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## Federal Recent Developments

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## FEDERAL RECENT DEVELOPMENTS

### TRIBAL COURTS: Jurisdiction

In *Brown Construction Co. v. Washoe Housing Authority*, No. 86-2537 (10th Cir., Jan. 4, 1988), the court of appeals reversed the district court's denial of a motion to dismiss this diversity suit pending consideration in the appropriate tribal forum. The court applied the Supreme Court's holding in *Iowa Mutual Insurance Co. v. LaPlante*,<sup>1</sup> noting that *Iowa Mutual* was decided after the district court's ruling. The court held that considerations of comity require the plaintiff to exhaust its tribal remedies before a federal court will consider the case.

In rejecting Brown's argument that the "sue and be sued" clause in the contract between Brown and Washoe supported federal diversity jurisdiction, the court, citing *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*,<sup>2</sup> agreed with the district court that federal jurisdiction cannot be established by consent. The court rejected Brown's argument that congressional intent was to apply the diversity statute in cases involving the U.S. Housing Act of 1937.<sup>3</sup>

1. 107 S. Ct. 971 (1987).

2. 797 F.2d 668 (8th Cir. 1986).

3. 42 U.S.C. § 1437 (1982).

In *Navajo Nation v. District Court for Utah County*, No. 85-2649 (10th Cir., Oct. 21, 1987), the court of appeals dismissed for lack of jurisdiction an action seeking a declaratory judgment as to whether state or tribal courts have jurisdiction over proceedings to determine the custody of a Navajo child.

The court cited *Allen v. Wright* in noting that when issues are mooted, their jurisdiction is lost.<sup>1</sup> The court found the issues mooted by the Utah Supreme Court's decision in *In re Adoption of Holloway*.<sup>2</sup> In *In re Holloway*, the court held that the state of Utah cannot assert its rule for determining the domicile of a child to defeat the underlying purposes of the Indian Child Welfare Act.<sup>3</sup>

1. 468 U.S. 737 (1984).

2. 732 P.2d 962 (Utah 1986).

3. 25 U.S.C. §§ 1901-1963 (1982).

## TRUST FUNDS: Timber: Accounting

In *Red Lake Band of Chippewa Indians v. Barlow*, No. 85-5272 (8th Cir., Dec. 9, 1987), the court of appeals reversed the district court's dismissal and order of return of transferred funds to the sawmill account of the tribe. The court had retained jurisdiction in the case and found contrary to the Secretary of the Interior's claim that the appeal was moot.

The Secretary contended that under the Act of May 18, 1916,<sup>1</sup> creating a forest reserve within the boundaries of the reservation, he was under no obligation to do anything with the funds other than hold them to the credit of the tribe, collecting interest and available for future use at the sawmill. The tribe argued that the sawmill had been closed since 1984 and was unprofitable and that the funds should be transferred to its general account. The court held that the Secretary read the 1916 Act too narrowly and the tribe too broadly.

The court cited *Preston v. Heckler*<sup>2</sup> in recognizing its duty to construe such statutes liberally "with all doubts resolved in favor of the Indians." The court remanded with instructions that the district court determine whether a sawmill can be operated that will benefit the tribe. If it can, the court directed that the funds be used for that purpose. If a sawmill is not economically viable, the court directed that the funds be retained in the "sawmill account" for any forestry or land management projects that could benefit the tribe. If no such projects could benefit the tribe, the court directed the funds to be transferred to the tribe's general account to be used for its general welfare.<sup>3</sup>

1. Ch. 125, 39 Stat. 123, 127 (1916); Ch. 927, 70 Stat. 982 (1956); 72 Stat. 958 (1958).

2. 734 F.2d 1359, 1369 (9th Cir. 1984) (citing, e.g., *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956)).

3. 25 U.S.C. § 155 (1982).

## WATER RIGHTS

In *Joint Board of Control of the Flathead, Mission & Jocko Irrigation Districts v. United States*, No. 86-4317 (9th Cir., Nov. 17, 1987), the court of appeals reversed the district court's grant of injunctive relief. The district court had enjoined the Bureau of Indian Affairs from continuing to implement the 1986 Interim Instream Flow and Pool Level Agreement. The district court found that the BIA in 1986 was protecting the tribes at the expense of the irrigators, a polar position from its 1985 position, and held

that the BIA must be guided by “just and equitable distribution” of “all waters of the Reservation.”

In reversing, the court noted that *Confederated Salish & Kootenai Tribes v. Namen* had determined that one of the tribes exercised aboriginal fishing rights.<sup>1</sup> The court noted their previous holding in *United States v. Adair* that similar treaty language clearly preserved those rights and the water needed for them.<sup>2</sup> The court held that it was error for the district court to hold that water claimed under potentially prior tribal fishing rights must be shared with junior appropriators.

1. 655 F.2d 951 (9th Cir. 1982).

2. 723 F.2d 1394 (9th Cir. 1983).

In *Metropolitan Water District of Southern California v. United States, Nos. 86-6332, 86-6741 (9th Cir., Oct. 14, 1987)*, the court of appeals remanded to the district court, with directions to dismiss for lack of jurisdiction. The court of appeals heard the case on the intervenors' (the Quechan, Fort Mojave, and Colorado River Indian tribes) motion for interlocutory review.

Citing *Chemehuevi Indian Tribe v. California Board of Equalization*,<sup>1</sup> the court held that an application to the Supreme Court under a continuing decree for a reallocation of water rights cannot be viewed as a waiver of sovereign immunity by the United States. The court also held that the government is immune from suit under the Quiet Title Act<sup>2</sup> when it claims an interest in real property based upon that property's status as trust or restricted Indian lands, and that the United States cannot allow a suit that would permit third parties to interfere with its discharge of its responsibilities to Indian tribes with respect to trust lands. The court noted its holding in *Wildman v. United States* that nothing in the Quiet Title Act suggests that the federal government is to be put to the burden of establishing its title when it has a colorable claim and asserts its immunity on behalf of Indian trust land.<sup>3</sup>

The court further held that the McCarran Amendment does not authorize private suits to decide priorities between the United States and particular claimants.<sup>4</sup>

1. 757 F.2d 1047 (9th Cir. 1985).

2. 28 U.S.C. § 2409a (1982).

3. Slip op. at 9-10 (9th Cir., Sept. 14, 1987).

4. 43 U.S.C. § 666 (1982).

