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LAND USE: EXCLUSION OF NON-INDIANS FROM TRIBAL LANDS—AN ESTABLISHED RIGHT

Joe D. Dillsaver

The Solicitor of the Department of the Interior, in a 1970 opinion, concluded that Indian tribes do not have criminal jurisdiction over non-Indians on tribal lands.¹ William R. Baldassin and John T. McDermott, in "Jurisdiction over Non-Indians: An Opinion of the 'Opinion',"² take issue with the Solicitor. They trace the development of the policy of criminal jurisdiction over non-Indians, contrast this problem with the idea of tribal sovereignty, and conclude that the time has arrived to recognize tribal authority over all happenings within the boundaries of a reservation.³

While complete criminal jurisdiction over the disposition of non-Indians is lacking for tribal authorities,⁴ a partial control over non-Indians is established and has been reaffirmed in two recent cases.⁵ This control is the right to exclude non-Indians from reservation land.⁶ This exclusion right does not address criminal jurisdiction alone but also encompasses other activities.⁷ The following discussion will trace the development of this exclusion, culminating with the two recent cases mentioned above.

Development

In 1821 the Secretary of War of the United States asked the Attorney General for an opinion of the rights of the Seneca Nation to exclude trespassers from its land.⁸ The opinion concluded that the Senecas did possess the exclusion right: "So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent."⁹

In 1904 the Supreme Court of the United States recognized the right of the Chickasaw Nation to exclude non-Indians. *Morris v. Hitchcock*¹⁰ involved the right of the Chickasaws to enforce a tax on livestock in compliance with legislation passed in 1898. Under the legislation, failure to comply with the act would result in removal of a noncitizen from the Chickasaw Nation. The Court not only acknowledged the right of the tribe to establish the conditions under which the noncitizen could be on the Chickasaw lands, but concurred with the tribe's belief that they could exclude those who did not comply.¹¹

A similar case in 1905, *Buster v. United States Inspector*,¹² reinforced the exclusion right. The case centered on the right of the Creek Nation to charge noncitizens who had purchased lots in town-sites within the nation a permit tax for the privilege of trading on the lots. The Court upheld the authority of the Creek Nation to prescribe the conditions to be followed by noncitizens conducting business within the Indian land.¹³ "It was one of the inherent and essential attributes of its original sovereignty."¹⁴ Part of this authority was the power to enforce the law¹⁵ and to have the noncitizen removed from the tribal lands.¹⁶

Two later United States government publications commented on the power of Indians to exclude. Felix Cohen, in the *Handbook of Federal Indian Law*, wrote of the protection of tribal possessions and said that the "use of reasonable force" was privileged to exclude trespassers.¹⁷ Also, the 1958 *Federal Indian Law*, published by the Department of the Interior, recognized the power of the tribe to exclude nonmembers from its territory.¹⁸

Recent Cases

Two recent cases give further credence to the authority of a tribe to exclude nonmembers from Indian land. The first case is the *Quechan Tribe v. Rowe*, a 1972 decision from the Southern District of the United States District Court of California.¹⁹ This action is for declaratory and injunctive relief by the tribe against the sheriff of Imperial County, California, to prevent him from interfering with tribal game wardens carrying out their duties.

The chief game warden of the Quechan Tribe saw three non-Indian youths carrying firearms during dove season on the Fort Yuma Reservation. Since the youths lacked the proper tribal hunting license, the warden relieved them of their weapons and instructed them to reclaim them at the tribal headquarters. The youths reported the incident to the Imperial County sheriff, who arrested the game warden for grand theft. However, no actual criminal prosecution followed.

The Quechan Tribe asserts and the court agrees that if a tribe has been given the right "to hunt, trap, or fish or to control, license or regulate hunting, trapping, or fishing by any federal treaty, agreement or statute," and there is a conflict between state and Indian law, the state law is unenforceable on Indian land.²⁰ This right was established and recognized by the Department of the Interior for the plaintiff tribe in 1936.²¹

In describing the right of tribal enforcement of its hunting and

fishing controls, the court refers to Ordinance 8-6-64, passed by the Quechan Tribal Council on August 6, 1964.²² This ordinance "provides that trespassers may also be referred to appropriate federal authorities for prosecution under 18 U.S.C. § 1165."²³ Even though founded in the hunting and fishing rights of the Quechan Indians, the court ultimately found that the tribe does not have the right to exclude trespassers in protection of those rights.²⁴ The perspective is narrowed to a specific enforcement of hunting and fishing rights, but the implication is that the right to exclude is inherent in tribal rights.²⁵

A March 19, 1975, decision, *Ortiz-Barraza v. United States*,²⁶ by the Ninth Circuit Court of Appeals, further strengthens the Indian exclusionary right of tribal nonmembers on reservation land. *Ortiz-Barraza* is not only persuasive for the point of exclusion, "intrinsic in the sovereignty of an Indian tribe is the power to exclude trespassers from the reservation,"²⁷ but establishes the right of partial criminal jurisdiction over non-Indians, at least up to the point of their delivery to the appropriate state or local authorities.²⁸

A Papago Indian Reservation police officer²⁹ observed a white pickup truck with a camper on Papago land. The truck, coming from the direction of the Mexican border, was driven by a young Mexican male whom the officer did not recognize. The officer knew all the non-Indians in the vicinity and decided to check the registration of the truck. The young Mexican was not able to produce either a driver's license or a vehicle registration. The officer then proceeded to search the camper and found marijuana in it.

Ortiz-Barraza was convicted for importation and possession of marijuana and his only basis for appeal was that the reservation officer did not have the authority to conduct the search. The court of appeals affirmed the actions of the trial court, but interestingly enough, spent most of the decision dealing not with the question of search and seizure but the right of the tribe to expel nonmembers.³⁰

The court of appeals drew its authority to affirm the tribe's right from several sources. First, the court assumes this is an inherent right of the sovereignty of an Indian tribe. "A tribe needs no grant of authority from the federal government in order to exercise this power."³¹ Second, the court found authority in the constitution of the Papago Indians and acceptance by the Bureau of Indian Affairs in 1937 of that constitution. In Article 5, Section 3, the Papago Council is empowered "[t]o remove or exclude from any of the three Papago Reservations nonmembers who occupy reservation land without lawful authority and whose presence may be injurious to the peace, happiness, or welfare of the members of the tribe."³² More

specifically, the court noted the power of the tribe to arrest any person who is not a member of the tribe for a federal or state crime and forcibly eject them from the reservation. In responding to the contention that tribes could not exercise criminal jurisdiction over non-Indians, the court states: "Such holdings, if presently valid, have not derogated from the sovereign power of tribal authorities to exclude trespassers who have violated state and federal law by delivering the offenders to the appropriate authorities."³³

To dispel any doubts of the tribal power to exclude non-Indians, the court of appeals specifically states that the power to regulate is backed by the power to enforce. "The power of the Papago to exclude non-Indian state and federal law violators from the reservation would be meaningless were the tribal police not empowered to investigate such violations. Obviously, tribal police must have such powers."³⁴

One other significant part of this decision deserves comment. This deals with an apparent partial overruling of *Ex parte Kenyon*³⁵ which held that tribes cannot exercise any criminal jurisdiction over non-Indians. This decision and its effect is commented on and criticized in the article by Baldassin and McDermott.³⁶ The court of appeals in *Ortiz-Barraza* questions the persuasion of *Kenyon*, "if presently valid,"³⁷ and flatly rules that the decision has "not derogated" the authority of a tribe to exclude trespassers who violate state or federal laws.³⁸

Conclusion

The ability to enforce the exclusion right, as stated before, is the result of interplay between federal and tribal statutes and principles of sovereignty. In *Quechan* the tribal ordinance to exclude was tied directly to the enforcement of a federal statute.³⁹ The power to exclude in *Ortiz-Barraza* springs from the Papago constitution adopted in January, 1937.⁴⁰

These examples from *Quechan* and *Ortiz-Barraza* suggest a perimeter of extension of the tribal right to exclude. In *Quechan* the court recognized the right of the tribe "if the Indians can show that some federal treaty, agreement, or statute authorizes them to adopt rules and regulations governing" the trapping, fishing, and hunting on tribal lands.⁴¹ The tribe, of course, had little difficulty in doing this. The court in *Ortiz-Barraza* went straight to the right of the Papago Tribe to have a constitution⁴² and to enforce its provisions:

We find that the actions of the Papago Council, taken together with the Papago Constitution and the applicable law previously discussed, clearly established the authority of a tribal police officer

... to investigate any on-reservation violations of state and federal law, where the exclusion of the trespassing offender from the reservation may be contemplated.⁴³

The conclusion is preeminent that Indians have a solid base for significant exclusion powers of non-Indians from tribal lands if the power is tied to the enforcement of a federal statute or is inherent in legislation springing from a tribal constitution.

NOTES

1. M-36810, 77 I.D. 113 (1970).
2. Baldassin & McDermott, *Jurisdiction over Non-Indians: An Opinion of the "Opinion,"* 1 AM. INDIAN L. REV. 13 (1973).
3. *Id.*
4. See *Ex parte Kenyon*, Fed. Cas. No. 7,720 (C.C. Ark. 1878), and Solicitor's Opinion, M-36810, 77 I.D. 113 (1970).
5. *Ortiz-Barraza v. United States*, 512 E.2d 1176 (9th Cir. 1975); *Quechan Tribe v. Rowe*, 350 F. Supp. 106 (S.D. Cal. 1972).
6. *Ortiz-Barraza v. United States*, 512 F.2d 1179 (9th Cir. 1975).
7. *Quechan Tribe v. Rowe*, 350 F. Supp. 106 (S.D. Cal. 1972). Enforcement of tribal hunting and fishing laws are among these activities.
8. 1 OP. ATT'Y GEN. 465, 466 (1821).
9. *Id.*
10. 194 U.S. 384 (1904).
11. *Id.*
12. *Buster v. United States Inspector*, 135 F. 947 (8th Cir. 1905).
13. *Id.* at 950.
14. *Id.*
15. *Id.* at 956.
16. *Id.* at 959. This action was brought by Buster in 1901 to prevent the removal of himself and others from Creek lands because of their failure to pay the permit tax required for doing business. The action was dismissed and then Buster appealed. In 1902, legislation was passed which would not allow the removal of non-Indians if they were in lawful possession of any lot in a townsite in Indian Territory. Buster relied on this 1902 legislation on appeal. The court rejected Buster's argument that he could not be excluded because the 1902 legislation had not been enacted and "the defendants had lawful authority both to stop their business and to depart them from the territory."
17. F. COHEN, *FEDERAL INDIAN LAW* 306 (1942).
18. *FEDERAL INDIAN LAW* 438, 439 (Dept. of Int. ed. 1958).
19. 350 F. Supp. 106 (S.D. Cal. 1972).
20. *Id.* at 109, referring to 18 U.S.C. § 1162.
21. *Id.* at 108.
22. *Id.*
23. 18 U.S.C. § 1165 (1966) deals with the prosecution and penalties for fishing, hunting, and trapping on Indian lands without permission.
24. Considering 18 U.S.C. § 1162 (1966), 18 U.S.C. § 1165 (1966), and the Quechan Tribe's Ordinance 8-6-64, the clarity of the tribe to exclude is manifest. Through 18 U.S.C. § 1162, the tribe is guaranteed the absolute control over the hunt-

ing, fishing, and trapping on their lands. Nothing "... shall deprive ... any Indian tribe, band or community of any right, privilege or immunity afforded under any Federal Treaty, agreement or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." 18 U.S.C. § 1165 provides that for a person on Indian lands to hunt, trap, or fish, he must have permission of the tribe to do so or he is liable for criminal prosecution. The Quechan's right to regulate the hunting, fishing, and trapping on their land was recognized in 1936 by the Department of the Interior. Ordinance 8-6-64 gives the Quechans the right to remove trespassers from their reservation to federal authorities under 18 U.S.C. § 1865, which in turn upholds 18 U.S.C. § 1162, the right to control hunting, fishing, and trapping.

25. 350 F. Supp. 106 (S.D. Cal. 1972).

26. 512 F.2d 1176 (9th Cir. 1975).

27. *Id.* at 1179.

28. *Id.* at 1180.

29. See HAGEN, INDIAN POLICE AND JUDGES (1966).

30. 512 F.2d 1179, 1180 (9th Cir. 1975).

31. *Id.* at 1179.

32. *Id.*

33. *Id.*

34. *Id.* at 1180.

35. Fed. Cas. No. 7,720 (C.C. Ark. 1878). This case involved a non-Indian who was tried in a Cherokee court for larceny. The court for the Western District of Arkansas released him, holding that the Indian court had no jurisdiction over a non-Indian for a criminal offense.

36. 1 AM. INDIAN L. REV. 14 (1973).

37. 512 F.2d 1176, 1179 (9th Cir. 1975).

38. *Id.*

39. 350 F. Supp. 106 (S.D. Cal. 1972). See note 24 *supra* for a full discussion of the interplay.

40. 512 F.2d 1176, 1180 (9th Cir. 1975).

41. 350 F. Supp. 106, 110. (S.D. Cal. 1972).

42. The constitution was approved in 1937 by the Bureau of Indian Affairs.

43. 512 F.2d 1176, 1180 (9th Cir. 1975).