4TH CIVIL NO.
D054439

In the Court of Appeal

OF THE

State of California

FOURTH APPELLATE DISTRICT
DIVISION ONE

Angelina Mike
Plaintiff and Appellant,

v.

Franchise Tax Board
Defendant and Respondent.

APPEAL FROM THE SAN DIEGO SUPERIOR COURT
HONORABLE RICHARD E.L. STRAUSS, JUDGE
Case No. 2007-00067324-CU-MC-CTL

APPELLANT'S REPLY BRIEF

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
RICHARD M. FREEMAN, CAL. BAR NO. 61178
CAROLE M. ROSS, CAL. BAR NO. 163048
12275 EL CAMINO REAL, SUITE 200
SAN DIEGO, CALIFORNIA 92130-2006
TEL: 858-720-8900

Attorneys for Appellant Angelina Mike

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Treatises

I.
INTRODUCTION

Reservation income of an Indian who resides within Indian country is exempt from state taxation. There is no requirement that the Indian reside in Indian country owned or controlled by her tribe. The Franchise Tax Board's ("FTB's") strained interpretation of the McClanahan exemption ignores subsequent United States Supreme Court precedent, the statutory definition of Indian country, and well-accepted canons of construction involving Indian rights endorsed by the Supreme Court.

The Supreme Court has held that a state may not tax income derived from reservation sources where an Indian resides anywhere within "Indian country," as that term is defined by 18 U.S.C. § 1151. The statutory definition of Indian country includes dependent communities and allotments as well as reservations. A dependent community is not on land owned or controlled by a tribe and does not necessarily involve a tribal government. A dependent Indian community can be made up of members from more than one tribe and still be considered statutory Indian country. Also, an allotment is a parcel of land owned in trust by the federal government for a particular Indian or owned by a particular Indian. Like dependent communities, allotments are not owned or controlled by tribes, but are still Indian country.

The FTB cites no authority for its argument that dependent communities and allotments constitute Indian country only if they are owned or controlled by a tribe because there is no such authority. The notion that statutory "Indian country" is determined by ownership or control of the land is simply incorrect as a matter of law. The statute on its face does not limit Indian country to land owned or controlled by the Indian's tribe. To the extent the FTB asserts the statute defining Indian country is ambiguous, the established canons of construction of Indian rights require that, in the event of any ambiguity, doubtful expressions must be resolved in favor of the Indians. (McClanahan v. Arizona Tax Comm'n (1973) 411 U.S. 164, 174.)

The FTB's assertion that statutory Indian country is limited to land owned or controlled by the taxpayer's tribe is based upon a mistaken assumption that tribal sovereignty must be infringed. Although the concept of sovereignty was used as a backdrop when the Court initially held that tribal income of an Indian in Indian country is tax exempt, the Court stated that interference with tribal sovereignty was not a prerequisite. The Court has never held that an Indian must live within her tribe's Indian country in order for her tribal income to be exempt.

Finally, this case differs from any case cited by the FTB because Appellant Angelina Mike's ("Mike") per capita distribution is derived from activities that occurred solely upon the reservation of Mike's tribe. The

tribal distribution is within a sphere of protected activity. Mike then took her distribution from her tribe's reservation to her residence on the reservation of the Agua Caliente Band of Cahuilla Indians. The Agua Caliente reservation, title of which is held by the federal government, falls within the definition of Indian country. Under these circumstances and applicable federal law, Mike's per capita distribution is exempt from state taxation.

II.
MIKE'S TRIBAL DISTRIBUTION IS NOT SUBJECT TO STATE INCOME TAX

A. In McClanahan, The Supreme Court Has Held That Tribal Income Of A Navajo Indian Who Lived On The Reservation Was Exempt From State Taxation.

The United States Supreme Court held that reservation income of a Navajo Indian who lived on the Navajo reservation was exempt from state taxation in McClanahan, supra, 411 U.S. 164. Although the doctrine of Indian sovereignty did not definitively resolve the issue, this doctrine provided a backdrop for interpreting the federal statutes and treaties. (Id. at 172.)

The Court noted that the important "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." (McClanahan, 411 U.S. at 148, quoting, Rice v. Olson (1945) 324 U.S. 786, 789.) "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty

long predates that of our own Government." (Id. at 172.) Although Indians are citizens and receive state services, "'[t]he relation of Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having semi-independent positions when they preserved their tribal relations; not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the full power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." (Id. at 173, quoting, United States v. Kagama (1886) 118 U.S. 375, 381-382.)

In McClanahan, the state of Arizona argued that the proper test was whether the tax infringed on the rights of reservation Indians to make their own rules and to live by them. Arizona also argued that sovereignty was not infringed because the tax was imposed on the members rather than the tribe. The Court rejected the arguments, responding that although it was not convinced that sovereignty was not implicated, infringement on tribal sovereignty was not the proper test. (Id. at 179.) "Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and the Indians themselves." (Id. at 179-180.) The fact that tribal self-government has not been infringed was not necessary for the exemption. (Id. at 179-180).

While the Supreme Court referred to "reservation Indians," the Court's decision did not distinguish between Indians living on their own reservation or the reservation of another tribe. The facts involved one Navajo Indian who happened to live and work on her own reservation. Thus, the Court did not limit its ruling to Indians who live on their own tribe's reservation.

B. The Supreme Court Has Held That The McClanahan Exemption Applies To All Indians In Statutory "Indian Country," Not Just Indians Living On Their Reservation

Two decades after McClanahan, the Court made it clear that the McClanahan exemption applies to all Indian country, as that term is defined in 18 U.S.C. § 1151. (Oklahoma Tax Comm'n v. Sac & Fox Nation (1993) 508 U.S. 114, 125 ["Sac & Fox"].)

In Sac & Fox, a federally recognized tribe sued for an injunction prohibiting the state of Oklahoma from taxing tribal members who lived or worked within the local geographic area. Oklahoma argued that the tribal members were not exempt because McClanahan was limited to formal reservations and the Sac & Fox reservation had been disestablished. The Court quickly rejected this narrow interpretation of McClanahan, stating that the exemption applied to all Indian country as defined by 18 U.S.C. § 1151. (Id. at 123.) The question is not whether the land is a formal reservation. "Instead, we ask only whether the land is Indian country." (Sac & Fox 508 U.S. at 125.) "[T]he intent of Congress, as elucidated by

[Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection." (Id. at 125, quoting, F. Cohen, Handbook of Federal Indian Law 234 (1982).[1]) "Additional congressional enactments supports our conclusion that the McClanahan presumption against state taxing authority applies to all Indian country, and not just formal reservations." (Sac & Fox 508 U.S. at 125.)[2]

"[O]ur cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.' Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments." (Sac & Fox 508 U.S. at 125, citing, 18 U.S.C. § 1151.) Absent express Congressional direction to the contrary, a state may not tax Indians who live and work in Indian country, as that term is defined by 18 U.S.C. § 1151.

Because the lower court never determined whether the Indians lived in Indian country, the Court remanded the case. "On remand, it must be

---

[1] Even though the FTB criticizes Mike for citing to the Handbook of Federal Indian Law, the Supreme Court and the FTB have cited to and relied upon this well-recognized treatise. (See Respondent's Brief p. 27.)

[2] Without citation to authority, the FTB claims that questions regarding members of another tribe were resolved adversely to Mike's claim by the Court of Appeals. There is no such order in any published decision.

determined whether the relevant tribal members live in Indian country – whether the land is within reservation boundaries, on allotted lands, or in dependent communities." (Id. at 126.) The Court went on to state that "[b]ecause all of the tribal members earning income from the Tribe may live within Indian country, we need not determine" whether the right to self-governance preempts the state's ability to tax. (Id.)

C. The Court Again Confirmed That The Issue Is Whether the Indian Lives Within Statutory Indian Country

Following Sac & Fox, the Court again used "Indian country" as the test to determine whether a state was entitled to tax the tribal income of Indians. (Oklahoma Tax Comm'n v. Chickasaw Nation (1995) 515 U.S. 450.) In Chickasaw Nation, the issues included whether Oklahoma was entitled to tax the income of tribal members who live outside Indian country. Rather than discussing tribal members and nonmembers, the Court spoke in terms of Indians and non-Indians, and reiterated that the proper test is whether the Indian resides in Indian country.

"When a state attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: `[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians." (Chickasaw Nation, 515 US at 458, quoting, County of Yakima

v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 258 (1992).) "Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country." (Id. at 458; see, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976); McClanahan, 411 U.S., at 165-166.) Because the Indians did not live in Indian country, the Court held that the tax was valid.

D. The Statutory Definition of Indian Country Does Not Require The Taxpayer Live In Her Own Tribe's Land

To support its argument that the exemption applies only to the Indian country of the taxpayer's tribe, the FTB claims "[i]t is undisputed that a member's income, when he or she is living outside lands owned or controlled by her tribe are fully taxable."[3] (Respondent's Brief p. 26.) While this principle might be accurate outside the context of Indian law, it is not accurate with regard to taxation of Indians. In Sac & Fox, the Court clearly held that the McClanahan exemption applies to informal reservations, dependent communities and allotments. As explained below, this necessarily means that the tribe need not own or control land in order for land to be considered Indian country.

[3] None of the cases cited by the FTB for this proposition involve Indians or Indian law.

The FTB's interpretation of Indian country stems from a fundamental misunderstanding of Indian land law, including a misconception as to who owns and controls the land within Indian country. It is nonsensical to argue that the McClanahan tax exemption only applies if an Indian is on land owned or controlled by her tribe. The statutory definition of Indian country includes lands that have no tribal government and lands that are not owned or controlled by any particular tribe. Despite this lack of tribal government, tribal ownership, and tribal control, these lands are statutorily defined as Indian country.

1. The FTB's Interpretation Impermissibly Restricts the Statutory Definition of Indian Country

According to the Supreme Court, whether an Indian's tribal distribution is exempt depends upon whether the Indian lives in "Indian country" as defined by 18 U.S.C. § 1151.[4] The term "Indian country" means (1) the boundaries of formal and informal reservations, (2) dependent Indian communities, and (3) Indian allotments, whether restricted or held in trust by the United States. Section 1151 does not limit Indian country to the dependent community or allotment of the Indian's tribe. Indeed, as explained below, such a limitation would be nonsensical.

[4] The FTB has already conceded that the tribal income of an Indian within Indian Country is not subject to state tax. (Estate of Leonard Saubel, et al., Case No. 352452, 379738, 355613 and 355681 [Joint Appendix 113-114].)

The FTB, however, seeks to limit or redefine Section 1151 as adding the phrase "of the individual Indian's tribe" after each clause.[5]

As the Court has explained, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." (Montana v. Blackfeet Tribe (1985) 471 U.S. 759, 766, quoting, Oneida County v. Oneida Indian Nation (1985) 470 U.S. 226, 247.) Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. (Blackfeet 471 U.S. 766, citing, McClanahan 411 U.S. at 174.) Doubtful expressions are to be resolved in favor of the Indians. (McClanahan 411 U.S. at 174.) The FTB's attempt to evade this well-accepted canon as applying to only the Indian country of the Indian's tribe lacks merit.

Thus, the Supreme Court did not limit Indian country to the Indian country of the particular taxpayer's tribe. The Court concluded that, for purposes of the McClanahan exemption, Indian country includes all land within Indian country as defined by statute, including all reservations, dependent communities, and allotments.

2. The FTB's Interpretation Is Inherently Inconsistent With The Statute

[5] During the proceedings before the trial court, the FTB conceded that Mike lived in Indian country, just not her tribe's Indian country. (JA 197:23-27.)

In order to be considered a dependent Indian community, the land must be: (1) set aside by the federal government for the use of Indians as Indian land; and (2) under federal superintendence. (Alaska v. Native Village of Venetie Tribal Government, et al. (1998) 522 U.S. 520, 527.) There is no requirement that a dependent community be controlled by an Indian's tribal government or even that there is a tribal government controlling any portion of the land. A dependent community includes land set aside for all Indians without regard to membership in any particular tribe. (United States v. McGowan (1914) 302 U.S. 535 [land set aside for all needy Indians who had been scattered throughout Nevada constituted a dependent Indian community[6]].) The dependent community may include Indians from many different tribes without any consideration of tribal membership. (See McGowan 302 U.S. 535.) Thus, a dependent community is not necessarily owned or controlled by any particular tribe and yet is still considered Indian country.

Similarly, an allotment is either a parcel of land owned by the United States in trust for an individual Indian (trust allotment) or owned by an

---

[6] In McGowan, the dependent community comprised of all Indians who came to live there without regard to tribal membership. If an Indian country may be comprised of unrelated Indians, it is illogical to conclude that Mike does not live in Indian country because she lives on the reservation of a neighboring and related tribe. Although McGowan was defined Indian country before Section 1151 was enacted, it remains a valid example of a dependent community. (Venetie 522 U.S. at 530.)

Indian subject to a restriction on alienation (restricted allotment). (Cohen's Handbook of Federal Indian Law, §3.04[2][c][iv], p. 195, 16.03[1], p. 1039 (2005)[7]; United States v. Sands (10th Cir. 1992) 968 F.2d 1058, 1061-62.) The statutory definition of Indian country includes both trust allotments and restricted fee allotments. (United States v. Sands (10th Cir. 1992) 968 F.2d 1058, 1061-62.) An allotment is neither owned nor controlled by a tribe. Thus, the FTB's theory that a tribe must own and control Indian country in order for the exemption to apply is inherently flawed. Tribes do not own or control dependent communities or allotments.

The fact that tribal ownership and control of land is not a prerequisite to applying the tax exemption is consistent with the reasoning of McClanahan. The Court expressly used the concept of Indian sovereignty as the backdrop for and not as the touchstone of that exemption. (McClanahan 411 U.S. at 172.) When Indians live in Indian country, tribal income is exempt from state taxation without regard to whether tribal sovereignty is necessarily being infringed. (See Sac & Fox 508 U.S. at 126; McClanahan 411 U.S. at 179-180.) Limiting the McClanahan exemption to Indian country controlled by the particular Indian taxpayer's tribe effectively means that the exemption will rarely, if

[7] Copies of the pages cited from this treatise are in the appendix attached hereto.

ever, apply to Indians who live in dependent communities and never apply to Indians who reside on allotments. This narrow interpretation is significantly more restrictive than what was intended by Congress and the Supreme Court.

E. The Court Has Not Limited the McClanahan Exemption To Member Indians

The FTB argues that Moe, Colville and Duro and other decisions effectively resolve the issue of whether an Indian must live in the Indian country of her own tribe in order to qualify for the McClanahan tax exemption. This myopic interpretation completely ignores Sac & Fox and Chickasaw, both of which were decided after the cases relied upon by the FTB.

1. Colville Involved The Marketing of A Tax Exemption

In Washington v. Confederated Tribes of Colville (1980) 447 U.S. 134, the tribes imported cigarettes onto the reservation for resale to the general public. The tribes challenged the state's efforts to force the smoke shops to charge and collect sales tax to Indian purchasers of cigarettes who resided on the reservation but who were not enrolled members of that tribe. The Court held that the tax was valid, stating that the value marketed to purchasers is not generated by reservation activities. (Colville 447 U.S. at 155.) The only thing the smoke shops offered the customers that was not available elsewhere was the tax exemption. (Id.) Principles of self-

government do not authorize tribes to profit by marketing tax-exemptions. Otherwise tribes could operate chains of discount stores on the outskirts of the reservations, selling all types of goods at deep discounts. (Id.)

The facts of Colville are significant because they did not involve any on-reservation activities that generated value (in contrast to the facts here.) The only reason the cigarettes had value was because they were brought onto Indian land. In a subsequent case, the Supreme Court emphasized that its holding in Colville was based upon the fact that the tribes were merely importing a product onto the reservation and profiting because they sold the item without tax. (California v. Cabazon Band of Mission Indians (1987) 480 U.S. 202, 219.)

In Cabazon, two tribes challenged the state's attempts to regulate the gambling activities that occurred on the tribal reservations. Relying upon Colville, the state insisted it was entitled to regulate the conduct because the tribes were merely marketing an exemption from state gambling laws. The Court distinguished Colville because the smoke shop was merely importing a product onto the reservation for immediate resale. (Id. at 219.) In contrast, the tribes in Cabazon were generating value on the reservation through gambling and other recreational activities. (Id. at 219-220.) The Court concluded that state regulation of the gambling activity would impermissibly infringe upon tribal government and, therefore, was preempted. (Id. at 221-22.)

Here, Mike's tribal income is derived from the gaming activities on the reservation - Mike's reservation. As in Cabazon, the gaming and recreational activities on the Twenty-Nine Palms Band of Mission Indians reservation implicate tribal self-government. The Court's decision in Colville does not somehow take this case beyond the realm of the McClanahan exemption. The argument that Colville somehow changed the landscape of the McClanahan exemption is not supported by the Supreme Court cases following Colville. Both Sac & Fox and Chickasaw were decided after Colville and yet neither case distinguishes between members and nonmembers. Instead, in both cases, the Court stated that whether income is exempt depends upon whether the Indian lives in Indian Country, as defined by statute.

In Chickasaw, the Court had the perfect opportunity to make a distinction between members and nonmembers with regard to the McClanahan exemption. There, the Court addressed a state property tax and a state income tax. The Court cited Colville with respect to whether the property tax was barred. The Court did not, however, state or imply that Colville should be interpreted to limit Indian country to the Indian country of the particular taxpayer.

2. Other Decisions Relied Upon By the FTB Are Similarly Inapposite

The FTB's reliance upon Moe v. Salish & Kootenai Tribes (1976) 425 U.S. 463 is ambiguous and misplaced. On the one hand, the FTB cites Moe as distinguishing between member and nonmember Indians. On the other hand, the FTB repeatedly concedes that the Court in Moe did not distinguish between member and non-members. (Respondents' Brief p. 5, p. 8-9; Moe p. 476-477.)

In Moe, an Indian tribe and a few of its members sued to challenge sales tax and property taxes with respect to property located on the reservation or sold on the reservation. The Court held that the sales tax and property tax were not valid as to the Indians who lived on the reservation. The Indian retailers, however, could be required to pass the tax along and collect the tax from non-Indians. The Court did not distinguish between members and nonmembers.

The Court's decision in Duro v. Reina (1990) 495 U.S. 676 also does not support the FTB's position. In Duro, the Court held that tribal criminal jurisdiction over nonmember Indians lay beyond the tribes' retained sovereignty. In reaching this conclusion, the Court rejected the notion that the definitions of "Indian" in federal statutes apply to all Indians without regard to membership in a particular tribe. (Id. at 689.) In response to Duro, Congress immediately amended 25 U.S.C. § 1301, to "recognize and

affirm" that that tribes' power of self-government includes the "inherent power" to exercise criminal jurisdiction over "all Indians." The Court has confirmed that the Duro-fix was merely a reaffirmation of what Congress originally intended. (United States v. Lara (2004) 541 U.S. 193, 199.) Thus, both Congress and the Court have confirmed that tribal sovereignty may be infringed where the conduct involves member and nonmember Indians. The FTB's reliance upon Duro as support for distinguishing between members and nonmembers is misplaced. The Duro-fix supports Mike's position that Indian country is not limited to land owned or controlled by the member's tribe.

The FTB's reliance upon the Supreme Court's decision in Strate v. A-1 Contractors (1997) 520 U.S. 438 is similarly misplaced. In Strate, Stocker, a non-Indian collided with Fredericks on a state highway that ran through an Indian reservation. Fredericks was not an Indian but she was a widow of a tribal member and her five children were members of the tribe. Fredericks and her children sued Stockert and the owner of the truck in tribal court. Stockert filed a suit in federal court against seeking a declaratory judgment that the tribal court lacked jurisdiction.

The Court held that the tribal court had no right to assert jurisdiction as a landowner over the state highway on which the accident occurred. (Id. at 456.) The Court also held that the tribal court lacked jurisdiction over these individuals. In general, tribes lack civil authority over non-Indians

unless either of two exceptions apply: the nonmember consented to jurisdiction by her conduct or the conduct has a direct threat on the tribe's political integrity, economic security or welfare. (Id. at 447, citing, Montana v. United States (1981) 450 U.S. 544, 546-57) The Court in Strate concluded that neither exception applied. (Id. at 457.)

The Court's decision in Strate involved Indians (the children, who were tribal members) and non-Indians. Although the Court used the term nonmember, it does not support an argument that the McClanahan tax exemption applies only where the taxpayer lives in her tribe's Indian country. Strate is not a tax exemption case. The Court decided Strate before Sac & Fox and Chickasaw Nation. If the Court had intended to limit the McClanahan exemption to the Indian country of the taxpayer's tribe, it could and would have expressly done so of the Tribe.

F. The State Cases Do Not Involve An Indian Whose Income Is Derived From Activities Of The Indian's Own Reservation

The state cases cited by the FTB addressing the McClanahan exemption are not persuasive for a very significant reason: none of these cases involve an Indian who earned her income from her tribe's (reservation) activities and yet lived on the reservation of another tribe. Mike's tribal distribution is a result of the income from income earned from the casino of the Twenty-Nine Palms Band of Mission Indians. The casino is located on the reservation of the Twenty-Nine Palms Band of Mission

Indians. Thus, Mike's income is within a protected sphere of activity. (See McClanahan 411 U.S. at 179.) Because Mike lives within Indian country, her tribal distribution is exempt from state taxation.

III.
CONCLUSION

Because Mike resides within the boundaries of the reservation of the Agua Caliente Band of Cahuilla Indians, she lives within Indian country as defined by Section 1151. The Court has declared that states may not tax an Indian's reservation income if the Indian lives within Indian country. Mike's tribal distribution, therefore, is not subject to state income tax. Accordingly, Mike respectfully requests that the Court reverse the trial court's judgment and order a refund to Mike.

Dated: October 30, 2009

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____

RICHARD M. FREEMAN
CAROLE ROSS
Attorneys for Petitioner and Appellant
Angelina Mike

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1).)

The text of this brief, exclusive of tables and certificate of word count, consists of 4,197 words, as counted by the Microsoft Word for Windows word-processing program used to generate the brief.

Dated: October 30, 2009

Richard M. Freeman
Carole M. Ross

APPENDIX

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW

2005 EDITION

LexisNexis™
Matthew Bender®

of ANCSA.[434] Thus, patented parcels of land and rights-of-way may also be within Indian country if they are within a dependent Indian community.[435]

[iv]—Allotments

The final subsection of the Indian country statute[436] includes in the definition "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." In this subsection, unlike sections 1151(a) and (b), Indian country status is tied specifically to land title except for rights-of-way. The term "Indian allotment" has a reasonably precise meaning, referring to land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation.[437] Most allotments were originally carved out of tribal lands held in common, and many remain within the present boundaries of reservations.[438] The phrase "the Indian titles to which have not been extinguished" refers to the termination of ownership by an individual Indian rather than to whether or not tribal aboriginal title has been extinguished. When land is allotted in trust or fee, any tribal property interest in the allotted parcel is eliminated.[439] Consequently, section 1151(c)'s major impact is on allotments not within a reservation or a dependent Indian community. These allotments have been set aside in a variety of ways, including "public domain allotments" and Alaska Native allotments.[440] Also, the complete or partial disestablishment of some reservations left trust allotments outside reservation boundaries, but their Indian country status is retained.[441] Other statutes provided for homesteading by Indians with title held under the same federal restrictions as allotments.[442] The government has at times converted

---

434 HRI, Inc. v. EPA, 198 F.3d 1224, 1248–1249, 1232, n.3 (10th Cir. 2000).

435 See also the discussion of fee lands within Pueblo "dependent Indian communities" in Ch. 4, § 4.07[2][d].

436 18 U.S.C. § 1151(c).

437 United States v. Ramsey, 271 U.S. 467 (1926); United States v. Pelican, 232 U.S. 442 (1914); United States v. Sands, 968 F.2d 1058, 1061–1062 (10th Cir. 1992). *See generally* Ch. 16, § 16.03.

438 *See* Ch. 16, § 16.03; United States v. Celestine, 215 U.S. 278 (1909); *see also* Seymour v. Superintendent, 368 U.S. 351 (1962).

439 As the Supreme Court explained, "The objects of this [allotment] policy were to end tribal land ownership and to substitute private ownership." Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 651 n. 1 (1976); *see also* Babbitt v. Youpee, 519 U.S. 234 (1997) (allotment is private property for purposes of fifth amendment takings clause).

440 *See, e.g.*, 25 U.S.C. § 334 (Indians residing outside of reservations); 25 U.S.C. § 336 (public domain lands); 25 U.S.C. § 337 (National Forests); Act of May 17, 1906, 34 Stat. 197 (Alaska Native Allotment Act). *See* Ch. 4, § 4.07[3][b][iv], and Ch. 16, § 16.03.

441 DeCoteau v. Dist. County Court, 420 U.S. 425, 427 n.2 (1975); *see* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 n.48 (1977). In the case of disestablishment, the parcels left were already designated as allotments.

442 The Act of July 4, 1884, § 1, 23 Stat. 76 (repealed 1976), which entitled any Indian to utilize the homestead laws to obtain land, and required that patents so obtained be placed in a

Indian fee holdings into trust holdings and has purchased trust lands for individuals.[443] Courts have treated both homestead and purchased parcels as allotments so long as they are in federal trust or restricted status.[444] In *United States v. Jackson*,[445] the Supreme Court held that a trust homestead's restrictions could be extended pursuant to General Allotment Act, because "it has long been the settled ruling of the Department of the Interior, both under the very statutes here involved and under other statutes enacted by Congress with similar purpose and pursuant to its general plan with respect to Indian allotments and homesteads, that Indian allotments and Indian homesteads are in all essential respects upon the same footing, and that each is equally within the purview of a statute in which the Congress may use only the terms 'allottee' and 'allotment.' "[446] They should be treated as Indian country under section 1151(c) as well, in accord with the modern notion that the Indian country statute should be construed broadly.[447]

[3]—Termination of Indian Country Status

The Indian country status of land can be terminated by treaty or agreement with affected tribes.[448] Congress also has power to terminate Indian country status unilaterally.[449] But the intent of Congress to terminate must be clearly expressed.[450] There is a presumption in favor of the continued existence of a

---

25-year restricted status almost identical to that of the General Allotment Act. 25 U.S.C. § 348. *See also* 25 U.S.C. § 412a (providing trust status for homesteads purchased with restricted funds). *See also*, Alaska Native Townsite Act, 44 Stat. 629 (repealed by Pub. L. No. 94-579, § 704(a), 90 Stat. 2743 (1976)). *See* Ch. 4, § 4.07[3][b][iv].

[443] Since 1934, this has been done pursuant to provisions of the Indian Reorganization Act. 25 U.S.C. § 465. *See* Chase v. McMasters, 573 F.2d 1011, 1015–1017 (8th Cir. 1978); City of Tacoma v. Andrus, 457 F. Supp. 342 (D.D.C. 1978). This section authorizes trust purchases for tribes or individualized Indians either within or without existing reservations. The Oklahoma Indian Welfare Act confers similar authority within that state. 25 U.S.C. § 501.

[444] *See, e.g.*, United States v. Nez Perce County, 50 F. Supp. 966 (D. Idaho 1943).

[445] United States v. Jackson, 280 U.S. 183 (1930).

[446] United States v. Jackson, 280 U.S. 183, 193 (1930); United States on Behalf of Heirs to Absentee Wyandotte Allotment of Van Pelt v. Weyerhauser, 765 F. Supp. 643, 650–652 (D. Or. 1991); Carlo v. Gustafson, 512 F. Supp. 833, 836 (D. Alaska 1981) (Alaska Native townsite lot is equivalent of allotment).

[447] Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993); *see also* Ch. 2, § 2.02.

[448] *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (agreement with tribe ratified by statute).

[449] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 566–568 (1903). When the termination of Indian country status involves a taking of property interests, compensation must be paid. *See* United States v. Sioux Nation, 448 U.S. 371 (1980); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968). *See* Ch. 15, § 15.09.

[450] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998); *see* Ch. 2, § 2.02. Examples of express termination include: Act of July 27, 1868, 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); Act of July 1, 1892, 27 Stat. 63 (1892) (North Half of Colville

potential bases for individual aboriginal rights:[21] First, original title would exist if individuals could establish that their lineal ancestors had exclusive use and occupation of a particular tract from time immemorial to the present day.[22] Second, original title might exist if individuals occupied public lands available for homesteading.[23] However, because this type of original individual title arises from the government's policy of encouraging settlement of public lands and from the implied consent of the government to Indian occupancy, an individual claiming this original title must be able to trace its inception prior to 1934, when the public lands were withdrawn from homestead entry.[24]

In addition to addressing original Indian individual title, the court determined that the Danns held "individual aboriginal use rights" to graze.[25] The original use right must have had its inception prior to the time that public lands were withdrawn from open grazing under the Taylor Grazing Act of 1934,[26] and must have been continuously exercised since its inception. The use right was restricted to the number and types of animals grazed prior to the withdrawal of the lands from open grazing.[27]

§ 16.03 Allotments

[1]—Terminology

Allotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian ("trust" allotment) or owned by an Indian subject to a restriction on alienation in the United States or its officials ("restricted" allotment).[28] The Supreme Court rejected the notion that "restricted" allotments should receive different legal treatment from "trust" allotments for purposes of Indian country jurisdiction,[29] and Congress codified

---

[21] United States v. Dann, 873 F.2d 1189 (9th Cir. 1989).

[22] United States v. Dann, 873 F.2d 1189, 1195–1196 (9th Cir. 1989). The court determined that the Danns were not able to meet this standard.

[23] United States v. Dann, 873 F.2d 1189 (9th Cir. 1989) (relying on Cramer v. United States, 261 U.S. 219 (1923)).

[24] United States v. Dann, 873 F.2d 1189, 1197–1198 (9th Cir. 1989), *as amended by* 1989 U.S. App. LEXIS 5946. The court remanded for findings concerning the inception of the Danns' claims to occupancy. *See also* Mary & Carrie Dann, Inter-American Comm'n on Human Rights ¶¶ 129–130 (Case No. 11.140) (Report No. 113/01, Oct. 15, 2001) (acknowledging rights of indigenous peoples to their traditional lands and finding that United States had deprived Mary and Carrie Dann of their lands held under original Indian title through unfair procedures).

[25] United States v. Dann, 873 F.2d 1189, 1999 (9th Cir. 1989).

[26] 43 U.S.C. §§ 315–315o-1.

[27] United States v. Dann, 873 F.2d 1189, 1199–1200 (9th Cir. 1989).

[28] *See* United States v. Clarke, 445 U.S. 253 (1980); United States v. Jackson, 280 U.S. 183 (1930); 18 U.S.C. § 1151(c); 25 U.S.C. § 348; 25 C.F.R. § 151.2(d)–(e); 25 C.F.R. § 152.1(c)–(d).

[29] United States v. Ramsey, 271 U.S. 467, 471–472 (1926). In two state tax cases, the Court

that decision in 1948, defining Indian country as including all allotments.[30] In practice, the Department of the Interior has treated the two forms of tenure identically for virtually all purposes.[31]

Allotments are subject to federal restraints on encumbrance and alienation,[32] and are exempt from taxation during the restricted period. These restraints apply by operation of law, whether the restrictions appear in the patent or other title document.[33] The restrictions are not personal to the allottee, but generally run with the land to the allottee's Indian heirs or devisees.[34]

Historical differences in terminology and statutory origin cause occasional confusion over allotment definitions. A number of early removal treaties allowed individual Indians to select parcels of land in the ceded area and remain after the tribe removed to the West.[35] These parcels were termed "reservations," because they were reserved from the cession. Their titles were often unrestricted, and, at least after 1834, freely alienable.[36] During the same period, the word "allotted" was used in some treaties and statutes to refer to tribal lands rather than individual holdings.[37]

[2]—Federal Policies Regarding Allotments

[a]—Policy of Allotting Tribal Land

From the early nineteenth century, non-Indian politicians, social reformers, and land interests advocated parceling out tribal land in severalty to Indians to promote assimilation.[38] Their motives varied from a sincere, though paternalistic, wish to benefit Indian people to thinly veiled desires to obtain Indian land.[39]

---

purported to rely on the difference between trust and restricted allotments. *See* Okla. Tax Comm'n v. United States, 319 U.S. 598, 603 (1943); McCurdy v. United States, 246 U.S. 263, 272 (1918). But the Court expressly repudiated the distinction in *West v. Okla. Tax Comm'n*, 334 U.S. 717, 723–727 (1948).

[30] 18 U.S.C. § 1151(c); *see* Ch. 3, § 3.04[2][c][iv].

[31] *See, e.g.*, 43 C.F.R. § 4.201 (definition of "restricted property").

[32] *See* United States v. Mitchell, 445 U.S. 535 (1980).

[33] United States v. Hemmer, 241 U.S. 379 (1916).

[34] Bowling v. United States, 233 U.S. 528, 535–536 (1914).

[35] *See, e.g.*, Treaty with the Choctaws, 1830, art. 14, 7 Stat. 333.

[36] *See* Jones v. Meehan, 175 U.S. 1, 8–21 (1899). With few exceptions, these parcels have long since ceased to be subject to federal restrictions and have passed from the purview of federal Indian law. For an exception, see Swimming Turtle v. Board of County Comm'rs, 441 F. Supp. 374, 376 (N.D. Ind. 1977).

[37] *See* Worcester v. Georgia, 31 U.S. 515, 552–553 (1832).

[38] *See* Delos S. Otis, The Dawes Act and the Allotment of Indian Lands (Francis Paul Prucha ed., Univ. Okla. Press 1973).

[39] *See* Ch. 1, § 1.04.

PROOF OF SERVICE

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

I am employed in the County of San Diego; I am over the age of eighteen years and not a party to the within entitled action; my business address is 12275 El Camino Real, Suite 200, San Diego, California 92130.

On **October 30, 2009**, I served the following document(s) described as **APPELLANT'S REPLY BRIEF** on the interested party(ies) in this action by placing the original thereof enclosed in sealed envelopes and/or packages addressed as follows:

See Attached Service List

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

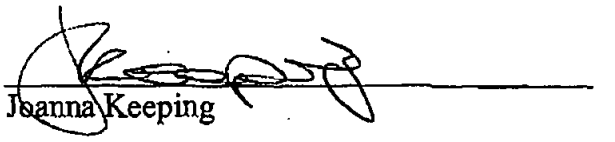
☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2.306 of the California Rules of Court. The telephone number of the sending facsimile machine was 858-509-3691. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine (or the machine used to forward the facsimile) issued a transmission report confirming that the transmission was complete and without error. Pursuant to Rule 2.306(g)(4), a copy of that report is attached to this declaration.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).

☐ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on **October 30, 2009**, at San Diego, California.



Joanna Keeping

SERVICE LIST

Edmund G. Brown Jr.
Attorney General of the State of California
Domini Pham
Deputy Attorney General
Leslie Branman Smith
Deputy Attorney General
P.O. Box 85266
San Diego, CA 92186-5266
Tel: (619) 645-2603
Fax: (619) 645-2489

Attorneys for Defendant
Franchise Tax Board

San Diego Superior Court
Hon. Richard E.L. Strauss
330 West Broadway
San Diego, CA 92101

Via Messenger

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Via Electronic Service