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Recent Developments

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RECENT DEVELOPMENTS

CIVIL RIGHTS: Tribal Membership

Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978), concerned a 1939 Pueblo ordinance which precludes membership for children of female members of the Pueblo who had married nonmembers, but grants membership to children of male members of the Pueblo who had married nonmembers. The suit was brought against the Pueblo and its governor alleging that the ordinance discriminates on the basis of both sex and ancestry and thus violates Title I of the Indian Civil Rights Act of 1968 (ICRA) [25 U.S.C. §§ 1301-1303]. Respondents sought declaratory and injunctive relief against enforcement of the ordinance.¹

The Court held that (1) suits against the tribe under the ICRA are barred by the tribe's sovereign immunity from suit because nothing on the face of the ICRA purports to subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief.² (2) Section 1302 does not impliedly authorize a private cause of action for declaratory and injunctive relief against the Pueblo's governor. Congress' failure to provide remedies other than habeas corpus for enforcement of the ICRA was deliberate, as is manifest from the structure of the statutory scheme and the legislative history. (a) Congress was committed to the goal of tribal self-determination, as evidenced by the provisions of Title I itself. Section 1302 selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique needs of tribal governments and thus manifests a congressional purpose to protect tribal sovereignty from undue interference. (b) Tribal courts are available to vindicate rights created by the ICRA. (c) It is clear that only the limited review mechanism of Section 1303 was contemplated by Congress. (d) Congress may also have considered that resolution of statutory issues under Section 1302 will frequently depend on questions of tribal tradition and custom that tribal forums may be in better position to evaluate than federal courts.

1. See Note, *Constitutional Law: Equal Protection: Martinez v. Santa Clara Pueblo—Sexual Equality Under the Indian Civil Rights Act* (this issue).

2. See Note, *Constitutional Law: Santa Clara Pueblo v. Martinez: Tribal Membership and the Indian Civil Rights Act* (this issue).

CONSTITUTIONAL LAW: Discrimination Between an Indian and a Non-Indian Charged With a Crime on a Federal Enclave

Respondents, enrolled Coeur d'Alene Indians, were charged with several crimes committed within the boundaries of their reservations, including the murder of a non-Indian. Two of the respondents were convicted of first-degree murder under the felony murder provisions of the federal enclave murder statute, as made applicable to Indians by the Major Crimes Act, 18 U.S.C. § 1153. The Court of Appeals for the Ninth Circuit reversed the trial court on the ground that respondents had been denied their constitutional rights under the equal protection component of the fifth amendment's due process clause. The court of appeals agreed with respondents' contention that their felony murder convictions were racially discriminatory as a non-Indian charged with the same crime would have been subject to prosecution only under Idaho law, under which premeditation and deliberation would have had to be proved, whereas no such elements were required under the felony murder statute.

The United States Supreme Court, in the case of *United States v. Antelope*,¹ reversed the court of appeals. The Supreme Court relied on the cases of *Morton v. Mancari*² and *Fisher v. District Court*³ for the proposition that federal regulation of Indian affairs is not based upon impermissible classifications. Instead, such regulation is rooted in the unique status of Indians as a "separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "racial group" consisting of Indians. Indeed, respondents were not subjected to federal criminal jurisdiction because they were of the Indian race, but because they were enrolled tribal members. Therefore, the federal criminal statutes enforced here are not based on impermissible racial classification.⁴ The Supreme Court found no violation of equal protection, as Indians under the Major Crimes Act enjoy all privileges of others within federal enclaves. Turning to the disparity between federal and Idaho law, the Court found that Congress has constitutional power to prescribe a criminal code in Indian country. Thus, under our federal system, the national government does not violate equal protection when

1. 97 S.Ct. 1395 (1977).

2. 417 U.S. 535 (1974).

3. 424 U.S. 382 (1976).

4. *United States v. Antelope*, 97 S.Ct. 1395, 1399 (1977).

its own body of law is even-handed, regardless of laws of states with respect to the same subject matter.

CONSTITUTIONAL LAW: Supremacy of the United States Constitution Over a Conflicting Provision of a Tribal Constitution

In *Cheyenne River Sioux Tribe v. Andrus, No. 77-1208 (8th Cir. December 16, 1977)*, the question presented was whether the tribal constitution, which provided for voter age of 21, or the United States Constitution, which provided for voter age of 18, controlled in a tribal election to amend the tribal constitution. The court of appeals held that the provision of the United States Constitution applied. In reaching that conclusion, the Court discussed the source of tribal government, 25 U.S.C. § 461 *et seq.* and the powers of the Secretary of the Interior under that act. The Secretary is given broad powers to promulgate rules and regulations for tribal elections. When the twenty-sixth amendment to the United States Constitution was ratified, the Secretary took the position that this amendment superseded the 21-year-old voter age requirement in 25 U.S.C. § 479. In October of 1976, the Cheyenne River Sioux Tribe requested that the Secretary call an election to amend the tribal constitution. The Secretary complied, stating that all persons over 18 years of age were eligible to vote. The court of appeals adopted its statement in a previous case that secretarial elections are specific federal elections regulated by federal statute to which the provisions of the twenty-sixth amendment apply. Therefore, the Secretary had authority to require that the eligible voting age for adult Indians with respect to the adoption of a tribal constitutional amendment be 18 years of age.

CRIMINAL JURISDICTION: Indian Country

United States v. Littlechief, No. CR-76-207-D (W.D. Okla. November 7, 1977); adopted in *State v. Littlechief, 573 P.2d 263 (Okla. Cr. 1978)*. The defendant in this case was charged with murder. It was conceded that the land where the alleged murder took place is part of an original Kiowa allotment and held in trust by the federal government. The United States District Court for the Western District of Oklahoma held that the land in question is "Indian country" within the meaning of 18 U.S.C. § 1151(c) and, therefore, the state has no jurisdiction because it is exclusive federal territory. This construction was also adopted by the

Oklahoma Court of Criminal Appeals and is considered binding on the state.

HUNTING AND FISHING RIGHTS: State Regulation of Fishing Activities of the Puyallup Tribe, Both On and Off the Reservation

After thirteen years of litigation, including two decisions by the United States Supreme Court, the Superior Court of the State of Washington entered a judgment against the Puyallup Tribe of Indians. That judgment declared that the court had jurisdiction to regulate the fishing activities of the tribe both on and off its reservation, and limited the number of steelhead trout that members of the tribe could catch with nets in the Puyallup River each year. The tribe was directed to file a list of members authorized to exercise treaty fishing rights, and to report the number of steelhead caught by its treaty fishermen to the Washington State Department of Game, and to the court, each week. The judgment was affirmed by the Supreme Court of Washington. The United States Supreme Court, in an opinion by Justice Stevens, which vacated and remanded the portion of the case in which the state court had ordered relief against the tribe itself, held that the tribe enjoyed sovereign immunity from suit.¹ However, individual members of the Puyallup Tribe remained subject to the regulation of fishing activities by the Washington courts, and the limit imposed on the total number of steelheads which could be caught by the Indians was based upon a valid conservation scheme. The Supreme Court advised the tribe that although it could resist the order of the state court requiring that it provide information with respect to the status of enrolled members and the size of their catch, the best interests of its members might be served by voluntarily providing such information to the court in order to minimize the risk of an erroneous enforcement effort. In a concurring opinion, Justice Blackmun questioned the continued validity of the doctrine of tribal immunity, and urged that it be reexamined in a future case.

A dissenting opinion, written by Justice Brennan and joined by Justice Marshall, disagreed with the majority's interpretation of the substantive rights of the Puyallup Indians. Justice Brennan was of the opinion that Article II of the Treaty of Medicine Creek granted the Puyallup Tribe the exclusive right to fish on its reservation, normally not subject to state control. Therefore, Justice Brennan would reverse and remand for a determination by the

1. Puyallup Tribe v. Washington Game Dep't, 97 S.Ct. 2616 (1977).

state courts, what measures, if any, are necessary to regulate the Puyallup's on-reservation fishery, strictly for conservation purposes.

JURISDICTION: The Criminal Jurisdiction of Tribal Courts Over Non-Indians

The most recent United States Supreme Court case is that of *Oliphant v. Suquamish Indian Tribe*, 98 S.Ct. 1011 (1978), decided March 6, 1978. The facts of the case are as follows: Petitioner Oliphant, a non-Indian resident of the Port Madison Reservation, was arrested by tribal authorities and charged with assaulting a tribal officer and resisting arrest. After arraignment in the tribal court, petitioner sought a writ of habeas corpus to the United States District Court for the Western District of Washington. The writ was denied, and the Court of Appeals for the Ninth Circuit affirmed the denial. Justice Rehnquist, writing for the majority of six, reversed the court of appeals, and held that Indian tribal courts do not have inherent criminal jurisdiction over non-Indians. The Supreme Court based its conclusion upon four findings: (a) From the earliest treaties with Indian tribes, it was assumed that the tribes, few of which maintained any semblance of a formal court system, did not have such jurisdiction absent a congressional statute or treaty provision to that effect, and at least one court held that such jurisdiction did not exist; (b) Congressional actions during the nineteenth century reflected that body's belief that Indian tribes do not have inherent criminal jurisdiction over non-Indians; (c) The presumption, commonly shared by Congress, the Executive Branch, and lower federal courts, that tribal courts have no power to try non-Indians, carries considerable weight; (d) By submitting to the overriding sovereignty of the United States, Indian tribes necessarily yield the power to try non-Indians except in a manner acceptable to Congress, a fact which seems to be recognized by the Treaty of Point Elliott, signed by the Suquamish Indian Tribe. Mr. Justice Marshall, joined by the Chief Justice, rendered the following dissenting opinion: "I agree with the court below that the 'power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed.'" In the absence of affirmative

1. 544 F.2d 1007, 1009 (9th Cir. 1976).

withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent."

LEGISLATION

This Act was introduced as S. 661 by Senators Bellmon (R-OK) and Bartlett (R-OK) on February 7, 1977. It has now been enacted as Public Law 95-281, 92 Stat. 30. It reads as follows:

AN ACT

To reinstate the Modoc, Wyandotte, Peoria, and Ottawa Indian Tribes of Oklahoma as federally supervised and recognized Indian tribes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

(a) That Federal recognition is hereby extended or confirmed with respect to the Wyandotte Indian Tribe of Oklahoma, the Ottawa Indian Tribe of Oklahoma, and the Peoria Indian Tribe of Oklahoma, the provisions of the Acts repealed by subsection (b) of the section notwithstanding.

(b) The following Acts are hereby repealed:

(1) The Act of August 1, 1956 (70 Stat. 893; 25 U.S.C. 791-807) relating to the Wyandotte Tribe;

(2) The Act of August 2, 1956 (70 Stat. 937; 25 U.S.C. 821-826) relating to the Peoria Tribe; and

(3) The Act of August 3, 1956 (70 Stat. 963; 25 U.S.C. 841-853) relating to the Ottawa Tribe.

(c) There are hereby reinstated all rights and privileges of each of the tribes described in subsection (a) of this section and their members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to the Act relating to them which is repealed by subsection (b) of this section. Nothing contained in this Act shall diminish any rights or privileges enjoyed by each of such tribes or their members now or prior to enactment of such Act, under Federal treaty, statute, or otherwise, which are not inconsistent with the provisions of this Act.

(d) Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligation for taxes already levied.

Sec. 2. (a) (1) The Modoc Indian Tribe of Oklahoma is hereby recognized as a tribe of Indians residing in Oklahoma and the provisions of the Act of June 26, 1936, as amended (49 Stat. 1967; 25 U.S.C. 501-509), are hereby extended to such tribe and its members. The Secretary of the Interior shall promptly offer the said Modoc Tribe assistance to aid them in organizing under section 3 of said Act of June 26, 1936 (25 U.S.C. 503).

(2) The provisions of the Act of August 13, 1954 (68 Stat. 718; 25 U.S.C. 564-564w), hereafter shall not apply to the Modoc Tribe of Oklahoma or its members except for any right to share in the proceeds of any claim against the United States as provided in sections 6(c) and 21 of said Act, as amended (25 U.S.C. 564e and 564t).

(3) The Modoc Indian Tribe of Oklahoma shall consist of those Modoc Indians who are direct lineal descendants of those Modocs removed to Indian territory (now Oklahoma) in November 1973, and who did not return to Klamath, Oregon, pursuant to the Act of March 9, 1909 (35 Stat. 751) as determined by the Secretary of the Interior, and the descendants of such Indians who otherwise meet the membership requirements adopted by the tribe.

(b) The Secretary of the Interior shall promptly offer the Ottawa Tribe of Oklahoma and the Peoria Tribe of Oklahoma assistance to aid them in reorganizing under section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503), which Act is reextended to them and their members by this Act.

(c) The validity of the organization of the Wyandotte Indian Tribe of Oklahoma under section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503), and the continued application of said Act to such tribe and its members is hereby confirmed.

Sec. 3. (a) It is hereby declared that enactment of this Act fulfills the requirements of the first proviso in section 2 of the Act of January 2, 1975 (88 Stat. 1920, 1921). with respect to the Wyandotte Tribe of Oklahoma, the Ottawa Tribe of Oklahoma, and the Peoria Tribe of Oklahoma.

(b) It is hereby declared that the organization of the Modoc Tribe of Oklahoma as provided in section 3 (a) of this Act shall fulfill the requirements of the second proviso in section 2 of the Act of January 2, 1975 (88 Stat. 1920, 1921).

(c) Promptly after organization of the Modoc Tribe of Oklahoma, the Secretary of the Interior shall publish a notice of such fact in the Federal Register including a statement that such

organization completes fulfillment of the requirements of the provisions in section 2 of the Act of January 2, 1975 (88 Stat. 1920, 1921), and that the land described in section 1 of said Act is held in trust by the United States for the eight tribes named in said Act.

Sec. 4. The Wyandotte, Ottawa, Peoria, and Modoc Tribes of Oklahoma and their members shall be entitled to participate in the programs and services provided by the United States to Indians because of their status as Indians, including but not limited to those under the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13), and for purposes of the Act of August 16, 1957 (71 Stat. 370; 42 U.S.C. 2005-2005F). The members of such tribes shall be deemed to be Indians for which hospital and medical care was being provided by or at the expense of the Public Health Service on August 16, 1957. Approved May 16, 1978.

LEGISLATION

Act of February 17, 1978, Pub. L. No. 95-232, 92 Stat. 30 Purpose: To provide for the return to the United States of title to certain lands conveyed to certain Indian pueblos of New Mexico, and for such land to be held in trust by the United States for such tribes.

Act of March 21, 1978, Pub. L. No. 95-247, 92 Stat. 158 Purpose: Authorizing the Wichita Indian Tribe of Oklahoma, and its affiliated bands and groups of Indians, to file with the Indian Claims Commission any of their claims against the United States for lands taken without adequate compensation, and for other purposes.

PROPOSED LEGISLATION

Senate Bill 2712: *The Indian Program Evaluation and Needs Assessment Act*

This bill was introduced March 6, 1978 by Senator James Abourezk (D-S.D.). S. 2712 would require all federal agencies which administer special programs and services for Indians to provide an annual report to Congress which would contain information critical to the Congress in evaluating the effectiveness of the various federally funded Indian programs. Such reports would allow Congress to monitor the efficiency and fiscal accountability of the agencies administering the programs, as well as stay current on the fluctuating status of Indian lands.

In addition, the bill would require that a comprehensive needs

assessment study be conducted every five years so that Congress can more realistically evaluate the needs of Indians throughout the country. The bill would also establish a Federal Interagency Council on Indian Affairs to coordinate federal Indian programs, policy, and budgetary planning to increase efficiency and avoid duplication within the various agencies serving Indians.

Senate Bill 2375: Tribal Recognition Bill

S. 2375 provides for the establishment within the Interior Department of a special investigative office which would, within one year of enactment of the bill, contact all known Indian tribal groups in the United States whose existence previously has not been acknowledged and inform such tribes of their right to petition for acknowledgement. The office would be required to offer the petitioning group technical assistance in preparing its petition for recognition and assist them in the organization of their members. Within two years of receiving a group's petition, the office must submit a written preliminary report to the petitioning group for its response. The office would then have 30 days after the petitioner's response to prepare a final report to be submitted to the group and to the Secretary of Interior. The Secretary would then have six months in which to decide whether to designate the group as a federally acknowledged Indian tribe. The bill also clearly outlines the definitions the office and the Secretary of Interior shall use in determining whether or not a group is a tribe.

TAXATION: State Sales Tax

Ute Indian Tribe v. State Tax Commission of Utah, No. 76 -1602 (10th Cir. February 17, 1978). This action was brought by the Ute Indian Tribe against the Utah State Tax Commission for injunctive relief and a declaratory judgment that Utah sales taxes could not be levied or collected on sales of personal property made by a tribal enterprise within the boundaries of the Uintah and Ouray Reservation. The complaint also sought return of funds collected by the tribe on the sales and remitted to the state. The trial court enjoined the state from seeking to collect sales taxes on sales made by the tribe on the reservation, and directed the return of the monies. On the basis of *Moe v. Confederated Salish & Kootenai Tribes*,¹ the Court of Appeals for the Tenth Circuit held that sales on trust lands by the tribe to Indians are not subject to the state sales tax, although sales tax may be applied to purchases by non-

1. 425 U.S. 463 (1976).

Indians on such lands. In addition, the court held that sales by the tribe to Indians not on trust lands are immune from state tax. However, the court held that the return to the tribe of monies collected is improper as the tax imposed was on the buyers and only they can seek a refund.

TRIBAL PROPERTY: Congressionally Diminished Reservation

In June of 1972, the Rosebud Sioux Tribe sued in the United States District Court for the District of South Dakota, to obtain a declaratory judgment that the original boundaries of their reservation, as defined in the Act of March 2, 1889, had not been diminished by three subsequent acts of Congress passed in 1904, 1907, and 1910. The district court concluded that Congress had intended to diminish the reservation, and the Court of Appeals for the Eighth Circuit affirmed. The United States Supreme Court, in an opinion by Justice Rehnquist,¹ affirmed the court of appeals. The Court concluded that although unilateral acts of Congress were enacted without the consent of three-fourths of the adult male members of the tribe as required by the original treaty, this was of no consequence in determining the intent of Congress to diminish the boundaries of the reservation. In reaching this conclusion, the Court put great reliance on the fact that had a 1901 amendment to the treaty been accepted by Congress, the reservation would have been diminished. The Rosebud Tribe had approved the cession of certain reservation lands to the United States government in return for certain payments. The Congress refused the terms of payment offered by the Rosebud Tribe, and instead, in 1904, passed an act substantially the same as the 1901 amendment, the only change being that which concerned payments to the tribe in return for the land. The Supreme Court held that the only point of contention between the 1901 amendment and the 1904 act involved method of payment and not the intent to diminish. Finding the intent sufficient, the Court held that Gregory County was clearly separated from the Rosebud Reservation in 1904. In 1907, an agreement was signed by a majority of the adult male Indians, to cede all land in Tripp and Lyman counties to the United States government. Congress incorporated the terms of the treaty into a bill that was enacted into law. This act was substantially the same as the 1904 act, and thus, Congress reaffirmed its intent to diminish the reservation. An act passed in

1. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

1910 by Congress contained terms similar to those found in earlier acts and detached Mellette County from the reservation.

In a vigorous dissent, Justice Marshall, joined by Justices Brennan and Stewart, attacked the reasoning of the majority concerning the intent to diminish the reservation. Justice Marshall carefully pointed out all the evidence contrary to the position taken by the majority, and found that the majority view went against established case law. Past cases, such as *Mattz v. Arnett*,² and *DeCoteau v. District County Court*,³ held that the intent to disestablish the boundaries of a reservation must be clear on its face, with all ambiguities resolved in favor of the Indians involved. The majority was apparently adopting a new view of intent to diminish, and this may threaten other reservations with similar circumstances. Justice Marshall also pointed out other problems that may result from the majority decision, such as jurisdictional disputes, clouds on title to real property, and problems with federal funding to Indians outside the reservation.

TRIBAL PROPERTY: Congressionally Diminished Reservation

Two groups of cases were joined together in this appeal. The first group of cases arose from indictments against Long Elk and four other Indians, for offenses committed within Indian country, that being the Standing Rock Indian Reservation. The second group of cases arose from indictments against Bird Horse and another Indian, for offenses also committed on part of the Standing Rock Reservation. The issue raised on appeal in *United States v. Long Elk*¹ is whether federal jurisdiction exists over criminal offenses committed within that portion of the Standing Rock Indian Reservation opened to settlement by a 1913 congressional enactment. The Eighth Circuit Court of Appeals addressed the jurisdictional issue in light of principles enunciated in *Rosebud Sioux Tribe v. Kneip*,² and held that the Act of 1913 did not disestablish any part of the Standing Rock Reservation. The particular portion of the reservation under consideration was the eastern half. The court distinguished the facts in this case from the *Rosebud* case, finding no intent of Congress to terminate the reservation status either in the language in the act which opened the reservation to settlement or in negotiations with the tribe. Furthermore, the legislative

2. 412 U.S. 481 (1973).

3. 420 U.S. 425 (1975).

1. 565 F.2d 1032 (8th Cir. 1977).

2. 430 U.S. 584 (1977).

history of the Act of 1913 does not disclose an intention to terminate the reservation status of the opened land, and the Presidential proclamation opening the land contained no language of termination. The states of South Dakota and North Dakota have never exercised jurisdiction over the part of the reservation affected by the act. Finally, the Act of 1913 opened only a small portion of the reservation, and those plots were interspersed among tracts allotted to Indians. The court concluded that the eastern part of the reservation was not disestablished and, therefore, federal jurisdiction over all defendants is sustained.