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Recent Developments

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RECENT DEVELOPMENTS

CIVIL JURISDICTION: Bingo Operations on Reservation

In *Seminole Tribe v. Butterworth*¹ the Seminole Tribe brought an action for declaratory and injunctive relief against Butterworth, sheriff of Broward County, Florida, in anticipation that Butterworth would arrest bingo players in the reservation's bingo hall for violating a Florida statute. The statute permitted bingo operations by certain qualified organizations subject to restrictions by the state. The court found that the Seminole Tribe's operation of bingo halls does not conflict with the grant of civil jurisdiction over Indian tribes given the state under Public Law 280. Citing *Bryan v. Itasca County*,² the court concluded that "states do not have general regulatory power over the Indian tribes" because Congress did not expressly confer such power in Public Law 280. The court also determined that bingo operations were "not against the public policy of the state of Florida." The Seminole Tribe therefore was not subject to state regulation of tribal bingo operations.

CONSTITUTIONAL LAW: Wrongful Taking Claims Are Not Within Subject Matter Jurisdiction of District Court

In *Oglala Sioux Tribe v. United States*, NR. 80-1878, 8 Indian L. Rptr. 2102 (8th Cir., June 1, 1981), the Eighth Circuit upheld the district court's dismissal of the tribe's fifth amendment complaint and quiet title action against the United States and the state of South Dakota. The tribes asserted that the 1877 ceding of the Black Hills to the United States constituted an unconstitutional exercise of the power of eminent domain under the fifth amendment. The district court dismissed the action for lack of jurisdiction, stating that there was no waiver of sovereign immunity by the United States and also dismissed against the state because of the fact that the United States was an indispensable party. The Eighth Circuit affirmed, holding that the enactment of the Indian Claims Commission Act¹ deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy for wrongful taking claims by Indians.

1. No. 80-5496, 8 I.L.R. 2168 (5th Cir., Oct. 5, 1981).

2. 426 U.S. 373 (1976).

1. 60 Stat. 1049, 25 U.S.C. §§ 70 *et seq.* (1976).

FISHING RIGHTS:

United States v. Washington, No. 77-1397, 8 Indian L. Rptr. 2122 (9th Cir., May 18, 1981)

The Ninth Circuit Court of Appeals affirmed the district court order enjoining enforcement of the state of Washington's "Buy Back Program" against Indians. Under the program, the state of Washington purchases and resells commercial fishing vessels, and it forbids the use of the resold vessels in any commercial fishing in Washington, by both Indians and non-Indians. In affirming the district court's decision, the Ninth Circuit cited the 1976 decision in *United States v. Washington*.¹ This case held that the Treaty of Medicine Creek² granted various Indian tribes a right to an actual share of certain valuable species of fish and that the state police power regulations could not be used to unduly impair this right. The Ninth Circuit held that Washington's BBP had the effect of impairing the Indian fishing rights under the Treaty of Medicine Creek by driving up the price of vessels that could be used for commercial fishing, and hence affirmed the district court's order enjoining enforcement of the Buy Back Program against Indians.

United States v. Washington, Nos. 79-4447 and 79-4472, 8 Indian L. Rptr. 2126 (9th Cir., April 20, 1981)

Members of the Samish, Snohomish, Snoqualmie, Steilacoon, and Duwamish Indian tribes asserted that they should be allowed to participate in the treaty fishing rights established in the 1976 case of *United States v. Washington*.¹ Their contention was based on the fact that their members were descendants of the Treaty of Medicine Creek signatories. The district court held that since these tribes were not recognized by the United States, they did not have treaty rights. Although affirming the decision, the Ninth Circuit stated that the district court's basis was wrong and the fact of federal nonrecognition was not decisive. The circuit court said that the key issue was whether some defining characteristic of the original tribe persisted in the evolving tribal community.

1. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 432 U.S. 1086 (1976).

2. 10 Stat. 1132, Dec. 26, 1854.

1. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 432 U.S. 1086 (1976).

This was to ensure that the group claiming treaty rights was a group named in the treaty. The court then held that no such defining characteristic existed because total assimilation had occurred; hence, these groups could not claim treaty rights. The court rejected appellants' claim that they lost their cultural cohesion through the actions of the United States government, first, because their ancestors were given inadequate reservation, and second, through the assimilation policy adopted by the federal government.

United States v. Oregon, 8 Indian L. Rptr. 2171 (9th Cir., September 10, 1981)

A federal district court enjoined virtually all Yakima tribal fishing for the spring chinook, a salmon that spawns above the Bonneville Dam in the Columbia River basin. In appealing the order granting the preliminary injunction, the Yakima Tribe asserted the injunction abrogated rights guaranteed by treaty to fish on their reservation without interference. The court, in denying that a violation of treaty rights occurred, states: "If states can regulate treaty fishing in the interest of conservation, then, *a fortiori*, a federal court with jurisdiction over all parties may do the same." The court also rejected the tribe's contention that the injunction violated the standards established in *Sohappy v. Smith*¹ which required that modifications of Indian fishing rights must apply the least restrictive method of preserving the salmon. The court refused to hold "clearly erroneous" the findings of the trial court and affirmed the grant of the preliminary injunction.

Wahkiakum Band of Chinook Indians v. Bateman, 8 Indian L. Rptr. 2159 (9th Cir., August 31, 1981)

The Wahkiakum Band of Chinook Indians sought declaratory and injunctive relief to protect their alleged fishing rights on the Columbia River. The District Court of Oregon rejected their claims that the right to fish was based on the laws, treaties, and Constitution of the United States, and that such right was aboriginal. The Wahkiakum appealed the district court's decision granting summary judgment for the defendants and urged that

1. 302 F. Supp. 899, 911 (D. Or. 1969).

because they are affiliated with the Quinaults and Quillehutes, signatories of the Treaty of Olympia, they have the right to fish traditional Wahkiakum waters of the Columbia. The court rejected this argument, and found appellants' reliance on *Halbert v. United States*¹ to be misplaced. In *Halbert* the Chinook Indians' post-treaty affiliation with the Quinault Nation was held to affirm entitlement to allotment rights on the Quinault Reservation. Here the court found that the Wahkiakum have the opportunity to exercise fishing rights on the Quinault Reservation, but this right extends only to the usual and accustomed Quinault fishing grounds, which do not include the areas on the Columbia River claimed by the Wahkiakum. Further, the court found that appellants' claim to aboriginal fishing rights on the Columbia River was extinguished by Congress by the Act of August 24, 1912, whereby a cash settlement was made with the Wahkiakum in return for land cessions and relinquishment of all rights, including fishing rights. Summary judgment for defendants was affirmed.

FOOD STAMP ACT: *Antone v. Block*, 8 Indian L. Rptr. 2138 (D.C. Cir., August 10, 1981)

This action was brought by a group of individual Indians, Indian tribes, and two Indian organizations to challenge the Department of Agriculture's administration of federal food programs on Indian reservations under the Food Stamp Act of 1977. Appellees argued that the department violated the congressional mandate for "expeditious implementation of the Act" and the Administrative Procedure Act.¹ The legislative history of the Food Stamp Act reveals that Congress envisioned a six- to nine-month period from the effective date of the Act to the issuance of implementing regulations; the department took twenty-one months to publish final regulations. In addition, appellees argued that the time-table provided for in the regulation for processing applications from Indian organizations, 150-240 days, violated section 1303 of the Act. The district court granted summary judgment in favor of appellees and amended the regulations to provide for a period of no longer than 150 days for processing applications from Indian-related programs.

1. 283 U.S. 753 (1931).

1. 5 U.S.C. § 706.

The court found it could not determine whether the delay in issuing the regulations violated the expedition requirements because there was no evidence in the record as to other matters demanding attention from the department during that period. In reference to the time-table for processing applications contained in the regulations, the court found that there was a rational basis for it and that it was fully supported by the rule-making record. Finally, the court determined that the district court's modification of the time-table "contravened the clear and valid legislative command of the [Administrative Procedure Act] that regulations are not to be disturbed unless they are so irrational or unsupported by substantial evidence as to violate 5 U.S.C. 706(2)."

MINING: *Austin v. Andrus*, 8 *Indian L. Rptr.* 2140 (9th Cir., February 2, 1981)

This suit was brought by members of the Navajo Tribe that were displaced by strip mining activities on the Navajo Reservation, seeking relief as "displaced persons" within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. The district court granted summary judgment for the government on the grounds that the mining project that displaced the plaintiffs was under the direction of a non-government company and did not constitute a "federal program" under the wording of the Act. The Ninth Circuit affirmed this holding, ruling that the Act provides relocation benefits only to those displaced by a written order of the government. The court held that plaintiffs' grievance was with the tribe rather than the federal government.

MINING: *Crow Tribe v. Montana*, No. 79-4321, 8 *Indian L. Rptr.* 2142 (9th Cir., July 13, 1981)

The Crow Tribe sought declaratory and injunctive relief against the state of Montana's imposition of state taxes for coal mined on the Crow Reservation and from off-reservation deposits held in trust for the tribe. Mineral leases for the mining of the coal have been granted by the tribe to non-Indian companies. In 1975, Montana enacted statutes imposing a severance tax and a gross proceeds tax on coal operators for all coal mined and sold in the state. In 1976 the Crow Tribe enacted its own coal severance tax, which applies only to coal mined on the reservation. The Crow tribe took the position that the incidence of the Montana tax is

on the tribe and as such is invalid as an unauthorized direct taxation of tribal mineral holdings. The Ninth Circuit disagreed, finding that the incidence of tax is on the non-Indian mineral lessee. The court rejected the tribe's argument that the state tax was an impermissible infringement on the tribe's ability to levy its own severance tax. Following *Washington v. Confederated Tribes of Colville*,¹ the court held that each taxing entity is free to impose taxes, as "neither tax by its terms precludes the other." The state of Montana may, however, force the tribe to choose between imposing its own tax, which in effect discourages coal mining, or of foregoing tax revenues altogether. Last, the court found that although a state tax is not invalid merely because it reduces tribal revenues, this particular case involves a special threat to tribal sovereignty. Finding the complaint adequate to support a cause of action against Montana, the court reversed the district court's dismissal and remanded for further proceedings. To succeed at trial, the tribe must show that the taxes substantially impair its ability to govern or to develop tribal resources, and that the tribal interests outweigh the state's legitimate purposes in levying taxes.

WATER LAW: State Has No Power to Regulate Water Use on Reservation

In *Colville Confederated Tribes v. Walton*, No. 79-4297, 8 Indian L. Rptr. 2089 (9th Cir., June 1, 1981), the circuit court held that the state of Washington had no power to regulate water use on the Colville Reservation. The case first arose when the Colville Tribe sought to enjoin Walton, a non-Indian owner of allotted lands, from using surface and ground waters in the No Name Creek basin, which is located entirely within the boundaries of the Colville Indian Reservation. The state intervened in the district court, asserting it had authority to grant water permits on the reservation. The district court held that the state could regulate the water from No Name Creek as long as it was not reserved for Indian use. The Ninth Circuit disagreed, holding that the state's regulation of the water in the No Name system was preempted by the creation of the Colville Reservation. The court relied on *FPC v. Oregon*,¹ which held that water use on a federal reservation was not subject to state regulation absent explicit recognition of state authority.

1. 447 U.S. 134 (1980).

1. 349 U.S. 435 (1955).