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INDIAN LAW

I. INTRODUCTION

The Ninth Circuit has made innovative, though sometimes conflicting, decisions in the area of Indian Law. Since this circuit has more Indians residing within its jurisdiction than any other,[1] its pronouncements have a widespread effect nationally as well as within the circuit. In this section, recent decisions in the areas of taxation, Indian land rights, and criminal jurisdiction will be examined.

II. TAXATION

Taxation in Indian country[2] involves issues which are uniquely confusing. As one commentator explains,

> [t]axation involves almost every theory of law that can be imagined, from sovereignty to civil jurisdiction, from property rights to special privileges of legislative bodies. In the field of Indian taxation the subject is much more complicated. Taxation involves tribal self government, treaty rights, congressional powers over individual Indians and tribes, and the relationship of tribal governments to state governments and agencies.[3]

1. Within the three circuits containing the largest population of Indians, the ratio of the total number of Indians to the number of Indians living on federal reservations is: Ninth Circuit—328,130/157,845 (about 2:1); Tenth Circuit—205,017/88,014 (about 5:3); Eighth Circuit—86,897/51,080 (about 8:5). *See* Sclar, *Participation by Off-Reservation Indians in Programs of the Bureau of Indian Affairs and the Indian Health Service*, 33 MONT. L. REV. 191, 193-94 nn.4 & 5 (1972).

2. Indian country is defined in 18 U.S.C. § 1151(a) (1970) as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent . . . ." Unless Congress terminates an Indian reservation by statute, all land within its original boundaries fixed by treaty, statute, or executive order is within Indian country, notwithstanding non-Indian ownership.

In addition, § 1151(c) provides that Indian country includes "all Indian allotments, the Indian titles to which have not been extinguished . . . ." Therefore, lands within a terminated reservation, the title to which remains in Indian hands, will be considered to be within Indian country for the purposes of the federal jurisdiction statutes. Further, § 1151(a) includes rights-of-way through an Indian reservation that fall within the definition of Indian country, thereby restricting the authority of a state to enforce traffic and highway laws over roads within these rights-of-way.

3. Deloria, *Foreword* to J. WHITE, TAXING THOSE THEY FOUND HERE at v (1972).

In *Fort Mojave Tribe v. County of San Bernadino,*[4] the tribe challenged a possessory interest tax[5] imposed on non-Indian lessees of tribal lands. Because under Federal law the lands could not be sold by the Indians, the tribe had leased the land with terms as long as ninety-nine years. The possessory interest tax was an attempt by the State of California to tax leaseholds as if the property were owned by the lessee and subject to a real property tax.[6] The tax was upheld as a valid state action because it was imposed on the use of the land rather than on the land itself, and the legal incidence of the tax fell upon the non-Indian lessee and not upon the tribe.[7]

In reaching this conclusion, the court analyzed the case according to the tests established by the Supreme Court in *McClanahan v. Arizona State Tax Commission*[8] and *Williams v. Lee*[9]: (1) a state may not tax any activity occurring on the reservation if federal statutes preempt this state action; (2) taxation of *Indian* activities on the reservation is further limited, since a state may tax these activities only if Congress has specifically delegated this authority to the state; and (3) a state may tax *non-Indian* activities in Indian country only if the imposition of such a tax will not interfere with the tribe's right of self-government.[10]

First, the panel considered whether federal statutes preempted state action. The tribe argued that, under the Indian Reorganization Act of 1934 (IRA)[11] and Public Law 280 (P.L.

4. 543 F.2d 1253 (9th Cir. Sept., 1976) (per Sneed, J.; the other panel members were Goodwin, J. and King, D.J.).

5. Possessory interest means the following: "(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled within ownership of the land or improvements in the same person. (b) Taxable improvements on tax-exempt land." CAL. REV. & TAX CODE § 107 (West 1970).

6. *See* Smith, *Taxing Possession of Federal Property,* 4 SANTA CLARA LAW. 166 (1964), for a discussion of the applicability of and inherent valuation problems under Revenue and Taxation Code § 107.

7. 543 F.2d at 1256. The district court concluded that Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972), which upheld the possessory interest tax, was controlling. 543 F.2d at 1255. However, the court of appeals stated that "it is important to review this area of the law in light of recent Supreme Court decisions concerning taxation by state and local governments affecting Indians." *Id.* Also, the court indicated that the status of the Fort Mojave Tribe should be examined to determine whether *Agua Caliente* could properly be applied. *Id.*

8. 411 U.S. 164 (1973).

9. 358 U.S. 217 (1959).

10. 543 F.2d at 1256-58.

11. Act of June 18, 1934, ch. 576, §§ 1-18, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1970)).

280),[12] the state was precluded from imposing this tax.[13] The Fort Mojave Tribe was organized under provisions of the IRA which required the tribe to establish a system of self-government under a constitution. The IRA provides in part that "the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . . ."[14] According to the tribe, the lease itself was a tribal asset within the scope of this provision. Thus, imposition of the tax would create an encumbrance on both a tribal asset and the tribe's reversionary interest in the land. The court reasoned, however, that the legal incidence of the tax fell upon the non-Indian lessees, and any indirect or undetermined economic burden placed upon the tribe's interest is "not sufficient to constitute an encumbrance of an 'interest in land or other tribal asset.'"[15] The court also considered whether P.L. 280 preempted this field.[16] This law grants civil jurisdiction over Indian country to the state but precludes state taxation of "any real or personal property . . . belonging to any Indian or Indian tribe."[17] Since the incid-

12. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (current version in scattered sections of 18, 28 U.S.C.), which required five states (California, Minnesota, Nebraska, Oregon and Wisconsin) to assume criminal and civil jurisdiction over Indian country within their borders and allowed other states to assume jurisdiction by enacting appropriate legislation and/or amending their state constitutions if they contained disclaimers of jurisdiction. P.L. 280 was amended by the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201-203, 82 Stat. 77-78 (codified at 25 U.S.C. §§ 1301-1303 (1970)) to require tribal consent prior to assumption of jurisdiction by a state.

13. 543 F.2d at 1256-57.

14. 25 U.S.C. § 476 (1970).

15. 543 F.2d at 1256. The IRA does not create a tax immunity for non-Indian lessees of reservation land by implication either. In the companion case to McClanahan, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Supreme Court held that the IRA did not alter the traditional tax immunities: Indian activities on the reservation are immune from state tax absent a congressional grant of the power to tax, while non-Indians on the reservation are subject to state tax unless Congress has specifically preempted the state's power to tax. *Id.* Therefore, the *Fort Mojave* court refused to imply a tax immunity for non-Indians without clear congressional guidelines to that effect. 543 F.2d at 1256. *See* Agua Caliente, 442 F.2d at 1187: "The general rule that tax exemptions are not granted by implication is applicable to taxing acts affecting Indians as it is to all others." *See also* Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943). *But see* Squire v. Capoeman, 351 U.S. 1 (1956), which points to a different rule when a federal taxing statute conflicts with the federal policy of protecting Indian wards. The *Squire* Court construed a federal taxing statute as constituting an encumbrance on the land.

16. The Supreme Court had ruled in Bryan v. Hasca County, 426 U.S. 373 (1976), that P.L. 280 did not alter traditional tax immunities, and in Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949), that no tax immunity for non-Indians existed prior to the passage of that statute.

17. P.L. 83-280, § 4(b), 28 U.S.C. § 1360(b) (1970).

ence of the tax falls upon the possessory interest of the non-Indian, and not upon the land itself or upon the tribe, this provision of P.L. 280 does not specifically preclude the state from imposing this tax.[18] Therefore, the court concluded that neither the IRA nor P.L. 280 preempted the state's power to tax.[19]

Second, the court analyzed the impact of the tax upon the tribe to see "whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them."[20] The court noted that the tax might cause some adverse economic effect because leases of California lands subject to the tax might bring a lower price than leases of other lands free of the tax. However, the court held that this was an indirect burden and did not infringe upon the tribe's ability to govern itself.[21]

In summary, a state tax will be valid as long as a state can show a legitimate interest in taxing its citizens which is neither preempted by federal statute nor constitutes a significant infringement on a tribe's ability to govern itself. The close questions, as yet unanswered, will be whether such a tax will be upheld where the lessee of reservation land is an emancipated Indian[22] or where the lessor is a tribe which does not have a recog-

18. Obviously, P.L. 280 does not authorize this tax since the grant of civil jurisdiction does not include a grant of the power to tax. However, the *McClanahan* Court hinted that a specific grant of authority is not required where the activities to be taxed are undertaken by non-Indians. The Court stated:

> In these situations [involving non-Indians] both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The Williams test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179.

19. 543 F.2d at 1256-57.

20. *Id.* at 1257-58 *quoting* Williams v. Lee, 358 U.S. 217, 220 (1958).

21. 543 F.2d at 1258. The panel also reasoned that most of the benefit which would result should the tax be struck down would accrue to non-Indians. Although the tribe might benefit to some extent, the court felt that the maxim that ambiguous statutes should be construed to benefit the Indians, was never intended "to authorize constructions which, on their face, benefit non-Indians handsomely, and Indians marginally if at all." *Id.* at 1257. *See* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976). There the Court held that the burden placed on an Indian proprietor of a reservation store to prepay and later collect state sales tax on cigarette sales to non-Indians did not constitute an impermissible infringement under *Williams.*

22. Indians who do not live on reservations or who are not enrolled members of a tribe are subject to state jurisdiction. See Note, *Indian Law—Boundary Disestablishment Through the Operation of Surplus Land Acts,* 1976 WIS. L. REV. 1305, 1309, for a graphic representation of jurisdiction in Indian country.

nized ability to govern itself.[23]

III. INDIAN LAND RIGHTS

In *Walker River Paiute Tribe of Nevada* v. *Southern Pacific Transportation Co.*,[24] the tribe sought to invalidate a fifty mile long railroad right-of-way easement within its reservation. The court upheld the portion of the easement over land which had been ceded to the United States but invalidated the portion of the easement over tribal lands which had never been ceded.[25]

The Walker River Reservation was created by an executive order issued by President Grant in 1874.[26] In 1880, the tribe orally granted a right-of-way through the reservation to a predecessor in interest of Southern Pacific. The following year the railroad filed maps with the Secretary of the Interior seeking to establish the right-of-way under the Railroad Right-of-Way Act of 1875.[27] The railroad and the tribe reduced the oral grant to a written agreement, but this agreement never received the necessary ratification by Congress and was therefore invalid.[28] Nevertheless,

23. Both of these questions were left unanswered in *McClanahan*, 411 U.S. at 167-68.

24. 543 F.2d 676 (9th Cir. Sept., 1976) (per Wallace, J.; the other panel members were Goodwin, J. and Williams, D.J.).

25. *Id.* at 699.

26. 1 C. Kappler, Indian Affairs: Laws and Treaties 869 (2d ed. 1904). The Ninth Circuit has held that the reservation was actually established by administrative action in 1859. United States v. Walker River Irrigation District, 104 F.2d 334, 338 (9th Cir. 1939).

27. Act of 1875, ch. 152, 18 Stat. 482 (codified at 43 U.S.C. §§ 934-939) [hereinafter referred to as the "1875 Act"], provides in part:

> § 934. The right of way through the public lands of the United States is granted to any railroad company . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, . . . to the extent of of one hundred feet on each side of the central line of said road . . . .
>
> § 937. Any railroad company deciding to secure the benefits of sections 934-939 of this title shall, within twelve months after the location of any section of twenty miles of its road, . . . file with . . . the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior, . . . all such lands over which such right of way shall pass shall be disposed of subject to such right of way . . . .
>
> § 938. Sections 934-939 of this title shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty, stipulation or by Act of Congress passed prior to March 3, 1875.

28. The agreements were held to be invalid under 25 U.S.C. § 177 (1970) which was

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both the tribe and the railroad believed that the right of way was valid. From 1902 to 1906, pursuant to federal allotment and cession statutes, lands containing twenty-six miles of track were ceded by the tribe to the United States and opened for settlement; some of the ceded lands were returned to the tribe in 1936.[29]

The 1875 Act authorized railroad rights-of-way over federal lands, with the exception of lands "within the limits of any . . . Indian reservation."[30] Southern Pacific argued that the general language of this exception did not apply to executive order reservations because executive order reservations were often treated differently by Congress.[31] The court held that the phrase "any . . . Indian reservation" should be construed in the Indians' favor and interpreted broadly to include all reservations. In addition, the legislative history of the 1875 Act and circumstances subsequent to its passage indicated that Congress did not intend the 1875 Act to authorize rights-of-way over executive order reservations.[32]

Southern Pacific next argued that the boundaries of the reservation had been changed, so the right-of-way was no longer within the reservation.[33] If so, the right-of-way would be valid under the 1875 Act, provided that the Act's other provisions were satisfied. The court reasoned that the Secretary of the Interior's approval of the maps filed by the railroad did not terminate the reservation with respect to the right-of-way because the Secretary

originally enacted as the Indian Non-Intercourse Act of 1790, Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138. Section 177 provides in part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

29. 543 F.2d at 681-82. In addition, lands containing seven miles of track were allotted to individual Indians under the same allotment and cession statute. *See* Act of May 27, 1902, ch. 888, 32 Stat. 260-61. A class action was brought by the allottees and their successors in interest. The Ninth Circuit reversed and remanded for dismissal by the district court because each party could not satisfy the $10,000 amount in controversy requirement of 28 U.S.C. § 1331 and the claims could not be aggregated. 543 F.2d at 684.

30. 1875 Act, ch. 152, § 5, 18 Stat. 482 (codified at 42 U.S.C. § 938).

31. For example, executive order reservations, unlike treaty reservations, can be terminated without payment of compensation. 543 F.2d at 686.

32. *Id.* at 688-89. After 1875 but before the 1899 Railroad Right-of-Way Act, Act of March 2, 1899, ch. 374, 30 Stat. 990 (codified at 25 U.S.C. §§ 312-318 (1970)), which allowed rights-of-way through reservations, Congress passed several statutes which granted rights-of-way through executive order reservations. These grants would have been unnecessary if Congress had intended that rights-of-way could be granted by the Secretary of the Interior under the 1875 Act. 543 F.2d at 689.

33. 543 F.2d at 689.

did not intend to terminate that portion of the reservation. Even if the Secretary intended to terminate it, he would have had to employ more formal means to do so.[34] Thus, the court concluded that the filing and approval of maps did not and could not create an easement across this executive order reservation.[35]

In 1906, the tribe ceded that part of the reservation containing twenty-six miles of track to the United States. The court found that under the terms of the Walker River Cession Statute,[36] the ceded lands were "to be disposed of under existing laws," and the 1875 Act qualified as an existing law. Since construction of the railway by itself has been held to establish a valid right-of-way under the 1875 Act,[37] as soon as land containing track was ceded, the right-of-way within the ceded lands became valid.

The court reasoned that, although most cases have held that cessions of reservation land do not alter reservation boundaries,[38] a fixed rule has not been established. A recent Supreme Court case indicated that congressional intent is controlling.[39] Thus, the court examined the language and legislative history of the Walker River Cession Statute and looked to the manner in which Congress and the Department of Interior treated the ceded lands.[40] The court found that the statute contained language similar to that contained in other statutes which the Supreme Court held terminated reservations.[41] The court also found that, when Congress restored some of the ceded lands, it characterized these lands as additions to the reservation, thereby implying that previous cessions diminished the size of the reservation. The court therefore concluded that there was congressional intent to alter the boundaries with each cession.[42] Since the 1936 restoration[43] of

34. *Id.* at 689-90.

35. *Id.* at 690. The court also dismissed Southern Pacific's contention that the right-of-way was perfected under an 1899 act. *Id.* at 690-93.

36. Act of May 27, 1902, ch. 888, 32 Stat. 260-61. This statute authorized the allotments and cessions which took place between 1902 and 1906. Under this statute, land was ceded to the United States for settlement by non-Indians.

37. *See* Jamestown & N.R.R. v. Jones, 177 U.S. 125, 130-32 (1900).

38. *See* Mattz v. Arnett, 412 U.S. 481, 498-506 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962); United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973).

39. Mattz v. Arnett, 412 U.S. 481, 505 (1973).

40. 543 F.2d at 693-96.

41. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); De Coteau v. District County Court, 420 U.S. 425 (1975).

42. 543 F.2d at 695-96.

43. Act of June 22, 1936, ch. 698, § 1, 49 Stat. 1806.

some of the ceded lands was subject to existing rights, the valid easement over the previously ceded lands was not affected by the restoration.

The *Walker River* decision may represent an equitable disposition of two longstanding but conflicting claims. However, because the statutes and the dealings between tribes and the government will differ from those in *Walker River*, it is unclear what effect the decision will have on litigation involving other tribes.

IV. CRIMINAL JURISDICTION IN INDIAN COUNTRY

A. BACKGROUND

Criminal jurisdiction[44] in Indian country[45] is one of the most complex areas of Indian law, involving a conflicting admixture of treaties, federal and state statutes, and federal regulations.[46] To determine which courts have criminal jurisdiction over a particular case—federal, state, or tribal courts—it is necessary to analyze: (1) the treaty, statute, or executive order which established the reservation; (2) the general federal statutes applicable to all Indian reservations; (3) any specific federal statutes and/or regulations pertaining to the reservation or tribe in question, and; (4) the effect of state statutes and constitutional provisions which relate to assumptions or cessions of jurisdiction over the reservation within the state.[47]

Jurisdiction may depend upon which crimes Congress has designated as federal crimes to be tried in the federal courts,[48]

44. Criminal jurisdiction, for the purpose of this discussion, shall include only that jurisdiction which is the subject matter of 18 U.S.C. § 1152 (1970) and § 1153 (1976). Other sections, not dealt with herein, include 18 U.S.C. § 1154 (1970) (dispensing intoxicants in Indian country); 18 U.S.C. § 1155 (1970) (dispensing intoxicants in Indian country wherein any Indian school site is located); 18 U.S.C. § 1163 (1970) (embezzlement or theft from an Indian tribe); 18 U.S.C. § 1164 (1970) (destroying reservation boundary or warning signs); 18 U.S.C. § 1165 (1970) (unauthorized hunting, trapping, or fishing on Indian lands).

45. *See* note 2 *supra*.

46. *See* Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975) [hereinafter cited as Clinton I] for a discussion of the interrelationships of treaties, statutes, and executive orders.

47. *Id.* at 952 and nn.5, 6 & 7.

48. 18 U.S.C. § 1153 (1976) enumerates fourteen crimes committed by Indians over which the federal courts have concurrent, and, in practice, exclusive jurisdiction. Rather than enumerating crimes, § 1152 incorporates all federal criminal law and applies it to Indians and non-Indians in Indian country. If an offense committed by an Indian is neither defined under § 1153, nor incorporated under § 1152, jurisdiction over this offense may be exercised by the tribal court. *See* notes 54 and 56 *infra* for text of these code sections.

whether federal jurisdiction has been ceded to the state in which the reservation is located,[49] or whether jurisdiction is reserved to the tribal courts.[50] Jurisdiction may also depend upon the race of the defendant and/or the victim[51] and the status of title to land where the crime was committed,[52] and it may be concurrent or exclusive.[53] Understandably, much litigation has ensued from conflicting constructions of the treaties, statutes, and regulations which try to delineate these jurisdictional factors.

Historically, criminal jurisdiction over most major offenses committed by Indians has been exercised by the federal courts under the Major Crimes Act, 18 U.S.C. § 1153.[54] However, noth-

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49. *See* note 12 *supra*.

50. For a discussion of tribal court jurisdiction *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942) (undated University of New Mexico reprint ed.) and Berkey, *The Inherent Powers of Indian Governments*, 2 AM. INDIAN J., May 1976 at 15.

51. If both the perpetrator and the victim are non-Indians, jurisdiction lies with the state courts according to the doctrine established in United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896); New York ex rel. Ray v. Martin, 326 U.S. 496 (1946). If the perpetrator is an Indian and the victim is a non-Indian, jurisdiction over major and many minor crimes has been exercised by the federal courts under 18 U.S.C. §§ 1152 (1970) and 1153 (1976). If both the perpetrator and the victim are Indians, jurisdiction over major crimes has been exercised by the federal courts under 18 U.S.C. § 1153; jurisdiction over minor offenses has been exercised by the tribal courts. If the perpetrator is a non-Indian and the victim is an Indian, jurisdiction has been exercised by the federal courts over all offenses under 18 U.S.C. § 1152.

52. Some state statutes which assume jurisdiction over Indians under P.L. 280 have assumed full jurisdiction over tribes who consent to the assumption and over land which is held in fee by Indians and only partial jurisdiction over Indian lands held in trust by the United States. One such statute was recently held to be unconstitutional on equal protection grounds in Confederated Bands and Tribes of the Yakima Indian Nation v. Washington, 552 F.2d 1332 (9th Cir.) (per Hufstedler, J.), *prob. juris. noted*, 98 S. Ct. 1447 (1978).

53. In practice, federal jurisdiction under § 1152 and § 1153 is exclusive with respect to the tribes. *See* Sam v. United States, 385 F.2d 213 (10th Cir. 1967); Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963); Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15, 18 (D.S.D. 1955) *aff'd* 231 F.2d (8th Cir. 1956). However, nothing in these statutes, or their legislative history, indicates that the tribes do not have the power to exercise jurisdiction concurrently with federal jurisdiction. The trend, at least in the Ninth Circuit, appears to be in favor of concurrent jurisdiction. *See* Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. Aug., 1976) (per Duniway, J.), *rev'd sub nom* Oliphant v. Suquamish Indian Tribe, 98 S. Ct. 1011 (1978). Both federal and tribal jurisdiction is exclusive with respect to the states. *See* F. Cohen, *supra* note 50, at 147, and Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze* [hereinafter cited as Clinton II], 18 ARIZ. L. REV. 503, 523 n.94, 557 (1976), for a discussion of the jurisdictional relationships between federal, state, and tribal courts.

54. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (codified, as amended, at 18 U.S.C. § 1153 (1976)), which provides, in part:

ing in the federal statutes or regulations specifically prevents a tribe from prosecuting serious crimes, even those enumerated in section 1153.[55]

Federal jurisdiction over offenses committed in Indian country is also conferred by 18 U.S.C. § 1152[56] which applies to all

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> Offenses committed within Indian country.—Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

55. *See Clinton II, supra* note 53, at 559. It can be argued that the legislative history of this code section indicates that Congress intended to create concurrent jurisdiction. In 1886, Representative Budd of California proposed a change in the language of the original House version of the Major Crimes Act. The actual language is unimportant, but as Representative Budd explained:

> [t]he effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country. I think it sufficient that the courts of the United States should have concurrent jurisdiction in these cases.

The fact that the objectionable language was deleted in the final form of the Act is strong evidence that Congress intended federal and tribal jurisdiction over major crimes to be concurrent. 16 CONG. REC. 934 (1886).

56. 18 U.S.C. § 1152 (1970) states:

> Laws governing.—Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Jurisdiction conferred by § 1152 must be exercised in a similar manner as under § 1153. *See* Keeble v. United States, 412 U.S. 205 (1973). 18 U.S.C. § 3242 (1970) requires that

crimes committed by non-Indians against Indians and crimes committed by Indians against non-Indians for which the Indian defendant has not already been punished by the tribe.[57] Although the language of this section does not confer exclusive jurisdiction, non-Indians charged with section 1152 crimes have almost always been prosecuted in federal courts.[58]

In addition to statutes, regulations, and treaty provisions, an issue often discussed in tribal jurisdictional decisions is the inherent sovereignty of the tribe.[59] The notion that tribal sovereignty should act as an estoppel on federal control arises from initial dealings with the Indian tribes. Treaties implied federal recognition of the tribes as sovereign nations.[60] However, the Supreme Court in early Indian law cases postulated a *limited* sovereignty for Indian tribes by upholding federal actions which narrowed tribal powers; tribes were described as "once-sovereign" or "quasi-sovereign nations."[61]

Indian offenses charged under § 1153 must be tried in the same manner as other offenses within the exclusive jurisdiction of the United States (i.e., § 1152 offenses). Indeed, if the crime is a major one and the defendant is an Indian, the jurisdiction conferred by § 1152 overlaps that conferred by § 1153, since the latter section is included in the federal law applied to Indian country by § 1152. At least one court has held that Indian defendants committing major crimes should be charged only under § 1153; and § 1152 should be reserved for non-Indian crimes. Henry v. United States, 432 F.2d 114 (9th Cir. 1970), *modified,* 434 F.2d 1283 (9th Cir.), *cert. denied,* 400 U.S. 1011 (1971). Under this scheme, Indian crimes not enumerated in § 1153 would be tried in the tribal courts. *See* Clinton II, *supra* note 53, at 538. This scheme is far from a fixed rule, however. Since the defendant's race alone may determine the section under which to bring a charge, crimes committed in Indian country must be punished uniformly under both sections in order to avoid equal protection challenges in the courts. *See* Keeble v. United States, 412 U.S. at 213. Both due process and equal protection arguments were put forth by the defendant, but they were avoided by the court in favor of statutory construction of 18 U.S.C. § 3242.

57. The tribal punishment exclusion in § 1152 is of limited value since an Indian defendant presumably may be prosecuted in federal court at any point prior to the time he has completed the punishment prescribed by the tribal court.

58. See note 53 *supra.*

59. *See, e.g.,* United States v. Antelope, 430 U.S. 641 (1977), *rev'g* 523 F.2d 400 (9th Cir. 1975); Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975); Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969); Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

60. *See* Clinton I, *supra* note 47, at 953 for a discussion of Indian treaties with the federal government from 1776 to 1871.

61. *See* Cherokee Nation v. Kansas Railway Co., 135 U.S. 641 (1890); Elk v. Wilkins, 112 U.S. 94, 99, 109 (1884); The Kansas Indians, 72 U.S. 737, 757, 760 (1866); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). *But see* United States v. Kagama, 118 U.S. 375 (1886), in which the Supreme Court stated: "The soil and the people within [the United States] are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two." *Id.* at 379.

Despite lack of a clear meaning, the term "sovereignty" and its variations have become ingrained in Indian legal terminology; jurisdictional questions are often decided ostensibly on the basis of a particular court's concept of the sovereignty of Indian tribes.[62] In addition, the notion of sovereignty has taken on new significance in recent years with the revitalized movement for Indian self-determination.[63]

B. THE NINTH CIRCUIT DECISIONS

This term, the Ninth Circuit rendered two decisions which illustrate its progressive, yet sometimes inconsistent, posture in the area of tribal criminal jurisdiction. In *Oliphant v. Schlie*,[64] one panel held that a tribal court may exercise criminal jurisdiction over a non-Indian who violates tribal law.[65] In *United States v. Wheeler*,[66] a different panel held that, once the tribal court has exercised jurisdiction over an Indian offender, federal courts are precluded from prosecuting even if the federal charge involves a section 1153 major crime.[67]

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62. Courts differ in interpretations of what the source of tribal power is: inherent tribal sovereignty or delegated federal authority. *Compare* United States v. Quiver, 241 U.S. 602 (1916) (indicating that the tribal power is the source of tribal court authority) *with* United States v. Mullin, 71 F. 682 (D. Neb. 1895) (indicating the source of authority is the Interior Department). Given the extremely weak position of most Indian tribes as a result of Congressional policy prior to the 1934 Indian Reorganization Act, it can be argued that tribal power was almost extinguished and could not be the source of tribal court power. Tribal power was revived as a result of the 1934 Act and the promulgation of federal regulations which created and controlled the courts of Indian Offenses. This tends to indicate that the source of tribal court power is for practical purposes the federal government. However, *see* Powers of Indian Tribes, 55 I.D. 14, 18-19 (1934) (a solicitor's report on the passage of the 1934 Act which says that the tribes' powers emanate from tribal sovereignty, not from Congress).

63. *See generally* KICKINGBIRD ET AL., INDIAN SOVEREIGNTY, INST. FOR THE DEV. OF INDIAN LAW (1977), which defines sovereignty in both international and Indian law terms and attempts to show that ". . . today Indian nations are sovereign and do exercise many sovereign powers." *Id.* at 35. This study is a prime example of the use of the sovereignty notion to support the goal of Indian self-determination and power. In September, 1977, a conference on Discrimination Against the Indian People in the Americas took place at the United Nations in Geneva in an attempt to gain international sovereign recognition for Indian "natives," and in February, 1977, the United Nations granted consultative status to the International Indian Treaty Council. *See also* Johnson & Perkins, *The Northwest Experience*, 63 A.B.A. J. 811 (1977), responding to Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not,"* 62 A.B.A. J. 1002 (1976), which illustrate the political debate over the sovereignty of the tribe and power in the tribal courts.

64. Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. Aug., 1976) (per Duniway, J.; the other panel members were Kennedy, J. and Burns, D.J.), *rev'd sub nom* Oliphant v. Suquamish Indian Tribe, 98 S. Ct. 1011 (1978).

65. 544 F.2d at 1009.

66. United States v. Wheeler, 545 F.2d 1255 (9th Cir. Dec., 1976) (per Sneed, J.; the other panel members were Goodwin, J. and East, D.J.), *rev'd*, 98 S. Ct. 1079 (1978).

67. 545 F.2d at 1258.

Habeas Corpus and Oliphant v. Schlie

Oliphant, a non-Indian, was arrested on the Port Madison Indian Reservation during a Suquamish tribal festival. He was brought before the Suquamish tribal court and charged with assaulting an officer and resisting arrest. Before trial, he petitioned the district court for a writ of haveas corpus, alleging that an Indian tribal court has no jurisdiction over a non-Indian. The district court denied the writ and the Ninth Circuit affirmed.[68]

According to the *Oliphant* court, "the proper approach to the question of tribal criminal jurisdiction is to ask first, what the original sovereign powers of the tribe were, and, then, how far and in what respects these powers have been limited."[69] After concluding that no treaty specifically withdrew criminal jurisdiction over non-Indians from the tribal courts, the court noted that congressional history indicated that section 1152 "was not intended, and should not be read, to prohibit Indian tribes from prosecuting non-Indians for offenses against tribal law committed on the reservation."[70] The court also reasoned that, although the Indian Civil Rights Act of 1968 places limitations on the maximum penalties a tribal court may impose,[71] it does not purport to withdraw any criminal jurisdiction from the tribes. Since the "inherent sovereignty" possessed by the Suquamish Tribe was never diminished by treaty or statute, the court held that the Suquamish tribal court exercised its jurisdiction validly, and the federal writ

68. *Id.* at 1011-12. The court noted that the defendant had raised the habeas corpus issue prematurely and was not being denied access to the federal courts altogether. If denied a fair trial, appeal from the conviction or a petition for a writ of habeas corpus would then be appropriate.

69. 544 F.2d at 1009. *See* Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975), where it was held that

> Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress . . . . Intrinsic in this sovereignty is the power of a tribe to create and administer a criminal justice system. "An Indian tribe may exercise a complete [criminal] jurisdiction over its members and within the limits of the reservation subordinate only to the expressed limitations of federal law." [citations omitted]

Id. at 1179.

70. 544 F.2d at 1011. The court explained that when § 1152 was enacted, federal jurisdiction was conferred as a "courtesy," not as a matter of right, because Congress felt that tribal courts could not be relied upon to adjudicate fairly. *Id.*

71. Pub. L. No. 90-284, §§ 201-203, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1303 (1970), limits the maximum penalty which a tribal court may impose to six months in jail, or $500, or both.

was properly denied.[72]

The *Oliphant* court acknowledged the practical need for tribal jurisdiction in this case. The tribe had attempted to secure the assistance of the Bureau of Indian Affairs and local county law enforcement personnel. In response, the tribe was given the services of one deputy for eight hours. Consequently, law enforcement during a celebration drawing thousands of participants was left to tribal deputies. According to the court,

> [f]ederal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated. Federal prosecutors are reluctant to institute federal proceedings against non-Indians for minor offenses in courts in which the dockets are already overcrowded, where litigation will involve burdensome travel to witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps a suspended sentence . . . . The dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior necessarily follows.[73]

In a dissenting opinion, Judge Kennedy argued that the issue of tribal jurisdiction over non-Indians was disposed of one hundred years ago and no federal court had found it necessary to pass on the issue in the interim.[74] Therefore, he contended that jurisdiction over non-Indians based upon a concept of the inherent sovereignty of the Suquamish Tribe is "novel and unusual."[75] While courts have relied on the concept of tribal sovereignty when the jurisdictional dispute involved federal preemption of state jurisdiction in Indian country,[76] Judge Kennedy asserted that this precedent should not be applied to tribal/federal jurisdictional disputes.[77]

72. 544 F.2d at 1014.
73. *Id.* at 1013-14.
74. *Ex parte* Kenyon, 14 F. Cas. 353 (No. 7720) (C.C., W.D. Ark. 1878).
75. 544 F.2d at 1014.
76. *See* Rice v. Olson, 324 U.S. 786, 789 (1945); United States v. Chavez, 290 U.S. 357 (1933); United States v. Ramsey, 271 U.S. 467 (1926); United States v. Kagama, 118 U.S. 375 (1886); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); Williams v. United States, 327 U.S. 711 (1946); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).
77. 544 F.2d at 1015.

Judge Kennedy did recognize a tribal right of self-government; however, his analysis of the applicable treaty and statutes led him to conclude that Congress intended that tribal law apply only to Indians[78] and that exclusive[79] federal jurisdiction over non-Indian offenders does not infringe upon the tribes ability to govern itself and its members. He concluded that a presumption in favor of any "general inherent jurisdiction [based on the sovereignty of the tribe] would be inconsistent with the juridical relations between the federal government and Indian tribes which has existed for the past 100 years."[80]

Double Jeopardy and United States v. Wheeler

Wheeler, a Navajo, pleaded guilty in tribal courts to charges of disorderly conduct and contributing to the delinquency of a minor. The charges arose out of an incident which took place on the Navajo Reservation and involved a young Indian girl. As a result of the same incident but over a year later, Wheeler was indicated in federal court for having carnal knowledge of a female Indian under the age of sixteen years, one of the major crimes enumerated in section 1153. The district court dismissed the indictment "on the basis that defendant [had] already been placed in jeopardy for the same offense."[81]

The Ninth Circuit affirmed and held that the tribal courts are "not arms of separate sovereigns."[82] At least for the purpose of double jeopardy, they are "arms of the federal government."[83]

78. Judge Kennedy stated that "silence in the Treaty of Point Elliott on the subject of tribal court jurisdiction cannot be taken as an assent to jurisdiction over all persons." *Id.* at 1016. He pointed to a change in treaty policy—from the early treaties granting specific jurisdiction over non-Indians to later treaties like the Point Elliott Treaty which were silent on the subject—as evidence of a congressional intent to discontinue granting this jurisdiction to tribes and to retain it exclusively for the federal courts. *Id.*

79. Judge Kennedy supported the traditional view that federal jurisdiction under § 1152 and § 1153 is exclusive. *Id.* at 1018.

80. *Id.* at 1019-20.

81. 545 F.2d at 1256. Other courts which have addressed the issue in a tribal/federal context have ruled that the tribal courts are arms of separate sovereigns and a federal prosecution is not barred by a tribal prosecution. United States v. Quiver, 241 U.S. 602 (1916); Talton v. Mayes, 163 U.S. 376 (1896); United States v. De Marrias, 441 F.2d 1304 (8th Cir. 1971); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959). *See* Clayton, *Indian Jurisdiction and Related Double Jeopardy Questions*, S. D.L. Rev. 341 (1972).

82. 545 F.2d at 1258.

83. *Id.*, *quoting* Colliflower v. Garland, 342 F.2d 369, 378-79 (9th Cir. 1965). A recent Eighth Circuit panel in United States v. Walking Crow, 560 F.2d 386 (8th Cir. 1977), disagreed with the holding in *Wheeler.* The Eighth Circuit questioned the precedent

The court applied the constitutional guarantee against double jeopardy, and thus the federal prosecution was prohibited.

C. The Supreme Court Decisions

On certiorari, the Supreme Court reversed both Ninth Circuit decisions.[84] The Court's concept of Indian sovereignty was central to each decision. The Court explained that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependant status."[85]

In *Oliphant,* the Court concluded that criminal jurisdiction over non-Indians, while never explicitly withdrawn by treaty or statute, was inconsistent with an Indian tribe's status as a dependent nation within the territory of the United States. Thus, unless authority has been delegated to the tribe by Congress, an Indian tribe does not possess the power to prosecute a non-Indian in tribal court.[86]

In *Wheeler,* the Court concluded that

> the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the federal government.[87]

Thus, the Court held that, even though Wheeler had been tried and punished by the tribe, the double jeopardy clause did not bar a federal prosecution.[88]

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established by *Wheeler* of preventing federal felony jurisdiction with relatively minor prosecutions in the tribal courts. The court also stated that "it is our view that the tribal courts are not arms of the same sovereign as the United States District Court," and, therefore, the double jeopardy claim does not prevent prosecutions for the same or similar offenses in both tribal and federal courts. *Id.* at 388.

84. Oliphant v. Suquamish Indian Tribe, 98 S. Ct. 1011 (1978); United States v. Wheeler, 98 S. Ct. 1079 (1978).

85. *Id.* at 1086.

86. *Id.* at 1020.

87. 98 S. Ct. at 1088-89 (footnotes omitted).

88. *Id.* at 1089.

D. Conclusion

In light of these recent Supreme Court holdings, it appears that a tribal government is free to act in any manner which only affects the tribe and its members. However, when the consequences of an act extend beyond the tribe and its members, that act may be held to have exceeded tribal powers.

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