STATE LAW IN INDIAN COUNTRY: ZONING, TAXATION AND OTHER CONSIDERATIONS

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A. Introduction

One area of federal Indian law that has undergone significant change is state regulation in Indian country. Major legal battles have been fought regarding the authority of state's to regulate land that exists within the exterior boundaries of an Indian reservation. While some cases arise regarding a state's efforts to regulate land or parties within a reservation, often the cases arise regarding a tribe's effort to regulate land held by non-Indians within the borders of the tribal reservation. A court's determination that a tribe has no regulatory authority leaves open the door for state regulation.

In the preeminent case of *Montana v. United States,* the United States Supreme Court discussed the ability of tribes to assert their regulatory jurisdiction over non-Indians.[1] "A tribe [has jurisdiction over] nonmembers who enter [into] consensual relationships with the tribe or its members [and] over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[2] In *Montana* the Court concluded that the Crow Tribe could not prohibit a nonmember from hunting and fishing on that portion of the reservation that was owned in fee by non-Indians. When a state attempts to exercise regulatory jurisdiction over portions of the reservation, courts consider whether state regulation has been preempted by specific treaties and federal laws, but may further consider whether state jurisdiction "would infringe on the right of the Indians to govern themselves."[3] This tension between state and tribal regulatory jurisdiction is an ongoing issue in federal Indian law.

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1 *Montana v. United States*, 450 U.S. 544 (1981).
2 450 U.S. at 565-66.
3 *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983).

We begin with the assumption that states do not have authority to regulate the affairs of Indians on-reservation.[4] State jurisdiction over on-reservation Indians requires express federal statutory authorization coupled with strict compliance by a state.[5] Tribal sovereignty retains its significance as a backdrop against which the relevant federal treaties and statutes can be read. When federal law is necessary to preempt state regulation of tribal members on-reservation, treaties and executive orders generally provide for that preemption.[6] The nature of tribal sovereignty, and a tribe's power over its members also precludes state authority. State regulation that would "infringe on the right of reservation Indians to make their own laws and be ruled by them" is invalid.

A State's rights to regulate fishing within Indian country is a good example of the changing law. Application of traditional principles of tribal sovereignty, bolstered by the lack of any Congressional delegation of authority over tribal fishing or hunting on-reservation, would lead to the conclusion that tribal members are free from state law when fishing or hunting on their reservations. Numerous courts have so held.[7] Nevertheless, in a 1977 decision, the Supreme Court held that a state court had jurisdiction to enforce state proposed regulations against tribal members fishing on-reservation.[8] There was no case support for the Court's decision, and there was no federal statute that would support the decision. Rather, the Court seemed to create "new" court power because it felt the fish were in danger as well as the off-reservation right of non-Indians.

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4 *Williams v. Lee*, 358 U.S. 217, 220 (1959), United *States v. Kagama,* 118 U.S. 375, 281-82 (1886).

5 *Kennerly v. District Court*, 400 U.S. 423 (1971).

6 *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

7 *See*, *e.g., Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1946); *Pioneer Packing Company v. Winslow*, 159 Wash. 655, 294 Pac. 557 (1930); *Arnett v. V. Gillnets*, 48 Cal. App. 3rd 454, 121 Cal. Rptr. 906 (1975), *cert. denied*, 425 U.S. 907 (1976).

8 *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*). *See, also*, *Montana v. United States*, 450 U.S. at 561.

The court reasoned that if tribal members had an unregulated right to harvest fish on-reservation they could frustrate the non-Indian off-reservation right to take fish. Moreover, tribes could, so said the Court, destroy the fishery through over fishing. The Court followed the statement of Justice Douglas in an earlier decision in the same case. There Justice Douglas found that neither party had the right to destroy the fishery. "The police power of the state is adequate to prevent the steelhead from following the fate of the passenger pigeon, and the treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."[9] There were no facts before the Court to indicate that the Puyallup Tribe was improperly regulating the on-reservation fishery, or that it had embarked on a predetermined plan to destroy the resource or to violate non-Indians' off-reservation rights.

The decision in *Puyallup III* appears to allow state regulation of on-reservation fishing by tribal members. The decision is remarkable because the case had never addressed the on-reservation issue: it started out as an off-reservation case. Moreover, the Puyallup Tribe was not even a proper party. The Court failed to address the fact that the state of Washington in a related case admitted it had no on-reservation jurisdiction to regulate tribal members.[10] While the decision in *Puyallup III* may be limited in its impact generally, and in its scope, it does raise the specter of additional regulatory interference by a state within the borders of an Indian reservation. In the alternative, it may be that *Puyallup III will be* limited by its facts: (i) virtually all of the land on the Puyallup Reservation had been sold to non-Indians, (ii) there was no tribal trust land adjacent to the Puyallup River, and (iii) non-Indians had historically fished on the Puyallup Reservation.[11] Although one can argue that on other reservations with different facts another rule should apply, the unique facts on the Puyallup Reservation should have made no difference. The existence of non-Indian fee land on a reservation does not spell

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[9] *Dep't of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 46 (1973).

[10] *See*, *United States v. Washington*, 385 F. Supp. 312, 322 (W.D. Wash. 1974).

[11] These facts relied on by the Court are not necessarily correct; but because they were relied on by the Court, these facts may serve to limit the impact of the decision.

termination of the reservation and in the case of the Puyallup Reservation the 9th Circuit Court of Appeals had previously confirmed its existence.[12]

B. Zoning

Zoning is a governmental function, the primary purpose of which is to segregate those lands uses that are incompatible. At the core of zoning regulation is the right of government to restrict or limit the ability of landowners to develop privately held property. Land use planning in general, and zoning regulations in particular, are generally considered to be basic attributes of government. Under these basic land use concepts, a tribal government should be able to regulate land use for all lands within its exterior boundaries whether held in trust or fee and whether held by the tribe, tribal members, other Indians or non-Indians. Of course, this is not the case.

In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation,* the Supreme Court restricted the Yakima Indian Nation's authority to zone lands owned by non-Indians within the reservation.[13] *Brendale* is a plurality decision with three separate opinions, resulting in a lack of clarity regarding zoning law on reservations that include lands owned or controlled by non-Indians. Justice White reasoned that the Yakima Indian Nation lacked the inherent authority to zone non-Indian fee lands and Congress had not expressly delegated the authority to zone non-Indian fee lands to the Yakima Indian Nation.[14] Justice White rejected the notion that *Montana* authorized a tribe to so regulate non-Indian fee land, as such a right had been withdrawn with the alienation of

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[12] *Mattz v. Arnett*, 412 U.S. 481 (1973); See, *United States v. Washington*, 496 F.2d. 620 (9th Cir. 1974), *cert*. de*nied*, 419 U.S. 1032 (1975).

[13] 492 U.S. 408 (1989)(the decision was a consolidation of three cases: *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, No. 87-1622, *Wilkinson v. Confederated Tribes and Bands of Yakima Indian Nation*, No. 87-1697, and *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, No. 87-1711).

[14] 492 U.S. at 425-27.

such lands under the Dawes Act, among other such Congressional actions, unless the tribe could demonstrate that the protectable interest in zoning was imperiled.[15]

Justice Stevens' opinion revolved around whether the non-Indian fee lands were within an area substantially owned by non-Indians. He relied on whether the Nation had the power to exclude non-members from the reservation, paying no heed to a tribe's authority to regulate land uses of all lands within the geographic governmental boundaries. Where Indian ownership dominated, the Yakima Indian Nation would continue to have a basis to zone including zoning of non-Indian land, but where there was substantial non-Indian ownership the Nation had lost the authority to zone non-Indian lands.[16] In contrast to Justice White and Justice Stevens, Justice Blackmun supported comprehensive zoning using the *Montana* exception. Blackmun contended that tribal zoning would be compromised if a tribe could not regulate non-Indian fee land.[17] The impact of the *Brendale* decision is to allow "checkerboard zoning" or zoning by more than one authority. Such a zoning scheme is inconsistent with a concept of comprehensive zoning.

There have been a handful of cases since the *Brendale* decision that have discussed the regulatory authority of a tribe. In *South Dakota v. Bourland*, the Supreme Court was asked to determine whether the Cheyenne River Sioux Tribe may regulate hunting and fishing by non-Indians on lands located within the exterior boundaries of the reservation by for which lands had been acquired by the United States for the operation of the Oahe Dam and Reservoir.[18] The Court explained that *Montana* and *Brendale* establish that the Tribe's right of regulatory jurisdiction formerly enjoyed by the Tribe

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[15] 492 U.S. at 427.
[16] 492 U.S. at 436, 446-47.
[17] 492 U.S. at 448-467 (Blackmun, J. dissenting).
[18] *South Dakota v. Bourland*, 113 S. Ct. 2309, 2313 (1993).

was eliminated when Congress took Tribal land for the Oahe Dam and Reservoir Project.[19]

The Ninth Circuit addressed the issue of whether the Hoopa Valley Tribe could regulate the land use activities of non-members on fee land within the exterior boundaries of the Hoopa Valley Reservation. The Hoopa Tribe had enacted a forest management/timber harvest plan prohibiting logging within a half mile buffer zone around the site of the White Deerskin Dance, a ten-day dance dedicated to world renewal. Robert Bugenig, a non-Indian, non-member of the Tribe, owned 40 acres in fee within the exterior boundaries of the Reservation and within the tribally defined buffer zone. Bugenig obtained a logging permit from the State of California and sought a hauling permit from the Tribe which was denied. Bugenig brought an action seeking declaratory and injunctive relief against the Tribe's exercise of regulatory jurisdiction limiting the use of her land. Judge O'Scannlain could find neither an express delegation of authority by Congress nor inherent authority by which the Hoopa Valley Tribe could enforce the buffer zone regarding the activities of Bugenig. O'Scannlain determined that "when a tribe attempts to assert regulatory authority over land that is owned and controlled by a nonmember, it confronts a nearly impossible task."[20] As the Ninth Circuit noted, *Montana's* second exception is "exceedingly narrow" and it is difficult to contemplate when a tribe may regulate land use on non-member, non-Indian land absent an express Congressional authorization.[21]

C. Taxation

State taxation is limited in Indian country, particularly where Indian interests are affected. States cannot impose income taxes on federally recognized tribes or wholly-owned tribal entities, have no power to tax trust lands whether held by the United States for the benefit of a tribe or for individual Indians, Indian-owned land or other tribal trust

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[19] 113 S. Ct. at 2317; Flood Control Act, 58 Stat. 889, as amended, 16 U.S.C. §460(d) and Cheyenne River Act, 68 Stat. 1191.

[20] 229 F.3d 1210, 1222 (9th Cir. 2000)

[21] 229 F.3d at 1223.

property, and cannot impose taxes where they are preempted by federal law. However, states can tax fee land within a reservation,[22] the business activities of tribes and tribal entities occurring off of the reservation, and states may be able to impose sales and excise taxes on sales or activities within a reservation if the legal incidence of the tax rests on non-tribal members, the balance of interest favors the state, and minimal burdens of collecting such tax are imposed on the tribe or tribal members.

For taxation purposes the courts have distinguished between Indians who are members of the tribe and nonmember Indians. The State of Washington successfully contended that it could impose cigarette and sales taxes on sales made to nonmember Indians in Indian country.[23] The Supreme Court explained that nonmember Indians "stand on the same footing as non-Indian residents."[24] For the latter group, states may impose tax activities that occur within Indian country.

This authority to tax all but member Indians is limited by preemption of the federal government. Arizona could not tax the revenues of a non-Indian trader on the Navajo Reservation because Indian traders were federally licensed and subject to extensive federal regulations.[25] The state could, however, require the Indian trader to collect and remit a state sales tax collected from nonmember purchasers of cigarettes.[26] The state may not, however, collect taxes from a nonmember company that contracts with the federal government. Finally, the existence of a tribal tax does not prohibit a state from imposing a similar tax, thus leading to dual taxation and disadvantaging certain

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[22] *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); see also *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998); *but see*, *Oneida Indian Nation v. City of Sherrill, NY*, 337 F.3d 139 (2d Cir. 2003).

[23] 447 U.S. 134 (1980).

[24] 447 U.S. at 161.

[25] *Warren Trading Post v. Arizona Tax Com*m'n, 380 U.S. 685 (1965).

[26] *Dep't of Taxation and Finance* v. *Milhelm Attea & Bros*., 512 U.S. 61 (1994).

activities from locating on an Indian reservation.[27] In conclusion, the law on state taxation in Indian country is fluid and changes quickly.

D. Other Considerations

State laws generally are not applicable to Indians on Indian land except where Congress has expressly provided otherwise or where the contracting parties agree to a state choice of law provision. Even when the parties agree, one should thoroughly review tribal law to ensure that such provisions are enforceable and adequate, particularly with respect to remedies against collateral located on a reservation.

A tribe has the authority and power to adopt laws for its own affairs and its own members. The extent to which particular remedies may be available to a creditor, including the right of repossession of property, is normally controlled by tribal law. Frequently, however, tribal codes are not comprehensive and will not specifically address an issue that arises in a business context. In some cases, new ordinances or resolutions must be drafted and enacted by the tribal government, in order to ensure that the desired remedies are available. In many instances, legal remedies drafted into a contract can be given the force of law by the adoption of an ordinance or resolution specifically affirming the enforceability of the contract in accordance with its terms as a matter of tribal law. This approach may not always be adequate to address matters affecting the rights of third parties, such as perfection and priority of security interests, and it may be necessary to have the tribe adopt an ordinance addressing such concerns. A tribe may, for instance, agree to the adoption of state substantive law, such as the Uniform Commercial Code (with minor modifications), as tribal law, that will establish the perfection, and protect the priority, of a secured party's security interest vis-a-vis other claimants of interests in or liens against the same property.

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[27] See, *e.g., Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989).