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Recent Developments

RECENT DEVELOPMENTS

CIVIL RIGHTS: Religion

Badoni v. Higginson, No. 78-1517 (10th Cir. Nov. 3, 1980). Individual members, medicine men and local organizations of the Navajo Nation brought an action for injunctive and declaratory relief against the Secretary of Interior, Commissioner of the Bureau of Reclamation, and the Director of the National Park Service. Their claim was that the management of the Rainbow Bridge National Monument, Glen Canyon Dam, and Lake Powell violated their rights under the free exercise clause of the first amendment. Their complaint included claims that (1) by impounding water to form Lake Powell some of the Navajo gods had been drowned and a sacred prayer spot had been flooded, and (2) by allowing tourists to have access to these sites the government had permitted desecration to the sacred nature of the site.

Regarding the first claim, plaintiffs asked that the water level in Lake Powell be lowered. As to the second infringement, plaintiffs asked that tourists be required to act in an orderly and dignified manner and that they be excluded at certain times so that religious ceremonies could be conducted in private. The district court denied their claims, saying that they had no property interest in the area, and even if they did, the government's interest outweighed their religious interest in this case. The Tenth Circuit, while noting that the lack of a property interest is not determinative, nevertheless upheld the lower court's decision by applying the two-part test enunciated in *Wisconsin v. Yoder*[1] dealing with free exercise claims, *i.e.*, (1) it must be shown that the act does have a coercive effect on plaintiff's religion thereby violating plaintiff's first amendment right, and unless (2) the government's interest outweighs the plaintiff's religious interest. The Tenth Circuit held that maintaining Lake Powell at its current level for the purpose of multistate water storage and power generation outweighed the plaintiffs' interest in having it lowered. In addition, the court held that the government had taken no action to prohibit plaintiffs' practice of religion at the Rainbow Bridge, and that for the government affirmatively to require tourists to stay off public lands while the Indians exercised their religion would be a clear violation of the establishment clause of the first amendment. As to requiring tourists to act in a courteous man-

1. 406 U.S. 205 (1972).

ner, the court stated that tourists' conduct is already regulated so as to promote and preserve the monument and the plaintiffs have no right to require others to conform their conduct to their own religious necessities.

CIVIL RIGHTS: Religion

In *Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980)*, members of the Cherokee Tribe brought an action to enjoin the completion of the Tellico Dam and the subsequent flooding of the Little Tennessee Valley in Monroe County, Tennessee. The complaint was that flooding the valley would infringe on the free exercise of tribal religion because Cherokee medicine men gathered medicine from the valley, and they believed the valley to be the birthplace of the Cherokees. In addition, the valley was the burial place of many Indians, all of which would be destroyed if the valley was flooded. The court for the Eastern District of Tennessee dismissed the suit on the ground that the complaintants lacked a property interest in the valley and, therefore, had no first amendment claim. The Sixth Circuit affirmed the lower court decision but stated that the lack of a property interest will not always preclude a free exercise claim. Instead the decision was based on the analysis enunciated in the United States Supreme Court case of *Wisconsin v. Yoder*.[1] The Sixth Circuit stated that the interests espoused by the Indians were more cultural and historical than religious because they had not demonstrated that worship in the valley was inseparable from their way of life as required by *Yoder*. Instead, the interests claimed showed no more than the individual personal preferences of the complaintants rather than the religious beliefs of the Cherokees as a whole. Because of this, the court held that there had been no infringement of a first amendment right of the Cherokee Nation.

EMPLOYMENT: BIA Indian Preference

In *Andrus v. Glover Construction Co., 100 S.Ct. 1905 (1980)*, the United States Supreme Court unanimously held that the "Buy Indian" Act, 25 U.S.C. § 47, which directs the Secretary of the In-

1. 406 U.S. 205 (1972).

terior to employ Indian labor "so far as may be practicable," and which permits him to purchase "the products of Indian industry . . . in open market," does not authorize the Bureau of Indian Affairs (BIA) to enter into road construction contracts with Indian-owned companies without first advertising for bids pursuant to Title III of the Federal Property and Administrative Services Act of 1949.

In 1976, the Bureau of Indian Affairs formally adopted the procurement policy that "all [BIA] purchases or contracts be made or entered into with qualified Indian contractors to the maximum practicable extent." Accordingly, the BIA announced that in every procurement situation it would consider dealing with non-Indian contractors only after it had determined that there were "no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement."

In 1977, subsequent to soliciting bids from three Indian-owned construction companies, the BIA awarded a contract to build a road in Pushmataha County, Oklahoma, to the Indian Nations Construction Company. The Indian Nations Construction Company is a corporation owned and controlled exclusively by Indians and the only Indian-owned company to actually place a bid on the project. Thereafter, the Glover Construction Company, a non-Indian corporation engaged as a general contractor in road building, filed suit alleging that the BIA was required by Title III to advertise publicly for bids. Section 252(c) of Title III mandates that "all purchases and contracts for property and services shall be made by advertising . . . ." The district court granted summary judgment to Glover Construction and declared the contract with Indian Nations Construction Company to be null and void, and permanently enjoined the BIA from circumventing the advertising requirements of 41 U.S.C. § 253. A divided panel of the Court of Appeals for the Tenth Circuit affirmed the judgment. The United States Supreme Court affirmed, stating that while it was debatable whether the language of the Buy Indian Act would cover letting contracts for road construction, section 252(e) of Title III specifically states that section 252(c) "shall not be construed to . . . permit any contract for the construction or repair of . . . roads . . . to be negotiated without advertising . . . ."

HUNTING RIGHTS: Eagle Protection Act

In *United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980)*, Fryberg, a member of the Tulalip Indian Tribe, was found guilty by the district court of violating the Eagle Protection Act for killing a bald eagle without a permit.[1] At the time of the alleged violation, Fryberg was on the Tulalip Reservation. On appeal to the Court of Appeals for the Ninth Circuit, the issue became whether the Eagle Protection Act modified treaty hunting rights granted to Fryberg pursuant to the Treaty of Point Elliott.[2] Fryberg relied heavily on *United States v. White*[3] where the Eighth Circuit held that the Act did not abrogate the treaty hunting rights of the Red Lake Chippewa Indians. The court further stated that to modify such rights requires Congress to do so expressly which it had not done in the Act. The Ninth Circuit, although recognizing *White*, believed the Eighth Circuit had construed the Act too narrowly, overlooking the broad wording of the Act, which purports to cover anyone within the United States or anyplace subject to the jurisdiction thereof and the pervasive purpose of the Act, *i.e.*, the protection of bald and golden eagles. The court stated that congressional intent to modify or abrogate treaty rights may be clear from the surrounding circumstances and legislative history despite the absence of a clear expression by Congress. The Ninth Circuit also relied heavily on the fact that there was a provision in the Act whereby Indians could get a permit from the Secretary of Interior to use eagle specimens for religious purposes. The court reasoned by implication from this provision that it was the intent of Congress to modify Indians' hunting rights and to include them within the Act's coverage. Finally, the Ninth Circuit surveyed a series of Supreme Court cases that dealt with the effect of conservation statutes, such as this Act, on Indian treaty rights, finding that such rights could be affected when (1) the sovereign has jurisdiction over an area of which it seeks to exercise its police power for conservation, (2) when the statute is nondiscriminatory (applies equally to treaty and nontreaty persons), and (3) the treaty modification must be necessary to achieve the conservation purposes of the statute. Here, the Ninth Circuit found the Act met all three of these requirements and, thus, it affirmed Fryberg's conviction.

1. 16 U.S.C. §§ 668 *et seq.* (1940).
2. 12 Stat. 927 (1859).
3. 508 F.2d 453 (8th Cir. 1974).

HUNTING AND FISHING RIGHTS: State Regulation

Cheyenne-Arapaho Tribes v. Oklahoma, No. 78-150 (10th Cir., Mar. 25, 1980). The Cheyenne-Arapaho Tribes of Oklahoma brought an action to enjoin the state of Oklahoma from exercising jurisdiction over Indian hunting and fishing on land allotted to individual Indians and on land held in trust by the United States for the Indians. The tribes claim was that such land constituted "Indian country" which cannot be regulated by the state absent an express mandate by Congress. The district court held that the trust lands were not Indian country and therefore the state could regulate Indian hunting and fishing on these lands. It further held that the Assimilative Crimes Act[1] extended state jurisdiction over Indian hunting and fishing. The Court of Appeals for the Tenth Circuit reversed the district court decision, recognizing that 18 U.S.C. § 1151(c) expressly defines Indian allotments as a part of Indian country. The Tenth Circuit further held that *United States v. John*[2] and the Oklahoma Indian Welfare Act,[3] as well as the Solicitor's interpretation of this Act,[4] brings these trust lands within the definition of Indian country, hence preventing state jurisdiction over either allottment or trust land. In overturning the lower court's reliance on the Assimilative Crimes Act, the Tenth Circuit stated that this Act does not assimilate state law that is inconsistent with federal policies expressed in federal statutes.[5] 18 U.S.C. § 1162(b) expressly protects Indian hunting and fishing rights; therefore, the Act could not extend state jurisdiction over these areas.

INDIAN CLAIMS: Treaty Abrogation

At issue in *United States v. Sioux Nation, 100 S.Ct. 2716 (1980),* was the abrogation by the United States of the Fort Laramie Treaty of 1868, under which the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation, and that no treaty for the cession of any part of the reservation would be valid as against the Sioux unless ex-

1. 18 U.S.C. § 13 (1940).
2. 437 U.S. 634 (1978).
3. 56 Stat. 21 (1942).
4. 59 Int. Dept. Dec. 1, 3.
5. No. 78-150 (10th Cir., Mar. 25, 1980).

ecuted and signed by at least three-fourths of the adult male Sioux population. The treaty also reserved the Sioux's right to hunt in certain unceded territories. However, in 1877, Congress passed an act abrogating the Fort Laramie Treaty based upon an "agreement" presented to the Sioux by a special commission but signed only by 10 percent of the adult male Sioux population. This "agreement" provided that the Sioux would relinquish their rights to the Black Hills and their right to hunt in the unceded territories in exchange for subsistence rations as long as they were needed.

In 1923 the Sioux brought suit in the Court of Claims alleging that the government had taken the Black Hills without just compensation, in violation of the fifth amendment. In 1942 the Court of Claims dismissed on the ground that the Court of Claims was not authorized to determine whether the compensation agreed to in the 1877 "agreement" was an adequate price for the Black Hills.

Thereafter, upon enactment of the Indian Claims Commission Act in 1946, the Sioux resubmitted their claim to the Indian Claims Commission, which held that the 1887 Act effected a taking for which the Sioux were entitled to just compensation and that the 1942 Court of Claims decision did not bar the taking claim under res judicata.

The government appealed to the Court of Claims, which held that the merits of the Sioux's claim had been reached in its 1942 decision, and therefore, such claim was barred by res judicata even though the court did concede that there was evidence of a want of fair and honorable dealing on the part of the government.

Subsequently, in 1978, Congress passed an act providing for *de novo* review by the Court of Claims of the taking of the Black Hills without regard to the defense of res judicata. Accordingly, the court held that the Sioux were entitled to an award of interest at an annual rate of 5 percent on the sum of $17.1 million. The United States Supreme Court affirmed, relying upon *Cherokee Nation v. United States*[1] as authority to the effect that Congress has the power to waive a judgment that would be res judicata as part of its power to pay the debts of the United States. Further, the court reasoned, the principle that it "must [be] presume[d] that Congress acted in perfect good faith in dealings with the Indians of which complaint is made, and that [it] exercised its best

1. 270 U.S. 476 (1926).

judgment in the premises,"[2] is inapplicable in this case. And upon consideration of the evidence, the court concluded that the congressional undertaking in 1877 to furnish the Sioux with rations was not intended to provide a fair equivalent for the value of the Black Hills but rather was an attempt to coerce the tribe into capitulating to congressional demands. Therefore, the 1877 Act was not merely a change in the form of investment of Indian tribal property, which Congress had the power to make as trustee for the tribe, but rather a taking without compensation. Consequently, that taking implied an obligation on the part of the government to make just compensation to the Sioux Nation, and that obligation, including interest, must now, at last, be paid.

JURISDICTION: Zoning

Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, No. C78-3597 (9th Cir., Dec. 24, 1980). The Muckleshoot Indian Tribe appealed a district court decision enjoining them from enforcing a tribal business licensing ordinance against Trans-Canada Enterprises, Ltd. After Trans-Canada had continually refused to comply with the tribal ordinance, the tribe got an injunction in tribal court to prevent Trans-Canada from construction of its development, in order to force compliance with the ordinance. Trans-Canada then obtained an injunction in federal district court against the tribe's enforcement of the ordinance, asserting that the ordinance violated due process and equal protection under the fourteenth amendment.

The district court held that it had jurisdiction over the case by virtue of the alleged fourteenth amendment violations, and hence, federal question jurisdiction. The Ninth Circuit reversed the district court, holding that the district court did not have subject matter jurisdiction. The Ninth Circuit held that the lower court's reliance on a federal question to invoke jurisdiction was incorrect because constitutional guarantees are not applicable to the exercise of governmental powers by an Indian tribe except to the extent that they are made explicitly binding by the Constitution or are imposed by Congress. Here, they had not been. Further, the court could not assert jurisdiction under the Indian Civil Rights Act[1] because the sole federal remedy under this Act is application for federal habeas corpus relief.

2. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).
1. 25 U.S.C.A. (1968).

LAND ALLOTMENTS: Governmental Responsibility Under the General Allotment Act

In *United States v. Mitchell, 100 S.Ct. 1349 (1980)*, suit was brought on behalf of 1,465 individual allottees of land on the Quinault Reservation in Washington for money damages for alleged breaches of trust in connection with mismanagement of forest resources situated on lands allocated to individual Indians under the General Allotment Act of 1887. The United States Supreme Court, reversing the Court of Claims, held that the General Allotment Act cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands.

A literal reading of the statute provides that "the United States does and will hold the land thus allotted . . . in trust for the sale, use and benefit of the Indian to whom such allotment shall have been made . . . ." However, the Supreme Court took the view that the language imposing the trust must be read *in para materia* with other provisions of the Act, which, in Justice Marshall's words, "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the government to manage timber resources."[1]

Justice White, joined by Justices Brennan and Stevens, wrote a dissenting opinion to the view that the word "trust" in the Act was intended to create a trust as that word is commonly understood. The dissent states, "This language would surely be a sufficient manifestation of intent to create a trust if the settlor were other than the United States."[2] Further, the statute was enacted "against a backdrop of a relationship between the United States and the Indian tribes that had long been considered to "resemble that of a ward to his guardian."[3]

SOVEREIGN IMMUNITY: Waiver Via ICRA

On June 20, 1980, the Court of Appeals for the Tenth Circuit handed down its decision in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980)*. The circuit

1. 100 S.Ct. at 1354.
2. *Id.* at 1357.
3. *Id.*

court affirmed its earlier decision in the case despite *Santa Clara*.[1] The central issue in *Dry Creek* was whether the Indian Civil Rights Act (ICRA)[2] waived tribal sovereign immunity as to suits brought against them by non-Indians under the Act.

The plaintiffs in this case were non-Indians who owned land in fee within the exterior boundaries of the Wind River Reservation of the Shoshone and Arapahoe tribes. The plantiffs constructed a guest lodge for hunting (Dry Creek Lodge) after consultation with the superintendent of the reservation. The superintendent encouraged the project and said there should be no access problem. The access road from Dry Creek Lodge to the principal highway was over certain tribal trust land and land owned by individual Indians. The day after the lodge opened, the tribes barricaded the access road to it, at the request of one of the families, across whose land the road lay. The Tribal Joint Business Council gave order to block the road. The plaintiffs sought a remedy with the tribal court but were refused access to it. Thereafter they brought this suit in the United States District Court for the District of Wyoming, alleging equal protection and due process violations of the ICRA. The district court eventually dismissed the case, holding that in light of the United States Supreme Court's decision in *Santa Clara*, they could not hear the case because tribal sovereign immunity from suit had not been waived by the ICRA nor had jurisdiction been granted.

The owners of Dry Creek Lodge appealed the district court's decision following *Santa Clara* to the Tenth Circuit. The Tenth Circuit distinguished *Santa Clara* by the fact that it was entirely an internal matter between tribal members and the tribal government with no non-Indians involved. The Tenth Circuit then held that the tribes' sovereign immunity from suit had been waived under the ICRA as to suits brought by non-Indians and stated that if not for the federal forum the plaintiffs would have no remedy. In his dissenting opinion, although Judge Holloway conceded that *Dry Creek* was a far cry from *Santa Clara* in its factual setting, he nevertheless felt the court's broad statements in *Santa Clara*, *i.e.*, "In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit," barred this action because of the immunity doctrine.

1. Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978).
2. 25 U.S.C. §§ 1301-1303 (1970).

TAXATION: Income Derived From Trust Lands

In *United States v. Anderson, 625 F.2d 910 (9th Cir. 1980)*, Anderson, a member of the Fort Peck Tribes and a cattle rancher, had an individual allotment of land held in trust by the United States. However, Anderson grazed his cattle on other Indian allotments held in trust by the United States. The federal government conceded that Anderson's income from his own allotment was tax-free but sought to collect taxes on his income allocable to his use of other trust land. The district court, relying upon the federal policies underlying the Indian Reorganization Act,[1] held such income could not be taxed. The Ninth Circuit reversed, saying, "Indians are subject to payment of federal income taxes, as are [other] citizens, unless an exemption from taxation can be found in the language of a Treaty or Act of Congress."[2] Therefore, policy can create no federal income tax exemption unless created expressly. The court then examined the General Allotment Act[3] and the Indian Reorganization Act[4] but found no such express exemption in either. In *Squire v. Capoeman*,[5] the General Allotment Act was construed to create an express tax exemption for an Indian deriving income directly from his own trust allotment. The reason behind this construction was to insure that at the end of the trust period the lands would remain unencumbered by tax liens in the hand of the allottee. However, the Ninth Circuit held that this case did not fall within *Capoeman* because the income the government is seeking to tax did not come from his own trust land and because obviously taxing his use of other trust land would not encumber that land which is not allotted to him. The court further held that section 5 of the Indian Reorganization Act created no federal tax exemption in that it only expressly exempted trust land from state and local taxation, with no mention being made of a federal exemption. In addition, the court reasoned that section 16 of the Indian Reorganization Act could not be used to assert an exemption because the Fort Peck Tribes voted against it, and even if it could be relied upon, no provision in a tribal constitution could limit the taxing power of the United States, a superior sovereign.

1. 25 U.S.C. § 466 (1934).
2. *Id.* at § 913.
3. 25 U.S.C. § 331 (1887).
4. 25 U.S.C. § 466 (1934).
5. 531 U.S. 1 (1956).

TAXATION: State Motor Carrier and Fuel Taxes on Reservations

In *White Mountain Apache Tribe v. Bracker, 100 S.Ct. 2578 (1980)*, the United States Supreme Court held that federal law preempts Arizona from imposing motor carrier and fuel taxes on non-Indian businesses that operate solely on Indian reservations.

Pursuant to a contract with the Fort Apache Timber Company, a tribal organization, the Pinetop Logging Company, a non-Indian enterprise authorized to do business in Arizona, felled tribal timber on the Fort Apache Reservation and transported it to the tribal organization sawmill. Pinetop's operations were performed solely on the reservation.

The state of Arizona sought to impose on Pinetop its motor carrier license tax, which is assessed on the basis of the carrier's gross receipts, and its use fuel tax, which is assessed on the basis of diesel fuel used to propel a motor vehicle on any highway within the state. Pinetop paid the taxes under protest and brought suit in state court, asserting that under federal law the taxes could not lawfully be imposed on logging activities conducted exclusively within the reservation or on hauling activities on Bureau of Indian Affairs and tribal roads. The state trial court held for the state and the Arizona Court of Appeals affirmed.

In reversing, the Supreme Court recognized two independent barriers to the assertion of state regulatory authority over reservation Indians. First, the exercise of the state's authority may be preempted by federal law. Second, it may unlawfully infringe on the right of the reservation Indians to make their own laws and be governed by them. The Court, therefore, reasoned that the federal government's regulation of the harvesting, sale, and management of tribal timber, and of the Bureau of Indian Affairs and tribal roads is so pervasive as to preclude the additional burden sought to be imposed here by assessing the taxes in question against Pinetop for operations that are conducted solely on BIA and tribal roads within the reservation. The Court concluded that "there is no room for these taxes in the comprehensive federal regulatory scheme."[1]

1. 100 S.Ct. at 2586.

TAXATION: State Privilege Tax

In *Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. 1980)*, the Tenth Circuit affirmed a district court decision that upheld the right of New Mexico to impose its gross receipts tax on contractors who performed work on the Mescalero Reservation, located within the state. The court stated that the tax was imposed directly on the contractors for the privilege of doing business within the state. The court went on to say that this case did not involve the taxing of Indian lands, nor income from such lands, nor Indian land generally, all of which the state recognizes no right to tax. The court reasoned that all the case concerned was the right of the state to impose a privilege tax on contractors doing business within the state. The fact that it may indirectly burden the Mescalero Tribe through indemnity agreements or increased costs did not, the court held, make it a tax on the tribe. In considering whether the indirect burden imposed by the state law constituted an interference with tribal self-government and internal affairs, the court dismissed this contention, reasoning that the indirect burden suffered by the Mescalero Tribe was the same indirect tax consequence suffered by all engaged in business. The tax is nondiscriminatory, reasoned the court, hence there is no interference with tribal internal affairs.

TAXATION: State Transaction Privilege Tax Preempted

Central Machinery Co. v. Arizona Tax Comm'n, 100 S.Ct. 2592 (1980), presented the question whether a state may tax the sale of farm machinery to an Indian tribe when the sale took place on an Indian reservation and was made by a corporation that did not reside on the reservation and was not licensed to trade with Indians. The transaction involved the sale of 11 farm tractors to Gila River Farms, an enterprise of the Gila River Tribe. The seller, Central Machinery Company, solicited the sale on the reservation, the contract was made there, and payment for and delivery of the tractors also took place there. Although the seller did not have a permanent place of business on the reservation, and was not licensed to engage in trade with Indians on reservations, the transaction was approved by the Bureau of Indian Affairs.

The state of Arizona, however, imposes a "transaction privilege tax" on the privilege of doing business within the state. The seller, therefore, added the amount of this tax—$2,916.62—

as a separate item to the price of the tractors, thereby increasing the amount of the total purchase price to Gila River Farms. The seller then paid the tax to the state under protest and instituted proceedings to claim a refund, stipulating that Central Machinery would pay over any tax refund to Gila River Farms. The Superior Court for Maricopa County held that the state had no jurisdiction to tax the transaction, but the Supreme Court of Arizona reversed.

Relying upon *Warren Trading Post Co. v. Arizona Tax Comm'n*,[1] the Supreme Court of the United States reversed the state court. The High Court held that Arizona had no jurisdiction to impose a tax on the corporation's sale of farm machinery to an Indian tribe where the sale took place on the reservation even though the corporation did not have a permanent place of business on the reservation and was not licensed to trade with Indians. The Court reasoned that since the transaction was plainly subject to regulation under the federal statutes and implementing regulations governing the licensing of Indian traders, federal law preempts the asserted state tax.

1. 380 U.S. 685 (1965).