NOOKSACK TRIBAL COURT OF APPEALS

ALMOJERA v. SEATTLE FIRST NATIONAL BANK

No. NOO-Ci-5/89-0153 (Nooksack Ct. App., Dec. 21, 1989)

Summary

In an action to remain in possession of a mobile home, the Nooksack Tribal Court of Appeals finds no legal basis which would entitle the appellant to remain in possession of the premises, despite having a handicapped daughter and no alternative housing.

Full Text

Before COOCHISE, CHOUGH, and ROE, Judges

Order

This matter came for a hearing before the Nooksack Court of Appeals on December 12, 1989. Andrea Almojera appeared without an attorney or spokesperson, the Seattle First National Bank was represented by attorney Janet L. Stauffer.

This court heard arguments from both parties and reviewed the records and files therein. The court being fully advised of the premises, issues its order as follows:

The court finds no merit in appellant's claim of a law allowing her to remain in respondent's mobile home because her daughter is handicapped. Although it is unfortunate that appellant has no other place to live or go, there is no legal basis to reverse the tribal court's ruling.

The court of appeals does hereby affirm the Nooksack Tribal Court's decision but modifies the tribal court order by extending the date appellant must vacate the mobile home and return its possession to respondent, Seattle First National Bank, to before January 21, 1990.

It is so ordered and adjudged this 21st day of December, 1989.

CHILKAT INDIAN VILLAGE TRIBAL COURT

CHILKAT INDIAN VILLAGE, IRA v. JOHNSON, et al.

No. 90-01 (Chilkat Tr. Ct., Nov. 3, 1993)

Summary

In an action brought by the Chilkat Indian Village, IRA against an individual and a corporation and individuals comprising the "Whale House Group" for the conversion of tribal trust property and violation of a tribal ordinance which prohibits the removal of such property from the village without prior notification of and approval by the Chilkat Village Council seeking declaratory and injunctive relief and monetary damages, the Chilkat Indian Village Tribal Court orders the return of artifacts and the payment of expenses for the artifacts' return as well as costs and fees of litigation.

Full Text

Before BOWEN, Tribal Court Judge

BOWEN, Tribal Court Judge

Decision

Background

This case involves the 1984 removal of four house posts and a rain screen, known as the "Whale House artifacts," from the Chilkat Indian Village in Klukwan, Alaska. The Chilkat Indian Village (village, tribe) filed this action in this court on January 8, 1990, against Michael R. Johnson, his corporation, and the individuals comprising the "Whale House Group."

The complaint sets forth two causes of action. First, the village alleges that defendants attempted to convert tribal trust property to their exclusive use and benefit. Second, the village alleges that defendants violated a tribal ordinance which prohibits removal of such property from the village without prior notification of and approval by the Chilkat Village Council, which is the tribe's governing body. The village seeks declaratory and injunctive relief, as well as money damages.

Following the resolution of procedural motions, as well as agreed continuances and stays in both tribal and federal district court, on January 2, 1992, defendants, through counsel Ms. Willard, filed answers generally denying the allegations in plaintiff's complaint, as well as alleging broad counterclaims (discussed below) against plaintiff.

A four-week court trial was completed on February 12, 1993. This matter is now ripe for decision. However, before addressing the merits of this tribal court case, it is useful to review related proceedings in federal court. As noted below, the federal district court (D. Alaska) retains jurisdiction of the related federal action in this matter in J84-024-CV (JAV).

After the 1984 removal of the artifacts from the village, the tribe filed an action in federal district court against Michael Johnson and his corporation (case no. J84-024 (D. Alaska)). Among other things, the federal court complaint alleged violation of the 1976 Tribal Ordinance governing removal of artifacts from the village (discussed below), and sought injunctive and monetary relief. On November 21, 1984, the district court enjoined Johnson in his personal and corporate capacities from selling or disposing of the artifacts, and ordered the tribe to join 14 individuals comprising the Whale House Group as named defendants. Following joinder of the Whale House defendants, and upon the tribe's October 22, 1985, summary judgment motion, the district court dismissed the tribe's claim that 18 U.S.C. § 1163 (prohibiting embezzlement and theft from Indian tribes) created a private cause of action in federal court. *Chilkat Indian Village v. Johnson*, 643 F. Supp. 535 [13 Indian L. Rep. 3137] (D. Alaska 1986). In a separate memorandum and order, the district court ruled *sua sponte* that it lacked subject matter jurisdiction over the tribe's remaining claims. In so doing, the court held that the tribe's claim that the artifacts were communally owned and defendants removed them without permission was a conversion claim arising under state rather than federal law. The district court further held that the tribe's 1976 Ordinance prohibiting removal without obtaining prior council approval did not arise under federal law for purposes of 28 U.S.C. §§ 1331 and 1362.

On appeal, the Ninth Circuit Court of Appeals affirmed the dismissal of claims against the Tlingit defendants and the dismissal of the claim founded on 18 U.S.C. § 1163. *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1476 [16 Indian L. Rep. 2115] (9th Cir. 1989).[1] The court of appeals reversed,

[1]"We reach a different conclusion with regard to the claim seeking to enforce the Village's ordinance against its own members or others whose Indian status may subject them to the internal jurisdiction of

however, regarding the village's claim against Michael Johnson and his corporation, holding that the tribe's enforcement of its ordinance against those non-Indian defendants raised federal questions. *Id.* at 1475. The court observed that "the heart of the controversy over the claim will be the Village's power, under federal law, to enact its ordinance and apply it to non-Indians." *Id.* at 1474. Questions such as whether the village is a federally recognized tribe, whether it possesses general legislative powers, or jurisdiction over the artifacts and defendants in particular, and whether its fee lands constitute Indian Country, were noted and described by the Ninth Circuit as issues which "are not before us now, but they are federal questions and they lie at the heart of the Village's claim to enforce its ordinance." *Id.*

In remanding the case to the district court, the Ninth Circuit did not address the question, which it said was not discussed by the parties, whether the case was subject to requirements of exhaustion of remedies in tribal court under *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 [12 Indian L. Rep. 1035] (1985). However the court did note that "[a]n earlier action arising out of this same controversy was dismissed partly because the issues might better be addressed in a tribal forum. *Johnson v. Chilkat Indian Village*, 457 F.Supp. 384 (D. Alaska 1978)." *Id.* at 1475 n.11.

On remand, Johnson moved for summary judgment on the basis that even if the tribe had the authority to enact the 1976 Ordinance and apply it to him, he did not violate it. On January 11, 1990, the district court rejected Johnson's argument, holding that if the village possessed sufficient attributes of sovereignty, then "the district court must abstain from hearing the suit until the parties have exhausted tribal remedies." Memorandum and order, slip op, at 9-10 (Jan. 11, 1990). The district court directed the parties to brief the threshold questions whether the village possesses the sovereign authority associated with tribal status and whether exhaustion is required. *Id.* at 11.

In its October 9, 1990 memorandum and order the district court granted the tribe's motion for summary judgment on the issues of tribal sovereignty and exhaustion. The court found that "acts of Congress and the executive lead this court to conclude that Chilkat Indian Village has been recognized as a tribe by the federal government." *Id.* at 12. The court noted the principle of federal Indian law that tribes possess retained civil regulatory and judicial authority in civil matters over non-Indians, and cited controlling language in *Montana v. United States*, 450 U.S. 544, 565 [8 Indian L. Rep. 1005] (1981) governing tribal civil authority over non-Indians. The district court then made the following significant holding.

> The court agrees with the plaintiff in that the power to pass the ordinance that is in dispute in this case was part of the retained, inherent power of the Chilkat Indian Village. In addition, it would appear that under its constitutional power, Chilkat Indian Village had the power to prevent the sale or disposition of any assets of the Village without the consent of the Council. The court further agrees that alleged acquisition by a non-Indian of the artifacts in question would constitute conduct that would have some direct effect on the welfare of the tribe....

Slip op. at 13-14 (Oct. 9, 1990).

On the subject of Indian Country as defined by 18 U.S.C. § 1151, the district court concluded that the village-owned fee lands at Klukwan, from where the artifacts were removed, constitute a "dependent Indian community" under that statute and applicable law, and thus are "Indian country." In rejecting defendants' argument that the Alaska Native Claims Settlement Act (ANCSA)[2] extinguished the village's authority over any defined territory, the court noted that "[a] fundamental canon of construction in Indian law is based on the principle that there must exist a 'clear and plain' intention to abrogate or limit an Indian right. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 353, 62 S. Ct. 248, 255 (1941)." Slip op. at 14. Finding that nothing in the ANCSA preamble "indicates a 'clear and plain' intention to *extinguish* Chilkat Indian Village's dependent status as it existed prior to the passage of ANCSA," the district court concluded "[t]herefore the status of the dependent Indian community was not extinguished by ANCSA." *Id.* at 15.

Finally, pursuant to the rules governing exhaustion set out in *National Farmers Union*, *supra*, and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 [14 Indian L. Rep. 1015] (1987), the district court submitted all issues pending in the case, including challenges to tribal jurisdiction as well as the merits of the tribe's claims that Johnson and his corporation violated the tribal ordinance, to this tribal court.[3]

Returning to the pre-trial procedural history of this case in this tribal court, as noted above, the plaintiff filed its complaint in this tribal court on January 8, 1990. That same day, Joe Hotch and Ed Warren, the duly appointed chief judge and alternate judge of this court, recused themselves (both were witnesses at trial, as were many of the leaders of the small Indian village). Eventually the undersigned was appointed as special judge by Chilkat Indian Village Resolution No. 90-006. With the above-described proceedings continuing in federal court, the parties agreed to stay proceedings in this court—except for continuing efforts by plaintiff to accomplish service of process on all defendants—until such time as the federal district court completed its (potentially dispositive) rulings on issues related to tribal status and exhaustion.

Following the above-described federal court proceedings, and pursuant to an order of this court regarding the filing of potentially dispositive motions, on March 15, 1991, defendants filed a "motion to dismiss and motion for summary judgment on behalf of all potential defendants." Plaintiff filed an opposing brief and defendants filed a reply. This court's November 27, 1991 memorandum and order denied defendants' motion with respect to arguments dealing with the subjects of timely service, statute of limitations, real party in interest, standing, and indispensable parties. Pursuant to

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the Village....In the overwhelming majority of instances, a tribe's enforcement of its ordinances against its members will raise no federal questions at all. *E.g., Boe v. Fort Belknap Indian Community*, 642 F.2d 276 [8 Indian L. Rep. 2069] (9th Cir. 1981). Such cases primarily raise issues of tribal law, and they are the staple of the tribal courts.... We conclude, therefore, that the Village's claim for enforcement of its ordinance against its own members does not arise under federal law within the meaning of 28 U.S.C. §§ 1331 and 1332." 870 F.2d at 1475-76.

[2]Act of December 18, 1971, P.L. 92-203, 85 Stat. 689, 43 U.S.C. § 1601 *et seq.*, as amended.

[3]Upon reconsideration, the district court noted that in referring the case to tribal court it "retained no issues to itself except to retain jurisdiction." Memorandum and order at 2 (Dec. 19, 1990). Following certification of its October 9, 1990 decision, as modified, for immediate appeal pursuant to 28 U.S.C. § 1292(b), on February 21, 1991, the court of appeals denied defendants' petition for appeal. As such, the above-outlined issues are now plainly before this court.

Fed. R. Civ. P. 12(d),[4] jurisdictional challenges were deferred so that additional and more complete evidence could be developed at trial.

A lengthy telephonic conference was conducted by this court on December 20, 1991, resulting in a comprehensive scheduling order dated January 15, 1992. On June 29, 1992, Donna Willard, attorney for all defendants, filed a motion for withdrawal for cause, citing irreconcilable conflicts.[5] Following an August 3, 1992 telephonic hearing on the motion and other matters, this court issued an order that same date granting her motion for withdrawal. The tribal court received copies of pleadings indicating that the federal district court granted a similar motion soon thereafter. Since that time, then, the defendants have represented themselves, including during trial.

In the months preceding trial, which commenced January 18, 1993, in the tribal court at Klukwan, Alaska, there were disputes regarding discovery motions, alleged noncompliance, and resulting orders. This court denied a motion by defendant Irene Rowan to continue the trial date for several months,[6] and ordered defendants Michael R. Johnson and his corporation to comply with plaintiff's discovery requests by January 8, 1993. This date extended the original deadline, with which defendants had still not complied, but rather had responded by requesting further delay in court-ordered deadlines based on unsubstantiated and likely disingenuous reasons.[7] A final pretrial conference was telephonically conducted January 11, 1993. Consistent with the court's practice upon issuance of the order allowing defendants' counsel Donna Willard to withdraw, notice was provided to all named defendants. Electing to participate were plaintiff's counsel Joseph Johnson and defendants Irene Rowan, Ronald Sparks, and William Thomas noted in this court's order following final pretrial conference, dated January 13, 1993, "[d]efendant Michael Johnson received notice, and, according to Irene Rowan, Michael Johnson telephoned her the morning of the hearing, discussed certain substantive matters with her, but apparently decided not to participate." Order following final pretrial conference at 1.

Applicable Law

The law applicable in this tribal court action is tribal law, which is comprised of both written and unwritten, custom law of the village.[8] The written manifestations of applicable tribal law include the Constitution and By-Laws of the Chilkat Indian Village, as amended, Ordinance 80-001, establishing a Chilkat Indian Village trial and appellate court system, and what is perhaps the most significant written expression of tribal law applicable to this case, the Ordinance of May 12, 1976 (Artifacts Ordinance) which reads as follows.

> No person shall enter onto the property of the Chilkat Indian Village for the purpose of buying, trading for, soliciting the purchase of, or otherwise seeking to arrange a removal of artifacts, clan crests, or other traditional Indian art work owned or held by members of the Chilkat Indian Village or kept within the boundaries of the real property owned by the Chilkat Indian Village, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.
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> No traditional Indian artifacts, clan crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by, the Chilkat Indian Village Council.[9]

As the district court noted in 1978 and again in 1990[10] when it referred this case to this court, article IV ("Powers of the Village") of the tribe's federally approved constitution and bylaws provides that the seven-member village council has the power to "prevent the sale, disposition, lease, or encumbrance of any land or waters, or other assets of the Village without the consent of the Council." Art. IV, §(1)(e). Under section (1)(n) of the same article, the council has the power to "preserve and cultivate the arts, crafts and culture of the Indians of this community and their customs. . . ."

Ordinance 80-001 (Tribal Court Ordinance), which defines basic aspects of the tribal court system, was enacted on April 29, 1980, following discussions with officials of the Bureau of Indian Affairs (BIA), and amendment of the tribe's constitu-

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[4]Chilkat Indian Village Ordinance No. 80-001, art. VII, § 1(b) provides that until such time as the tribal council may adopt procedural rules, the Federal Rules of Civil Procedure apply to the extent that such rules are compatible with Tlingit custom and law.

[5]The principal spokesman among the Tlingit defendants had earlier verbally informed the tribal court clerk that the Tlingit defendants had fired Ms. Willard.

[6]By letter to the court dated December 9, 1992, defendant Irene Rowan requested that the trial be postponed from January until June or July 1993, in order to facilitate settlement negotiations, and to become familiar with court procedures and possibly retain a new lawyer. This request was denied for the obvious reasons that plaintiff did not embrace the need for delay based on negotiations, and Ms. Rowan and the other defendants had been on notice and expressly advised to obtain new counsel by their former attorney Donna Willard since June 25, 1992.

[7]On January 5, 1993, the court received cover letters dated December 30, 1992, from Sharon and Michael Johnson, with a brief enclosed narrative requesting a two-month delay to respond to this court's December 23, 1992 order compelling defendants Johnson and his corporation to comply with plaintiff's discovery request. Michael Johnson's unsworn statement claimed that he was scheduled for surgery January 6, 1993, which was stated to take two hours, and would require one or two months' recovery. He claimed that his physical condition would prevent him from conducting the search necessary to comply with the discovery request. He provided no other details regarding the operation, such as what it was for, did not indicate whether it was elective or otherwise, and offered no sworn information by anyone pertinent to the procedure and how he may have been restricted thereby. Nonetheless, it was evident from the testimony and documentary submissions of the other defendants during trial, which began January 18, 1993, that Michael Johnson and his wife conducted searches and reviews of documents in their possession relevant to plaintiff's discovery request, and selectively faxed and otherwise made certain documents available to the other defendants.

[8]This court is also mindful of (and has in many instances applied) federal statutory and case law; especially that which has been applied to this dispute by the district court and court of appeals. This court's November 27, 1991 memorandum and order at 5-6 expressly adopted the district court's October 9, 1991 holding that plaintiff Chilkat Indian Village has been recognized by the federal government as a federally recognized tribe. As discussed below, nothing in the federal trial and appellate court decisions respectively authored by Judge James A. von der Heydt and Judge William C. Canby, Jr., a distinguished Ninth Circuit judge who published *American Indian Law*, (2d ed. 1988), is inconsistent with the conclusions of tribal law enunciated below. Therefore, to expressly confirm conformities between tribal and federal legal applications, as well as a matter of comity, the federal court rulings to date are hereby adopted as a matter of tribal law.

[9]In discussing the village's power to enforce the ordinance against non-Indians, the court of appeals wrote that "[i]ndeed, the meaning of the ordinance is barely open to dispute, but the Village's power under the federal statute or common law to enact and apply it is open to immense dispute." 870 F.2d at 1474.

[10]*Estelle Dehaven Johnson v. Chilkat Indian Village, et al.*, 457 F. Supp. 384, 386 (D. Alaska 1978); slip op. at 10 n.20 (Oct. 9, 1990).

tion (certified by the BIA's Area Director for Alaska). The constitutional amendment added a new section making it clear that the tribe had authority to "adjudicate matters of a civil and criminal nature, arising within the geographic limits of the real property owned by the Village...." Art. IV, § 1(O).

The Tribal Court Ordinance establishes trial and appellate courts of record, sets forth the qualifications of judges, provides for the appointment of judges *pro tem*, as was required in this case where the sitting judges might have had or be perceived to have a conflict, and addresses the law to be applied in cases brought in the court, including applicable Tlingit custom law. Article III includes a provision disclaiming any criminal jurisdiction. Article VII, § (1)(b) of the Ordinance provides that pending the adoption of tribal procedural rules, "the Federal Rules of Civil and Appellate Procedure, insofar as they are applicable and compatible with Tlingit custom and law, shall be followed in the Trial Court and Court of Appeals of the Chilkat Indian Village."

As is common in many tribal courts, strict rules of evidence applicable in state and federal court trials were not imposed by this court. The only rule of evidence at trial was relevancy.

Issues

Some of the threshold issues raised by defendants have already been decided. As noted above, this court adopted as a matter of tribal law the district court's holding that the village is a federally recognized tribe. *See* n.9, *supra*. This court's November 27, 1991 memorandum and order also held that the tribe has the authority to establish a tribal court as a function of its retained, inherent judicial powers. *Id.* at 6.

Additionally, this court adopts as a matter of tribal law the district court's holding quoted above (at 5-6) that the village had the authority to enact the Ordinance of May 12, 1976,[11] governing removal of artifacts, and that the "alleged acquisition by a non-Indian of the artifacts in question would constitute conduct that would have some direct effect on the welfare of the tribe...." Slip op. at 13-14 (Oct. 9, 1990).

There is no dispute about the basic facts surrounding the physical removal of the artifacts from the Whale House in Klukwan during April 1984.[12] Rather, the issues to be decided are: (1) whether the Whale House rain screen and four house posts constitute "artifacts, clan crests, or other Indian art works" within the meaning of the relevant tribal ordinance; (2) whether the tribe has the power to enforce the ordinance against the defendants, including the non-Indian art dealer, Michael Johnson and his corporation; (3) whether any or all of the defendants violated the ordinance; (4) whether defendants have presented any defenses which preclude judgment against any or all of them; and (5) whether defendants can pursue counterclaims against the tribe, and if so, whether such counterclaims have been established. Finally, this court will determine the appropriate relief and other remedial orders which should issue.

Plaintiff must establish its claims by a preponderance of the evidence. The same standard applies to defendants' counterclaims. The following discussion is a chronological account of the testimony and documentary evidence presented at trial which is relevant to the above issues.

Discussion

The trial in this matter commenced January 18, 1993, and ended February 12, 1993. Before opening court, the court agreed to meet with the parties, and a number of procedural and special needs aspects were discussed. Defendants informed the court that all named Tlingit defendants would attend and participate, with the exception of Mia and Rochene Rowan. Their mother Irene Rowan informed the court that they were away from the area and that she would represent them. The trial schedule was discussed in light of such concerns as the special needs of defendant Margaret Thomas, who is diabetic and the oldest among all defendants. There was no problem reaching agreement as to the hours in which court would be held at Klukwan in order to accommodate special needs, as well as the expressed needs of defendants to caucus and otherwise prepare on a daily basis for trial.[13]

Particular concerns of several defendants regarding their rights at trial and opportunity to present all aspects of their case were discussed, defined, and resolved. The Tlingit defendants made it clear that they were not representing defendants Michael Johnson and his corporation.

The parties were reminded that, while opening statements would not constitute evidence, the parties could use that avenue to state objections on the record, which the defendants had verbally raised in the off-record pretrial meeting.

The opening statement of plaintiff's counsel Joseph Johnson provided an overview of plaintiff's case, including a reading of the May 12, 1976 Ordinance, and what plaintiff expected to establish at trial. Among other things, attorney Joseph Johnson emphasized the role of art dealer Michael Johnson, beginning at least in 1971, in offering large sums of

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[11]Since the district court's most recent holding in this matter, there has been a refinement of federal case law on the definition of Indian Country, and a clarification by the Interior Department regarding its view of tribal powers in this state. *Oklahoma Tax Commission v. Sac and Fox Nation*, (No. 92-259) _____ U.S. _____ [20 Indian L. Rep. 1020] (1993) issued by the Court on May 17, 1993. That decision emphasized in part that "Congress has defined Indian country broadly to include...dependent Indian communities...." *Id.* at. (The question of Indian Country at Klukwan is discussed below as it relates to the tribe's authority to enact and enforce the Artifacts Ordinance which prohibits removal "from the Chilkat Indian Village.")

Additionally, during Assistant Secretary of the Interior Ada Deer's recent visit to Alaska (October 1993), she released a list of federally recognized tribes in this state which broadly defines the listed tribes' powers, and includes the Chilkat Indian Village of Klukwan. While the current Interior Department's policies covering all of the issues of this case have not as yet been fully fleshed out, recent pronouncements not only confirm that tribes such as the Chilkat Indian Village are federally recognized; there is also evident a clear trend towards viewing such tribes as having all of the attributes of sovereign status of tribal governments in the 48 contiguous states.

[12]Defendants William Thomas and Clifford Thomas, together with their uncle, Clarence Hotch (since deceased), and Buzzie and Vincent Hotch performed the actual removal while non-Indian art dealer Michael Johnson (who had travelled several hundred miles from Seattle, Washington) waited 22 miles away in Haines, Alaska. The artifacts were taken to Haines, where the men picked up Michael Johnson, and temporarily stored the artifacts in defendant Evans Willard's garage. William Thomas and Michael Johnson then discussed arrangements to ship the artifacts to Seattle, where they have since remained in a warehouse pursuant to the federal court's injunction.

[13]The defendants attending trial were housed at Haines, Alaska, 22 miles by road from Klukwan. Some of the defendants permanently reside at Haines, a city with a number of hotels, which is accessible by land and air, as well as by ferry (the Alaska Marine Highway). In this respect defendant Michael Johnson's protest that trial at Klukwan during the winter somehow posed difficulties preventing one's ability to attend is regarded as disingenuous.

money in his quest to acquire the artifacts, and the effect of those efforts on the tribal community.

Defendants William A. Thomas, Jr. (Bill Thomas), Evans Willard, Clifford Thomas, David Light, Christine Thomas Martin, Margaret Thomas, and Irene Rowan all made opening statements. They all took the position that the tribal court lacked jurisdiction over them and the subject matter of the case, and emphasized that they appeared "under protest" in order to defend the good name of their family, including deceased relatives who had been accused of wrongdoing in connection with the removal of the artifacts. Defendants at trial were reassured that their objections were duly noted and preserved, and that the court subscribed to the general legal maxim that fundamental jurisdictional challenges are never waived.

Plaintiff called as its first witness Joe Hotch, President of the Chilkat Indian Village Council. Mr. Hotch, who was recalled to the stand three times during the trial, was at all times found to be a credible witness. He began his testimony by explaining the significance of the traditional regalia (headpiece and shirt) which he wore while testifying. He then provided some demographic information about Klukwan.

The village has a population which varies from 110-120 people in the winter, to 150-175 people in the summer. With the exception of about ten people, Mr. Hotch stated that all residents are Tlingit Indians. The tribe, which is organized and has a constitution and bylaws pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, collectively owns all of the land in the village, including all of the real property on which all residences are situated.[14] Joe Hotch stated that the tribal council, of which he is president, is regarded by village members as the sole governing body. He stated that at various times some of the Tlingit defendants served as members of the council, including Evans Willard, David Light, Wes Willard, and Bill Thomas.

Mr. Hotch, whose parents were Victor and Annie Hotch, is a member of the Eagle (or Wolf) moiety, Eagle Clan, and Bear and Killer Whale houses. He is the caretaker, *i.e.*, "*hit-sati*" of the Killer Whale House. He stated that his father Victor Hotch was a member of the Valley House (Ganexteidi Clan of the Raven moiety). Mr. Hotch emphasized that a *hit-sati* has the duty under tribal law to care for the property of the house *and* clan, and has no right to sell or otherwise dispose of clan property.

Mr. Hotch's testimony addressed several aspects of Tlingit social structure, which is complex, and was covered in detail by other witnesses such as Rosita Worl, a highly regarded Tlingit anthropologist, whose testimony is discussed below. All Tlingits are either of the Raven or Eagle (also called Wolf) moiety, which exists primarily for marital purposes. Under Tlingit custom law one must marry only a member of the opposite moiety, regardless of the lack of blood relation of prospective marital partners of the same moiety.

Although identification by Tlingits as members of a particular village is very significant for many purposes, the clan is the primary and most important affiliation for Tlingits. While there are several clans within the Eagle moiety at Klukwan, perhaps conveniently, all Ravens in Klukwan are members of the Ganexteidi Clan. Finally, within each clan there are different house groups. Mr. Hotch listed all of the house groups in Klukwan. "Houses" in this context refer to physical structures, which traditionally housed nuclear families.[15] *See generally*, G. Emmons, *The Tlingit Indians* (edited with additions by Frederica de Laguna, 1991).

Regarding the four house posts (sometimes called poles or totems) and rain screen here at issue, Joe Hotch testified that they were "clan trust property," with great spiritual significance to the Ganexteidi Clan, which has primary custodial rights over them. Mr. Hotch and other witnesses explained that the tribe on the whole also has an interest in the artifacts because they have tremendous significance not just for Ravens, but for all Eagles in Klukwan as well.

Joe Hotch described in eloquent terms the healing quality which the artifacts assume. For example, when a member of an opposite clan (of the Eagle moiety) died, and a potlatch was held as a part of the progression of Tlingit funeral arrangements, members of the grieving clan would be brought before the rain screen and told that it constituted medicine which would relieve the loss of their clan member.

Mr. Hotch also provided detailed testimony regarding how certain property is confirmed as being clan trust property, which includes presenting it in a ceremony in which members of the opposite "tribe" (*i.e.*, in this case members of clans of the Eagle moiety) are invited, which completes the confirmation of the clan trust status of property such as the Whale House artifacts, which, according to Mr. Hotch, were subject to this process. Joe Hotch recalled attending many ceremonies at the Whale House in which the artifacts played a central role.

He also recalled the two unsuccessful attempts in the mid-1970s to remove the artifacts from the Whale House in Klukwan. He recalled that in 1976 Estelle DeHaven Johnson, a Tlingit who was the granddaughter of "Chief Shotridge" of the Whale House, attempted to remove the artifacts with the backing of art dealer Michael Johnson. The attempt was thwarted when villagers (Victor Hotch in particular by some accounts) placed one or more skiffs (small vessels) in front of the door to the Whale House. Joe Hotch (and others) recalled that following the first unsuccessful removal attempt, Michael Johnson financed a federal court action to determine ownership of the artifacts. *Estelle Johnson v. Chilkat Indian Village, et al.*, 457 F. Supp. 384 [5 Indian L. Rep. F-194] (D. Alaska 1978), although the pendency of that action did not deter a second attempt to remove the artifacts later in 1976.[16] That second attempt was unsuccessful when the village siren was sounded, trees were felled blocking exits of the village, and members of the tribe acted together to prevent the removal.[17]

Joe Hotch identified plaintiff's exhibit (ex.) 6, which was admitted during Mr. Hotch's testimony. That document, dated October 7, 1976, was signed by Mr. Hotch's father Vic-

[14]*See* discussion *infra* regarding the land status of Klukwan (unique status of current tribal ownership of exact boundaries of former reserve). Unlike many other Native villages in Alaska, which have both IRA tribal governments and state-chartered municipal governments, at Klukwan the only government is the plaintiff in this action—the IRA tribal government. It provides all necessary services, such as fire, water, electricity, garbage collection, etc.

[15]Traditionally, as a function of the matrilineal nature of Tlingit social structure and practice, Tlingit males moved to the house of their maternal uncle around the age of 8-12 years of age, where they were thereafter raised and received instruction about their clan and tribal law generally. (*E.g.*, testimony of Rosita Worl.) While this practice is less common today, many witnesses, especially elders, were raised in this manner.

[16]Alaska State Judge Linn Asper, who was counsel to the tribe in 1976, testified that he was incredulous that Michael Johnson financed a second attempt to remove the artifacts in 1976 at the same time that he was financing the federal suit to clarify ownership of the artifacts.

[17]Testimony of Judge Asper, Evelyn Hotch, and Jones Hotch, Jr.

tor Hotch, and witnessed by Joe Hotch and Richard King. It reads:

> To Whom It May Concern:
>
> I, Victor Hotch, of Klukwan, Alaska, state that I no longer wish to be associated with any plan or option or agreement for the sale and removal of houseposts, screens, or other Tlingit Indian artifacts kept in the Whale Clan House at Klukwan. By this letter I withdraw any permission which I have previously given to any person, including Michael and Sharon Johnson and the Northwest Historical Corporation for the sale and removal of the Whale House artifacts.

Plaintiff's ex. 6. According to Joe Hotch, his father executed this statement around the time that he had returned checks to Michael Johnson: one for $50,000, and another for $1,000, which had been tendered in an attempt to solicit Victor's support for the removal and sale of the Whale House artifacts. Joe Hotch testified that he and Richard King, members of the Eagle moiety, witnessed the document, which was significant because as members of an opposite clan of the Eagle moiety (Victor was a Raven), the appropriate "stamp" under Tlingit custom law was put on the document.

Joe Hotch testified that around the same time, *i.e.*, the Fall of 1976, a peace party was held in Klukwan, attended by representative clans of both moieties, for the purpose of confirming the position of the community on the whole that the Whale House artifacts should not be removed. The congregation was also intended to heal wounds resulting from contacts initiated by Michael Johnson with a number of village residents, which involved discussions about the possibility of removing the Whale House artifacts, which would then be sold on consignment by Michael Johnson.

Joe Hotch testified that he had taken it upon himself to earlier write to Michael and Sharon Johnson to express his objection to Mr. Johnson's offers of large sums to entice the sale of the Whale House and other artifacts. Mr. Hotch's May 27, 1975 letter to Michael and Sharon Johnson (who then resided in Seattle, Washington) reads in pertinent part as follows.

> I find it imperative to present my objection to your technique and tremendous dollar offers you present to gain possession of our artifacts here in Klukwan. These artifacts are a part of our Thlinget needs to retain, as they represent our past and our future within the art itself; for this reason they have been handed down generation after generation.
>
> ....
>
> A Thlinget selling its tribal artifacts is degrading its entire Clan, much more the Thlinget nation.... We have gone on record year after year to protect our tribal artifacts. I'm sure our IRA president Dick Hotch made you aware of this by telephone previously, however I'm doing likewise, being that this affects many tribes in our Thlinget nation I'm sending copies to the newspapers listed below.

Plaintiff's ex. 10. Michael Johnson's June 6, 1975, in response, reads in relevant part as follows.

> I understand your fears for as well as your love of the objects which represent your fine heritage. There is no doubt that there is strong pressure from the non-native world regarding these objects. Tlingit art is now recognized by all the art authorities of the world as one of the greatest that ever existed and is important to the whole history of mankind.

Significantly, in the next paragraph, Michael Johnson assures Joe Hotch that:

> I would never...attempt to purchase objects from a clan keeper without the consent of the entire clan.

Plaintiff's ex. 11. Joe Hotch testified that the background to the letters quoted above included unsuccessful efforts by Michael Johnson to persuade his father Victor Hotch, who had been appointed caretaker (*hitsati*) of the Whale House, as well as Victor's sister Mildred Sparks, to accept large sums in exchange for agreeing to facilitate the removal and sale of the Whale House artifacts. Joe Hotch then testified that following unsuccessful attempts by Michael Johnson to persuade his father and aunt to sell the artifacts, Michael Johnson telephoned Joe Hotch, raising the ante a bit, offering him $75,000 if he would arrange for the sale of the rain screen and house posts to Michael Johnson.

Joe Hotch testified that he was saddened when around this same time (during the mid-1970s) Michael Johnson was ultimately successful in persuading Joe's brother Dick Hotch to sell a bear mask, which was lost to their Bear Clan forever. Joe Hotch testified that Michael Johnson furnished Dick Hotch with a replica of the bear mask which was intended to fool the community into thinking that the replica was the original. According to Mr. Hotch, that folly proved fruitless and the replica was recognized as such.

This testimony by Joe Hotch laid the foundation for discussion of what is referred to simply as the Ordinance of May 12, 1976, quoted above, which prohibits removal from the village (without prior council approval) of "artifacts, clan crests, or other Indian art works," which defendants are accused of violating. Mr. Hotch testified that by that time they had retained the services of attorney Linn Asper, who represented the tribe in its attempts to prevent removal of the artifacts by enacting the May 12, 1976 Ordinance to that effect, as well as defending the tribe in Estelle Johnson's federal action seeking to clarify ownership and control of the artifacts.

On May 6, 1976, the village sent a telegram to the BIA in Washington, D.C., requesting direct intervention to assist the tribe in preventing continuing attempts to remove artifacts, as well as recovering artifacts lost to date which had been removed without appropriate consultation and consideration by the entire clan, which properly exercised custody of artifacts under tribal law. The telegram informed the BIA's Commissioner Morris Thompson that "[o]n April 26, 1976 members of Chilkat Indian Village unanimously voted never to sell our artifacts and to protect those within our possession. The tremendous dollars offered for these artifacts are turning our Tlingets against one another." Plaintiff's ex. 13. Joe Hotch testified that six days later, upon proper notice, the ordinance prohibiting removal of artifacts (without first requesting and receiving council approval) was passed unanimously. He and others testified that the ordinance was thereafter conspicuously posted in the village.

Mr. Hotch also explained that the tribe was the plaintiff in this and the related federal court action (J84-024) because Martha Willard requested the assistance of the IRA § 16 tribal government in recovering the artifacts after the 1984 removal. Mrs. Willard, a leader of the Ganexteidi Clan, had previously rejected Michael Johnson's proposals regarding the sale of the artifacts, and was the person who contacted state troopers, alleging that a criminal theft of the artifacts had occurred.

Judge Linn Asper provided lengthy, credible testimony which covered his legal representation of the village from 1976-1980, including the establishment of this tribal court through amendment of the tribe's constitution, and then enactment of Ordinance 80-001. Prior to holding his current position as a state court judge in Haines, Alaska, Mr. Asper was a state district court judge for several years in Juneau, Alaska.

Judge Asper testified that he was originally retained to assist the village in getting back the "Frog House"[18] property, and then became general counsel to the tribe, handling all of its legal affairs. He stated that one week after the Frog House property was removed, he was arranging to get an affidavit from a truck driver involved in removal of the Frog House property. That truck driver informed Mr. Asper that he could not talk with him just then because he had to go to Klukwan to pick up another load of artifacts. Mr. Asper notified Joe Hotch at Klukwan, and the members of the village prevented the trucks from removing the Whale House artifacts.

The dispute over control of the Whale House artifacts resulted in the *Estelle Johnson* litigation in federal court, mentioned above. Linn Asper represented the village, which was one of the defendants, and Robert E. Giles of the Seattle firm of Perkins, Coie *et al.* represented the plaintiff. According to Judge Asper, Michael Johnson financed plaintiff's action, and sought a declaration by the federal court that he had the right to purchase and remove the artifacts from Klukwan. Michael Johnson was unsuccessful with respect to that relief. Judge von der Heydt's September 27, 1978 memorandum and order, 457 F. Supp. 384 (D. Alaska 1978), held that the defendant village had sovereign immunity, was an indispensable party, and dismissed the case without prejudice on that basis. 457 F. Supp. at 389. Judge von der Heydt's order clearly reflects the federal court's expectation and preference that the dispute be resolved by a tribal court at Klukwan according to Tlingit law. *Id.*

In response to a question from plaintiff's counsel, Judge Asper stated that the 1976 Ordinance prohibiting removal was a central part of the federal court action, and that Michael Johnson clearly was aware of it. Numerous exhibits were received into evidence from that period reflecting the ongoing wrangling of the parties and their attorneys over this dispute, which still has finally to be resolved.

The state and federal governments were brought in as well. For example, as early as August 25, 1975, the BIA's Area Director for Alaska memorialized the following observations.

> We made a trip to Klukwan on August 21st. While we were up there the Village Council expressed some concern they had about a man who continually comes to Klukwan in order to attempt to purchase ceremonial regalia and other original artifacts. Several members of the Council have confronted this individual and indicated they don't like him coming around and making these attempts. His solicitations are of a serious nature insofar as he has offered as much as $500,000.00 for some items.

Plaintiff's ex. 31. The same Area Director's June 14, 1978 letter to Linn Asper reads: "Your question relating to recognition of Chilkat Indian Village as it is currently organized is an unequivocal yes."[19] Plaintiff's ex. 33.

The witness also testified that during the pendency of the earlier federal action a second attempt was made during early morning hours to remove the artifacts from the Whale House. According to Judge Asper, the locks to the Whale House were broken, but villagers managed to stop the removal before the truck could be loaded and driven away. Judge Asper testified that it was thereafter discovered that Michael Johnson had rented the truck which was used in that attempt.

On the subject of Michael Johnson's involvement with the attempt to remove the artifacts during the pendency of the *Estelle Johnson* case, Judge Asper recalled:[20] "Michael Johnson had invoked the jurisdiction of the federal court and at the same time he was asking the federal court to do these things for him [allow for sale and removal of the artifacts] he was financing the operation to steal them, the way we saw it."

Judge Asper also provided answers and insights (under both direct and cross-examination) regarding the Tribal Court Ordinance (80-001), including the intent behind the ordinance, and the intended meaning of particular provisions. For example, he stated that article III, § 4(2), which asserts jurisdiction over "Decedents Estates," was specifically drafted to empower the tribal court to hear disputes such as the instant matter. Judge Asper also explained that the ordinance was enacted in response to the federal court's ruling in the *Estelle Johnson* case, which concluded with the expectation that a tribal forum would be established to resolve the dispute. He stated that the ordinance was intended to confer tribal court jurisdiction over a non-Indian such as Michael Johnson, who had visited the village several times during the early 1970s, and had established a pattern of contacts designed to facilitate his commercial dealings with members and property within the village.

Tlingit elder George Stevens, Sr., born in 1916, provided credible and compelling testimony at trial. Mr. Stevens, like other Tlingit elders, such as Cyrus Peck, Sr., began his testimony by making a statement in Tlingit. That statement was then translated (by Anna Katzeek), and the witness was then subject to direct and cross-examination. Mr. Stevens stated that he is a member of the Valley House (of the Ganexteidi Clan of the Raven moiety). He then stated that his mother's English maiden name was Sarah Kladoo, and that Maggie Hotch was her blood sister. The witness next responded "right" when asked if Maggie was the mother of Mildred Sparks, Victor Hotch, and Clarence Hotch.[21]

Mr. Stevens provided the court with his knowledge of the background to the building of the current, cement Whale House, and his view of the significance of the artifacts. He recalled the 1937 payoff potlatch for his maternal grandmother, and the purchase of cement in Juneau by his mother, transferred by his father to Klukwan, resulting in the rebuilding of the Whale House, now known as the cement Whale House in Klukwan. Mr. Stevens emphasized that his mother's people (Ganexteidi Clan) and other tribal members were motivated in significant part to construct the present cement Whale House to preserve[22] the artifacts:

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[18]That dispute arose when a Canadian art dealer purchased certain property which the tribe felt was communally owned, and could not be sold by the individuals who dealt with the art dealer. Judge Asper stated that the Frog House matter was settled just prior to trial.

[19]Judge Asper testified that the special relationship between Klukwan and the federal government included factors such as Klukwan having comprised the only reservation in southeast Alaska other than Metlakatla, and the iron ore business undertaking at Klukwan which the Interior Department, with the village as a de facto partner, managed during the 1970s.

[20]At this and other points Judge Asper clearly recalled his recollections and feelings as an *advocate* for the village while he was their counsel. The court particularly noted his indignation at this juncture of his testimony.

[21]This simple accounting of the witness's matrilineal background is significant within the context of this case because it logically follows that he would consider the Tlingit defendants, descendants of Mildred Sparks and Clarence Hotch, to be members of the Valley House; not the Whale House.

[22]The prior Whale Houses were made of wood, and were therefore subject to burning—which threatened the destruction through burning of artifacts kept therein.

> The reason why my mother helped on that house at that time...is to preserve that wall screen, and the totem poles, wormdish, whatever they had in there. They wanted to preserve it and save it. During the pay-off there was nothing said about selling it—no!

Mr. Stevens stated that he felt compelled "to testify against your group [the Tlingit defendants]. I have to, I'm not going to sit back. I'm honoring my mother's words."

The witness then recalled that just before his mother died in 1968, she summoned him and expressed concern over the fate of the artifacts. Mr. Stevens was instructed by his mother that if he was ever approached on the subject of removing the artifacts, not to take part in it. Expressing himself in Tlingit, Mr. Stevens's translated testimony was as follows.

> My mother said the poles in the house, and the screen, there's something happening with them in the wrong way. There's a story on the screen and our respect is on it. Without this screen and the corner posts, this house is going to be like a house with ghosts—a weird place. That's what she said to me.

George Stevens stated that Victor Hotch advised him to be courageous in resisting any attempts to sell the artifacts, saying "don't let anything happen to our artifacts." The witness testified that as a matter of tribal law, no one individual could sell the artifacts, and that the artifacts represent the history of the Ganexteidi Clan.

Under cross-examination, Mr. Stevens reiterated that Victor Hotch told him several times never to take part in selling the artifacts.

Anna Katzeek testified at length about the history and significance of the artifacts. Mrs. Katzeek is the widow of George Katzeek, who was a member of the Ganexteidi Clan. She was privy to many conversations over the years regarding the artifacts. She recalled that Mary Williams gave Victor Hotch the key to the Whale House around 1950, with the understanding that the totems would be preserved so that future generations could view their history through the artifacts. Mrs. Katzeek was definite in saying that Victor Hotch was a member of the Valley House.

Mrs. Katzeek said that the rightful heirs of the Whale House today would be Martha Willard's children, and the descendants of female children. However, under tribal law, even if the rightful heirs of the Whale House could be determined (which would not include the Tlingit defendants), it is still the Ganexteidi Clan as a whole which would control decisions about the custody of the artifacts. Mrs. Katzeek said it was "unthinkable" to her husband and his clan, as well as to herself, that the artifacts could be sold. The artifacts tell the story of the clan and must remain with the clan, she said.

David S. Case, the author of *Alaska Natives and American Laws* (1984), testified about his role in the Interior Department's Regional Solicitor's Office from 1978-1982, and certain advice he gave the BIA regarding Klukwan's Constitution and the requirements for enacting ordinances. In particular, Mr. Case testified that there was no need for the BIA to approve Klukwan's Tribal Court Ordinance.

Elder Annie Hotch, the widow of Victor Hotch (they were married in 1915), testified that her husband knew that the artifacts were not to be sold, and gave his brother Clarence the key to the Whale House with this understanding.

Noted Tlingit writer and scholar Andrew Hope III provided the court with useful testimony covering details of Tlingit social structure, and the meaning of "clan crest objects." Mr. Hope explained that such objects, which include the artifacts here at issue, have gone through a ceremonial process, such as a potlatch in which the objects are dedicated. The spirits of ancestors are honored, and those spirits are warmed and like to be around clan crests such as the Whale House artifacts, according to Tlingit belief.

On the subject of ownership and sale of crest objects, Andy Hope expressed his view that such objects, which can include songs and stories, cannot be "owned;" there is no way to put a price on spirits, and certainly no *hitsati, i.e.*, caretaker of a tribal house, has the right to unilaterally dispose of clan crest objects. Mr. Hope offered his view that the artifacts should remain in the village, and that the spirits will feel better upon the return of the artifacts to the Tlingit community in Klukwan.

Rosita Worl, who is Tlingit, is a social anthropologist with roots in Klukwan. She received her M.S. degree from Harvard in 1975, and has submitted a draft thesis for her Ph.D. at that institution. She testified about Tlingit social structure, clan crests, and related subjects of tribal law. This court found her to be a credible, informative, and well-prepared witness, who provided direct answers to the questions presented to her.

Ms. Worl testified that the Whale House artifacts are crest objects which are owned by the Ganexteidi Clan on the whole. They were commissioned in the traditional way and brought out in a potlatch, in which members of the opposite side (Eagles) played a central role. Under Tlingit law, such objects cannot be sold, unless for some reason (such as restitution for a crime) the entire clan decides to do so. The participants in a clan decision such as this would include all adult males, and high-ranking women. The witness testified that the traditional penalty for an individual selling artifacts in violation of tribal law was death.

Ms. Worl explained that Tlingit society traditionally is a "meritocracy," where one achieves high status not through physical wealth, but rather through good deeds. It is not a caste system, as one can change his or her status through the nature of their deeds. A 15-year-old could achieve high status, according to Ms. Worl.

Like other witnesses, Ms. Worl was asked if one must automatically follow the directives of an uncle.[23] She responded that an adult would not automatically follow a directive from someone like a maternal uncle, but rather would exercise independent judgment to assess the directive.

Rosita Worl stated that the Whale House has tremendous significance for all members of the Ganexteidi Clan, as well as the village generally. Many bodies laid in state at the Whale House. She added that any member of the Ganexteidi Clan has the right under tribal law to use the Whale House for certain purposes.

The next witness at trial was Charles Smythe, who received a Ph.D. in cultural anthropology from the University of Oregon in 1978. Dr. Smythe testified at length about the history of the Whale House artifacts and the genealogy of the Whale House of Klukwan and its members.

Dr. Smythe testified that establishment of the Whale House goes back to around 1830, and was the idea of a respected Ganexteidi leader named Xetsuwu. He was concerned that many Ganexteidi were marrying below their status, and that establishing a new house could bring together several groups which would not only have higher status than any of the previous house groups standing alone, but would also enhance their security.

Dr. Smythe subscribes to the view that Xetsuwu then commissioned the house posts from the Old Wrangell area of

[23]The Tlingit defendants argue that they were duty bound to follow the directive of Clarence Hotch to sell the artifacts.

southeast Alaska. While there is a difference of opinion over who actually carved the house posts, a number of scholars attribute Xetsuwu himself with creation of the rain screen.[24]

Dr. Smythe utilized charts showing family trees to support his conclusion that the Tlingit defendants are not members of the Whale House, but rather are members of the Valley House of Klukwan. Further, he stated that he found no connection between the Whale and Valley houses.

A nexus of sorts is evident however, from the testimony of Dr. Smythe and others that Mary Williams, a member of the Whale House, made the decision to give the key to the Whale House to Victor Hotch, despite the fact that Victor was a member of the Valley House. (This figurative and literal giving of the key, making Victor caretaker of the Whale House, undoubtedly contributed to the apparent good faith belief of the Tlingit defendants that they are members of the Whale House.) Dr. Smythe also testified that Estelle Johnson and her children are the sole surviving members of the Whale House of Klukwan.[25]

Under effective cross-examination by defendant Irene Rowan, Dr. Smythe stated that he had spent about 75 days researching the history of the Whale House, yet he admitted that he had not interviewed any of the Tlingit defendants, apparently because he thought they might be hostile.

Ms. Rowan also asked Dr. Smythe who were the current leaders of the Ganexteidi Clan in Klukwan. He answered that such leaders would include George Stevens, Chief William Johnson,[26] Ruth Kasko, James King, Jones Hotch, Jr., and perhaps others.

Plaintiff called as its next witness Roger McCoy, a retired Alaska state trooper, who was contacted by Martha Willard in June 1984 to report the theft of the artifacts some two months earlier. There was no question who the principal players in the removal were, and the troopers and the state prosecutor proceeded to investigate the removal of the artifacts in order to determine if a state crime had occurred. While Trooper Roy Holland went to Seattle to interview Michael Johnson and others, Trooper McCoy drove to Klukwan to view the alleged crime scene and interview witnesses there.

Trooper McCoy confirmed the removal of the artifacts by four or five men in April 1984 around Easter. He said that he spoke with Clarence Hotch, Bill Thomas, Irene Rowan, and others, such as complainant Martha Willard. Trooper McCoy testified that he next gathered facts indicating that the artifacts had been ferried to Seattle, and that Michael Johnson, whose residence was in Seattle at that time, acted in concert with the removers and likely oversaw the removal of the artifacts from Klukwan while he (Michael Johnson) was just 22 miles away at the nearest city of Haines, Alaska, when it took place.

Trooper McCoy stated that as a result of his investigation, he concluded that some art dealers make a living by persuading Indians to sell their artifacts. He also testified that because of the cloud over ownership of the artifacts, the district attorney declined to prosecute the removal as a criminal theft.

Plaintiff's witness David Katzeek is a Tlingit born in Klukwan (Thunderbird Clan, Eagle moiety) who, like his mother Anna Katzeek, is familiar with Tlingit tribal law, including applications of tribal law within the village, and is generally regarded as having such expertise. His testimony included his statement that applicable tribal law in this case prohibits the removal and consigned sale of the Whale House artifacts by a group such as the Tlingit defendants.

Mr. Katzeek was asked by plaintiff's co-counsel Ms. Perlmutter to explain the historical significance of the Whale House artifacts, and then whether there is a spiritual significance to the artifacts. His answers were as follows.

> The primary significance is knowing who you are... with us, these particular artifacts tell a story.... When you're selling an artifact...you're not only getting rid of a piece of wood...you're getting rid of the music, the song, the dance, and the good, the bad, and the ugly.
>
> ....
>
> The worm dish story of a young woman nursing a worm as a pet which became a threat to the entire community...is right up there in the 21st century. If the problem was not resolved it would have ended in the destruction of not just the clan that was involved, but the entire community.... A similar thing 2,000 years later is happening. Is that of the mind? Is that just happening within the intellect? It doesn't involve the soul and the spirit? A script could be written: 'Wormdish Revisited, the Community of Chilkat, 2,000 years later.' This is why we need to keep these things here; this is why we sing the song, and this is why we need them for our ceremonial parties. That's the significance of the artifacts.

Ed Warren was plaintiff's next witness at trial. The court observed that he clearly was well-informed with respect to the subjects he addressed during direct and cross-examination, and presented a calm and credible demeanor. Mr. Warren, a Tlingit who was born, raised, and continues to reside in Klukwan, emphasized that the IRA § 16 tribal government, which is the plaintiff in this action, is the proper party under the circumstances of this dispute to civilly prosecute this case on behalf of the Whale House and the Ganexteidi Clan, and to oversee the return and custody of the artifacts, which he characterized as clan trust property. Mr. Warren noted that the Chilkat Indian Village Tribal Council is the singular governing body in Klukwan, and that members of the village organized the tribal government pursuant to IRA § 16 with the confidence that the council would take ultimate responsibility for protecting tribal resources, which encompasses the artifacts.

Ganexteidi Clan member Ruth Kasko compared the artifacts with the American flag, rhetorically asking, "where are you without it?" She recalled that her father Daniel Katzeek (Killer Whale) and her oldest brother George helped to build the current cement Whale House for the Ganexteidi. He wasn't concerned about not being paid for this labor, Mrs. Kasko testified, because he knew that his children were Ganexteidi and felt that his efforts were to their behalf. Mrs. Kasko, a leader of the Ganexteidi and current member of the tribal council, stated that the 1976 ordinance was intended to protect tribal property such as the artifacts.

Evelyn Hotch's deceased father Clarence Hotch was a principal participant and on the scene director of the 1984 removal of the artifacts which gave rise to this litigation. Her testimony reflected an abiding feeling that her father's ultimate decision to cooperate in a commercial dealing with

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[24]*See, e.g.*, Emmons "The Whale House of Chilkat," *Raven's Bones* (Andrew Hope III, editor 1982) at 81 *et seq.* Anna Katzeek testified that she understood the artifact known as the rain screen to depict the "rains—the falling of the rains in the great flood which covered the earth, which the Tlingit people witnessed."

[25]Dr. Smythe noted that Estelle Johnson has resided away from the village for about 40 years, does not relate as a member of the village, and actually "sold" her interest in the Whale House to Michael Johnson for $60,000.

[26]According to Chief William Johnson, the word "chief" in his name holds no significance regarding a title, and is simply a part of his name in Klukwan.

Michael Johnson to remove the artifacts was dead wrong under tribal law, and that she never forgave him for that.

Mrs. Hotch recounted a history dating back to the 1970s of visits to Klukwan by the non-Indian defendant Michael Johnson, during which she observed systematic and calculated attempts by Michael Johnson to "butter them up." Mrs. Hotch cited offers by Michael Johnson to arrange and finance trips to Seattle for her father, and others who were seen as potential players in a deal to sell and remove the Whale House artifacts.

Subsequent to the removal of the artifacts by her father and other defendants, Evelyn Hotch testified that she asked her father how he could do such a thing, which contravened not only tribal customs and written tribal law (the 1976 Ordinance) which she knew her father was aware of, but also the explicit directive of her Uncle Victor Hotch to his brother Clarence to make sure to reject all efforts by outsiders to purchase and remove the artifacts. Mrs. Hotch sighed that her father had no answer to this question, and simply told her to mind her own business.

Other witnesses called by plaintiff included Don "Bosch" Hotch, Judson Brown, and Jones Hotch, Jr. A common theme of their testimony was that removal of the artifacts violated applicable tribal law, and that the remedy for the violation should include the return of the artifacts to Klukwan.

Jones Hotch, Jr. testified that he is a member of the Whale House, but was never consulted regarding the removal of the artifacts (and never would give such consent). The witness stated that "our artifacts are on foreign soil. We want them brought back to home soil."

Defendant Bill Thomas was called by plaintiff, and was the only defendant to testify. Plaintiff's attorney Ms. Perlmutter was allowed to conduct her questioning of Mr. Thomas in the form of cross-examination. A lot of ground was covered and facts regarding his knowledge of events regarding the 1984 removal of the artifacts and Michael Johnson's role were effectively elicited.

Ms. Perlmutter began by confirming that Mr. Thomas first talked with Michael Johnson about the artifacts in 1983. She then asked if Michael Johnson was the one who initiated the contact, *i.e.*, "he made the first phone call to you?" Bill Thomas answered that yes, he thought that was the case. Plaintiff's ex. 82 was then discussed. That document is a copy of a March 14, 1984 letter from Michael Johnson addressed to "Chief" Clarence Hotch and Mr. Bill Thomas. It reads as follows.

> I do want you to know that Estelle Johnson will not be coming up there. I have too much money, time, and emotion invested in this thing to let her interfere. You must remember that her Uncle and Mother built the Whale House building, and that we will need her to be on our side later. That is why I am talking to her now. You and Clarence will not have to deal with her. I will.
>
> I expect to come to Haines to meet with everyone April 23 or 24. We can discuss the contracts we already have as well as how to handle this thing in the future.
>
> If you decide to take the artifacts out before then call me...and I will come right up. Be assured that I will get you the best price for it.
>
> P.S. Why don't you call Martha and Rose and try to reach an understanding with them. Perhaps they would like me to sell their things for them and you could help each other move the things out of the Village.

Plaintiff's ex. 82.

Mr. Thomas testified that prior to the removal he and Clarence Hotch met with Michael Johnson at the Thunderbird Motel in Haines, and discussed the anticipated removal of the artifacts. Bill Thomas stated that during that meeting Michael Johnson presented him with the consignment agreement. Plaintiff's ex. 84. That agreement is signed by Michael Johnson and Bill Thomas. Mr. Thomas signed on behalf of "the Whale House Group," whose members are listed in an appendix. The consignment agreement, which is dated May 1, 1984,[27] guarantees that the Tlingit defendants will receive a minimum of $1 million from the sale of the artifacts.

The members of the "Whale House Group" listed in the appendix to the consignment agreement are the Tlingit defendants in this case. All of them signed a document titled "Power of Attorney and Confirmation of Ownership" in early May 1984 appointing Bill Thomas as their agent regarding the sale of the artifacts through dealer Michael Johnson. Plaintiff's ex. 85. That document provides that if Bill Thomas dies or becomes disabled, Irene Rowan is appointed in his place.

A separate contract was executed on July 25, 1984, by Michael Johnson, and Estelle Johnson and Shirley Cunningham. That document acknowledges that Michael Johnson was attempting to sell the artifacts at that time; that the women claim an interest in the artifacts; and that in exchange for Michael Johnson paying Shirley Cunningham $10,000 and Estelle Johnson $50,000, the women agree to:

> release any interest they may have in any other Artifacts from the village of Klukwan, Alaska, that are not in the possession of the undersigned and any interest they may have in the cement structure situated in Klukwan, Alaska, known as "The Whale House."

Plaintiff's ex. 86.

Mr. Thomas recited the basic facts involving the actual removal of the artifacts in late April 1984, about which there is virtually no dispute. Clarence Hotch came to Bill's house in Klukwan and told him the time had come to act to remove the artifacts. Bill called his brother Clifford, who brought a truck from his residence in Haines. Buzzy and Vincent Hotch also assisted, according to Bill Thomas. Clarence opened the door to the Whale House, they removed the artifacts (except the worm dish, which was too fragile and old to even be carried), loaded them onto three trucks, and transported the artifacts to the Haines Motel where Michael Johnson was staying, so that he could inspect the property. After being stored in the garage of Defendant Evans Willard for a few days, Michael Johnson and Bill Thomas arranged for and effected transportation of the artifacts to Seattle by ferry.

Bill Thomas stated that he currently feels at times that the removal was wrong. He said that in large part he felt obliged to participate in the removal because his uncle, Clarence Hotch, desired it.

Mr. Thomas also discussed the current rift between the Tlingit defendants and Michael Johnson. Mr. Thomas testified that the Tlingit defendants no longer consider the consignment agreement to be binding; that the artifacts are not for sale; and that they should be returned to Klukwan.

Bill Thomas explained that the rift with Michael Johnson was inevitable upon the Tlingit defendants' decision to fire attorney Donna Willard during the spring of 1992, at which time they also informed Michael Johnson that the artifacts were no longer for sale. Mr. Thomas stated that Michael Johnson responded with a threatening letter, saying he was not going to "get shafted." Bill Thomas then emphasized to the court that the Tlingit defendants were not present at trial

[27]Bill Thomas testified that he signed the agreement at the office of Michael Johnson's attorney in Seattle after the artifacts had been shipped there.

for the purpose of defending Michael Johnson, who Bill Thomas said took advantage of an elder: his uncle Clarence Hotch.

Conclusions

I. The Whale House Rain Screen and House Posts as Artifacts, Clan Crests, and Indian Art Within the Meaning of the Ordinance

The artifacts consist of four elaborately carved wooden posts (made of spruce and over nine feet high) and a wooden partition (made of thin cedar boards) called a rain screen. George Emmons[28] wrote that they are "unquestionably the finest example of native art, either Tlingit or Tsimshian, in Alaska, in boldness of conception—although highly conventionalized in form—in execution of detail, and in arrangement of detail."[29] The record indicates that if the artifacts were sold on the open market they would likely reap a price of several million dollars.

The artifacts were created around 1830. A prominent leader in Klukwan, Xetsuwu, resolved to build a new house (Whale House) in order to unify certain existing house groups of the Ganexteidi Clan. He commissioned the house posts from a famous carver who resided in the Stikine River area, near what is currently referred to as Old Wrangell, Alaska. The name of that artist remained unknown until 1987, when a written account was discovered which identified his name as Kadjisdu.axtc.[30] The artist, who made detailed sketches while being told about the clan's stories during the canoe trip to Klukwan, is said to have resided in Klukwan for one year while carving the posts. By some accounts he was paid 10 slaves, 50 dressed moose skins, and several blankets.

The four posts represented the four groups that were brought together to form the new Whale House. The posts and rain screen tell stories of the clan; not just of the Whale House. The artifacts and the Whale House itself were created and dedicated in the traditional manner. The Ganexteidi hired Eagles to construct the original house. The Eagles were then repaid in a traditional "payback party,"[31] and the property was brought out in a potlatch and dedicated as clan property.

As Dr. Smythe noted, Xetsuwu's vision to unify the Ganexteidi under a new house with these clan crests was successfully implemented. The clan, as well as the Chilkat Indians generally, became a strong and powerful people. They maintained control of valuable trade routes to interior Alaska, and became quite prosperous.

The historical resistance by members of the clan to a series of efforts by outsiders to purchase these great works is testimony in itself of the clan crest nature of the artifacts, which are held in trust by the clan.

Around 1899, Yeilgooxu (whose English name was George Shotridge), *hitsati* of the Whale House, organized the construction of a new Whale House because the original one was in disrepair. Although a mudslide destroyed it before completion, the artifacts were rescued. Yeilgooxu refused the offers of his friend George Emmons to acquire the artifacts. Following the death of Yeilgooxu, Yeilxaak, who was *hitsati* of the Raven House, was chosen to be *hitsati* of the Whale House, in part because of his close ties with the Whale House.

Louis Shotridge, the son of Yeilgooxu, caused a furor in the tribal community when he attempted to purchase the Whale House artifacts for the University of Pennsylvania's University Museum. In 1922 he arranged a meeting of Ganexteidi leaders, and offered $3,500 for the artifacts. Although that was a tremendous amount of money at that time and place, the clan turned him down.[32]

As a function of the matrilineal nature of Tlingit social structure, Louis Shotridge, like his mother, was a member of the Kaagwantan Clan of the Wolf moiety—the opposite side of his father's clan (Ganexteidi) and moiety (Raven) affiliations. His disingenuous[33] claims to the property under Western inheritance law were rejected by the village. Shotridge became obsessed with acquiring the artifacts, continued his efforts during the 1920s and 1930s, but was never successful. While working for the territorial government in 1937 as a stream guard Louis Shotridge suffered a mysterious death. A schoolteacher found him near his cabin south of Sitka, Alaska. He had laid there several days with a broken neck, and died an agonizing death 10 days later.

Obsession with acquiring the Whale House artifacts did not end with Louis Shotridge. Defendant art dealer Michael Johnson has also been obsessed with the artifacts' acquisition, and his actions in this respect have caused tremendous conflicts and ill will at Klukwan. While the Tlingit defendants cooperated with him to remove the artifacts in 1984, the evidence brought out at trial leads this court to conclude that they seem to regret their 1984 actions in concert with Michael Johnson. Their spokesman Bill Thomas expressed such regret, and all of the Tlingit defendants now want the artifacts returned to Klukwan, and want nothing more to do with Michael Johnson and his attempts to sell the artifacts.

This court concludes that, inexorably, the Whale House property at issue constitutes "artifacts, clan crests, or other Indian art works" within the meaning of the tribe's 1976 Ordinance prohibiting removal of such property without first obtaining the consent of the council at Klukwan.

II. Power of the Village to Enact the Ordinance and Enforce it Against the Defendants

Defendants have challenged the tribe's authority to enact and apply its 1976 Ordinance. The assertion directly raises two issues going to the heart of this dispute. First, does the Chilkat Indian Village have the power to enact this legisla-

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[28]Witness Rosita Worl, who the court finds provided the best expert testimony at trial, was asked by the court who, among several published ethnographers and anthropologists on the subject of Tlingit culture, best reported the culture. She provided helpful analyses of several works, and singled out Emmons as the most accurate. Emmons's copious notes while living among the Tlingit during the 1880s and 1890s are included in a highly regarded and informative book which was published two years ago. G. Emmons, *The Tlingit Indians* (edited with additions by Frederica de Laguna 1991). *See id.* at 60 *et seq.* (Whale House of Klukwan).

[29]*See* n.24, *supra*. *See generally* Enge, "Treasure of the Tlingit," *Anchorage Daily News*, April 4-8, 1993, at A1 (five-part series on the history of the Whale House artifacts) (Enge).

[30]Enge, part 2 at 4.

[31]In referring to ceremonies, "party" is synonymous with "potlatch."

[32]New York anthropologist Edmund Carpenter, who in 1975 published an essay about Louis Shotridge and the artifacts, is quoted as saying: "There wasn't 35 bucks in the whole of Klukwan at the time and they turned it down. That's style." Enge, part 3 at 6.

[33]He wrote a letter to the museum in Pennsylvania confessing that "as one who had been trained to be a true Kaguanton, in my heart I cannot help but have the feeling of a traitor who has betrayed confidence." *Id.*

tion?[34] If so, may it lawfully apply the ordinance to some or all of the defendants? Answers to these dual questions require a two-tiered analysis.

A. The Tribe's Power to Enact the 1976 Ordinance

In *Chilkat Indian Village v. Johnson, et al.*, 870 F.2d 1469 (9th Cir. 1989), the court assumed—without deciding—that the Chilkat Indian Village had the power to enact the challenged ordinance in the first instance. But to prevail on this claim, the court held that the tribe must establish its authority "under federal common or statutory law...." 870 F.2d at 1474, n.9.

The village has consistently maintained that it has the authority to enact the ordinance under *both* federal common and statutory law. At the same time during this epic litigation, defendants have maintained that the tribe lacks the sovereign capacity to enact the ordinance. Just before trial, which commenced January 18, 1993, defendants cited a recently issued Solicitor's opinion in support of their position. Solicitor's Opinion, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers* (Jan. 11, 1993) (Sol. Op.) During the course of the four-week trial in this matter the parties requested—and were granted—the opportunity to present oral arguments on this issue.

Because it is the policy of the tribe to develop tribal law in a manner consistent with applicable decisions of the federal courts, the starting point in determining the tribe's legislative powers under federal common or statutory law is applicable decisions of the United States Supreme Court.

In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 [10 Indian L. Rep. 1028] (1983), the Court evaluated a dispute between the Mescalero Apache Tribe and the state of New Mexico over hunting and fishing rights on the reservation[35] by nonmembers. The Court noted the state's concession that "the Tribe exercises exclusive jurisdiction over hunting and fishing by members of the Tribe and may also regulate the hunting and fishing by nonmembers." 462 U.S. at 330 [footnote omitted]. The Court then addressed competing state and tribal interests. While that recurring conflict of federal Indian law is not at issue in this tribal court action, the Court's "broad considerations," quoted below, which guided its assessment of federal and tribal interests, are equally applicable to the Chilkat Tribe's power to regulate, through enactment and enforcement of its 1976 Ordinance, the use and control of tribal resources such as the artifacts, whose situs for over 150 years was Klukwan (in houses affiliated with the Ganexteidi Clan) prior to their 1984 removal.

> We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage use of their territory and resources by both members and nonmembers.

462 U.S. at 334-35 [citations and footnotes omitted]. This court construes the "broad federal commitment" recognizing the power of tribes to manage the use of their "resources by both members and nonmembers" as encompassing the Chilkat Tribe's power here to regulate the conditions under which the Whale House artifacts can be removed from the village. *Id.*

This conclusion is compelled from an examination of the tribe's federally recognized authority under federal statutes and common law,[36] as well as the "Indian country" status of the contiguous 897.4 acres owned in fee title by the tribe, which comprise the Chilkat Indian Village, and define the boundaries of its territorial jurisdiction. See Chilkat Ordinance 80-001, art. III, § 5.

Federal common law includes recognition by the federal courts of tribes' inherent legislative powers. In referring this case to this tribal court, the district court noted and rejected defendants' argument that the power to enact civil legislation such as the ordinance at issue is restricted to tribes occupying "reservations":

> This argument avoids the principle that those powers lawfully vested in an Indian tribe are generally not 'delegated' powers granted by Congress, but rather are "inherent powers of a limited [sovereign] which [have] never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322, 98 S. Ct. 1079, 1086 (1978).... Tribes exercise power "over both their members and their territory." *Mazurie*, 419 U.S. at 557, 95 S. Ct. at 717. This power includes the power to legislate and adjudicate matters within tribal territory.

Slip op. at 12 (Oct. 9, 1990). Citing controlling language in *Montana v. United States*, 450 U.S. 544, 565 (1981) (*Montana*), Judge von der Heydt then concluded that "the power to pass the ordinance that is in dispute in this case was part of the retained, inherent power of the Chilkat Indian Village." Slip op. at 13. *See also* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 252-57, 342-43 (Cohen). ("Under the principle that tribal sovereignty is retained where not ceded to or restricted by federal authority, tribal court civil jurisdiction is very broad."[37] *Id.* at 342.)

This court concludes, then, that the Chilkat Tribe had authority to enact the 1976 Ordinance based on federal common law, the village's IRA constitution, as well as its retained, inherent authority.

B. The Tribe's Authority to Enforce the Ordinance

In *Chilkat Indian Village v. Johnson, et al.*, 870 F.2d 1469, 1474 (9th Cir. 1989), the court held that "[i]n our case the state of the law is such that the heart of the controversy over the claim will be the Village's power, under federal law, to enact its ordinance and apply it to non-Indians [footnote omitted]." With respect to enforcement against the Tlingit Indian defendants, however, the court held that no federal issue was raised, and that enforcement against the Tlingit

[34]Despite the prior holdings of this court and the federal district court that the village did have authority to enact the ordinance, the issue is revisited by this court in light of the evidence established at trial.

[35]"Reservation" is a term of art, and is a part of the federal definition under 18 U.S.C. § 1151 of "Indian Country," which includes "dependent Indian communities," such as the lands owned in fee by the Chilkat Indian Village. *See* Judge von der Heydt's slip op. in J84-024 at 15 (Oct. 9, 1990).

[36]As noted above, both sources of federal law were addressed by the federal district court in its 1978 and 1990 holdings recognizing the powers of the tribe under its IRA § 16 constitution to prevent the sale of village assets without council approval, and to preserve the arts, crafts, and culture of the Indian village.

[37]Cohen n.103 at this juncture cites *United States v. Wheeler*, 435 U.S. 313 [5 Indian L. Rep. A-33] (1978), and 55 Interior Dec. 14 (1934) (Powers of Indian Tribes). This tribal court also subscribes to the analysis of tribal powers contained in *Hepler v. Perkins*, 13 Indian L. Rep. 6011, 6014 (Sitka Tr. Ct. 1986).

defendants[38] raised "issues of tribal law...[which] are the staple of the tribal courts." 870 F.2d at 1475-76.

The Supreme Court's 1981 language in *Montana* remains the basis under federal law to evaluate tribal civil jurisdiction over non-Indians. The *Montana* Court held that the two circumstances in which tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians are:

> [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements.
>
> [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66. *See also Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 109 S. Ct. 2994, 3007, 3018 [16 Indian L. Rep. 1044] (1989); *Duro v. Reina*, 110 S. Ct. 2053, 2061 [17 Indian L. Rep. 1025] (1990); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 [17 Indian L. Rep. 2093] (9th Cir. 1990); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1078 [17 Indian L. Rep. 2035] (9th Cir. 1990) (*Morongo*); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 [9 Indian L. Rep. 2043] (10th Cir. 1982); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 [9 Indian L. Rep. 2009] (9th Cir. 1982).

There is no dispute that defendant Michael Johnson (and his corporation) entered into contractual relations with the Tlingit defendants regarding the removal and sale of the Whale House artifacts. The evidence at trial revealed Michael Johnson's extensive history of dealing with tribal members. Those dealings finally bore fruit in 1984 when defendant Bill Thomas, a tribal member residing in Klukwan, signed the consignment agreement with Michael Johnson on behalf of all of the Tlingit defendants. These facts meet the first basis of the *Montana* Court set forth above. This court holds that the tribe has the authority to regulate these consensual relations, and that it has jurisdiction in this respect over non-Indian defendants Michael Johnson and his corporation.

The trial evidence convincingly demonstrated the continuing importance of the artifacts to the tribe. As such, this court concludes that the removal of the artifacts from Klukwan had a direct effect on and posed a distinct threat to the political integrity, health, and welfare of the tribe. This court heard extensive, credible testimony about the significance of the artifacts to the welfare of the Ganexteidi Clan as well as the entire tribe. All members of the village continue to rely on the artifacts for essential ceremonial purposes. The artifacts embody the clan's history. Just as earlier attempts to remove the artifacts caused injury to the tribe through friction and clashes among tribal houses and clans, *a fortiori* the 1984 removal in violation of the tribe's 1976 Ordinance had a direct effect on the health and welfare of the tribe. This court finds that under the second basis of the *Montana* Court, the tribe retains inherent power to exercise authority over the conduct of Michael Johnson, who conspired with the Tlingit defendants to remove the artifacts from the village in violation of the 1976 Ordinance.

The Ninth Circuit stated that the issue of Indian Country must be addressed when assessing the village's claim to enforce its ordinance. 870 F.2d at 1474. In referring the case to this court, the district court did so. It held that "if Chilkat had governmental power under its status as a reservation, it appears that ANCSA did nothing to extinguish those powers." Slip op. at 11 (Oct. 9, 1990). Although ANCSA extinguished the tribe's reservation, Judge von der Heydt held that Indian Country continued to exist after passage of ANCSA, because nothing in ANCSA explicitly terminates Chilkat's powers, including its territorial jurisdiction. "Therefore, the status of the dependent Indian community was not extinguished by the passage of ANCSA." Slip op. at 15.

Nonetheless, defendants continue to argue that the village does not constitute Indian Country within the meaning of the applicable federal statute. 18 U.S.C. § 1151. Defendants offered a single piece of evidence: the above-mentioned U.S. Solicitor's opinion which issued in the last days of President Bush's administration. Plaintiff argues that the Solicitor's opinion ignores controlling law governing the effect of ANCSA; that even if the Solicitor's pinion were correct, it does not apply to the Chilkat Indian Village; and that the evidence demonstrates that the Chilkat Indian Village is a "dependent Indian community." This court agrees.

The village holds its former reservation lands in fee title. The Solicitor's opinion noted as follows.

> Although ANCSA did revoke the reservation for the Natives of the Village at Klukwan, the reservation lands were not conveyed to the ANCSA corporation for the Village of Klukwan. Instead, Klukwan became a special case during ANCSA's implementation when Congress amended § 16 of ANCSA in 1976 by adding § 16(d), 43 U.S.C. § 1615(d). As a result, the IRA-chartered "Chilkat Indian Village" organized in 1941 by the Natives of Klukwan, ended up holding fee title to the 897.4 acres of its prior statutory reservation.

Sol. Op. at 108 n.271. Defendants argue that the Solicitor's opinion must be construed as concluding that those village lands do not constitute Indian Country. According to the Solicitor, although there are tribes in Alaska, various provisions of ANCSA implicitly extinguished tribal territorial powers. Sol. Op. at 130.

This court finds that the Solicitor opinion's most glaring omission on this issue is its failure to even mention the one judicial decision squarely on point: the district court's ruling in this case. Slip op. at 15 (Oct. 9, 1990). As noted above, the district court held that ANCSA did not extinguish the dependent Indian community (Indian Country) land status in Klukwan. Because the Solicitor's opinion is just that: an *opinion*, this court continues to subscribe to the view expressed in the decision of the federal district court, which constitutes binding authority on the federal question of tribal territorial jurisdiction over non-Indians.

Plaintiff also argues that even if the Solicitor's opinion were correct, it does not apply to the Chilkat Indian Village. Plaintiff points out that the Solicitor considers Klukwan a "special case," as quoted above. The Solicitor's finding that ANCSA "lands and village-owned fee lands in Alaska do not as a general rule qualify as dependent Indian communities," Sol. Op. at 117, is not inconsistent with an additional finding that the "special case" of Klukwan falls outside of this "gen-

[38]The tribe's constitution, art. II, § 2 provides that under certain circumstances loss of membership can occur. No evidence at trial was presented establishing that any of the Tlingit defendants has at any time taken the affirmative steps provided for in the constitution to become nonmembers of the village. Joe Hotch testified that some of the Tlingit defendants have at various times served on the village council (which requires membership). The evidence did confirm that Bill Thomas, the only defendant to testify, was a member and resided in the village at the time of the 1984 removal. After trial, this court provided all parties with the opportunity to address the question whether any or all of the Tlingit defendants are currently members of the village. No response was received by any party.

eral rule," and that the Chilkat Indian Village's lands constitute a dependent Indian community, and thus Indian Country.

Finally, plaintiff argues that the evidence establishes that the Chilkat Indian Village is a dependent Indian community. In this respect, plaintiff asserts that the federal courts have adopted standards for determining the existence of Indian Country which apply to tribes in Alaska. In *Alaska v. Venetie*, 856 F.2d 1384, 1390 [15 Indian L. Rep. 2123] (9th Cir. 1988), the court of appeals adopted the criteria in two other federal appellate decisions. *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981).

The relevant criteria involve consideration of (1) the nature of the area, (2) the relationship of the area inhabitants to Indian tribes and the federal government, (3) the established practice of government agencies toward that area, (4) the degree of federal ownership and control over the area, (5) the degree of cohesiveness of the area inhabitants, and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples. *Alaska v. Venetie*, 856 F.2d at 1391. While a full discussion of plaintiff's extensive briefing on this issue is beyond the proper scope of this decision, which incorporates the district court's holding on this question, this court agrees with plaintiff that the evidence presented at trial supports the conclusion that Klukwan meets the standards of a dependent Indian community set forth above.

III. Violation of the Ordinance by Defendants

There is abundant evidence in the trial record establishing that all of the defendants, including Michael Johnson, violated the 1976 Ordinance. The Tlingit defendants did not counter any of the evidence regarding their role with Michael Johnson, as well as the actual removal. Neither did Michael Johnson, who elected to not attend the trial, offer any such evidence. This court finds that the Tlingit defendants violated the tribe's 1976 Ordinance.

If any defendant can be singled out as the architect of the removal it is Michael Johnson. He began his quest in the early 1970s when he first visited Klukwan. He returned regularly, systematically dealing with different clan and house members in his efforts to acquire the artifacts. Johnson at first focused on Martha Willard, telling her in 1975 that he had found documents confirming her title to the artifacts. When she resisted his attempts, Michael Johnson turned to Estelle DeHaven Johnson.

When Estelle's attempt to remove the artifacts (paid for by Mr. Johnson) was unsuccessful, Michael Johnson financed a lawsuit in federal court to determine ownership of the artifacts. Yet that pending lawsuit did not deter Michael Johnson from financing a second attempt to remove the artifacts. Michael Johnson admitted to this in a 1977 sworn statement. Plaintiff's ex. 131 at 97-98. A third attempt by Johnson was unsuccessful because Wackenhut, a security service, declined his offer to pay them to enter the village and remove the artifacts.

After the federal case was dismissed, Michael Johnson directed his efforts to Victor Hotch, Clarence Hotch, and Mildred Sparks, sending checks to all of them. The evidence showed that Victor, at least, returned the checks and declined to complete any agreement for the sale of the artifacts. Michael Johnson finally persuaded Clarence Hotch, acting in concert with the Tlingit defendants, to remove the artifacts so that the defendants now before this court could profit from selling the Whale House artifacts.

The preponderance of evidence at trial leads this court to conclude that Michael Johnson, as well as some of the Tlingit defendants, was aware of the 1976 Ordinance.[39] Nonetheless, neither Michael Johnson or any other defendant requested the permission of the council before removing the artifacts.

The fact that Michael Johnson was 22 miles away in the town of Haines during the physical removal of the artifacts does not absolve him from culpability for violating the ordinance. This court agrees with plaintiff that, just as the driver of a getaway car is guilty of a bank robbery committed by his partners, Michael Johnson is as responsible for the removal of the artifacts as if he had been among the men who performed the physical removal that April night in 1984.

Defendant Michael Johnson conducted an obsessive campaign to acquire the artifacts. He dealt with any and all people in the village who might assist him to remove the artifacts. Acting through his corporation, he played village members off against each other, while making inconsistent representations to them. The evidence at trial uniformly established that Michael Johnson conspired with the Tlingit defendants to remove the artifacts, and that he aided and abetted the actual physical removal of the artifacts.[40] This court finds that Michael Johnson and his corporation violated the tribe's 1976 Ordinance.

IV. Defendants' Defenses

Even though Bill Thomas was the only defendant (called by plaintiff) to testify at trial, it was apparent from the questions posed by various defendants, as well as the full record (including the closing remarks of the Tlingit defendants), that the defendants intend to rely primarily on two defenses: (1) that under Tlingit custom, they had no choice but to obey their uncle, Clarence Hotch, and (2) that traditional Tlingit culture is dead, and thus tribal law is not valid. The incompatibility of these mutually exclusive assertions has not escaped notice by this court.

As to the first assertion, there was a wealth of testimony at trial that the Tlingit defendants, as adult members of their clan, certainly did have the right to question a directive by their uncle which contravened established customs of the village—in this case that the artifacts could not be sold by a caretaker of one house, but rather were subject to the control of the entire Ganexteidi Clan (and regulated through ordinance by the tribal government).

Additionally, in order to obey their uncle Clarence Hotch, the Tlingit defendants necessarily had to disobey a contrary directive by their uncle Victor Hotch. The evidence at trial showed that while Victor may have waffled in some years during the 1970s, by 1980 he had clearly expressed his disapproval of Michael Johnson's efforts, and instructed that the artifacts were not to be sold. The family understood that Victor had willed his stock in Klukwan, Inc. to Clarence pursuant to their agreement that Clarence would use this asset to preserve the artifacts.

The defendants' argument that Tlingit culture is essentially dead was unsupported by the trial evidence. While the culture

[39]As noted above at 27, Judge Asper testified that the tribe's 1976 Ordinance was a central part of the initial *Estelle Johnson* federal court litigation (financed by Michael Johnson) in this matter, and that therefore Michael Johnson was certainly aware of the tribe's 1976 Ordinance when the 1984 violation of the ordinance occurred.

[40]The record in federal court on this issue was sufficiently established to allow the court of appeals to explain in the *Morongo* case: "In Chilkat, the non-Indian had caused the artifacts to be removed from the Village; the subject of the regulation was clearly internal." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1078 (9th Cir. 1990).

has been under assault from non-Indian outsiders and institutions,[41] the lengthy testimony of many credible witnesses at trial confirmed the vitality of Tlingit culture at Klukwan, and the continuing, important role of traditional law. This court finds that the Chilkat Indian Village maintains and nourishes its culture—even though that culture, like any, is dynamic and ever-changing as a function of time and changed circumstances.

Defendants' counterclaims include a claim for aliquot credits in ownership, and the claim to legally own the artifacts. To the extent that these claims may really be in the nature of affirmative defenses, this court finds that they are unsubstantiated by the evidence at trial.

Based on the evidence at trial, and the full record, this court concludes that no legal defense has been established by defendants.

V. Defendants' Counterclaims

Defendants asserted several counterclaims[42] in their initial pleadings in this court. The defendants did not pursue these counterclaims at trial. Plaintiff argues that the counterclaims are barred by the tribe's immunity from suit, and, in any event, were not proven. Based on a review of applicable law, and the obvious lack of any evidence to support the counterclaims, this court rules for plaintiff on this issue.

This court's review of applicable federal law shows that the primary source of tribal counterclaim immunity law is *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940) (*USF&G*). The Court in that case held:

> These Indian nations are exempt from suit without congressional authorization [footnote omitted]. It is though the immunity which was theirs as sovereigns passed to the United States for their benefit.... Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits.

309 U.S. at 512-23.

Citing this 1940 case, the Court more recently affirmed tribal immunity from counterclaims in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, _____ U.S. _____, 111 S. Ct. 905, 112 L.Ed.2d 1112 [18 Indian L. Rep. 1006] (1991). In *Oklahoma* the tribe filed a suit to enjoin collection of $2.7 million in cigarette taxes for sales made to non-Indians on tribal property.[43] The state counterclaimed, asking the federal court to enforce its assessment, and to enjoin the tribe from selling cigarettes in the future without collecting and remitting state taxes to the state. The tribe moved to dismiss the counterclaims based on sovereign immunity.

While acknowledging the general concept of tribal sovereign immunity, the state argued that the tribe waived its immunity when it sought an injunction. It also argued that to the extent that its counterclaims were compulsory under Fed. R. Civ. P 13(a), the federal court did not need an independent basis to hear those claims. The Court rejected the state's arguments, noting that it had "rejected an identical contention over a half-century ago in" *USF&G.*, 112 L.Ed. 2d at 1120. The Court stated: "We held that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Id.* at 513. The Court went on to hold: "Petitioner does not argue that it received congressional authorization to adjudicate a counterclaim against the tribe, and the case is therefore controlled by Fidelity & Guaranty. We uphold the Court of Appeals' determination that the Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief." *Id.*

The Ninth Circuit Court of Appeals issued what is perhaps the leading federal case on the subject of tribal counterclaim immunity outside of the Supreme Court's decisions. *Chemehuevi Indian Tribe v. California State Board of Equalization,* 12757 F.2d 1047 [12 Indian L. Rep. 2057] (9th Cir. 1985), *rev'd in part on other grounds*, 474 U.S. 10 [12 Indian L. Rep. 1077] (1985) (*Chemehuevi*). The *Chemehuevi* court held that tribal sovereign immunity bars counterclaims brought directly against a tribe. *Id.* at 1052. Distinguishing *United States v. Oregon*, 657 F.2d 1009, 1014 [8 Indian L. Rep. 2171] (9th Cir. 1981), the court held that entry into a lawsuit may constitute express consent, "but only if, when entering the suit, the tribe explicitly consents to be bound by the resolution of the dispute ordered by the court." *Id.* at 1053 n.7.

Pursuant to tribal policy discussed above, this court incorporates the above federal law as a matter of tribal law. Defendants' counterclaims, which were not factually established, are dismissed as a matter of law.

Relief and Order

In fashioning the appropriate relief in this tribal court case, this court first recognizes that the artifacts are currently stored in a Seattle warehouse pursuant to an injunction of the federal district court in J84-024 (JAV). Therefore, plaintiff, as the prevailing party in this action, is directed to make appropriate application to the district court to enforce necessary aspects of this court's order; principally for a modification allowing for the return of the artifacts to the Whale House at Klukwan.

This court is convinced that as a matter of tribal law the artifacts must be returned to Klukwan. Placing them in the Whale House will return the parties to the status that existed before the illegal 1984 removal.[44] In other words, it will reinstate the pre-litigation status quo. This court also recognizes that there may be a lack of adequate custodial capacity of the Whale House, and possibly the Ganexteidi Clan as a whole in Klukwan. After all, the clan, through its leaders, requested that the village (which enacted the 1976 Ordinance) bring this action enforcing the ordinance, and seek the return of the artifacts to the village on its behalf. Accordingly, this court hereby makes it clear that plaintiff Chilkat Indian Village, in consultation with the Ganexteidi Clan, has ultimate authority to enforce its ordinance, effect the return of the artifacts to Klukwan, and otherwise exercise all necessary custodial responsibility in overseeing the care and future custodial arrangements of the Whale House artifacts.

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[41]As the federal courts are acutely aware, the interests of tribes and states frequently collide. It is no surprise that the state of Alaska intervened in the federal action in this matter, and argued against recognizing tribal authority.

[42]Those counterclaims are intentional and malicious interference with contract rights; deprivation of due process, equal protection and just compensation; a claim for aliquot credits on ownership; negligence; breach of fiduciary trust obligation; libel; that defendants are the legal owners; and a claim for all fees and costs.

[43]The tribal property had the same Indian Country status as the land owned by the village in this case.

[44]This remedial action should also promote healing of the most recent wounds suffered by the tribal community (including the Tlingit defendants) by the continuing efforts by outsiders to use tribal members to purchase and remove the Whale House artifacts from Klukwan.

Plaintiff has sought an award of unspecified actual and punitive monetary damages against defendants. Its request for actual damages is against all defendants jointly and severally. Its request for punitive damages is requested in separate unspecified amounts against (1) the Tlingit defendants, and (2) Michael Johnson and his corporation. Plaintiff cites several factors which it believes justify a separate award of punitive damages against Michael Johnson and his corporation. Those factors are consistent with this court's findings regarding Michael Johnson's pernicious role in this matter discussed above.

On the subject of damages under tribal law, this court finds that the evidence presented at trial compels a fundamental distinction between the Tlingit defendants and Michael Johnson and his corporation—even though no legal rationale was established for the 1984 actions of any of the defendants. Although the Tlingit defendants were undoubtedly motivated in part by greed, they also believed—mistakenly as it turns out—that as members of the Whale House[45] they had a right to assume custody of the artifacts. The bad faith conduct of their uncle Clarence Hotch and Michael Johnson contributed to their incorrect assumption—as of 1984—that they had the right to take the actions resulting in violation of the tribe's ordinance. They appeared at trial, attempted in good faith to justify their actions, but also expressed responsibility for their actions. The Tlingit defendants, in their own way, expressed regret, and all of them now want the artifacts returned to the village.

Michael Johnson, on the other, hand remains relentless in his efforts to acquire the artifacts, which he intends to sell to the highest bidder. He is unremorseful, and has become vindictive regarding the prospective outcome of these proceedings. He chose to not participate in the trial, and was likely disingenuous about his reasons for not attending. He declined to participate even by telephone.[46] The evidence unequivocally established that he exercised bad faith in this matter from the beginning.[47] As Judge Linn Asper testified: "Michael Johnson had invoked the jurisdiction of the federal court [to clarify ownership], and at the same time he was... financing the operation to steal them...."

Order

Under these circumstances, and upon due deliberation under tribal law, this court orders the following: The artifacts are to be returned to the Whale House in Klukwan. Plaintiff shall make appropriate application to the federal district court to accomplish this as soon as possible. Michael Johnson (and his corporation) are to pay for all expenses required to return the artifacts to the Whale House at Klukwan. Additionally, defendants Michael Johnson and his corporation are responsible to plaintiff, as the prevailing party, for costs and fees in this tribal court action. Plaintiff is ordered to submit a bill of costs and a statement of its attorneys' fees within 30 days of receipt of this decision. Michael Johnson (and other defendants) shall have 30 days after service of said bill and statement to file an objection. No other actual or punitive damages are awarded.

Counsel for plaintiff: Carol H. Daniel, Joseph D. Johnson, and Mary Ann Kenworthy, Anchorage, Alaska; Willa Perlmutter, Juneau, Alaska

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[45]The evidence at trial established that the Tlingit defendants are not, as they had honestly thought, members of the Whale House. They are members of the Valley House. Of course, under tribal law, even if they were members of the Whale House, other members of the Whale House, as well as the Ganexteidi Clan at Klukwan, would need to be consulted before the artifacts could be taken out of the cement Whale House building in the village. Then, pursuant to the 1976 Ordinance, council permission would need to be received.

[46]Telephonic testimony is allowed and is common in state and tribal courts in Alaska.

[47]For example, his May 28, 1975 letter addressed to "Tlingit Friends" confirms his understanding that: "All people involved in this know the Whale House is clan material."

CHIPPEWA-OTTAWA CONSERVATION COURT

CHIPPEWA-OTTAWA TRIBES v. PETERSON, JR.

No. 92-64 (Chip.-Ott. Cons. Ct., Sept. 22, 1993)

Summary

The Chippewa-Ottawa Conservation Court finds the defendant in violation of section 7.1(B)(2) of the Chippewa-Ottawa Treaty Fishery Management Authority Rules and Regulations.

Full Text

Before ANDARY, Conservation Court Judge

ANDARY, Conservation Court Judge

Part A: Procedural History

This matter comes before this court as a result of the defendant, Robert E. Peterson, Jr., being charged with allegedly violating section 7.1(B)(2) of the Chippewa-Ottawa Treaty Fishery Management Authority Rules and Regulations. Section 7.1(B)(2) of said fishing regulations, which is a fishing area restriction, provides as follows:

Section 7.1 Area Restrictions—Lake Huron

Pursuant to the Negotiated Settlement governing the treaty ceded waters of Lake Huron the following area restrictions apply:

....

(B) A transition zone shall be established within grids 505 and 506 and shall contain the area south of a line extending from Hammond Bay Harbor buoy, northeasterly (approximately 78 degrees) to a point where grids 406, 407, 506 and 507 meet, and west of a line extending due north from the 40 Mile Point light to the near upper limit of grid 506 (11-11½ miles) (see Settlement Maps). The following stipulations apply in said zone:

....

(2) effective January 1, 1990 and thereafter: tribal commercial fishing activity is prohibited at any time, excepting however, any tribal commercial fishing activity for chubs that is permitted pursuant to Section VII paragraph 23(b) of the Negotiated Settlement; said transition zone becomes a primary lake trout rehabilitation zone for purposes of lake trout management.

The alleged violation took place on June 16, 1992. Subsequent to the defendant being advised in writing that representation by the court advocate was available to him, an appearance was filed by Daniel T. Green as attorney for defendant on or about July 10, 1992. A pretrial was held on August 11,