Golden Gate University Law Review

Volume 15
Issue 1 *Ninth Circuit Survey*

Article 14

January 1985

Summaries: Indian Law

Margaret Crow

INDIAN LAW

KIRSCHLING v. UNITED STATES: ALLOTMENT PROCEEDS EXEMPT FROM GIFT TAX

I. INTRODUCTION

"Enough to say that in our view this attempt to tax evidences, at the least a sorry breach of faith with the Indians."[1]

Kirschling v. United States[2] presented the Ninth Circuit with an issue of first impression as to the applicability of federal gift tax to a transfer of timber allotment proceeds from a noncompetent Indian[3] to a non-Indian. Reversing and remanding a district court summary judgment in favor of the government, the Ninth Circuit held that the transfer was exempt from gift tax.

After obtaining special allotment timber cutting permits, plaintiff, Helen Kirschling negotiated the sale of $2,280,702.00 worth of timber from her allotments on the Quinault Indian Reservation in Washington.[4] The proceeds were deposited in her Individual Indian Money account at the Bureau of Indian Affairs (BIA). Shortly thereafter she withdrew $850,000.00 in the form of a check from the BIA and converted $750,000.00 into cashier's checks payable to Duane Grandorff, a non-Indian.[5]

On her 1976 gift tax return, Kirschling stated that the

1. Squire v. Capoeman, 220 F.2d 349, 351 (9th Cir. 1954) *aff'd* 351 U.S. 1 (1956).

2. 746 F.2d 512 (9th Cir. 1984)(per Farris, J.; the other panel members were Fletcher, J. and Craig, District Judge sitting by designation.).

3. "The term 'noncompetent Indian' refers to one who holds land under a trust patent and who may not alienate or encumber that land without the consent of the United States." *Id.* at 513 n.1 (citing Hoptowit v. Comm'r, 709 F.2d 564, 565 n.1 (9th Cir. 1983).

4. 746 F.2d at 513.

5. *Id.* The IRS assessed a deficiency against Grandorff alleging that the transfer was income for past service rendered. The Tax Court suit was stayed pending the outcome of this case. *Id.* at 514.

transfer was exempt because it was a gift of Indian trust funds. The Internal Revenue Service (IRS) contested the exemption and assessed a deficiency of $174,112.50. After paying the deficiency, Kirschling brought an action for a refund claiming that a gift of proceeds of allotted property was not taxable. The government contested the characterization of the transfer as a gift and additionally, argued that the General Allotment Act of 1887[6] did not imply any exemption for such gifts.

The district court granted partial summary judgment for the government on the issue of the taxability of gifts of allotment proceeds and later set a trial date to determine whether this transfer was a gift or compensation for services rendered.[7] Prior to trial, the district court granted a summary judgment for the government on the grounds that the Internal Revenue Code barred the plaintiff from recovering on a theory different from that set forth in her refund claim.[8]

II. BACKGROUND

Cases on taxation related to Indian allotments have partially focused on the congressional intent behind the General Allotment Act of 1887.[9] The Act served as the government's primary tool in efforts to assimilate tribal Indians by breaking up reservation lands.[10] Parcels of reservation lands were allotted to individual Indians for the purposes of encouraging agricultural activity. The government held the allotments in trust for twenty-five years or longer at the discretion of the Secretary of the Interior.[11]

---

6. 24 Stat. 388 (codified at 25 U.S.C. §§331-411 (1976)).

7. 82-1 USTC (CCH) ¶13,443 at 84,225 (W.D. Wa. Sept. 2, 1981). The district court held that the transfer was taxable because it was made to a non-Indian and because the allottee received the proceeds in fee simple prior to the transfer.

8. 746 F.2d at 514.

9. 24 Stat. 388 (codified at 25 U.S.C. §§ 331-411 (1976)).

10. The trust status of most allotted lands has been indefinitely extended by Executive Orders. Exec. Order No. 10,191, 15 Fed. Reg. 8889 (1950); 25 U.S.C. § 348 (1970). *See also* 25 U.S.C. § 462 which states that "[t]he existing periods of trust placed on Indian land and any restriction or alienation thereof are extended and continued until otherwise directed by Congress."

11. By the time the policy of assimilation through allotment programs ended with the passage of the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984, *as amended* 25 U.S.C. §§ 461-69 (1970), most reservations had become a checkerboard of individual Indian allotments, tribal lands and non-Indian homesteads composed of non-allotted or formerly allotted lands. The IRA sought to reestablish tribes as self-governing entities by

During the trust period the Indian had limited control over the land, requiring government approval to sell, lease, or encumber it. At the end of the trust period the Act provided for conveyance by a patent "discharged of said trust and free of all charge or encumberance whatsoever."[12] The Act also allowed the Secretary to issue a patent in fee simple at any time the Indian allottee was adjudged "competent and capable of managing his or her own affairs."[13] Such a determination was recognized by issuance of a certificate of competency. In 1906 Congress amended the Act to remove "all restrictions as to sale, encumbrance, or taxation" of allotted lands received in fee simple.[14]

Disregarding the general language of the General Allotment Act, the Tenth Circuit in *Jones v. Taunah*[15] held that federal income tax applied to income earned by Indians from their allotments unless explicity statutory language exempted that income.[16] When the Ninth Circuit reached a contrary conclusion on indistinguishable facts, the Supreme Court granted certiorari to resolve the tension between the requirements of explicit language for granting tax exemptions and the rule of statutory construction requiring ambiguities to be resolved in favor of Indians.[17]

In 1956, the Supreme Court issued its opinion in *Squire v Capoeman*[18] which seemed to be the definitive answer on federal taxation of income derived from Indian allotments. With facts

---

substituting tribal ownership for the allotment system. For a discussion of the tax implications of these shifts in characterization of Indian trust lands, *see* Fiske and Wilson, *Federal Taxation of Indian Income From Restricted Indian Lands*, 10 LAND & WATER L. REV. 63 (1975).

12. 25 U.S.C. § 348 (1976).

13. 25 U.S.C. § 349 (1976).

14. *Id.*

15. 186 F.2d 445 (10th Cir. 1951). The Indian allottees in this case had received income from agricultural leases, oil and gas rentals and royalties and from an oil lease bonus, all directly derived from their allotments.

16. *Id.* at 448. The dissent held that the combination of the General Allotment Act and the applicable treaty allowed exemption of the income from oil and gas royalties though not of the interest on the income. *Id.* at 449-50. (Phillips, C.J., dissenting in part.)

17. "We may add that while the court below appeared to regard as distinguishable the decision of the Tenth Circuit . . . we can see no ground upon which the holding can be distinguished. Rather, we agree with the dissenting opinion of Chief Justice Phillips." Squire v. Capoeman, 220 F.2d 349, 350 (9th Cir. 1951).

18. 351 U.S. 1 (1956).

strikingly similar to *Kirschling*, the Court held that timber sale proceeds from an allotment were exempt from capital gains tax.[19] It rejected the assertion that this was an ordinary tax case in which exemptions to tax laws must be express in order to be valid.[20] Interpreting the applicable treaty, the General Allotment Act and congressional policy towards Indians, the Court found that Congress intended to subject Indians allotments to all taxes only after a patent in fee simple had been issued to the allottee. Through the General Allotments Act Congress expressed its intent that income directly derived from the allotted land be exempt from all taxation.[21] Without such an implication of exemption, the policy of assimiliation, the stated purpose of the Act, would have been hindered.

III. COURT'S ANALYSIS

The Ninth Circuit reviewed *de novo* the lower court's conclusion that the General Allotment Act could not be interpreted to exempt allotment proceeds from gift taxation.[22] The court

---

19. The Indian allottees in both *Capoeman* and *Kirschling* were members of the Quinault Indian Tribe and all sought relief from taxes imposed on income received from sale of timber from their allotments. The most interesting difference in the cases is the amount of income involved in each case. Proceeds from the sale of trees from 93.5 acres of allotted lands brought the Capoemans $15,080.80 in 1943. 351 U.S. at 4.

The system of timber sales at the time was managed by the government to the disadvantage of individual sellers who received between one-third and one-half of the prevailing market value for their timber. This was because the government placed enormous tracts of forest lands, including federal holdings as well as Indian trust lands, of varying quality and accessibility up for bid at one time. *Id.* at 4 n. 7. Kirschling negotiated her own sale thus receiving more than $2.2 million for her timber. The district court pointedly noted that she could rely on *Copoeman* to "*avoid* income tax on the substantial income she must have realized" as though the amount of income had a relationship to the doctrine permitting tax exemptions. 82-1 USTC ¶13,443 at 84,228 (emphasis added).

20. We agree with the government that Indians are citizens and that in ordinary affairs of life, *not governed by treaties or remedial legislation*, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that the taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the General Allotment Act.

351 U.S. at 6 (emphasis added.)

21. The Court found that the language of section 5 of the General Allotment Act, "free of all charge or encumbrance whatsoever" could be reasonably interpreted to mean exemption from taxation. 351 U.S. at 7. In addition amendment to section 6 specifically included exemption from taxation as one of the restrictions to be removed only upon transfer of title in fee simple. *Id.*

22. 746 F.2d at 514.

noted that although *Capoeman* concerned a capital gains tax, the Ninth Circuit had previously held that it was not to be applied narrowly.[23] In fact, the language of the holding specifically exempted allotments from *all* taxation.[24]

Analogizing a line of cases exempting transfer of allotments and allotments proceeds from estate tax, the court found support for its view that *Capoeman* applied.[25] Since the purpose of the gift tax is to prevent avoidance of estate taxes by *inter vivos* transfers of property, these analogies were properly persuasive in this case of first impression.[26] Cases holding that ambiguous language which could reasonably be interpreted to confer a tax exemption for Indians must be so construed provided additional support for the applicability of the *Capoeman* interpretation of the General Allotment Act.[27]

The court's analysis then shifted to whether or not the allottee had received the property in fee simple prior to making the gift. Rejecting the government's argument that issuance of the check by the BIA constituted receipt of allotment proceeds in fee simple, the court found the statutory requirements for issuance of a patent in fee simple unmet.[28] The General Allotment Act required either that the statutory trust period expire[29] or that the Indian be determined to be competent before a patent could be issued.[30] Since those sections expressed congressional intent to protect noncompetent Indians from all taxation until such a patent issued, Kirschling's income from the sale of timber was exempt from all taxation, including gift tax.

IV. CONCLUSION

In *Kirschling*, the tension between strict construction of tax

---

23. Stevens v. Comm'r, 452 F.2d 714, 744 (9th Cir. 1971).

24. "[U]ntil such time as the [fee simple] patent is issued, the allotment shall be free from *all* taxes." 746 F.2d at 515 (citing *Capoeman* 351 U.S. at 8).

25. 746 F.2d at 151 (citing Asenap v. U.S., 283 F.Supp. 566 (W.D. Oklahoma 1968); Nash v. Wiseman, 227 F.Supp. 552 (W.D. Oklahoma 1963)).

26. 746 F.2d at 515.

27. *Id.* The Ninth Circuit in *Stevens* had noted the strong language in *Capoeman* urging favorable construction of statutes touching upon the special relationship between the government and the Indians. 452 F.2d at 744. The Supreme Court in *Capoeman* noted its previous decision in Carpenter v. Shaw, 280 U.S. 363 (1930). "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith." *Id.* at 367.

28. 746 F.2d at 516.

29. 25 U.S.C. § 348 (1976).

30. 25 U.S.C. § 349 (1976).

exemption statutes and liberal construction of statutes and treaties concerning Indians is once again resolved clearly in favor of the noncompetent Indian. The court will not favorably consider arguments that Indian tax cases sought to be resolved without reference to those statutes and treaties which specifically outline the trust relationship. Following *Capoeman*, the court found the statutory language to be sufficient to allow the exemption.[31]

The unresolved issue for which *Kirschling* and similar cases will be instructive, is the tax status of restricted Indian lands, such as those reacquired from allottees under the Indian Reorganization Act, from which an individual Indian derives income.[32] The trends in analysis by the courts towards consideration of all relevant legislation, treaties and general Indian policy serves as a warning to the IRS to expand its consistently narrow view of Indian tax case precedent.[33] To continue to argue that tax exemptions for Indians must be supported by specific statutory language is to ignore the judicial deference to the guardian-ward relationship as it is related to taxation.[34]

*Margaret Crow**

---

31. 746 F.2d at 516.

32. The Indian Reorganization Act provided for restoration of non-allotted lands to tribal ownership, exchanges of Indian and non-Indian lands to effectuate consolidation within reservations and transfers of allotted lands from individual Indian ownership back to tribal ownership. 25 U.S.C. §§ 4634a, 463e, 464. (1970).

33. *See* Fiske and Wilson, *supra* note 10.

34. The IRS interpretation of the Capoeman decision is expressed in Revenue Ruling 67-284, 1967-2 CUM. BULL. 55, which sets out a five part test for determining whether an exemption for income derived from an allotment will be granted:

> (1) The land in question is held in trust by the United States Government;
> (2) such land is restricted and allotted and is held for an individual noncompetent Indian, and not for a tribe;
> (3) the income is "derived directly" from the land;
> (4) the statute, treaty or other authority involved evinces congressional intent that the allotment be used as a means of protecting the Indian until such time as he becomes competent; and
> (5) the authority in question contains language indicating clear congressional intent that the land, until conveyed in fee simple to the allottee, is not to be subject to taxation. If one or more of these five test is not met, and if the income is not otherwise exempt by law, it is subject to Federal income taxation.

Id. at 56-57.

"It is not to be lightly assumed that Congress intended to tax the ward for benefit of the guardian." Superintendent of Five Civilized Tribes v. Comm'r, 295 U.S. 418, 420 (1935).

* Golden Gate University School of Law, Class of 1986.

DONOVAN v. COEUR D'ALENE TRIBAL FARM: NINTH CIRCUIT APPLIES OSHA TO INDIAN FARM

I. INTRODUCTION

In *Donovan v. Coeur d'Alene Tribal Farm*,[1] the Ninth Circuit held that the Occupational Safety and Health Act[2] (the Act) applied to an Indian farm due to the absence of congressional intent to exclude Indian enterprises from coverage. In reversing an Occupational Safety and Health Review Commission (the Commission) decision vacating citations and penalties assessed against the farm,[3] the court held that the statute was enforceable despite arguments that the Tribe's inherent sovereign power to exclude non-Indians barred application.[4]

In October, 1978, a compliance officer from the Occupational Safety and Health Administration (OSHA) conducted an inspection of two grain elevators on the Coeur d' Alene Tribal Farm, a commercial enterprise wholly owned and operated by the Tribe on their reservation in northern Idaho.[5] Citations were issued for twenty-one alleged violations and fines totalling $185.00.[6] While not challenging the facts upon which the citations were based, the Tribe claimed the Act had no application to an Indian enterprise.[7]

An Administrative Law Judge (ALJ) upheld the citations and penalties.[8] Upon review, the Commission remanded the case for reargument in light of their recent decision in *Navajo Forest Products Industries* (NFPI) which held the Act inapplicable to

1. No. 84-7031, slip op. (9th Cir. Jan. 15, 1985)(per Sneed, J.; the other panel members were Wright, J., and Alarcon, J.).
2. 29 U.S.C. §§ 651-78 (1982).
3. Coeur d'Alene Tribal Farm, 11 O.S.H. Cas. (BNA) 1705 (Nov. 16, 1983).
4. Coeur d'Alene Tribal Farm, No. 84-7031, slip op. at 137.
5. *Id.*
6. *Id.*
7. *Id.*
8. Coeur d'Alene Tribal Farm, 1980 O.S.H.D. (25,5P)54 (May 20, 1980)(per Stuller).

an enterprise on an Indian reservation.[9] The ALJ reaffirmed the earlier decision, distinguishing *NFPI* on the ground that the Coeur d'Alene Tribe had no treaty upon which to base its claim of sovereign powers.[10] The Commission reversed and vacated the citations on the ground that the Act did not apply to tribal enterprises because of a tribe's inherent right to exclude non-Indians.[11] The government then appealed to the Ninth Circuit.

II. BACKGROUND

The primary Supreme Court cases relied upon in *Coeur d'Alene Tribal Farm* were *Federal Power Commission v. Tuscarora Indian Nation*[12] and *Merrion v. Jicarilla Apache Tribe.*[13] These cases outline the origin and scope of tribal sovereign powers.

Tuscarora held that the Federal Power Act authorized the taking of twenty-two percent of Tuscarora lands which were to be inundated by the construction of a dam.[14] The Indians argued that the government could not condemn the land without explicit statutory language authorizing application of the Act to Indian lands. However, the Court found that the lands in question were not "tribal lands embraced within an Indian reservation" and thus not excludable under provisions of the Act.[15] Therefore, the exercise of eminent domain powers did not conflict with any rights guaranteed by treaty and was permissible.[16] The Tuscaroras had no treaty with the United States government upon which they could rely to argue their sovereign rights were infringed by the taking of these lands. The lack of a treaty

9. 8 O.S.H. Cas. (BNA) 2094, *aff'd* 692 F.2d 709 (9th Cir. 1982). The Commission decision in this case will be referred to as *NFPI* to distinguish it from the appellate court decision which will be referred to as *Navajo Forest Products.*

10. Coeur d'Alene Tribal Farm, 1982 O.S.H.D. ¶25,962 (Feb. 16, 1982)(per Stuller).

11. 11 O.S.H. Cas. (BNA) at 1708.

12. 362 U.S. 99 (1960).

13. 455 U.S. 130 (1982).

14. 362 U.S. at 124 (Black, J., dissenting).

15. Section 4e of the Federal Power Act, 41 Stat. 1063, *as amended*, 16 U.S.C. §§ 791a-828c, prohibited the taking of reserved land if such taking would "interfere or be inconsistent with the purpose for which such reservation was created or acquired." Although Section 3 (2) defined reservation as including "tribal lands embraced within Indian reservation" the majority decided that the Tuscarora Indian lands did not meet that definition because the Indians held the lands in fee simple. The dissent found this definition to be "wholly artificial and limited." 362 U.S. at 127 (Black, J., dissenting).

16. 362 U.S. at 124.

has served as a distinguishing factor between this case and later ones reaching opposite results.[17]

In *Merrion*, the Court examined whether the Jicarilla Apache Tribe had the power to levy severance taxes on the oil and gas production of non-Indians on reservation lands.[18] In sustaining the tax, the Court characterized the right alternatively as one of self-government[19] or as derived from the right to exclude non-Indians from the reservation.[20] The Court stated that the right to exclude non-Indians was a "hallmark" of sovereignty.[21] Both rights were deemed essential to self-government and territorial management.[22] The reservation in *Merrion*, like the one in *Tuscarora*, was not created by a treaty with explicit language recognizing its sovereign powers.[23] The Court noted that "the Tribe's sovereign power is not affected by the manner in which its reservation is established."[24]

During the hearings on *Coeur d'Alene Tribal Farm*, a case with strikingly similar facts came before the Occupational Safety and Health Review Commission, ultimately progressing to the Tenth Circuit. In *Donovan v. Navajo Forest Products Industries*,[25] the court upheld a Commission decision that the Occupational Safety and Health Act did not apply to a tribal enterprise because it violated the tribe's sovereign right to exclude non-Indians.[26] The government had argued that under the *Tuscarora* holding, the Act applied to the Navajo Forest Products Industries, a timber conversion facility wholly owned and operated by the Navajos on their reservation in New Mexico.[27] The court held that by implication *Merrion* overruled *Tuscarora* at least as to the statement relied upon by the government that "it is now well-settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their

17. *See* text accompanying note 15 *supra*.
18. 455 U.S. at 133.
19. *Id.* at 139.
20. *Id.* at 144.
21. *Id.* at 141.
22. *Id.*
23. The reservation was established by the Executive Order of 1887. I C. Kappler, *Indian Affairs, Laws and Treaties* 875 (1904) (order of President Cleveland).
24. 455 U.S. at 134.
25. 692 F.2d 709 (1982).
26. *Id.* at 714.
27. *Id.* at 710.

property."[28]

The court held that article II of the 1868 treaty between the United States and the Navajo Tribe, which recognized the right to exclude non-Indians from the reservation, applied to OSHA inspectors.[29] *Tuscarora* was distinguished due to the lack of a treaty in that case. The application of the statute did not abrogate any treaty rights which would have been the result of application of the Act in the instant case. However, the court emphasized that the Court in *Merrion* had clearly stated that the right to exclude need not be explicitly expressed in a treaty in order to be enforceable.[30]

The Commission's final decision in *Coeur d'Alene Tribal Farm*[31] reached several conclusions as to why the Act did not apply to the farm.[32] The Tribe argued that the Commission's *NFPI* decision governed and that the Act did not apply because it did not express congressional intent to abrogate tribal sovereign powers. The government argued that *NFPI*, at that time on appeal to the Tenth Circuit, ought to be overruled.[33] The Commission noted two reasons why the lack of a treaty did not distinguish this case from *NFPI*. First, treaty making with Indian tribes ended in 1871,[34] two years before the reservation was established by executive order.[35] The executive order and the congressional approval of Articles of Agreement in 1887 served as recognition of tribal sovereignty. Secondly, and more importantly, the specific right to exclude non-Indians is a "fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and of its members."[36] Specific governmental recognition of such a right was not essential to protect it from abrogation.

Finding no material factual distinctions between *NFPI* and

---

28. *Id.* at 713.
29. *Id.* at 711-12.
30. *Id.* at 712-13.
31. 11 O.S.H. Cas. (BNA) 1705 (Nov. 16, 1983).
32. *Id.* at 1708.
33. *Id.*
34. Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified in part at 25 U.S.C. § 71.)
35. Exec. Order No. 1111 (1873).
36. 692 F.2d at 712 (citing *Merrion*, 455 U.S. at 141).

the case before it, the Commission again rejected the government's arguments that the *Tuscarora* rule should apply and held for the farm.

III. COURT'S ANALYSIS

The Ninth Circuit accepted the government's argument that *Tuscarora* applied and proceeded to examine three exceptions to the rule. Although silent on the issue of its applicability to Indian tribes, the Act would be held to apply unless it (1) touched exclusive rights of self-government; (2) abrogated treaty rights; or (3) showed an intent in its legislative history to exclude Indians.[37] If any of these exceptions were satisfied then the statute must expressly state its intent to apply to Indians, a test which this Act did not meet.

The court rejected the argument that tribally owned enterprises, such as the farm, fell within the scope of the "tribal self-government" exception. The court defined the exception as applying only to intramural matters.[38] The fact that such enterprises primarily serve the goals of improving economic and social conditions on the reservation, with the profit motive secondary, did not impress the court which characterized the farm as "a normal commercial farming enterprise."[39]

Within this same exception, the court entertained but rejected the proposition that the right to exclude non-Indians was a "fundamental aspect" of sovereignty.[40] Distinguishing *Merrion* on its facts, the court stated that although *Merrion* recognized the right to exclude as a "hallmark" of sovereignty, the opinion did not address Congress' ability to alter those sovereign rights. It rejected the Indian's contention that such alterations must be express rather than implied.[41]

Addressing the treaty rights exception, the court held that the lack of a treaty or other document signed by the United States specifically guaranteeing the right to exclude was fatal to

37. Slip op. at 138-39 (citing U.S. v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980) *cert. denied* 449 U.S. 1111 (1981).

38. Coeur d'Alene Tribal Farm, No. 84-7301, slip op. at 139.

39. *Id.*

40. *Id.*

41. *Id.* at 139-40.

the claim that the Act must expressly state its intent to apply to Indians. In rejecting *Navajo Forest* the court stated that "to whatever extent the Tenth Circuit's decision is not tied to the existence of an express treaty right, we disagree with it."[42]

IV. Conclusion

This opinion gives cursory treatment to the essential issue of why a power, recognized as sovereign, will be protected only where a treaty is found. Besides the fact that many reservations were created without a treaty and the fact that treaties vary in specificity, this holding ignores the Tenth Circuit's observation that the treaty *recognized* rather than *created* the rights in question.[43]

Under its plenary powers Congress can abrogate the sovereign rights of Indians tribes to exclude non-Indians. However, by analogizing to cases which hold that for a general statute to abrogate treaty rights congressional intent must be clearly expressed,[44] the court ought to require the same for abrogation of inherent sovereign rights. Even though the existence of tribal enterprises is well-known, the Occupational Safety and Health Act does not specify application to Indian reservations. To distinguish essentially similar tribal enterprises on the basis of existence of a treaty is arbitrary and unfair to the tribes. Specific language in the statute would lead to fair and consistent application and would avoid artificial distinctions between reservations.

*Margaret Crow**

42. *Id.* at 140 n.3. As to the third factor from the *Farris* test, neither side presented arguments that there existed in the legislative history of the Act any manifestation of congressional intent to exclude Indians.

43. 692 F.2d at 712.

44. Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 Calif. L. Rev. 601, 623-30, (1975).

* Golden Gate University School of Law, Class of 1986.