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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW: "There Ain't No Such Thing as a Free Lunch"

In the case of *Vigil v. Kleppe, No. 76-653 (D.N.M., July 16, 1979)*, the United States District Court of New Mexico decided that the Bureau of Indian Affairs is not required to provide free lunches for all Indian students. Plaintiffs challenged the discontinuation of a Bureau program that provided free lunches to all Indian children in public schools regardless of need. The program was transferred to the Department of Agriculture, which requires that family size and income requirements be met. The Bureau continued to provide free meals to Indian students at the day and boarding schools it operated.

In challenging the transfer, plaintiffs argued that the federal government has a fiduciary duty to provide free lunches to Indian students in public schools regardless of family size and income, and that this duty could not be delegated to the Department of Agriculture. The court rejected this argument by finding that the function of providing free lunches is discretionary, not mandatory, and since the duty does not exist it could not be improperly delegated.

The court also rejected plaintiff's claim that imposing income requirements on Indian students in state-operated schools but not on those in Bureau-operated schools is violative of equal protection. The result of the new program, the court said, was merely that nonneedy Indian students in public schools could no longer receive free lunches. Since by definition they do not need free meals, the actions of the Bureau bore a rational relationship to a legitimate governmental purpose. The lesson intended by the district court was to note that nothing in any statute or treaty, no matter how liberally construed, mandates the provision of free lunches for all Indian school children.

HUNTING AND FISHING: Post-termination Rights

In denying certiorari, the United States Supreme Court has given a final stamp of approval to the Ninth Circuit view in *Callahan v. Kimball*.[1] The case involved the question of whether the members of a federally terminated tribe, the Klamaths, still possessed hunt-

1. 590 F.2d 768 (9th Cir.), *cert. denied*, 99 S.Ct. 2834 (1979).

ing and fishing rights guaranteed by treaty to the Klamath Tribe. These rights to hunt, fish, and trap within the boundaries of the ancestral reservation had been statutorily exercised free from state regulatory control,[2] and the Klamath Termination Act[3] had expressly provided that "nothing in this Act shall abrogate any fishing rights or privileges of the tribe or members thereof enjoyed under Federal treaty." The Act, however, simultaneously eliminated federal supervision of tribal affairs, disposed of all federal trust property, and closed the tribal rolls as of the date of its effect.

The plaintiffs in the case were individual Indians who either personally withdrew from the tribe, pursuant to Section 564d(a)(2) of the Termination Act, or whose ancestors personally withdrew from the tribe and had their interest in the tribal property converted to cash. The Ninth Circuit, in its prelude to analysis of the issues at hand, noted that *Kimball I*, a prior litigation of this same dispute,[4] held conclusively that the rights in abstract would indeed survive tribal termination. The state, however, conceded that issue and based its claim on the precepts that (1) such rights were retained only by those members who had not withdrawn from the tribal roll, therefore the protection was unavailable to the plaintiffs at bar; (2) those born after the effective date of termination were not covered by the terms of the treaty as the tribal rolls were also closed at that time; (3) treaty rights are inapplicable to land disposed of either to the government or to private interests; and (4) the state may regulate game-related activities for the purposes of conservation.[5]

The court rejected the first three contentions by referral to the opinion in *Kimball I* and the language of the Termination Act itself, pointing specifically to the "members thereof" clause contained in the statute.[6] In particular, the court ruled that its decision in this regard was not based upon rights to tribal property, because those were indeed given up, but that the clause cited made hunting and fishing rights individual and not communal in nature. Therefore, those rights would survive termination even as to Indians who had withdrawn from the tribe.[7] The court used as

2. Treaty of Oct. 14, 1864, 16 Stat. 707.
3. Act of Aug. 13, 1954, 25 U.S.C. §§ 564-564(x).
4. Kimball v. Callahan, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974).
5. Callahan v. Kimball, 590 F.2d 768, 771 (9th Cir. 1979).
6. Kimball v. Callahan, 493 F.2d 568-69 n.9 (9th Cir. 1974).
7. Callahan v. Kimball, 590 F.2d 768, 772 (9th Cir. 1979).

a base for this same proposition its citation to the rule enunciated in *McClanahan v. Arizona Tax Commission*[8] and *Mason v. Sams*,[9] that legislation with respect to Indian matters deals with communities or individuals with individual rights. Accordingly, the court ruled that an individual Indian enjoys a right of user in tribal property that is derived from the tribe's legal and/or equitable property rights. The fact that an individual Indian withdraws from the tribe does not affect his relationship with the tribe for purposes unaffected by legislative acts.[10]

The court held further that the only relevance of the tribal roll closing was that of determining which persons were to share in the distribution of property subsequent to the termination. Hunting and fishing rights retained thereby extend to all Klamaths.[11] The court did, however, note briefly that the state may employ such regulatory methods as may be necessary and mutually agreeable to effect conservation measures.

JURISDICTION: Federal Supremacy Under the Major Crimes Act

The authority of tribal court systems vis-á-vis the Indian Major Crimes Act of 1976[1] was tested in *United States v. Broncheau*[2] and found wanting by the Ninth Circuit. The defendant was indicted for assault upon a non-Indian within the Nez Perće reservation, in contravention of the Major Crimes Act. He alleged in his defense that (1) the tribal court had sole jurisdiction to punish Indians for offenses committed on Indian land; (2) the Major Crimes Act was unconstitutional in that it authorizes different treatment, based upon an "impermissible racial classification," for Indians and non-Indians and thereby denies due process of law and equal protection under the law; (3) his indictment was defective because it failed to allege that defendant was an enrolled Indian; and (4) if such allegation were unnecessary, the Major Crimes Act is void for vagueness.

The court dealt with the statutory interpretation problems first, defusing the constitutionality claims with its holding that an

8. 411 U.S. 164, 181 (1973).
9. 5 F.2d 255, 258 (W.D. Wash. 1925).
10. Callahan v. Kimball, 590 F.2d 768, 773 (9th Cir. 1979).
11. *Id.* at 776.
1. Pub. L. 94-297, 90 Stat. 585, 94th Cong., S. 2129, *amending* 18 U.S.C. § 1153.
2. 597 F.2d 1260 (9th Cir. 1979).

allegation of enrollment is not necessary under the statute but that a mere allegation of status as an Indian will suffice,[3] and denying that the result of such an interpretation would be the widespread use of arbitrary prosecutorial discretion. The court disposed of the vagueness theory with its reasoning that the term "Indian" has been "sufficiently judicially explicated over the years" to advise the reasonable person that his conduct may be proscribed thereby.[4] The court reiterated the test in *United States v. Rogers*,[5] that Indian status may be determined by (1) blood quantum, and (2) government or tribal recognition of the individual as Indian.

As to the jurisdiction of the federal courts in the matter, the Ninth Circuit found that such authority remained intact by virtue of *United States v. Wheeler*.[6] Referring to that precedent, the court noted that "Indian sovereignty exists only at the sufferance of Congress and is subject to complete defeasance."[7] The court then pointed out that unlike the General Crimes Act,[8] which recognizes the punitive authority of the tribe, the Major Crimes Act contains no exceptions to the exclusive exercise of federal jurisdiction over the offenses enumerated within it.[9] The court added that the new Act, if anything, strengthened the codification contained in the old Section 1153 Act.[10]

The court also denied that the statute was based upon "impermissible racial classifications" so as to render it constitutionally suspect upon its face, choosing instead to view the Act as dealing with Indians as a political, rather than racial, entity—an act which deals with the unique status of Indians as "once-sovereign peoples."[11] In further mitigation of Broncheau's claim, the court also emphasized that the defendant's treatment was the same, in accord with the mandate of *United States v. Antelope*,[12] as would have been afforded to any other person committing a like offense on federal land. Therefore, the court reasoned, the disparity in treatment received at the federal and state forums was

3. *Id.* at 1262.
4. *Id.* at 1263.
5. 45 U.S. 567 (1845).
6. 435 U.S. 313 (1978).
7. *Id.* at 323.
8. 18 U.S.C. § 1152.
9. United States v. Wheeler, 435 U.S. 313, 325 n.22 (1978).
10. United States v. Broncheau, 597 F.2d 1260, 1264 (9th Cir. 1979).
11. *Id.* at 1265.
12. 430 U.S. 641 (1977).

irrelevant to the case, so long as such federal treatment was "evenhanded."[13]

JURISDICTION: Indian Country Concept Extended to Indian Schools

The Supreme Court denied review of the Oklahoma Court of Criminal Appeals decision in *C.M.G. v. Oklahoma, 594 P.2d 798 (Okla. Cr. 1979).*[1] Denial of review left standing the decision that an Indian school reserved for the use of Indians is a dependent Indian community within the meaning of federal statute,[2] and thus the state of Oklahoma has no jurisdiction over crimes committed there.

The court found that when the land on which Chilocco Indian School is located was ceded to the United States, part of it was reserved for the settlement of Indians and for use as an Indian school. The court noted that the overwhelming majority of occupants and residents of the school are Indian and that all funding and services are provided by the Bureau of Indian Affairs. Therefore, citing the test used in *United States v. Pelican,*[3] the Court determined that Chilocco fit the definition for Indian country because the land "had been set aside for the use of the Indians as such, under the superintendence of the Government." In so holding, the Court found that Indian country need not inure to the benefit of a single tribe or of named tribes, and that the title to the land need not remain with the Indians who are to benefit from its use. Thus, since Article 1, Section 3 of the Oklahoma constitution prohibits state jurisdiction over Indian country, the federal government retains exclusive jurisdiction over Indian country located within Oklahoma boundaries, which includes Chilocco.

SOVEREIGNTY: Public Law 280 and State Regulation of Oil and Gas

Oklahoma's attempt to regulate oil wells on Indian trust land was upheld in the case of *Currey v. Corporation Commission of*

13. United States v. Broncheau, 597 F.2d 1260, 1266 (1979).
1. 100 S.Ct. 524 (Dec. 10, 1979).
2. 18 U.S.C. § 1151 (1970).
3. 232 U.S. 442 (1942).

Oklahoma, No. 51906 (Okla. June 12, 1979). The plaintiff's wells were located on Choctaw restricted land but were also spewing salt brine onto neighboring land. The Corporation Commission, exercising its regulatory power, issued a complaint and ordered the wells to be plugged. The issue to be dealt with was the state's assumed jurisdiction over federally restricted land, even though the state had disclaimed such jurisdiction in Article 1, Section 3 of its constitution. Under Public Law 280, a state must, where necessary, amend its constitution so as to assume the regulatory jurisdiction conferred by that same law. Oklahoma had not done this. Plaintiff's argument was that abrogation of power by the federal government requires an active assumption by the state before such power may be exercised at the state level.

The Oklahoma Supreme Court disagreed with this premise, holding instead that the state's action was valid, as Public Law 80-336 had made "all restricted lands of the Five Civilized Tribes . . . subject to all oil and gas conservation laws of the State of Oklahoma."[1] The court found the phrase, "where necessary," in Public Law 280 to be central to the dispute and held that by virtue of Public Law 80-336, no affirmative statutory enactment was necessary for Oklahoma to assume jurisdiction of this issue.

SOVEREIGNTY: "Smoke-Shop" Licensing

The Supreme Court denied review of the Tenth Circuit decision in *New Mexico v. United States, 590 U.S. 323 (10th Cir. 1979).*[1] Denial of review left intact the court's holding that the state of New Mexico lacks the authority to license and regulate liquor sales on tribal land. The state based its authority on a construction of 18 U.S.C. § 1611, which provides that certain federal liquor prohibitions do not apply to transactions within Indian country provided that the transaction is "in conformity both with the laws of the State in which such act occurs and with an ordinance duly adopted by the tribe. . . ." The court held that regulatory powers in Indian country belong to Congress except for those within the inherent jurisdiction of the tribe. Congress may delegate this authority to the state, but when it does so, it must be done in specific terms. After reviewing the legislative history of Section 1611, the court held that this section neither expressly nor impliedly delegates this authority to the state.

1. Pub. L. 80-336, 61 Stat. 731; Act of Aug. 4, 1967, ch. 459, § 11.
1. 100 S.Ct. 63 (1979).

TAXATION: Property Tax Exemption Not Extended to Income

The denial of certiorari by the Supreme Court left standing the United States Court of Claims decision in *Critzer v. United States, 597 F.2d 708 (1979)*[1] that income realized by an Indian from businesses and leases on buildings located on tax-exempt reservation land is not exempt from federal income tax. The Court of Claims had rejected plaintiff's argument that the income was derived solely and directly from the land because the buildings were part of the land. Instead, the court held that the improvements were capital assets, the utilization and management of which produced taxable income. The court analogized the situation to that in *Mescalaro Apache Tribe v. Jones*,[2] in which the Supreme Court upheld a gross receipts tax akin to an income tax, but denied the imposition of a compensating use tax as the equivalent of a property tax.

TAXATION: State Taxation on the Reservation

In *Confederated Tribes of the Colville Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1979), U.S. Supreme Court Docket No. 78-630, 48 U.S.L.W. 4668 (U.S. June 10, 1980)*, the tribes of the Colville Reservation (Colville), the Lummi and the Makah tribes challenged efforts by the state of Washington to impose and collect taxes on on-reservation cigarette sales by the tribes to non-Indian consumers. In addition, the tribes challenged the state's efforts to apply its vehicle excise taxes to Indian-owned vehicles and asserted that the state's assumption of jurisdiction was invalid.

The Washington District Court held: (1) The cigarette tax could not be applied to on-reservation transactions because it was preempted by the tribal taxing ordinance and constituted an impermissible interference with tribal self-government. Therefore, the retail sales tax could not be applied to tribal cigarette sales, and the state could not impose certain record-keeping requirements on the tribes in connection with various tax-exempt sales. (2) The vehicle excise taxes could not be imposed on vehicles owned by the tribes and their members. And (3) the state's

1. 100 S.Ct. 299 (1979).
2. 411 U.S. 145 (1973).

assumption of civil and criminal jurisdiction over the Lummi and Makah tribes was unconstitutional.

On appeal, reversing in part and affirming in part, the United States Supreme Court held: (1) The imposition of Washington's cigarette and sales taxes on on-reservation purchases by nonmembers of the tribes is not preempted by tribal taxation of the same transaction and the state may validly impose and enforce certain record-keeping requirements, as well as stamp affixation. (2) The motor vehicle and mobile home, camper, and trailer taxes cannot properly be imposed upon vehicles owned by the tribes or their members and used both on and off the reservations. (3) The state's assumption of civil and criminal jurisdiction over the Makah and Lummi reservations is lawful.

Of the several issues presented, the most significant was whether an Indian tribe preempts a state from the power to tax on-reservation purchases by nonmembers of the tribe by imposing its own tax on the transaction or by otherwise earning revenues from the tribal business. The main contention of the tribes was that cigarettes brought directly into the reservation were not sold untaxed. Rather, the tribes had imposed their own tax upon the merchandise thereby generating substantial revenues to fund various essential governmental services, including programs promoting the tribe's social and economic development. The tribes asserted that the imposition of additional state taxation on the same transaction would result in a competitive disadvantage causing substantial forfeiture of tribal revenues. Because of this economic impact, the tribes argued that the state taxes were preempted by federal statutes regulating Indian affairs, inconsistent with the principle of self-government, and invalid under the Indian commerce clause. The district court ruled in favor of the tribes, stating that the state tax was preempted because of the tribal tax regulating the same subject matter. The state tax was thereby in violation of the *Williams v. Lee*[1] test and thus posed an obstacle to the accomplishment or execution of congressional purpose. The district court also held a similar case, *Moe v. Confederated Salish & Kootenai Tribes*[2] inapplicable as precedent because there the cigarettes were sold by individual Indians, not by any tribal enterprise. In addition, there was no tribal tax imposed in *Moe*, and no direct economic benefit to the

1. 358 U.S 217 (1959).
2. 425 U.S. 463 (1976).

tribe as a whole. The Supreme Court, however, disagreed, stating that "the simple collection burden imposed by Washington's cigarette tax on tribal smokeshops is legally indistinguishable from the collection burden upheld in *Moe* . . . ."[3] Also contrary to the lower court, the Supreme Court ruled that the state did not run afoul of the principle of *Williams v. Lee*, "the right of reservation Indians to make their own laws and be ruled by them,"[4] merely because the result of imposing its taxes will be to deprive the tribes of revenues they currently are receiving.

Ultimately, the High Court reasoned that no principle of federal Indian law could substantiate the lower court conclusion, and that the state's interest in taxing nontribal purchases (including those made by Indians resident on the reservation but not enrolled in the governing tribe), outweighs any tribal interest that may exist in preventing the state from imposing its taxes. Accordingly, the Court held that although the tribes have the power to impose their cigarette taxes on nontribal purchases as an incident of sovereignty, the state is not thereby preempted from also imposing its sales and cigarette taxes upon nonmembers purchasing cigarettes at tribal smokeshops. No doubt the far-reaching effect of this decision will set an important precedent in Indian law.

3. Washington v. Confederated Tribes, U.S. Supreme Court Docket No. 78-650, 48 U.S.L.W. 4668, 4675 (U.S. June 10, 1980).

4. 358 U.S. 217, 220 (1959).