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Federal Recent Developments

FEDERAL RECENT DEVELOPMENTS

CLAIMS

In Antoine v. United States, 710 F.2d 427 (8th Cir. 1983), Jacob W. Antoine, an enrolled member of the Rosebud Sioux Tribe, brought an action to recover an allotment of Indian land or damages for its loss. Under 25 U.S.C. § 345, the existence of a cause of action to recover damages for the loss of Antoine's ancestor's allotment was recognized. According to *Antoine v. United States*,[1] the United States is not required to grant a substitute allotment.

The district court awarded damages for the loss of the allotment based on its value at the time it was delivered to Wicatanynaun, the ancestor, along with interest. Antoine appealed on the basis that the amount was inadequate.

The court of appeals was not persuaded by Antoine's argument that the district court erred in refusing to allow damages for the present value of the tract, loss of income from the land, and interest. The court held that the owner of the property had the right to recover its value at the time of the taking plus an amount sufficient "to produce the present full equivalent of that value paid contemporaneously with the taking."[2] The court of appeals also held that the 5 percent interest rate applied for all the years was inappropriate. The economic circumstances between the date of taking and the date of payment should be examined to determine the proper rate of interest.

1. 637 F.2d 1177, 1182 (8th Cir. 1981).
2. United States v. Creek Nation, 295 U.S. 103, 111 (1935).

FEDERAL SUPREMACY

Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983), raised the issue whether an Indian tribe had the authority, *without the Secretary of Interior's approval*, to terminate a lease which had originally been executed with approval as required by federal law. The district court held that a tribe had such authority. The court of appeals, however, reversed and remanded for further proceedings.

On September 11, 1969, the Yavapai-Prescott Tribe leased a tract of land to appellant Marlin D. Kuykendall for the purpose of an automobile dealership. The tribe obtained the approval of the Secretary of Interior as required by 25 U.S.C. § 415, which authorizes commercial leases of Indian land, as implemented by

25 C.F.R. §§ 162.1-162.20. In the event of a breach of a lease agreement, 25 C.F.R. § 162.14 requires the Secretary to participate in the cancellation of the lease. However, the lease stated that in the event of Kuykendall's default on the lease obligations the tribe "and/or" the Secretary could terminate the lease. In March of 1979, Kuykendall sublet the land without the approval of the tribe. The tribe notified Kuykendall that the sublease was a breach of the lease and terminated the lease on June 27, 1979, without the Secretary's approval.

The court reviewed the congressional record of 25 C.F.R. § 162.14, and found Congress adopted section 415 to encourage long-term commercial leases of Indian land and to enhance its profitable development.[1] The court of appeals held that the Secretary's approval of a lease termination was consistent with the legislative intent of 25 U.S.C. § 415. It is the Secretary of Interior's responsibility to determine the proper balance between tribal power and protection of long-term interests, or the risk of improvidence, of the tribe.

The court cited two additional considerations for its decision. First, if decided otherwise, the tribe could insist upon new terms in a new lease which may not meet the Secretary's approval. Second, if a tribe possesses a unilateral power to terminate a lease, the value of the lease could be depressed and the lessee discouraged from making any substantial improvements on the leasehold.

1. H.R. REP. No. 1093, 84th Cong., 1st Sess. 1, *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2691.

PROBATE

In *Cultee v. United States, 713 F.2d 1455 (9th Cir. 1983)*, appellants, the four daughters of William Mason Cultee, contested the validity of their father's will. Cultee was a member of the Quinault Indian Nation. He died on August 4, 1976, leaving a will dated August 14, 1973. The will was prepared and executed in the presence of BIA personnel. It left all of Cultee's property to Helene Jake, who was Cultee's cousin, and it stated Cultee had no children. After a hearing before the Department of Interior Administrative Law Judge, who recognized appellants as Cultee's daughters but rejected their challenge to the will, appellants appealed to Interior's Board of Indian Appeals, which affirmed the Interior Administrative Law Judge's decision.

In the United States district court, appellants argued that 25 U.S.C. § 464 required the incorporation of a state law that made a will invalid if it failed to mention or to disinherit the testator's children.[1] Defendant made a motion for summary judgment and the district court, citing 25 U.S.C. § 373 (1976), ruled that if the Secretary of Interior approved an Indian will before or after the testator's death, it is valid. The summary judgment was granted for appellees because the Secretary had approved the will.

On appeal, the appellants argued that section 464 required the Secretary of Interior to invalidate a will that devises restricted land unless the will complies with state probate law. Appellees argued that 25 U.S.C. governed testamentary disposition of Indian property, including allotted land held in trust and restricted land.

The court held that Cultee's will was valid only if approved by the Secretary according to 25 U.S.C. § 373. Also, the Secretary may only approve wills that comply with the restrictions on alienation in 25 U.S.C. § 464. Section 464 limits the Secretary's discretion to approve Indian wills devising restricted Indian lands to wills that devise the property to one of three classes. The three classes recognized by the statute are: (1) the Indian tribe where the land is located, (2) any member of the tribe, and (3) the "heirs" of the testator as determined by state law. Contrary to the position argued by Cultee's daughters, this does not mean that any Indian devise of restricted lands must comply with state probate law, but only that one class of eligible devisees is defined by reference to such law.

The court of appeals determined that Cultee's will, as modified by the final order of the Administrative Law Judge who originally heard this case, was within the requirements of both section 373 and section 464. The judgment of the district court was therefore affirmed.

1. WASH. REV. CODE § 11.12.090 (1974).

SOVEREIGNTY

In *Snow v. Quinault Indian Nation, 10 I.L.R. 2170 (9th Cir. 1983)*, Kenneth Snow and other non-Indian persons who owned businesses located within the Quinault Reservation sought an injunction, declaratory relief, and monetary damages to prevent the tribe from implementing a business license fee and tax on businesses within the reservation. The tax was for the purpose of supporting tribal governmental services. The district court had

granted summary judgment in favor of the tribe. Snow appealed the district court's decision.

The court of appeals determined that Indian tribes possess immunity from suit in state or federal courts. Tribal officials acting within the scope of their authority and as representatives also have tribal immunity. However, tribal sovereign immunity exists only at the sufferance of Congress. Immunity to suit may also be waived by the tribe. Conduct that is outside the scope of the tribe's sovereign powers is not eligible for tribal immunity.

The Quinault Tribe had not waived sovereign immunity nor had it consented to be sued. Also, Congress had not divested the tribe of its immunity. *Merrion v. Jicarilla Apache Tribe*[1] held that the power to tax was a necessary instrument of self-government and territorial management. The court held that the tribe retained its power to tax even though ownership of land by non-Indians established their legitimate presence within the reservation. The Quinault tax was for the purpose of raising revenue to support tribal government services. Therefore, the tax was within the tribe's sovereign power even though levied against non-Indian-owned businesses.

Snow argued that sovereign immunity was waived when the tribe's revenue clerk, Edith Chenois, consented to service of process. The court held that a tribal officer's acceptance of service did not offset the sovereign immunity of the tribe. The tribe's sovereign immunity could not be waived by officials.

Snow also argued that he was denied equal protection of the law in violation of the Indian Civil Rights Act (ICRA)[2] because of the manner in which the tribal business tax was to be implemented. The court of appeals found that Snow failed to submit his ICRA denial of equal protection claim to the Quinault Tribal Court for adjudication. Congress intended for tribal courts to decide ICRA claims which affect both Indian and non-Indian interests. As a consequence, Snow could not avoid the tribal court by claiming that the district court had jurisdiction over the ICRA claim.

1. 455 U.S. 130 (1982).
2. 25 U.S.C.A. § 1302(8).

TAXATION: Essential Governmental Function Per the Internal Revenue Code

Presidential Commission on Indian Reservation Economies

The Indian Tribal Governmental Tax Status Act of 1982, which

was enacted during the Ninety-seventh Session of Congress, advances the relations between the governments of the Indian tribes and the United States. The Act also eliminates discriminatory tax treatment of tribal governments under the Internal Revenue Code. The Act grants beneficial tax treatment to an Indian tribe when the tribe is engaged in an "essential governmental function."

The Presidential Commission on Indian Reservation Economies (PCIRE) was created by President Ronald Reagan to advise him concerning industrial and business development on Indian reservations. PCIRE has been working to encourage the Treasury Department to make a clear definition of an "essential governmental function." PCIRE wants the definition to include any tribal activity that is eligible for federal funding, including direct contracts and grants. This type of definition of "essential governmental function" would incorporate into the regulations that will implement the Indian Tribal Governmental Tax Status Act the view that tribal governments should be permitted to exercise their own discretion in planning and executing programs that will benefit them.

To support its proposal, PCIRE points out that Indian tribal governments receive support in the form of grants, training, and technical assistance from the federal departments of HUD, HHS, Education, and Labor. This is in addition to the assistance provided by the Bureau of Indian Affairs. PCIRE contends that when the federal government funded these programs, they were considered to be actions in pursuit of an "essential governmental function." Therefore, the same view should extend to the regulations of the Treasury Department implementing the Tax Status Act, and any tribal function eligible for federal funding should be treated as an "essential governmental function" for the purpose of the Internal Revenue Code.

In *Southland Royalty Co. v. Navajo Tribe, 10 I.L.R. 2185 (10th Cir. 1983)*, the Navajo Tribe imposed taxes on the value of mineral interests and gross receipts. Similar taxes had been collected by the state of Utah and San Juan County for many years. Oil companies holding mineral leases on the Navajo Reservation brought suit to challenge the imposition of the taxes on the basis that the Navajo taxes were invalid, or alternatively, because the state and local taxes were invalid. The district court found that the Navajo taxes' validity depended upon approval by the Secretary of Interior. This approval had not been obtained. The district court also found that the taxes imposed by the state and county were valid.

The facts and issues of *Merrion v. Jicarilla Apache Tribe*[1] were similar to those in the present case. In *Merrion*, the court held the tribe's power to tax was derived from the general authority of the tribe as sovereign to control economic activity on its reservation and to defray the cost of governmental services by requiring businesses operating within the reservation to contribute.[2]

The plaintiffs tried to distinguish the rule of *Merrion* by arguing that the Navajo Tribe had not organized and adopted a constitution under the Indian Reorganization Act of 1934 (IRA).[3] Therefore, the taxes imposed by the Navajo Tribe should not be reviewed by the federal courts as taxes imposed by the IRA-organized Jicarilla Tribe would be reviewed. Plaintiffs argued that taxes imposed by the Navajo Tribe should be preempted as disruptive of federal energy policy despite the *Merrion* rule.

The Tenth Circuit did not agree with plaintiffs' argument and noted that other factors unconnected with approval by the Secretary of the Interior, such as state taxation, could cause disruption of federal policy. However *Merrion*[4] indicated that under 25 U.S.C. § 398c state taxation of mineral leases was not prohibited.

The Tenth Circuit also held that the National Gas Policy Act of 1978[5] allowed for tribal taxes without regard to adoption of a constitution under IRA. The power of the Navajo Tribe to tax exists despite federal regulation of the oil and gas leases on the Navajo Reservation.

1. 455 U.S. 130 (1982).
2. *Id.* at 137.
3. 25 U.S.C. §§ 461-479.
4. 455 U.S. 130 at 150-51.
5. 15 U.S.C. §§ 3320(a), (c)(1) (Supp. III 1976).

In *Hoptowit v. Commissioner, 10 I.L.R. 2140 (9th Cir. 1983)*, appellant William Hoptowit was elected to the Yakima Tribal Council in November of 1975. The tribal council was the governing body of the tribe and handled the tribe's business. The council members were paid for their service. In 1976, Hoptowit received $18,000 in per diem payments. Taxes were not withheld from the payments and Hoptowit did not report the payments as taxable income.

The Commissioner of Internal Revenue audited Hoptowit and determined a deficiency of approximately $40,000, which was attributed to the per diem payments and income from a smoke

shop operated by Hoptowit on the Yakima Reservation. On a petition for redetermination of Hoptowit's tax liability, the Tax Court held that neither the per diem payments nor the smoke-shop income was exempt from federal income taxation. Hoptowit appealed as to the ruling on the per diem payments.

Hoptowit based his claim for tax exemption on the treaty with the Yakimas which ceded land in Washington Territory and reserved the tract that is now known as the Yakima Indian Reservation. This treaty provided that the "tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation. . . ."

Hoptowit argued that the "exclusive use and benefit" language expressed a tax exemption and guaranteed the right to distribute income from the resources of the reservation to the tribe for the exclusive benefit of its members.

The Commissioner argued that the treaty gave the Yakima Indians the exclusive right to the use and benefit of the reservation, but did not protect tribal members' income from taxation.

The court of appeals held that any tax exemption created by the "exclusive use and benefit" language was limited to income derived directly from the land. The court followed *Commissioner v. Walker*,[1] where the court held that a tribal member could be taxed when tribal money was used to compensate him as an elected tribal treasurer even though certain tribal funds were tax exempt. Therefore, if any tax exemption was created by the language of the 1855 treaty with the Yakimas, it did not extend to the income used to compensate Hoptowit for serving as a tribal council member.

1. 326 F.2d 261 (9th Cir. 1964).