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FEDERAL RECENT DEVELOPMENTS

CRIMINAL JURISDICTION: Major Crimes Act

In *Kansas v. Mitchell*, 642 P.2d 981 (Kan. 1982), appellant Mitchell, an American Indian, had been convicted by a jury in state court of second degree murder for an offense against another Indian within Indian country. Mitchell made an untimely appeal because of lack of information about his appellate rights, challenging Kansas' jurisdiction over the offense charged. Appellant argued that the Federal Major Crimes Act, 18 U.S.C. § 1153 (1981 Supp.) confers exclusive federal jurisdiction over the Indian defendant charged with killing another Indian within Indian country. Kansas argued that the state had concurrent jurisdiction pursuant to 18 U.S.C. § 3243.

The court reviewed the circumstances of Mitchell's attempted appeal and found that he was improperly and inadequately informed of his appellate rights. These special circumstances warranted waiver of the statute of limitations and allowed the court to reach the merits. After discussion about the legislative history of 18 U.S.C. §§ 1153 and 3243, the court found that even though Kansas, like a few other states, was given concurrent jurisdiction over some offenses committed by or against Indians within Indian country, Congress specifically intended to reserve exclusive federal jurisdiction over the major crimes as defined in the Federal Major Crimes Act. The court held that under sections 3243 and 1153, Kansas exceeded its jurisdiction by trying Mitchell for the alleged murder of another Indian in Indian country. The action against Mitchell is dismissed.

LEASING MINERAL RIGHTS

In *Merrion v. Jicarilla Apache Tribe*, 102 S. Ct. 894 (1982), non-Indian lessees who produced oil and gas from within the tribe's reservation pursuant to leases granted them under the auspices of the Secretary of the Interior brought two suits, consolidated for trial, against the Jicarilla Apache Tribe and its tribal council seeking a declaratory judgment and an injunction that would prohibit enforcement of the tribe's oil and gas severance tax to be measured by the production from oil and gas wells within the reservation. The United States District Court for the District of New Mexico declared the tax illegal, and the tribe appealed. The Court of Appeals for the Tenth Circuit, sitting en banc, reversed.

On certiorari, the United States Supreme Court, in a 6-3 opinion, held that an Indian tribe has inherent power to impose a severance tax on production by non-Indians of oil and gas on tribal land. Even if the tribe's authority to tax non-Indians is derived solely from its power to exclude non-Indians from the reservation, a tribe may still impose a severance tax on non-Indians who have a right of entry pursuant to lease contracts with the tribe because non-Indians remain subject to a tribe's lesser-included power to tax or place other conditions on their conduct or continued presence on the reservation. The Court further stated that Congress has not, by establishing national energy policies or by enacting statutes governing leasing of oil and gas interests on tribal lands and permitting state taxation of mineral lessees on certain reservations, preempted tribal taxation on severance of minerals when both the taxing ordinance and the tribal constitution have received approval by the Secretary of the Interior. Finally, the Court held that a tribe's enactment of a severance tax pursuant to a scheme established by Congress precludes judicial review of a tribe's taxing power under the commerce clause.

In *United Nuclear Corporation v. Watt*, No. 81-1537 (D.D.C. May 21, 1982), United Nuclear Corporation obtained two uranium exploration and mining leases from the Navajo Tribe in 1971, which were approved by the Secretary of the Interior as required by 25 U.S.C. § 36A. UNC then submitted a mining plan directly to the Secretary for approval pursuant to 25 C.F.R. § 177.7 (1981). The Secretary, however, refused acceptance of the plan because the tribe had not given its approval, though such tribal acceptance is apparently not required. UNC sought, *inter alia*, an equitable extension of its leases to compensate for the delay in approval of its mining plan. Defendant moved to dismiss under Federal Rule of Civil Procedure 19(b): failure to join an indispensable party, i.e., the Navajo Tribe. The court found that the Secretary is not the lessor and that his status as tribal trustee and guardian only permits him to veto leases; he may not require that a lease be granted. Because the Secretary lacks authority to lease, he also lacks authority to extend an expired lease. Therefore, a court cannot consider extension of the leases without joining the tribe as a necessary and indispensable party. UNC was granted leave to join the tribe, although the suit could still be subject to a sovereign immunity challenge.

RIGHTS-OF-WAY AND EASEMENTS: Power Lines

In *Pueblo of Santa Ana v. Mountain States Telephone & Telegraph Co.*, No. 80-841-M Civ. (D.N.M. June 2, 1982), the Pueblo of Santa Ana sought damages from the defendant telephone company for trespass from 1907 to the present, caused by the construction of telegraph and telephone lines over lands held in fee simple by the Pueblo but subject to federal restraints against alienation. The Secretary of the Interior had approved the right-of-way grant in 1928 pursuant to section A of the Pueblo Lands Act (P.L.A.). Plaintiffs contended that he acted without the proper authority in doing so. After reviewing the legislative history of the P.L.A., the court concluded that the congressional intent in passing the Act was to extend the protections of the Non-Intercourse Act to the Pueblos, including the provisions against alienation of lands without clear and express congressional authority. The court held that the Secretary had no such authority either through congressional delegation or pursuant to the P.L.A., and the right-of-way grant was therefore invalid.

Defendant argued that the Pueblo was barred from raising the trespass issue by the judgment in *United States v. Brown*,¹ which was a quiet title action brought by the United States on behalf of the Pueblo. Before any trial, the case against the telephone company was dismissed on the ground that the company had obtained a valid right-of-way. Defendant asserted that the Pueblo was collaterally estopped from relitigating this issue. The court held that "for collateral estoppel to apply, the factual issue must have been actually litigated and necessarily decided." In *Brown*, no such determination on the merits was ever reached; therefore, the Pueblo was not barred from bringing this suit.

TRUST AND RESTRICTED LANDS: Conveyance

In *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Hallett*, 540 F. Supp. (D.S.D. 1982), Richard Tall, an Oglala tribal member, applied to the BIA for fee patents on three allotments held by him. The application was denied by the Superintendent of the Pine Ridge Agency on the basis of a tribal ordinance prohibiting alienation of trust lands without tribal approval, which Tall

1. No. 1814 Equity (D.N.M. 1928).

had not attempted to obtain. Tall appealed the Superintendent's denial to the Aberdeen Area Director, who reversed the Superintendent and approved the fee patent application. The tribe then appealed the Area Director's decision through the Department of the Interior's administrative proceedings. In the final administrative decision, the Board of Indian Appeals upheld the approval of Tall's application.

The tribe brought this suit in the federal district court to halt issuance of Tall's fee patent until he has applied for tribal approval. The court held that since the tribe is within the coverage of the Indian Reorganization Act (25 U.S.C. §§ 461 *et seq.*), there is direct statutory authority for the Secretary of the Interior to grant fee patents in his discretion. The court found no authority that any tribe possesses the power to initially pass on a decision statutorily committed to the Secretary's discretion.