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Recommended Citation

Civil Rights; Challenging Tribal Membership Ordinance; Constitutional Law: Indigent Indians' Right to Counsel in Tribal Court; Constitutional Law: Tribal Judge Serving as Tribal Prosecutor as Violation of Indian Civil Rights Act; Indian Lands: Termination of Aboriginal Land Rights; Jurisdiction: Exhaustion of Tribal Remedies Required; Jurisdiction: State Jurisdiction Where "Reservation" Lands Not Owned by Indians; Land Rights: Determination of Property Rights in Mineral Interests Under Allotted Lands, 4 AM. INDIAN L. REV. 343 (1976), https://digitalcommons.law.ou.edu/ailr/vol4/iss2/10

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RECENT DEVELOPMENTS

CIVIL RIGHTS: Challenging Tribal Membership Ordinance

Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976) concerns a 1939 Santa Clara Pueblo ordinance decreeing that the children of female members married to nonmembers would be ineligible for pueblo membership, while children of male members married to nonmembers would be granted pueblo membership. The ordinance was challenged by female pueblo members and their children on the grounds that it was violative of the equal protection provisions of the Indian Civil Rights Act of 1968. [25 U.S.C. § 1302(8)] The district court (see Recent Developments Vol. IV, No. 1) found for the defendant pueblo, noting that the striking of the ordinance would alter the pueblo’s culture and that the male-female distinction was rooted in traditional values.

The circuit court held that the Indian Civil Rights Act was modeled after the Constitution of the United States and is to be interpreted in the light of constitutional law. The court discussed a “weighing test” and found that the interests of the pueblo must be considered in determining whether such discrimination would be tolerated. Noting that the first amendment nonestablishment clause is not applicable to Indian tribes because it would endanger the continued existence of tribal theocracies, the court nevertheless found that sex discrimination of this type could not outweigh the guarantee of equal protection as so guaranteed to every other American. While recognizing that blood-quantum requirements for pueblo membership is a valid basis for discrimination, the court stated that the instant ordinance was not attributable to venerable tradition and that it originated from economic considerations (to prevent depletion of pueblo resources) and was, therefore, arbitrary.

The court mentioned several times the fact that the children involved in the suit lived on the pueblo, spoke the Tewa language, and were admitted to pueblo religious practices. Although the case was not decided on this point, it should be recognized that the suit was a class action and is applicable to those “similarly situated.” The case seems to leave open the question of pueblo membership for children of female members when the family does not live in the pueblo. Nonresidency might be a more valid basis on which to impose nonmembership, although if nonresident children of male members are accorded membership then membership must be accorded to nonresident children of female members to be consistent with the spirit of the law of this case.

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CONSTITUTIONAL LAW: Indigent Indians’ Right To Counsel in Tribal Court

In Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976), a Lummi criminal defendant, tried in a tribal court for violation of the tribal code, appealed his imprisonment, claiming that he should have been afforded the right to have counsel appointed because he was indigent. The circuit court held that the sixth amendment right to counsel, as set forth in Gideon v. Wainwright [372 U.S. 335 (1963)], does not apply to Indian tribes through the 1968 Indian Civil Rights Act [25 U.S.C. § 1302]. The Indian Civil Rights Act prohibits a tribe from denying to any person in a criminal proceeding the right to have counsel for his defense, at his own expense. Citing legislative history, the court held that it was the intent of Congress, based partially on arguments by Indian tribes themselves, that the Constitution of the United States was not to be adopted in toto by virtue of the passage of the Indian Civil Rights Act. The rationale behind the legislative history, as stated by the court, was that there is no bar over which the tribal court would have jurisdiction from which it could select attorneys and compel representation. The Lummi constitution stated that no member shall be denied any of the rights or guarantees enjoyed by non-Indian citizens under the Constitution of the United States. This obviously would include the sixth amendment right to counsel. The Lummi constitution also stated that no member shall be denied the rights and guarantees of the Indian Civil Rights Act. While the two constitutions could be read consistently, the court relied on its “intent test” and conclusively held that the sixth amendment right to counsel is not applicable to Indian tribes.

CONSTITUTIONAL LAW: Tribal Judge Serving As Tribal Prosecutor As a Violation of Indian Civil Rights Act

In Wounded Knee v. Andera, 416 F. Supp. 1236 (D.S.D. 1976), the petitioner, a member of the Crow Creek Sioux Tribe, was tried and found guilty in tribal court of disorderly conduct. At the trial the tribe as prosecutor was not officially represented, and the judge asked questions and cross-examined witnesses, as well as fulfilling his judicial duties. The petitioner appealed that the judge was concurrently acting as tribal prosecutor and that such action denied her a fair trial and was a denial of due process under the Indian Civil Rights Act of 1968 [28 U.S.C. § 1302 et seq.]. The tribe argued that because the Indian Civil Rights Act does not require counsel for defendants, by analogy, none should be required for the tribe. The
tribe stated further that it was financially unable to hire a prosecutor and that cultural and traditional Indian values would be injured if the tribe were required to hire a prosecutor. The court in sustaining petitioner’s view held that serving the dual functions of tribal judge and tribal prosecutor was indeed violative of due process. The court reasoned that a defendant, although denied an attorney as a matter of law, and inarticulate though he may be, can still proceed before a court. A tribe, however, is an impersonal entity and, therefore, requires personal representation. Furthermore, financial obstacles can in no case be a reason for any governmental entity to deny personal rights and liberties secured by the Indian Civil Rights Act.

INDIAN LANDS: Termination of Aboriginal Land Rights

In United States v. Gemmill, 535 F.2d 1145 (9th Cir. 1976), several Indian defendants attacked their convictions for theft of government property (cutting Christmas trees on national forest lands), claiming that the Pit River Indian Tribe holds title to the land on which the violations occurred. The court held that Indian title is a permissive right of occupancy granted by the federal government to the aboriginal possessors of the land and may be extinguished by the federal government at any time. The court further held that the manner, method, and time of extinguishment are within the complete control of the United States. A finding that the Indian title had been extinguished was based on concentrated military action against the Pit River Indians culminating in a decisive victory in 1867, inclusion of the land in the national forest system in the early 1900’s, and payment of compensation to the Pit River Indians for the lands in 1964. Although recognizing that it may be difficult to determine the exact date of termination, the court decided that the century-long assertion of control over the Pit River Indians and their lands was sufficient to destroy any Indian claim to title by virtue of aboriginal possession.

JURISDICTION: Exhaustion of Tribal Remedies Required

In Bruenette v. Dann, 417 F. Supp. 1382 (D. Idaho 1976), an associate judge of the tribal court of the Shoshone-Bannock tribes was arrested on a contempt charge issued by the chief judge and subsequently terminated from her position by the Business Council. She then sued in United States District Court the chief judge, the Business Council, and the tribe for violation of her civil rights under the Indian Civil Rights Act of 1968. The court, in granting the defendant’s motion for summary judgment, found that while any

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action charging a violation of the Indian Civil Rights Act is within the jurisdiction of the United States District Court, the plaintiff must first exhaust all possible tribal remedies. The court held that because the plaintiff was an associate judge, she was certainly aware of the tribal appeals process and would not be heard to say that just because the appeal would be taken to the named defendants that it would be ineffective or an exercise in futility. The court concluded that it is essential to the strengthening of the tribe’s powers of self-government that tribal remedies be exhausted, even in a claim under the Indian Civil Rights Act.

JURISDICTION: State Jurisdiction Where “Reservation” Lands Not Owned by Indians

In Brough v. Appawora, 553 P.2d 934 (Utah 1976), an auto accident case, the Supreme Court of Utah held that where the accident occurred on a county road on lands previously held by the Ute Tribe and later sold, the state of Utah has jurisdiction over any enrolled Ute tribal member involved. The Utah Supreme Court based its decision on the fact that the Ute Tribe no longer had a property interest in the land. Justice Tuckett’s dissent points out that Indian tribal courts have jurisdiction over cases arising in Indian country and that under federal statutes Indian country includes all land within the limits of any Indian reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation. Justice Tuckett continues by indicating that where an Indian reservation has been established by Congress, only Congress can terminate the reservation or change its status. The basis of the majority opinion is on jurisdiction derived from land rights and the dissent is based on jurisdiction derived from civil rights conferred on Indians by the federal government.

LAND RIGHTS: Determination of Property Rights in Mineral Interest Under Allotted Lands

Northern Cheyenne Tribe v. Hollowbreast, 96 S.Ct. 1993 (1976). In 1926 Congress enacted an allotment act applicable to the Northern Cheyenne Reservation [Act of June 3, 1926, 44 Stat. 600]. The act provided for individual allotments and Section 3 reserved all “... timber, coal, or other minerals ... for the benefit of the tribe.” The section contained a proviso that at the end of fifty years the coal and other minerals “... shall become the property of the respective allottees or their heirs.” During the 1960’s the value of the coal reserves increased significantly, and Congress moved in 1968 to
amend the 1926 act to reserve all mineral rights to the tribe in perpetuity. The crucial issue was whether the 50-year proviso gave the allottees a vested right in the minerals. The 1968 act terminating the allottees' rights was conditioned on a judicial determination that the allottees had no vested mineral rights. This case is the culmination of that judicial determination. The Supreme Court decided that based on legislative history, the intent of the tribe in requesting allotment and the intent of the Congress in executing the act was that only the surface was to be allotted. It was held that the 50-year proviso could only grant an expectancy and was therefore subject to termination by a subsequent congressional act without liability for "just compensation" under the fifth amendment.