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Federal Recent Developments

FEDERAL RECENT DEVELOPMENTS

ABORIGINAL TITLE: Wrongful Possession Actions Based on Aboriginal Title

In *County of Oneida v. Oneida Indian Nation, 12 Indian Law Reporter 1005 (1985)*, the U.S. Supreme Court affirmed in part and reversed in part the ruling of the Second Circuit.[1] In this suit the Oneida Indian Nation of New York state sued Oneida County for damages for two specified years caused by a wrongful possession claim. The wrongful possession claim was based on a 1795 land purchase from the Oneidas by the state of New York, which was done in violation of the Non-Intercourse Act of 1793. The Non-Intercourse Act provided that any land transactions with the Indians be negotiated in the presence of a federally appointed commission to protect the Indian. Oneida County attacked the claim on several theories. The Supreme Court held that the Oneida Nation retained a federal common law right of action for violation of its possessory rights and that this common law right was not preempted by the Non-Intercourse Act, which did not provide civil remedies, nor was the land transaction ratified by federal approval of later land transactions between the state of New York and the Oneidas. Other defenses asserted by Oneida County were also held unpersuasive. Although the transaction was more than 175 years old, the Court could not find an applicable federal statute of limitations on the claim, nor would the Court apply the state statute of limitations because to do so, it held, would conflict with an underlying federal policy not to bar Indian claims that were brought by the Indians themselves, as this policy was manifested in 28 U.S.C. § 2415(a)(b) and subsequent amendments.

The Court did not rule on a laches defense because it was denied at the trial level and not raised at the appellate level, and neither the defense of abatement nor that the issue fell within the political question doctrine were found to have merit.

The Supreme Court did reverse the lower court on one issue. Oneida County had cross-claimed against the state of New York in the event liability was found. The lower courts allowed this claim under the doctrine of pendent and ancillary jurisdiction. However, the Supreme Court found this to be a question of state law and questioned whether the state of New York's eleventh amendment immunity had been waived as required to consent to

1. 105 S.Ct. 2173 (1985), *aff'd in part and rev'd in part*, 719 F.2d 525 (2d Cir. 1983).

suit in federal court on this cross-claim. Finding a lack of evidence on this issue, the Supreme Court held that the district court erred in exercising ancillary jurisdiction over this claim and therefore reversed and remanded on that issue.

CRIMINAL JURISDICTION

In *United States v. Burnett, 777 F.2d 593 (10th Cir. 1985)*, Harold Ed Burnett was convicted of first degree murder in the Northern District of Oklahoma. The murder victim was Laban Marchmont Miles, a half-blood Osage Indian who was shot to death at his home, a restricted Osage allotment in Osage County, Oklahoma. The case was first brought in state court, which held that the state of Oklahoma lacked jurisdiction of the matter because the crime was committed in Indian country and thus federal jurisdiction was exclusive.

An indictment was then filed in federal district court charging Burnett and two others with first degree murder. Burnett argued in federal court, as he had in state court, that an Osage allotment was not Indian country and that the state had criminal jurisdiction. Burnett argued two points. First, that the designation of Indian country only applied to original Osage allottees, and second, that Congress has relinquished its guardianship over Osage restricted allotments, terminating any basis for federal jurisdiction.

The court refused to accept either argument and, quoting *United States v. Ramsey*,[1] said that a restricted Osage allotment in which fee title is held by an Indian allottee who cannot alienate the property without approval of the Secretary of Interior is Indian country. The conviction of first degree murder was affirmed.

1. 271 U.S. 467 (1925).

Gambling

The issue of gambling on Indian reservations was again litigated in *Carbazon & Morongo Bands of Mission Indians v. County of Riverside, 783 F.2d 900 (9th Cir. 1986)*. The two bands filed in federal district court for declaratory and injunctive relief against Riverside County, California, to prevent the county from enforcing its gambling ordinance against the bands. The state of California intervened.

On appeal to the Ninth Circuit from a summary judgment issued by the district court in favor of the bands, the county and the state argued that state and local laws pertaining to gambling should

apply on Indian reservations under (1) Public Law 280, (2) the Organized Crime Control Act, and (3) federal common law.

The court said that since California only regulates the types of activities operated by the bands rather than prohibiting them, these activities were civil in nature and not against public policy. Because Public Law 280 relates to criminal jurisdiction on reservations, the law would not pertain to the gambling activities. The court also said that since the activities were not against public policy in California, the Organized Crime Control Act was not involved.

The court dealt with the federal common law question by balancing the state, federal, and tribal interests. The state interest involved was the prevention of intrusion of organized crime into the state. The court said that there was no indication of organized crime on the reservation. The court went on to say that while this might be a legitimate interest, it was far outweighed by the federal interest of assisting tribes to find nonfederal money to operate their governments and the bands' interest in acquiring that money, creating jobs for their members, and providing services to those members. The court affirmed the decision of the district court granting injunctive relief to the bands.

ENVIRONMENTAL LAW: State Regulations on Reservation Lands

The state of Washington sought review of a ruling by the EPA that the state could not apply its regulation for hazardous waste disposal upon Indians and non-Indians within the reservation.[1] The Resource Conservation and Recovery Act (RCRA) authorized states to regulate hazardous waste activities within the state, reserving this regulation to the federal government until the state program is equivalent to the federal program.[2] The RCRA, however, did not specifically exclude Indians or Indian tribes from the Act and arguably, at least by implication through definitions used in the RCRA, Indian tribes could be included within the Act. The state of Washington argued that these references to Indian tribes evidenced an intention of Congress to allow regulation of the tribes within the Act.

1. Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).
2. 42 U.S.C. §§ 6901-6987 (1976).

The EPA ruled that the Act does not specifically include Indians or Indian tribes, and thus, even if the state does implement a program equivalent to the federal program, such a state program will not reach the Indian reservation lands. The court of appeals found this interpretation of the RCRA to be reasonable and, absent a clear legislative intent on the issue of state regulatory jurisdiction on the reservations, deference to the agency determination must be observed. The court of appeals also emphasized that the people of the state will not be without protection; because the reservations will not fall under state regulatory jurisdiction, the federal standard will remain intact as to the reservations. Also, ideas of preservation of tribal sovereignty were emphasized and allowing EPA to retain jurisdiction will give the agency an opportunity to promote tribal sovereignty by allowing the tribe to participate in hazardous waste management. The EPA ruling was affirmed.

FISHING RIGHTS: United States v. Washington, 759 F.2d 1353 (9th Cir. 1985).

In yet another chapter of this long dispute over fishing rights between the state of Washington and the United States as trustee for the Indian tribes, the Court of Appeals for the Ninth Circuit granted the state's petition for rehearing of an earlier decision in the case.[1] The case involves treaty fishing rights and, specifically, (1) whether hatchery fish are to be included in the amount of fish apportioned by treaty (the hatchery fish issue), and (2) whether the treaties impose a duty upon the state to refrain from despoiling the fish habitat (the environmental issue).

The district court entered declaratory relief on the issues, stating that hatchery fish were to be included in the fish to be apportioned by treaty and, second, that the state must refrain from actions that would deprive the treaty Indians of the fish necessary for their moderate living needs.

After vacating the denial of the state's petition for rehearing, the Ninth Circuit Court of Appeals affirmed with respect to the hatchery fish issue and vacated the declaratory relief with regard to the environmental issue. With respect to the environmental issue, the court of appeals reasoned that this issue did not meet the necessary requirement of presenting a sufficient case or controversy

1. United States v. Washington, 694 F.2d 1374 (9th Cir. 1983).

between the parties, and therefore was contrary to the exercise of sound judicial discretion in that the declaration serves neither the needs of the parties, the jurisprudence of the court, nor the interests of the public. The court of appeals thought declaratory relief on the environmental issue was simply too vague and uncertain absent concrete facts that presented an actual controversy and the declaratory relief granted served only to confuse the legal rights of the parties. Therefore, as to the hatchery fish issue, the court of appeals affirmed and as to the environmental issue, the court of appeals vacated the district court's determination of that issue.

INDIAN LANDS: Irving v. Clark, 758 F.2d 1260 (8th Cir. 1985).

In an attempt to prevent the fractionalization of Indian allotments through inheritance and devise to such a degree that a large number of individuals owned undivided fractional interests of tracts of land so as to make the land unproductive, Congress enacted the Indian Land Consolidation Act in 1983.[1] Section 2206 of that Act provided that:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descendant [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

The appellants here were potential heirs or named devisees within six months after the Indian Land Consolidation Act was passed. Appellants assert that the Act violates the fifth amendment protections against the taking of property without compensation. The court of appeals agreed; it declared section 2206 unconstitutional and reversed the holding of the district court. The holding was based on the Sioux Allotment Act, which "has a specific clause to the effect that acceptance of benefits thereunder by individual Indians would be taken as a release of those individuals' claims to tribal lands."[2] Therefore, each Indian allottee gained certain vested rights through the Sioux land act and one of those vested rights was the ability to dispose of lands upon their death.

1. Pub. L. No. 97-459, 96 Stat. 2515, 2517 (1983), 25 U.S.C. §§ 2201-2210 (1982).
2. Act of Mar. 2, 1889, ch. 405, § 16, 25 Stat. 888, 889.

JURISDICTION

In *National Farmers Union Ins. Co. v. Crow Tribe, 105 S.Ct. 2447 (1985)*, the Supreme Court ruled that federal courts have jurisdiction under 28 U.S.C. § 1331 to determine whether a tribal court has jurisdiction in a civil suit against a non-Indian, but may not act until tribal remedies have been exhausted.

In this case, a Crow minor brought an action for personal injury damages in tribal court against a state school district. He received a default judgment. The school district then asked the federal district court to enjoin the execution of the tribal judgment for lack of jurisdiction over the defendant. The district court granted a permanent injunction. The Ninth Circuit Court of Appeals reversed, finding no federal jurisdiction.

The Supreme Court reversed the Ninth Circuit's decision, noting that the question of tribal court jurisdiction must be decided in reference to the federal law. However, the Court said the federal jurisdiction was not exclusive. Unlike criminal cases, there is no legislation concerning tribal jurisdiction over civil disputes between Indians and non-Indians. The Court said, therefore, it was inappropriate to bring the case in federal court before all tribal remedies were exhausted. The Court said that jurisdiction in the tribal courts depends on the extent of the tribe's sovereignty, any changes or limits set by Congress, and provisions of federal law, treaties, court decisions, or administrative orders. Thus the tribal court must determine its jurisdiction before the question may come before a federal court.

The Court remanded the case to the district court to decide whether to dismiss the case or hold it in abeyance pending the tribal court's further action.

JUVENILES: Indian Child Welfare Act

In *Kiowa Tribe v. Lewis, 777 F.2d 587 (10th Cir. 1985)*, the Kiowa Tribe attacked in federal court a decision of a Kansas court that allowed a non-Indian couple to adopt a child who the tribe contends is an Indian subject to the requirements of the Indian Child Welfare Act. The adoption of the child, born out of wedlock to an Indian father and a non-Indian mother, was being handled by a Kansas state court. When the court found out that the ICWA was possibly involved, the court recessed and notified the Kiowas, who filed to intervene. After considering briefs, the court ruled that the ICWA was not applicable and denied the tribe's motion to intervene. The tribe appealed to the Kansas Supreme Court,

which affirmed the trial court's refusal to allow tribal intervention.

Rather than appealing to the United States Supreme Court, the tribe brought suit in federal district court. The federal district court held that the suit was barred by res judicata and collateral estoppel and dismissed the suit. The Tenth Circuit affirmed, finding that full faith and credit must be given to the state court judgment because the state proceedings satisfied the minimum procedural requirements of the fourteenth amendment and the due process clause of the United States Constitution.

The circuit court said that once the tribe elected to pursue the appeal through the state court system, the only review from the Kansas Supreme Court was directly to the United States Supreme Court by appeal or petition for certiorari. A collateral attack in federal district court was barred.

TAXATION: State Taxation on Mineral Leasing of Tribal Lands

The state of Montana imposed taxes on the Blackfeet Tribe's royalty interests in oil and gas produced under leases issued by the tribe on unallotted reservation land. The leases were executed to non-Indians who paid the taxes to the state and deducted the payment from royalty payments due the tribe.[1] The tribe sought injunctive relief in the U.S. District Court for the District of Montana. Montana claimed jurisdiction pursuant to a 1918 statute,[2] which authorized states to tax these lands and which was later amended in 1924.[3] A subsequent act passed in 1938 did not authorize state taxation of these royalty interests.[4] The tribe argued that the general repealer clause in the 1938 Act invalidated the 1929 Act and thus the state taxation was invalid. The district court granted summary judgment to the state and the court of appeals, on rehearing, reversed in part and affirmed in part.

The Supreme Court affirmed the court of appeals and held that in light of two fundamental canons of statutory construction regarding Indian law, the leases executed under the 1924 Act could be taxed by the state. However, because of the repealer, the leases executed under the 1938 Act could not be taxed by the state. The canons of construction relied upon were (1) that states may tax Indians only when Congress has clearly manifested its consent to

1. Montana v. Blackfeet tribe, 105 S.Ct. 2399 (1985).
2. Act of Feb. 28, 1891, 26 Stat. 795, 25 U.S.C. § 397.
3. Act of May 29, 1984, ch. 210, 43 Stat. 244, 25 U.S.C. § 398.
4. Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. §§ 391-416(j).

such taxation, and (2) that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. The Supreme Court emphasized that these canons of statutory construction were rooted in the unique trust relationship between the United States and the Indians.

Tribal Taxation Authority over Tribal Lands

The Navajo Tribe's authority to impose taxes on both members of the tribe and nonmembers alike was affirmed by the Supreme Court.[1] In 1978 the Navajo Tribal Council enacted two ordinances that imposed taxes on leasehold interests on tribal lands and the receipts from business activity within the Navajo Nation. These taxes were passed without the Secretary of Interior's approval since that approval was not required by the Navajo constitution with regard to tax enactments. Petitioners brought an action in the U.S. District Court for the District of Arizona to invalidate the taxes. The district court held the taxes required approval of the Secretary and enjoined the tribe from enforcing the tax. The Court of Appeals for the Ninth Circuit reversed, and the Supreme Court affirmed the court of appeals' holding that the power to tax is an essential attribute of self-government and territorial management and that neither the Indian Reorganization Act of 1934,[2] nor the Indian Mineral Leasing Act of 1938[3] required the Secretary of the Interior to approve tribal tax enactments.

1. Kerr-McGee Corp. v. Navaho Tribe, 105 S.Ct. 1900 (1985).
2. 48 Stat. 984, 25 U.S.C. §§ 461-92.
3. 52 Stat. 347, 25 U.S.C. § 396(a).

WATER RIGHTS: Colville Confederated Tribes v. Walton

This case involves yet another chapter of this 14-year-old dispute.[1] Walton, a non-Indian successor of Indian water rights and a number of Indian allottees sought water from the No Name Creek Hydrological System for irrigation purposes. The tribe sought water from the same system to establish trout-spawning grounds for the Ozark Lake Fishery. The court here readjusted the district court's water allocation to the respective parties. In making the ad-

1. 752 F.2d 397 (9th Cir. 1985), *reh. denied*, 758 F.2d 1324, *cert. denied*, 106 S.Ct. 1183 (1986). *See Walton I*, 460 F. Supp. 1320 (E.D. Wash. 1978) and *Walton II*, 647 F.2d 92 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

justments, the court of appeals looked to the number of irrigable acres Walton owned and the amount of water he appropriated with reasonable diligence for irrigation.

The court emphasized that once perfected, a water right must be maintained by continued use or it is lost. This calculation required investigation into the diligence of the immediate grantees from the original Indian allottees in this pursuit and continuing through the chain of title to the immediate possessor. Applying this criteria, the court of appeals found Walton irrigated 30 acres and, using the concept of "water duty" of 4 acre-feet per year to determine beneficial uses, allocated Walton 120 acre-feet per year.

The Indian allottee's allocation was based on the district court's finding of 166.6 irrigable acres or a beneficial use of 666.4 acre-feet per year. However, the district court only awarded 428.8 acre-feet per year since only 107.2 acres were being irrigated. The court of appeals found the reduction to be in direct conflict with the mandate in *Walton II* and reinstated the full 666.4 acre-feet allocation.

The court of appeals also held that the tribe has a reserved right to sufficient water to permit natural spawning of the trout. Therefore, based on expert testimony accepted at trial, sufficient water for this purpose amounted to 350 acre-feet per year.

Since all parties have a priority date as of the creation of the reservation and since the estimated water supply is 1,000 acre-feet per year, the court of appeals held that each party should bear this proportionate share of any adjustment required by water shortages.