

American Indian Law Review

Volume 5 | Number 1

1-1-1977

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Recommended Citation

Criminal Law: Double Jeopardy; Due Process: Participation in Tribal Awards; Indian Lands: State Power of Eminent Domain; Indian Lands: Federal Power of Eminent Domain; Indian Reservations: Hunting; Jurisdiction: Viability of Tribal Jurisdiction over Non-Indians; Taxation: State Taxation of Non-Indian Lessees of Indian Lands: Tribes: Jurisdiction of Dispute between Hopi and Navajo; Tribal Courts: Exhaustion Doctrine, 5 AM. INDIAN L. REV. 255 (1977), <https://digitalcommons.law.ou.edu/ailr/vol5/iss1/10>

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RECENT DEVELOPMENTS

CRIMINAL LAW: Double Jeopardy

In *United States v. Wheeler*, 545 F.2d 1255 (9th Cir. 1976), the circuit court affirmed a district court decision that a Navajo Indian who pled guilty in tribal court to charges of contributing to the delinquency of a minor and disorderly conduct could not be later tried on federal charges of carnal knowledge of a female Indian under the age of sixteen years where the tribal court charge is a lesser included offense of the federal charge. Such action would violate the fifth amendment double jeopardy clause of the Constitution, according to the court. In Circuit Judge Sneed's opinion, he stated that tribal courts and federal courts are, in effect, arms of the same sovereign, not separate sovereigns as are states and the federal government. Analogizing to cases in which it was held that one may not be tried on the same charges in both territorial courts and military courts, nor in both municipal and state courts, Judge Sneed held that the double jeopardy proscription applies equally to tribal and federal courts. The court further held that in accordance with Supreme Court cases, where one is charged with a crime that is a lesser included offense of a crime with which he has already been charged in another court of the same sovereign, the double jeopardy provision of the Constitution is thereby violated.

DUE PROCESS: Participation in Tribal Awards

In *Delaware Tribal Business Committee v. Weeks*, — U.S. —, 97 S. Ct. 911, (1977), an Act of Congress had provided for distribution of funds to certain Delaware Indians pursuant to an award by the Indian Claims Commission based on an 1854 treaty violation by the United States. The "Kansas Delawares" in 1866 separated from the main tribe and are not a federally recognized tribe today. The Kansas Delawares were excluded from the award, even though they were lineal descendants of the Delaware Tribe as it existed at the time of the treaty violation in 1854. The Kansas Delawares were granted an injunction against distribution of the funds on the grounds that their exclusion was a denial of due process under the fifth amendment. The Supreme Court held that the award was made to the tribal entity of which the Kansas Delawares were no longer a part due to the 1866 treaty (Treaty of 1866, 14 Stat. 793). The Court further held that the exclusion of the Kansas Delawares

had occurred before, which indicated that Congress had historically distinguished them from the tribal entity and also that the exclusion was justified in order to prevent substantial administrative problems it thought would attach to wider distribution. On this basis, the Court found that the exclusion was constitutional and was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." (*Morton v. Mancari*, 417 U.S. 535 (1974)) Justice Stevens dissented, stating that the "statutory exclusion of the Kansas Delawares from any share in the fund . . . is manifestly unjust and arbitrary." He concluded that based on the facts there was no need for discrimination within the class, that there was no principled justification for the discrimination, and that there was no reason to believe that the discrimination was the product of actual legislative choice but due rather to a legislative accident.

INDIAN LANDS: State Power of Eminent Domain

In *Plains Electric Generation & Transmission Co-op v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976), a condemnation action was brought under the state of New Mexico's power of eminent domain. An Act of Congress, Act of May 10, 1926, 44 Stat. 498, provided, in essence, that lands of the Pueblo Indians of New Mexico may be condemned for any purpose consistent with state law. The Pueblo appealed an adverse decision and challenged the validity of the 1926 Act. The court held that although there had been no express repeal of the Act by Congress, the Act was repealed "by implication." The repeal by implication was based on the fact that the 1926 Act was irreconcilably in conflict with later acts and that later acts cover the whole subject of the earlier Act and were intended as a substitute. Therefore, it was held that the district court lacked jurisdiction to hear a case based on state condemnation under the 1926 Act.

INDIAN LANDS: Federal Power of Eminent Domain

In *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002 (8th Cir. 1976), the United States brought suit to acquire by eminent domain certain Indian lands for use in a recreation project. The Winnebago Tribe appealed a finding of the district court that the United States has the authority to condemn the tribe's land. On appeal it was undisputed that Congress has the power to abrogate treaties which set aside lands for Indian tribes in order to

permit the taking of those lands by eminent domain. However, the court held that Congress had never exercised that power. The court stated that rights secured by treaty will not be deemed abrogated or modified absent a "clear expression" of congressional purpose. Lacking any reference to abrogation of the Winnebago Treaty of 1865 for such a purpose in either committee reports or statutory language, Indian lands were held not to be available for acquisition by eminent domain.

INDIAN RESERVATIONS: Hunting

In *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976), the appellees were hunting guides who took two hunters onto the Crow Indian Reservation in Montana for the purpose of hunting elk. The "hunters" were persons acting under the auspices of the Bureau of Sport Fisheries and Wildlife and authorized to do whatever was necessary to complete their investigations. The appellees were charged with trespass on the Crow Reservation, violation of the Lacey Act [18 U.S.C. § 43] prohibiting interstate transportation of illegally killed animals, and conspiracy to violate the Lacey Act. The government appealed a dismissal of the indictment and the Ninth Circuit Court reversed, holding that 18 U.S.C. § 1165 proscribes unauthorized entry onto an Indian reservation for the purpose of hunting, trapping, or removal of game, and that the participation of undercover agents did not constitute an authorization for the appellee's trespass or in any other manner make lawful what would otherwise be an unlawful trespass. The court also refused to accept appellee's argument that 18 U.S.C. § 1165 does not extend to the activities of hunting guides. The circuit court did state, however, that 18 U.S.C. § 1165 does not directly prohibit hunting and fishing on Indian reservations but makes the act of going on the reservation for that purpose illegal. The Lacey Act, prohibiting the interstate transportation of illegally killed animals, requires an illegal killing for conviction under the Act. The government argued that the killing of the elk was illegal under Section 1165, but the circuit court held that Section 1165 was not an attempt to regulate hunting and fishing and was a mere trespass statute. Therefore, Section 1165 could not be used as a predicate for a conviction under the Lacey Act. The court found that there was no illegal killing by the appellees under either Section 1165 or under state law, but remanded, stating that if the undercover agents were without state authorization to make kills, then any kills would be illegal on the part of the agents. This

would support an indictment against the appellees under the Lacey Act. The circuit court reversed the dismissal of the conspiracy counts, citing traditional conspiracy theories.

JURISDICTION: Viability of Tribal Jurisdiction Over Non-Indians

In *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), Oliphant appealed a denial of a writ of habeas corpus, alleging that a tribal court had no criminal jurisdiction over him. Oliphant was a non-Indian arrested on the Suquamish Reservation in Washington. In affirming the district court's denial of the writ, the circuit court considered first, what the original sovereign powers of the tribe were, and then, how far and in what respect the powers had been limited. Initially, the court held, criminal jurisdiction was an inherent power of the sovereignty that the Suquamish originally possessed. That sovereign power could only be modified or terminated by a relevant treaty or congressional action. Two treaties between the United States and the Suquamish were cited and neither relinquished any criminal jurisdiction. Several statutes were argued by Oliphant to support his position. The court found that 18 U.S.C. § 1152, which extends federal enclave law to Indian country, neither declared exclusive federal jurisdiction nor extinguished tribal jurisdiction. Oliphant also argued under the Indian Civil Rights Act of 1968, 25 U.S.C. Section 1302, but the court held that the statute merely applies certain due process limitations on the exercise of criminal jurisdiction, but does not withdraw it. The court also found that although the state of Washington had at one time assumed criminal jurisdiction over Indian country within the state by virtue of federal law, Washington had since proclaimed retrocession of that power under applicable federal law. The court found that even if retrocession were invalid under state law, federal law controlled.

TAXATION: State Taxation of Non-Indian Lessees of Indian Lands

In *Fort Mojave Tribe v. San Bernadino County*, 543 F.2d 1253 (9th Cir. 1976), the Indian tribe appealed a California District Court decision upholding a county possessory interest tax imposed on non-Indian lessees of tribal lands. After deciding that state action had not been preempted by federal legislation, the court applied the test of *Williams v. Lee*, [358 U.S. 217 (1958)] to

determine whether a state statute not otherwise preempted is invalid. *Williams* held that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." The *Williams* test protects state interests up to the point where tribal self-government would be affected. The court here held that any interference with tribal self-government was not serious, that no Indian or Indian land was subjected to direct state court process, and that the only effect of the tax on Indians was an "indirect economic burden," which would perhaps reduce the revenues on their leases. The lessee would be liable for the tax and no Indian could be taken into court as was the case in *Williams*.

TRIBES: Jurisdiction of Dispute Between Hopi and Navajo

Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir. 1976), is the most recent development growing out of the long-standing Hopi-Navajo feud concerning joint use areas of the Hopi and Navajo reservations. Prior judicial and congressional action had resulted in the Navajo being ordered to reduce the number of livestock grazing in the joint use area and being cited for contempt for failure to comply. In 1974 Congress passed an act which directed the Secretary of Interior to commence the reduction of livestock. The Navajo then asserted that the district court no longer had jurisdiction to grant relief with respect to livestock reduction as the circuit court decided it did in *Hamilton v. Naka* [453 F.2d 152 (1974)]. The Court of appeals decided that this argument was erroneous and that the 1974 act in no way affected the district court's jurisdiction and, therefore the original plan requiring reduction remained effective without any extension of time. The circuit court also decided that court action cancelling grazing permits violated the Administrative Procedures Act requiring notice and hearing (5 U.S.C. § 706). However, the court held that those procedures were not applicable because the district court was vested with the authority to determine grazing rights, not an agency.

TRIBAL COURTS: Exhaustion Doctrine

In *St. Marks v. Chippewa-Cree Tribe of Rocky Boy*, 545 F. 2d 1188 (9th Cir. 1976), the plaintiff had been barred by the tribal court from running for tribal judge in one election and for tribal council in another election. He was barred for failure to satisfy the

physical residency requirement in both instances. The plaintiff challenged that requirement in tribal court with respect to the second election and sued in district court with respect to the first election. The district court dismissed the action on the grounds that the plaintiff had not exhausted his tribal remedies. While the district court action was still in process, the plaintiff had been dismissed from the tribal action, the tribal court apparently holding the residency requirement valid. The Ninth Circuit Court of Appeals held that the plaintiff satisfied the jurisdictional precondition of exhaustion of tribal remedies as specified in the Indian Civil Rights Act (25 U.S.C. § 1302), even though the precondition was satisfied *after* the invocation of federal court aid rather than before. The court distinguished an earlier Ninth Circuit case, *Howlett v. Salish & Kootenai Tribes* [529 F.2d 233 (9th Cir. 1976)] (see Recent Developments, Vol. IV, No. 1), stating that the time element here was not in issue in that case. The court stated that the exhaustion requirement was not inflexible and was imposed to further the congressional goals of preserving and strengthening Native American cultures by insuring that tribal institutions are not denied the opportunity to resolve tribal disputes or make tribal policy.

The court set up a test to determine when the exhaustion remedy will be required. First, it must be determined whether any meaningful tribal remedy exists; second, if such a remedy does exist, it must be determined whether it in any way serves the purpose for which it was intended; and third, if it does serve such a purpose, the need to preserve and strengthen tribal institutions must be balanced against the need to immediately adjudicate alleged deprivations of individual rights. In applying the test to this case, the court held that no balancing was necessary because the tribal court had already ruled on physical residency requirements and no purpose would be served by requiring the tribal court to repeat its ruling. Consequently, the exhaustion requirement was fulfilled albeit *after* resort was had to a federal court.