailing the smuggling of contraband in long hair and preventing escapees from altering their appearance (by cutting their hair to avoid detection or recognition).[7] The court held that "the district court properly found rational nexus between the short hair regulation and the valid neutral penological concerns behind it."[8]

The appellate court found that Iron Eyes was not precluded from practicing some tenets of his religion, and that there was a reasonable alternative means of exercising his religious beliefs.[9] Although Farmington Prison had only four Native Americans, the court concluded that the increased cost of conducting longer searches on inmates with long hair had a valid impact on guards, other inmates, and the allocation of prison resources.[10] Furthermore, exempting Native Americans from grooming regulations would likely cause prison friction and unrest.[11]

The court deferred to the discretion of the prison officials to grant exemptions and determine whether an alternative to a regulation exists.[12] The court did question the possibility of harassment of Iron Eyes because of the prison officials' prior actions in declaring that Iron Eyes was not Native American and then forcibly cutting his hair while this action was pending, but affirmed the district court.[13]

5. *Id.* at 813. The prisoner must establish he has a sincere religious belief and that the challenged regulation infringes upon that belief. *Id.*

6. 482 U.S. 78 (1987). The standard set out in *Turner* was "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. The four factors for determining reasonableness of the regulation at issue are: (1) whether there is a valid, rational connection between the prison regulation and the legitimate, neutral governmental interest used to justify it; (2) whether alternative means exist for prisoner to exercise the constitutional right at issue; (3) the impact that would be caused by accommodation of the right on prison staff, inmates, and allocation of prison resources; and (4) whether any alternative exists that would fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests. *Id.* at 89-91.

7. *Id.* at 814.

8. *Id.*

9. *Id.* at 814-15.

10. *Id.* at 815.

11. *Id.*

12. *Id.*

13. *Id.* at 816.

Judge Gerald Heaney's dissent stated that the regulation unreasonably infringed on the religious beliefs of Native Americans because of the arbitrary discretion permitted prison officials in granting exemptions.[14] Furthermore, Heaney argued, it was "infirm" and unreasonable for not setting forth the criteria for allowing the exemption.[15] Heaney added that the prison officials' failure to ever approve an exemption is a basis for a claim of arbitrary and capricious behavior.[16]

Heaney added that an equal protection claim and a claim for cruel and unusual punishment are present because of the alleged vicious treatment of Iron Eyes and the physical abuse and harassment he received.[17] Furthermore, Iron Eyes may have a claim of retaliation against the prison officials because of their abusive actions in forcibly cutting his hair and threatening him with punishment while this appeal was pending.[18]

REMOVAL OF TRIBAL COURT CASES TO FEDERAL COURT

Becenti v. Vigil, 902 F.2d 777 (10th Cir. 1990).

In 1982, Mary Becenti's son, now deceased, obtained a loan for a laundry business located on the Jicarilla Apache Reservation in New Mexico. He obtained the loan from the Jicarilla Apache tribal credit committee. When Becenti's son died in 1985, the buyer of his share agreed to continue the loan. Mary Becenti owned a 10 percent interest in the laundry. A Bureau of Indian Affairs' loan specialist refused to accept payments by the substitute obligor, and instructed the tribal credit committee to foreclose on the loan. Mary Becenti filed a civil action in the Jicarilla Apache Tribal Court for violation of trust responsibility and breach of standard of care against the loan specialist and his supervisor as federal employees.

The federal government's petition for removal to a federal district court pursuant to 28 U.S.C. § 1442(a)(1)[1] was granted.

14. *Id.* at 816 (Heaney, J., dissenting).
15. *Id.* at 819.
16. *Id.* at 822.
17. *Id.*
18. *Id.* at 823.

1. Title 28 U.S.C. § 1442(a)(1) provides:
(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing

The government then moved for dismissal for lack of subject matter jurisdiction, failure to join an indispensable party, and failure to prosecute. The government supported its motion on grounds of sovereign immunity because the suit was against federal officers acting within their scope of employment.

The district court granted the motion to dismiss for lack of jurisdiction on sovereign immunity grounds. The court determined a judgment against the BIA loan specialist would, in effect, be a judgment against the United States.[2] Becenti appealed the decision to the Tenth Circuit asserting that section 1442 only allowed removal from state courts, not tribal courts.

The issue before the Tenth Circuit was whether Congress authorized removal of cases against federal officials from tribal courts to federal district courts. The Tenth Circuit equated the section 1442 definition of "state court" to 28 U.S.C. §§ 1441 and 1443(1). These latter sections limited removal actions to the fifty states.[3] The court agreed with the government that the power to remove cases involving government officials is essential to the system of government. However, it refused to expand the jurisdiction of federal courts in absence of express statutory language.[4]

The Court of Appeals reasoned that Congress provided alternative federal forums for some federal employees but did not guarantee every federal employee a forum under section 1442.[5] The court concluded that until Congress resolves the need to expand section 1442 to include removal from tribal courts, the federal courts may not exercise jurisdiction over them.[6]

The court vacated the district court's order stating that the removal from the tribal court was improvident and remanded

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the place wherein it is pending:

> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1) (1988).

2. Becenti v. Vigil, No. 87-1254JP (D.N.M. Oct. 20, 1988).

3. Becenti v. Vigil, 902 F.2d 777, 779 (10th Cir. 1990). *See also* Guam v. Landgraf, 594 F.2d 201, 202 (9th Cir. 1979) (court whose jurisdiction is Guam is not a state court).

4. *Becenti*, 902 F.2d at 779-80.

5. *Id.* at 780.

6. *Id.* at 780-81.

the case to the district court for remand to the tribal court.[7]

STANDARD OF REVIEW OF TRIBAL COURT DECISIONS

FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990).

A non-Indian corporation, FMC, located its plant on fee land within the Shoshone-Bannock Reservation, located near Fort Hall, Idaho. FMC had 600 employees, making it the largest employer on the Reservation. The Shoshone-Bannock Tribes (Tribes) passed a Tribal Employment Rights Ordinance (TERO),[1] which required reservation employers to give preference to Indians in employment, contracting, and subcontracting. FMC originally objected to the TERO but subsequently entered into an employment agreement with the Tribes.

Dissatisfied with FMC's compliance with the employment agreement, the Tribes filed a civil suit in the Shoshone-Bannock Tribal Court. FMC challenged the tribal court's jurisdiction in federal district court. The district court enjoined the Tribes from enforcement of any orders against FMC until the tribal court ruled on the jurisdiction question.[2]

The tribal court held that it had jurisdiction over the dispute and found FMC in violation of the TERO.[3] The tribal appellate court affirmed the lower tribal court's decision.[4] However, the federal district court held that the Tribes did not have jurisdiction over FMC, reversed the holding of the tribal appellate court, and granted FMC a preliminary injunction.[5] The Tribes then appealed to the U.S. Court of Appeals for the Ninth Circuit.

The issue before the Ninth Circuit was whether the Tribes had the power to enforce the TERO over non-Indians located on fee land on the Reservation. FMC argued for a standard of "clearly erroneous" on questions of fact and de novo review for questions of law, and the Tribes argued for a standard of

7. *Id.* at 781.

1. Shoshone-Bannock Tribe Employment Ordinance, EMPT-80-54 (July 22, 1980) (approved by the Secretary of the Interior Oct. 14, 1980).

2. FMC v. Shoshone-Bannock Tribes, No. 87-4059 (D. Idaho April 14, 1989).

3. Shoshone-Bannock Tribes v. FMC, No. C-87-39 (Shoshone-Bannock Tribal Ct. July 22, 1987).

4. FMC v. Shoshone-Bannock Tribes, No. C-87-64 (Shoshone-Bannock Tribal App. Ct. May 19, 1988).

5. FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1312 (9th Cir. 1990).

"clearly erroneous" on mixed questions of law and fact. The federal district court had applied an "independent review" standard.[6]

The Ninth Circuit held that, for factual questions, the standard of review was the "clearly erroneous" standard, and de novo for questions of law.[7] The court reasoned that some deference to tribal courts must be shown because of traditional judicial respect to the first (trial) court of its fact-finding ability.[8]

The court cited the United States Supreme Court in *National Farmers Union Insurance v. Crow Tribe of Indians*[9] for the exhaustion of tribal remedies doctrine and the competency of tribal courts issues. According to the Ninth Circuit, the development of a factual record at the tribal court level serves as the basis for a deferential, "clearly erroneous" standard of review on questions of fact.[10] As for its decision mandating a de novo standard of review for questions of law, the court stated that tribal court review was helpful but that federal courts had no obligation to follow tribal court expertise.[11] The court emphasized that a federal question existed on the determination of the tribal court's jurisdiction over the non-Indian, and that "federal courts are the final arbiters of federal law . . . ."[12]

The Ninth Circuit then reviewed the tribal appellate court's assertion over jurisdiction over FMC, which was based on the test defined in *Montana v. United States*.[13] The court then ruled that the Tribes had the power to regulate the employment at FMC.[14] The case was then remanded to the tribal court to allow FMC the opportunity to challenge the TERO application under the Indian Civil Rights Act.[15]

6. *Id.*
7. *Id.*
8. *Id.* at 1313.
9. 471 U.S. 845 (1985).
10. *FMC*, 905 F.2d at 1313.
11. *Id.*
12. *Id.*
13. 450 U.S. 544 (1981). Under *Montana*, a tribe retains inherent sovereign power to exercise civil jurisdiction over non-Indians on fee lands within their reservation boundaries provided that several circumstances are met. The first is a consensual relationship test, the second is when the conduct threatens or has some direct effect on tribal political integrity, economic security, health, or welfare. *Id.* at 565-66.
14. *FMC*, 905 F.2d at 1314.
15. *Id.* The Indian Civil Rights Act of 1968 states, in pertinent part that no Indian tribe in exercising powers of self-government shall "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]" 25 U.S.C. § 1302(8) (1988).

UNITED STATES DISTRICT COURTS

25 U.S.C. § 51 TRIBAL CONTRACT APPROVAL

Stock West Corp. v. Lujan, No. 90-250-JU, 17 Indian L. Rep. (Am. Indian Law. Training Program) 3153 (D. Or. Sept. 27, 1990).

Stock West Corporation (Stock West) entered into separate contracts with two tribally-incorporated businesses, the Colville Tribal Enterprise Corporation (CTEC) and the Colville Indian Precision Pine Company (CIPP). Both contracts provided that Stock West would manage the construction of and market a sawmill on the Colville Reservation. Both contracts contained a section 81 clause.[1] However, the Bureau of Indian Affairs (BIA) refused to approve the contracts because the Tribe was not a party to either contract. All parties to the contracts believed BIA approval was necessary yet no appeal was made to the Interior Board of Indian Appeals (IBIA).

CTEC and CIPP filed an action in the Colville Tribal Court alleging breach of contract and served a notice of default (for undisclosed reasons) on Stock West. Stock West then sued in federal district court demanding arbitration pursuant to the contracts. The district court held that it had concurrent jurisdiction with the tribal court and dismissed the case on grounds of comity.[2] Stock West appealed to the Ninth Circuit which affirmed the lower court's decision.[3] The tribal court then held the contracts void for lack of BIA approval.[4]

1. Title 25 U.S.C. § 81 provides, in pertinent part:

> No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money or other thing of value . . . , or for granting or procuring any privilege to him . . . , or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States . . . , unless such contract or agreement be executed and approved as follows:
>
> . . . .
>
> Second. It shall bear the approval of the Secretary of the Interior [specifically the Bureau of Indian Affairs] and the Commission of Indian Affairs indorsed upon it.

25 U.S.C. § 81 (1988).

2. Stock West, Inc. v. Confederated Tribes of the Colville Reservation, No. C-87-242-RJM, 1, 14 Indian L. Rep. (Am. Indian Law. Training Program) 3097 (Aug. 4, 1987).

3. Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1227-30 (9th Cir. 1988).

4. Confederated Tribes of the Colville Reservation v. Stock West, Inc., 15 Indian L. Rep. (Am. Indian Law. Training Program) 6019, 6020-21 (1988).

Again, BIA refused to grant its approval following a request by Stock West for retroactive approval of both contracts. Stock West then commenced an administrative appeal to IBIA but IBIA dismissed the appeal because of failure of Stock West to appeal within the statutory time limit. Stock West then filed again in federal district court for administrative review of the IBIA dismissal.

The issues presented to the district court were (1) whether the district court has subject matter jurisdiction, (2) whether Stock West has standing, and (3) whether the Colville Tribe is an indispensable party to the litigation.

The district court found it had subject matter jurisdiction under the Administrative Procedures Act.[5] As to the standing issue, the court applied the "zone of interest" standard[6] and further inquired into the congressional intent of the class of plaintiffs.[7] The court, after examining 25 U.S.C. § 81, its legislative history, and prior case law, found that section 81 was a remedial statute designed to protect Indians, not non-Indian contractors.[8] Finally, the court held that the plaintiff, Stock West, lacked standing because its alleged injury did not fall within the statutory zone of interests.[9]

In analyzing the indispensable party issue, the court determined that the Tribe was a necessary party to the litigation and, thus, indispensable under rule 19(a)[10] because the Tribe had contracts with Stock West Corporation to provide timber, and

5. Stock West Corp. v. Lujan, No. 90-250-JU, 17 Indian L. Rep. (Am. Indian Law. Training Program) 3153, 3154 (D. Or. Sept. 27, 1990) (referring to 5 U.S.C. § 702 (1989)).

6. A party seeking standing under 5 U.S.C. § 702 must have an interest arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 153 (1970).

7. *Stock West*, 17 Indian L. Rep. at 3154.

8. *Id.*

9. *Id.* at 3155.

10. Rule 19(a) provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

FED. R. CIV. P. 19(a)

the sawmill was on tribally-leased land.[11] The court also found that tribal sovereign immunity barred compelling joinder in the action.[12]

The court granted BIA's (the defendant's) motion for dismissal pursuant to rule 19(a)(i), emphasizing that an entity doing business with tribes or tribal corporations is on notice to comply with section 81, and to secure a proper waiver of tribal sovereign immunity.[13]

STATE COURTS

INDIAN CHILD WELFARE ACT AND VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS

Catholic Social Services, Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1989), *cert. denied*, 110 S. Ct. 2208 (1990).

CAA, an Athabascan tribal member, gave birth to CMF in 1980. In 1985, CAA sought assistance from Catholic Social Services (Catholic Services) for alcohol and parental counseling. In 1986, CAA relinquished custody of her second child, M, to Catholic Services and CMF was placed in foster care. Catholic Services returned CMF to CAA one month later. Soon afterward, however, CAA voluntarily gave up CMF after having subjected the child to physical abuse.

Catholic Services requested that CAA sign a Relinquishment of Parental Rights form. It was later shown that Catholic Services did not inform CAA of an alternative form, a Consent to Adopt. Catholic Services also did not inform CAA that Catholic Services would become CMF's legal custodian, and did not mention either the existence of Cook Inlet Tribal Council (Cook Inlet), a tribal child welfare organization, or that CAA had the right to be represented by counsel.

CAA voluntarily relinquished her parental rights on June 30, 1986, and the state trial court entered a final decree terminating CAA's parental rights on July 15, 1986.

After learning of Cook Inlet through an ad, CAA contacted them for counselling and assistance in regaining custody of CMF. On the same day that CMF's foster parents petitioned to

11. *Stock West*, 17 Indian L. Rep. at 3155.

12. *Id.* Rule 19(b) provides: "If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." FED. R. CIV. P. 19(b).

13. *Id.* at 3155-56.

adopt CMF, CAA filed a Revocation of Relinquishment in the state trial court.

Cook Inlet moved to intervene in the adoption proceeding and to set aside the termination decree pursuant to section 1914 of the Indian Child Welfare Act (ICWA).[1] The state trial court vacated CAA's relinquishment of parental rights, citing the failure of Catholic Services to notify Cook Inlet of the voluntary relinquishment proceeding.[2] Catholic Services appealed to the state supreme court.

The issue before the Alaska Supreme Court was whether Cook Inlet was entitled to notice of a voluntary termination of parental rights proceeding under the ICWA.

The court compared section 1912(a) (involuntary termination)[3] with section 1913 (voluntary termination)[4] in determining that Congress did not explicitly grant tribal intervention rights in voluntary termination proceedings as it did in involuntary termination proceedings.[5] The court also looked to the legislative history of the ICWA and the Bureau of Indian Affairs' *Guidelines for State Courts*[6] to substantiate its decision that tribal notice was not required in *voluntary* termination proceedings.[7] The court concluded that its decision, in denying tribal rights to intervention, was not "fundamentally unfair" because Con-

1. Title 25 U.S.C. § 1914 provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section 1911, 1912, and 1913 of this title.

25 U.S.C. § 1914 (1988).

2. Cook Inlet received no notice of the custody proceedings. CAA v. Catholic Social Servs., Inc., No. 3AN-86394P (Alaska Super. Ct. June 24, 1988).

3. Title 25 U.S.C. § 1912(a) provides:

> In any voluntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved[,] the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, . . . of the pending proceedings and of their right of intervention.

25 U.S.C. § 1912(a) (1988).

4. Title 25 U.S.C. § 1913 provides: "Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parent rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction . . . ." 25 U.S.C. § 1913(a) (1988).

5. *Catholic Servs.*, 783 P.2d at 159.

6. Bureau of Indian Affairs Guidelines for State Courts: Indian Custody Proceedings, 44 Fed. Reg. 67,586 (1979).

7. *Id.*

gress had stopped short of granting tribes the right to notice in voluntary proceedings.[8] The court reversed the lower court's decision and remanded for further proceedings.[9]

In a dissent, Justice Jay Rabinowitż stated that the ICWA explicitly granted tribal rights to intervene in any state court proceeding termination parental rights to an Indian child.[10] Justice Rabinowitz stated that tribes have an implicit and fundamental right to notice of any proceeding within the Act's scope.[11] He argued that section 1911(c) of the ICWA provides that the tribe has an unqualified right to intervene *at any point* in the proceedings and that the majority erroneously concluded that Congress did not grant this right.[12] Justice Rabinowitz concluded that the powers to tribes granted under section 1911 and 1915 are illusory unless the Tribe is given notice of a voluntary termination proceeding.[13]

JURISDICTION: 25 U.S.C. § 483(a)

Federal Land Bank of Wichita v. Burris, 790 P.2d 534 (Okla. 1990), *reh'g denied*, (May 15, 1990).

Two Osage tribal members, Jess Burris (now deceased) and Joan L. Burris, mortgaged their restricted land to the Federal Land Bank (FLB),[1] with the approval of the Commissioner of Indian Affairs (Commissioner). The Burris's defaulted on the mortgage and FLB filed a foreclosure action in state district court. The court dismissed the action for lack of jurisdiction.[2] FLB appealed to the state's supreme court.

8. *Id.*
9. *Id.*
10. *Id.* at 1161 (Rabinowitz, J., dissenting).
11. *Id.*
12. *Id.* at 1161-63.
13. *Id.* at 1163.

1. The restricted Indian land was mortgaged pursuant to 25 U.S.C. § 483(a), which provides:

> The individual Indian owners of any land which either is held by the United Stated in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State . . . in which the land is located. For the purpose of any foreclosure or sale proceeding[,] the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, ...

25 U.S.C. § 483(a) (1988).

2. Federal Land Bank v. Burris, No. C-87-414 (Dist. Ct. Nov. 16, 1987).

The issue before the court was whether state courts have subject matter jurisdiction over foreclosure actions of approved mortgages of restricted Indian land.

The state supreme court examined the statutory language of 25 U.S.C. § 483(a), its legislative history, and two prior cases concerning similar foreclosure actions.[3] However, the court agreed with FLB that because the Osage Tribe did not have a tribal court, FLB would be without a remedy or forum.[4]

The court interpreted section 483(a) as conferring jurisdiction to state courts even though that section did not use the word "jurisdiction."[5] The court focused on the statutory language that subjected mortgage foreclosure proceedings to the substantive law of the state in which the land in question is located.[6]

In further support of FLB, the court observed that the statute treated the Burris' title to the mortgaged property as unrestricted fee simple.[7] The court acknowledged that while its decision departed from *Deernose* and *Smith*, it was consistent with the presumption that the act was neither vain nor useless,[8] and cited 25 U.S.C. § 355[9] as persuasive authority.[10]

The court concluded by stating that its decision did not conflict with its prior decision in *Ahboah v. Kiowa Housing Authority*,[11] because section 483(a) extinguished the restricted Indian title. Therefore, the Burris' property could not be considered

3. Crow Tribe of Indians v. Deernose, 158 Mont. 25, 487 P.2d 1133 (1971) (state court does not have jurisdiction over the foreclosure action, and federal courts have exclusive jurisdiction); Northwest S.D. Prod. Credit Ass'n v. Smith, 784 F.2d 323 (8th Cir. 1986) (in affirming *Deernose*, the court held that (1) section 483(a) did not give state courts jurisdiction, (2) there is no federal cause of action, and (3) that a tribal forum was proper).

4. Federal Land Bank of Wichita v. Burris, 790 P.2d 534, 536-37 (Okla. 1990).

5. *Id.* at 537.

6. *Id.*

7. *Id.*

8. *Id.*

9. Title 25 U.S.C. § 355 provides:

> [T]he lands of full-blooded members of the Five Civilized Tribes are made subject to the laws of . . . Oklahoma providing for the partition of real estate. . . . In case of a sale under any decree, or partition, the conveyance thereunder shall operate to *relieve the land described of all restrictions* of every character.

25 U.S.C. § 355 (1988) (emphasis added). However, the court ignored the fact that the Osage Tribe is not one of the Five Civilized Tribes.

10. *Burris*, 790 P.2d at 537-38.

11. 660 P.2d 625 (Okla. 1983) (state court has no jurisdiction in Indian country).

Indian country.[12] The court reversed the lower courts' decision and remanded the case for further proceedings.[13]

12. *Id.* Indian Country is defined in 18 U.S.C. § 1151(c) (1988) as "all Indian allotments, the Indian titles to which have not been extinguished . . . ."

13. *Id.* at 538-39.