CHAPTER 9

PROPERTY

American Indian property rights jurisprudence, despite much rhetoric that Indian people often did not recognize individual ownership and other foundations of Anglo-American property rights, is largely consistent with Anglo-American property common law. The main differences involve the subject matters and fact patterns that arise, deriving from the unique relationship that Indian nations and people have with the United States government, which has historically acted as either the literal or assumed "owner" of all Indian property. As such, there are numerous property regimes arising under federal law that apply exclusively to Indian nations and people.

That said, key concepts in traditional and customary law shine through the property regimes that permeate Indian country that differ remarkably from Anglo-American jurisprudence. *Cf.* Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009). This chapter highlights both the structural complexities of Indian property regimes and the areas where tribal common law impacts these regimes.

A. TRADITIONAL PROPERTY SYSTEMS

RETELLING ALLOTMENT: INDIAN PROPERTY RIGHTS AND THE MYTH OF COMMON OWNERSHIP

Kenneth H. Bobroff, 54 Vanderbilt L. Rev. 1559, 1571-99 (2001)

. . .

III. Indigenous Private Property Systems

. . . Indian societies have had myriad different property systems, varying widely by culture, resources, geography, and historical period. Many of them have recognized property rights in land and have done so in ways that provided for transfer of land, rational inheritance, and legal change. Many continue to do so today. Indian property systems did differ in important ways from the Anglo-American property regime. Given the central importance of the land to native societies — indeed to most native peoples' very identities — it is not

surprising that almost all Indian property systems restricted the decision to transfer land rights outside the tribe to tribal leaders. This led many outsiders, including nineteenth- and twentieth-century reformers, to conclude that title to Indian lands was invariably held by the tribe in common. . . .

A. Indians' Historical Property Systems

. . .

1. Indian Property Systems in New England

In his study of the ecology of colonial New England, William Cronon writes, "[t]he difference between Indians and Europeans was not that one had property and the other had none; rather, it was that they loved property differently." Southern New England Indian families had exclusive use of their cultivated fields (usually planted in corn) and the land their homes occupied. Maintenance of these property rights depended upon continued use of the land and was subject to periodic abandonment as intensive cultivation exhausted old fields and families cleared new land. Any member of the village could generally use non-agricultural lands, such as clam banks, fishing ponds, berry-picking areas, and hunting territories. Any member could use a village's territory to collect wild plants, cut wood for canoes, or gather sedges for mats, but sites used for fishing nets and weirs or hunting snares and traps could be owned by an individual or family. Property rights in land could become quite complicated, since they might include an exclusive right to take certain scarce resources from a particular place at a particular time (e.g. to trap deer in the winter) but not the right to exclude other villagers from taking a plentiful resource from that same place at a different time (e.g. to hunt migratory birds in the spring or fall). "Property rights," Cronon notes, "shifted with ecological use." Although Cronon prefers the term "usufruct" in describing New England Indians' property rights, the important observation is that their systems recognized exclusive rights in land, even if those rights required continued use, were rarely traded in a market, and were more finely "sliced" than the typical bundle of European property rights.

2. Algonquian Property Systems

Less agricultural societies often provided for private hunting rights in land. Northern Algonquian tribes, which ranged west into the Great Lakes . . . , appear to have developed family territory systems to govern hunting rights in land. In the early twentieth century, Aleck Paul, of the Temagami band of Chippewa at Bear Lake, Ontario, told an anthropologist, "[t]his division of the land started in the beginning of time, and always remained unchanged." According to Paul, his grandfather had parceled out the family hunting ground between his two sons, Paul's father and uncle, before his grandfather died:

> We were to own the land so no other Indians could hunt on it. Other Indians could travel through it and go there, but could not go there to kill the beaver. Each family had its own district where they belonged and owned the game. That was each one's stock, for food and clothes. If another Indian hunted on our territory, we, the owners, could shoot him. . . . I remember about twenty years ago some Nipissing Indians came north to hunt on my father's land. He told them not to hunt beaver. "This is our land," he told them; "you can fish

but must not touch the fur, as that is all we have to live on." Sometimes an owner would give permission for strangers to hunt for a certain time or on a certain tract. This was often done for friends or when neighbors had had a poor season.

These systems recognized exclusive hunting rights on lands within each families' boundaries, usually marked by rivers, ridges, lakes, or other natural landmarks such as swamps and clumps of cedars or pines. The property systems governing these territories seemed to have included inheritance within families, rules and sanctions against trespass, and the right to recover furs taken by non-owners. . . .

Such claims about specific Indian property systems are open to dispute.

Modern Anishinaabe cultural critic Gerald Vizenor views characterizations by anthropologists as distorted and inaccurate. Instead, he points to evidence supplied by visual stories, totemic creations, and other "mappery" of the Ojibwa, to argue that the native sense of motion and use of the land in the northern woodlands did not embrace inheritance or tenure of territory. . . . But while the available data may be inadequate to conclude exactly what Anishinaabe property laws were at specific times, they do strongly suggest that Ojibwa communities developed systems recognizing property rights in land, perhaps before European contact and without doubt in the centuries after contact but before allotment. . . .

3. Iroquois Property Systems

In the fertile areas of upstate New York, extending into Canada, the nations of the Haudenosaunee, known as the Iroquois League, long recognized exclusive property rights in agricultural fields and homes. Ownership of cleared land was held by individual families and clans and was maintained by continued use. Ownership included rights to control the use of a particular field and the disposition of the crops grown, both of which were held by women "matrons" in each family. . . .

Scholars have argued over the character and importance of property rights in Iroquois cultures. . . . Elisabeth Tooker has emphasized that Iroquois property ownership rested on use, not on transferable legal title. This distinction is significant insofar as it emphasizes that a woman holding a family's exclusive right to use a particular plot of cleared land did not hold the right to transfer use of the land outside the village or, especially, outside the League to non-Iroquois. As George Snyderman, an early anthropologist, noted, "the land belonged to all the people who inhabited it. No individual could enforce a personal claim to a specific piece of land. Neither could any individual by his own right and desire legally 'sell' lands." . . .

4. Inuit Property Systems

Much further north, in present-day Canada and Alaska, Inuit peoples, hunting and fishing societies, had extensive and well-regulated systems of property rights in land. Bands, each commonly known by a geographical name followed by the [suffix] -miut meaning "the people of," held specific land areas. The band (and in some instances the larger "tribe" or regional grouping) maintained the right to use its territory through use and occupancy. At the band level, the Inuit system of property rights included the right for

individual band members to use the land, the right for the band to exclude others from the land, and the right to allow others to use the land. An established system existed for determining which community members were entitled to use the land (including processes for incorporation of outsiders into the community). They even possessed means to alienate some uses to outsiders. Moreover, bands formally granted use rights to non-Inuit communities, including Moravian settlers and Newfoundland fishing families. Band members and their neighbors also recognized the particular landmarks and transition zones that separated one band's lands from the lands of neighboring groups. . . .

. . . Inuit lands were held communally, meaning they were subject to the community's governance, but not in common, which implied they were available without limit to the first appropriator. This system ensured that the individual members of the band used the land and its resources in harmony rather than in conflict and so as not to endanger the group's security. The system's longevity and stability over generations is evidence of the system's usefulness.

5. Property Systems in the Five "Civilized" Tribes

The heavily agricultural Five "Civilized" Tribes (as non-Indians named the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles) . . . recognized property rights in land — formally and informally — before and after they adopted written constitutions and statutes. Before the Chickasaws, Choctaws, and Creeks were forced from their lands in the southeast, they tended private gardens (Creek women, as with the Iroquois, controlled these plots) close to individual families' homes. While fields outside the village were often cleared and tended communally, each family's plot was divided from the others and crops were gathered and stored separately. Long before removal west, Cherokees recognized extensive and well-developed rights in personal property — including in slaves, black and Indian alike. As for property in land, legal scholar John Phillip Reid concluded that communal property had little importance for pre-constitutional Cherokees, except for hunting grounds. Agricultural fields, crops, and homes all were owned individually and, Reid believed, usually by women.

Even the United States acknowledged that the Tribes recognized private property rights in land. In the removal Treaty of May 6, 1828, the United States promised to compensate each head of a Cherokee family for "property that he may abandon" after agreeing to emigrate west. . . .

After the United States forced the Five Tribes across the Arkansas River to what is now Oklahoma, the tribes re-created property systems. Article I of the Cherokee Constitution of 1839 declared that "[t]he Lands of the Cherokee nation shall remain common property. . . ." Nonetheless, the statutes and practices established by the Five Tribes recognized and protected private property rights in land. The Cherokee and Choctaw nations both passed laws in 1839 prohibiting anyone from settling on public lands within a quarter mile of the "house, field, or other improvements" of another without the latter's consent. The Chickasaw Nation later passed a similar trespass statute. Citizens could "open a farm" in any part of the public domain, provided that it did not encroach upon the property of another citizen. Moreover, they could hold the

land during its agricultural uses, but if abandoned, the land reverted to the Nation and it became available for new settlement. . . .

. . . An opinion by U. S. Judge Isaac Parker in an 1891 condemnation proceeding describes Cherokee property law:

> While citizens of the Cherokee Nation do not have a fee to the lands they occupy, they can hold them forever, and fully enjoy the profits arising from them, and this right may be granted to their heirs or may descend by inheritance. Practically they get all the productions of the land, the same as though they held it in fee. If there is any peculiar value to the land, it attaches to the right of possession, and the occupant gets the benefit of it. . . . [W]hile they do not hold the fee to the land, I think their interest is so great as to entitle them, as perpetual occupants, to compensation for the additional servitude case upon their lands. [*Payne v. Kansas & A.V.R. Co.*, 46 F. 546, 559 (W.D. Ark. 1891), *rev'd on other grounds*, 49 F. 114 (8th Cir. 1892).]

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6. Indian Property Systems in the Southwest

Private property rights among other agricultural tribes further west were common and, in most instances, persist today. In the Southwest, the Akimel O'odham (Pimas) received farm plots assigned by the village headman and council in return for assisting in irrigation canal construction and maintenance. These plots could be passed to heirs and loaned to others, though they were not generally sold or traded. Families among the Tohono O'odham . . . held perpetual use rights to specific farm plots within the village field system. These rights rested on continuous farming, but were inheritable from generation to generation. The Mohave people, who presently live on the Colorado River Indian Reservation, divided their aboriginal lands by clan, with each clan having songs to identify clan territory. Clan lands were in turn staked out with markers into family farming areas. Arguments over boundaries between farms were settled by a contest call[ed] "Thopirk," literally "strength against strength," amounting to a pushing contest similar to a tug-of-war. Families left without farm areas when the river shifted or when a particular area could not be flooded would be lent space in another family's garden, marked off with posts, or, sometimes, two corn stalks, to designate that the land was being used by someone other than the family controlling the area. . . .

Almost all the Rio Grande Pueblo property systems provide for family ownership of homes and agricultural plots, with grazing lands available for common use. San Juan Pueblo anthropologist Alfonso Ortiz, writing in the 1970s about his own pueblo, described a property system in which individuals and families enjoyed "use rights" to particular plots of farmland, to house sites, and to the communal grazing area. He noted that most families had fruit trees on their land, but that any wild plants could be freely gathered, even if growing in an otherwise cultivated field. The Pueblo's governing council has the rarely exercised authority to confiscate a family's land for serious and sustained misconduct. Both men and women inherit land. By the time of Ortiz's writing, most agricultural lands lay fallow, with some rented by individual families to outside Hispanic farmers. . . .

At Hopi . . . , anthropologists have reported that each autonomous village has its own lands which are assigned to that village's matrilineal clans. Boundary stones, set at the corners of each field formerly marked each clan allotment. Within each clan, fields are assigned to women of the clan and are inherited matrilineally. Beyond the clan lands, any man may establish a field as long as he cultivates it and may assign his field to another. Grazing is done in common. . . .

7. Indian Property Rights in California and the Pacific Northwest

. . . In California, even tribes that were not primarily agricultural recognized some family property rights, including, for instance, a woman's right to devise a particular oak tree to her daughter. The value of the transfer lay in the gathering of acorns, a diet staple of many California Indians. Among tribes in what is now northern California, along the Klamath River and the nearby Pacific coast, property was held in individual private ownership and included ownership rights in other tribes' territories. For example, Hupas owned property inside Yurok territory. Ownership could be divided over time, with several individuals each having rights to the same fishing spot at different times of the year. As one scholar notes, "[i]ndividual Hupas held the rights to specific hunting, fishing, and gathering grounds as privately owned property. These rights gave them the privilege of controlling use, rental, alienation, and inheritance, as well as liability for damages incurred on the property. . . . Individuals without land rights rented their use from others."

In much drier areas further south, the native peoples recognized property rights of various kinds at the time of Spanish contact. According to anthropologist Florence Connelly Shipek, southern California Indians, including Luiseño and Kumeyaay bands, recognized family or individual ownership of "fields of grain-grass or other annuals, perennials, various shrubs, oak and other trees, cactus patches, cornfields and other resources such as clay beds, basket-grass clumps, quarries, and hot and cold springs." Individuals owned widely varying amounts of land and often maintained land in several different areas. Ownership normally meant that the individual's family had labored to develop and maintain the resource. . . .

Among salmon fishing tribes of the Northwest coast — Tlingit, Tsimsian, Haida, Nuxalk, Kwakiutl, Nootka, Coast Salish, and Chinook — property rights were well-defined long before Europeans arrived. Anthropologists have concluded that production rights to specific hunting, gathering, and, especially, fishing grounds on the Northwest coast belonged to clan-houses, with stewardship, namely the right and obligation to direct resource production resting in the house's leader. Northwest Indians told ethnologists in the nineteenth and twentieth centuries that specific people owned particular fishing-sites and had to give permission in order for extended family members to use the site. D. Bruce Johnsen has relied upon anthropological reports to hypothesize that the well-established security of the clan-houses' property rights and the house leader's stewardship right allowed the house leaders to manage the fishery over many years in order to maximize salmon production. The house leader's "executive right" descended according to local rules of inheritance, to the owner's eldest son in some areas, to his sister's eldest son in others. Franz Boas reported that among the Kwakiutl, primogeniture held regardless of

whether the first born child was male or female. The house leader's rights generally descended to a single individual to avoid excessive division of the land among the leader's children. Indians' property rights to these salmon fishing spots were recognized in treaties signed with the Northwest tribes in the 1850s and are still exercised today.

In addition to real property rights, Northwest coast tribes have long recognized extensive ownership rights in personal property, both tangible and intangible. In particular, intellectual property has been extremely important in Pacific coast cultures, with families holding exclusive rights to the use of particular names, carvings, paintings, and crests connected with the family's history. Violation of these rights — apparently the equivalent of copyright — could result in violence and bloodshed. Personal property in tangible goods was extremely important as well and, according to anthropologists, the potlatch ceremony developed as an important means for establishing social rank, providing social insurance, and maintaining a level of distribution of wealth. The potlatch was even used as a means of resolving disputes over ownership of fishing sites, with the party giving away or destroying the most property obtaining good title to the spot.

8. Indian Property Rights on the Great Plains

. . . [N]either the Comanches nor the Cheyenne recognized property rights in land as they ranged widely across the plains, but both recognized extensive individual property rights in moveable goods. . . . Private property in horses became the primary source of wealth among tribes in the horse culture and buffalo-hunting economy. Horses were owned by men, women, and children and the number of horses owned varied widely by individual.

Generally, tribes dependent upon the buffalo for their economy recognized no more than temporary property rights in seasonally occupied villages. Yet even some of these tribes seem to have recognized private property rights in land cultivated as individual family garden plots. The Pawnees, who had a mixed horticultural and hunting economy, recognized property rights in garden plots assigned to women by the village chief. Rights to these tilled fields (and their produce) were respected — even when the village had decamped for the summer camp — as long as the tiller wished, but reverted to the village for reassignment at her death.

The agricultural tribes of the Upper Missouri-Hidatsa, Mandan, Arikara, and Omaha, among others, depended upon corn and, like other agricultural tribes, established property rights in cultivated lands. . . .

B. The Persistence of Indian Property Rights after Allotment

Even after resettlement or confinement to reservations, many Indians continued to create or modify private property systems to meet their new circumstances. Confinement led some tribes to develop private property rights to manage what little land they had left. At Yakima, whose members had been primarily hunters and fishers, the Indian Agent assigned individual family plots that supported farming without generating land use or inheritance problems. By 1894, twenty years before Congress allotted their reservation, the Indian Agents reported that almost all the Salish and Kootenai Indians who settled on the Flathead reservation lived in their own houses, occupied definite

fenced holdings, and cultivated crops of grain, hay, and vegetables and orchards of apples and plums. Sufficient arable land existed to allow each family to fence and use as much as desired. . . .

Even among some of the tribes once in the buffalo economy, private property rights developed after confinement to the reservations. Santee Dakota Indians . . . began farming and by the mid-1880s were close to being self-supporting, with individual Indians farming for themselves, protected in the recognition of private property rights to the land they cultivated. . . .

C. Indian Property Rights Today

Tribal legal systems today continue to recognize property rights in land. A prime example is the Navajo Nation. Navajo private property rights in land are fiercely asserted and protected, consistent with a long history of property and individual ownership in Diné culture. One early outside observer noted that Navajo common law recognized ownership in five classes of property: hard and soft goods; ceremonial values such as songs, medicines, names, and formulae; wild and domesticated animals; and agricultural or rangeland. Farms were held by both men and women, were marked by posts or fences, and were subject to loss through non-use. Stock ranges, springs, and water holes likewise were subject to ownership claims, trespass was recognized as a compensable offense, and land rights were passed through inheritance.

. . . Navajo land law follows the principle that "one must use it or lose it," applying policies "designed to assure that Navajo Nation lands are used wisely and well, and that those who actually live on them and nurture them" have rights to their use. The courts use customary family trusts and the concept of a "most logical heir" to avoid the fragmentation of land use rights otherwise caused by intestate inheritance. . . .

The Ho-Chunk Nation, located in Wisconsin, is laying the foundation to recreate a system of private property. Its recently passed constitution includes provision for purchase of individual members' property through condemnation proceedings, for land use regulation and zoning, and the power "to create and regulate a system of property including but not limited to use, title, deed, estate inheritance, transfer, conveyance, and devise."

In 1999, the Pueblo of Isleta established the Isleta Appellate Court for Land and Property Disputes. The Tribal Council established the Court as a traditional appellate court and directed it to apply traditional law in its decisions. Specifically, the Court was given jurisdiction over some 40 disputes — some originating in disagreements dating back more than 75 years — which the Tribal Council had not decided in its role as the appellate court of general jurisdiction. The Council appointed seven members of the Pueblo to the Court, including three attorneys and four elders. They conduct their proceedings in the Tiwa language. The Court has dealt with both substantive property law issues and traditional procedures for resolving disputes. Among the former have been questions of inheritance of family homes, whether homes can be partitioned, proper ceremonial use of homes, set-back restrictions on property use, and mechanisms for transfer and sale of family property. In deciding both substance and procedure, the Court has heard cases, trusting that the application of traditional legal principles would enunciate a coherent body of property law, much as English common law judges developed property law in medieval England.

NOTES

1. As the United States government and individual Americans imposed themselves upon American Indian nations more and more, Indian nations' view of property changed in order to adapt to changing conditions. For example:

> [T]he Cherokees gradually became a people of property. The official census of the Cherokee Nation in 1824 and published in the *Cherokee Phoenix* in 1828 revealed that the Cherokee Indians possessed considerable wealth, including slaves, livestock, wheels, and looms, as well as 120 gins, 10 ferries, 9 stores, a turnpike, 6 public roads, and a threshing machine. Elias Boudinot, editor of the *Phoenix*, estimated the aggregate value of this property at $2,200,000.

RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAWS FROM CLAN TO COURT 94 (1975).

2. Tribal customary law continues to be forceful in some cases. Consider *In re Howard*, 1 Am. Tribal Law 438, 7 Navajo Rep. 262 (Navajo Nation Supreme Court 1997), in which the court refused to consider evidence of an oral will introduced in the form of a clandestine tape recording:

> Generally, under Navajo common law, information is property. A person's words are property. Taping them in a clandestine manner and without the knowledge and consent of the speaker is a form of theft. It is deceit. Despite any other rule governing telephonic or other electronic communications where a sender does not know a recipient or third person is recording the communication, we hold that as a matter of policy, framed by Navajo common law, the Navajo Nation courts will not receive recordings of electronic communications if they are made without the knowledge and consent of a speaker or sender or other legal authorization. We conclude that the Window Rock Family Court erred in receiving the tape and its transcript into evidence and relying on it to rule in favor of an oral will.
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> *In re Howard*, 1 Am. Tribal Law at 444.

B. TRIBAL PROPERTY

CHILKAT INDIAN VILLAGE, IRA v. JOHNSON

Chilkat Indian Village Tribal Court, No. 90-01, 20 Indian L. Rep. 6127 (November 3, 1993)

BOWEN, Tribal Court Judge

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. . . .

A four-week court trial was completed on February 12, 1993. . . .

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. 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, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.
>
> 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.

[A]rticle 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(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. . . ."

. . . 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

. . . [T]he village had the authority to enact the Ordinance of May 12, 1976, governing removal of artifacts, and . . . 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. . . ."

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,

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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 deal[er] 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.

the issues to be decided are: (1) whether the Whale House rain screen and four house posts constitute "artifacts, clan crests, or other traditional Indian art work[s]" 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; [and] (4) whether defendants have presented any defenses which preclude judgment against any or all of them. . . . Finally, this court will determine the appropriate relief and other remedial orders which should issue. . . .

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 wooded partition (made of thin cedar boards) called a rain screen. George Emmons 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. 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.extc. 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 [Eagle Clan members] to construct the original house. The Eagles were then repaid in a traditional "payback party," 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 Shotirdge), *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 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. . . .

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 not to attend the trial, offer any such evidence. This court finds that the Tlingit defendants violated the tribe's 1976 Ordinance. . . .

Defendant Michael Johnson conducted an obsessive campaign to acquire the artifacts. He dealt with any and all people in the village who might assist

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." . . .

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. This court finds that Michael Johnson and his corporation violated the tribe's 1976 Ordinance.

IV. Defendant's Defenses

Even though Bill Thomas was the only defendant (called by the 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 this 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 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 has been under assault from non-Indian outsiders and institutions, 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. . . .

Relief and Order

. . . 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

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.

be a lack of 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 the 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. . . .

NOTES

1. Angela Riley notes the importance of the Michael Johnson case to persuade the Chilkat Indian Village first to enact its Artifacts Ordinance in 1976, and then later to persuade federal courts to recognize the importance of tribal law in this context:

> Expecting the world to recognize and abide by tribal law may seem idealistic. . . . However, tribal law may, in fact, influence rule makers and judges outside of the tribal court system. [T]he mere acknowledgment of tribal law in federal and state courts lends increased legitimacy and respect to tribal law systems.
>
> [T]ribal law has found its way into relatively few Anglo-American court decisions, but there have been successes. One example is the case of *Chilkat Indian Village v. Johnson*. . . .
>
> [After the Village unsuccessfully sued Johnson in federal court], the . . . Ninth Circuit heard the case on appeal. [870 F.2d 1469, 1470 (9th Cir. 1989).] In addressing whether the tribe's conversion claims arose under federal law, the Ninth Circuit expressly acknowledged the legal underpinnings of the tribe's claim by stating that the Village's proprietary interest in the artifacts was a "creature of tribal law or tradition." As to the claims against the Indian defendants, the court dismissed them, stating that the case against them belonged in tribal court. However, in doing so, the court recognized the customary law of the Tlingit people, referencing the Artifacts Ordinance and stating that the enforcement of the Ordinance against tribal members was an issue for the tribal courts.
>
> Although the Ninth Circuit did not adjudicate matters of tribal law (nor, most would argue, should it have), the mere incorporation of the Artifacts Ordinance in its opinion validated tribal law. When federal courts acknowledge tribal law in a published opinion — whether or not it actually influences the outcome of the case — it gives tribal law an increased legitimacy in the eyes of tribal members and the dominant culture.

Angela R. Riley, *"Straight Stealing": Toward an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 123-25 (2005).

2. Kristen A. Carpenter's scholarship demonstrates that American Indian people often view tribal property rights as surviving the loss — and even desecration — of the land:

> Tribes' own laws and customs provide another source of Indian interests in sacred sites on public lands. For several reasons it is appropriate to look to

> tribal law and custom as a source of property law on sacred sites. First, if the aim is to facilitate legal solutions that ensure religious freedoms for American Indians, such solutions will only be meaningful if they incorporate tribal values. Tribally enacted legislation serves as a clear expression of those values. Second, courts and scholars have generally accepted the role of "custom" in supporting citizens' interests in public lands. Third, preexisting land and property rights of indigenous peoples often survive the colonial process. . . .
>
> Tribal law and custom also help to expose the limits of the ownership model and suggest alternatives to notions of absolute rights. Irrespective of who owns a particular sacred place, indigenous peoples may have undeniable, ongoing relationships with it. As Rebecca Tsosie has explained: "The mere fact that the land is not held in Native title does not mean that the people do not hold these obligations, nor . . . that they no longer maintain the rights to these lands." Even if a place has been desecrated, "a people's custodial responsibilities remain. No matter how damaged, the land retains its power and significance." Indigenous customs and laws may challenge Anglo American property law to be more cognizant of the responsibilities and relationships that transcend ownership.

Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. Rev. 1061, 1112-13 (2005).

C. TRIBAL PROPERTY CODES

1. GRAZING LEASES

Riggs v. Estate of Attakai

Navajo Nation Supreme Court, No. SC-CV-39-04, 7 Am. Tribal Law 534 (June 13, 2007)

Before Yazzie, Chief Justice, and Ferguson and J. Benally, Associate Justices.

Yazzie and Ferguson filed the opinion of the Court. J. Benally filed an opinion concurring in the judgment. . . .

I.

The Court applies the following facts in deciding the case. When Mary Lou Attakai was 15 years old, her maternal grandfather, Paddock, gave her Grazing Permit No. 7-58, for 66 sheep units within District 7. The grazing permit was actually used by Mary Lou's mother and sisters, including Sista Riggs when Mary Lou moved away to other areas.[2] Sista Riggs has a separate permit she received as a result of a peacemaking after her mother's death. . . . Seven years after [Mary Lou's] death, when no probate petition was filed, Riggs filed a quiet title action requesting that the grazing permit be transferred to her. Phillip Attakai, surviving spouse of Mary Lou, and Tom Attakai filed an answer

2. The maternal clan is Ta'neezahnii. Other family members also had grazing permits within the area, including Riggs. Riggs is sister to Mary Lou and a maternal aunt to Tom Attakai.

claiming title when the quiet title action was filed. Tom Attakai died before the Family Court issued its decision.

II.

The question before this court is whether the Family Court erred in its determination when it granted the grazing permit to Tom Attakai without applying Navajo customs and traditional practices, and without considering Navajo Nation policies as acknowledged by this Court in prior quiet title actions. The Family Court concluded that Tom Attakai, being the son of Mary Lou, was of the same clan as Mary Lou, and that granting the permit to him would satisfy the wishes of the maternal grandfather Paddock to keep the permit within the clan by indicating the grazing permit "be used for the family." The Family Court reasoned that the traditional practice of maintaining the permit within the clan would be satisfied and that although Tom did not live in the area covered by the grazing permit, by awarding him the permit would give him and his sisters a "sense of home."

In *Begay v. Keedah*, 6 Nav. R. 416, 421 (Nav. Sup. Ct. 1991), this Court acknowledged the following Navajo Nation policies gleaned from Navajo statutes to be considered when determining the award of a grazing permit: 1) animal units in grazing permits must be sufficiently large to be economically viable, 2) land must be put to its most beneficial use, 3) the most logical person should receive land use rights, 4) use rights must not be fragmented, and 5) only those who are personally involved in the beneficial use of land may be awarded it. *Id.* The Court now holds that these factors are to be considered and applied consistent with the Navajo Fundamental Law which defines the role and authority of Dine women in our society. Traditionally, women are central to the home and land base. They are the vein of the clan line. The clan line typically maintains a land base upon which the clan lives, uses the land for grazing and agricultural purposes and maintains the land for medicinal and ceremonial purposes. The crucial role of women is expressed in the principles established by White Shell Woman and are commonly referred to as *Yoolgaii Asdzáán Bi Beehazáanii.* These principles include *Iiná Yésdáhí* (a position generally encompassing life; heading the household and providing home care, food, clothing, as well as child bearing, raising, and teaching), *Yódí Yésdáhí* (a position encompassing and being a provider of, a caretaker of, and receiver of materials things such as jewelry and rugs), *Nitl'iz Yésdáhí* (a position encompassing and being a provider of and a caretaker of mineral goodness for protection), *Tsodizin Yésdáhí* (a position encompassing spirituality and prayer). This is why the women are attached to both the land base and the grazing permits. For the most part, Navajos maintain and carry on the custom that the maternal clan maintains traditional grazing and farming areas.

Because they are keepers of the clan line and land base, Navajo women are often the most logical persons to receive land use rights to hold in trust for the family. They are also the ones who are burdened with putting the land base to its most beneficial use by managing the herd and the land upon which the herd graze for the benefit of the clan group. This means that keepers have to balance the number of sheep units with the size of the land base, making sure the land base remains compatible, sustainable and feasible for sufficient continued

beneficial use. Overgrazed land cannot be put to beneficial use. This practice is consistent with preserving a large area by discouraging the fragmentation of grazing permits and the land base.[4] The Navajo Nation policy is to discourage the breaking up of land. Progressive fragmentation of the land decreases usefulness of the land. *See In the matter of the Estate of Wauneka*, 5 Nav. R. 79, 83 (Nav. Sup. Ct. 1986).

. . . The issue of the ownership of the permit is therefore reviewed de novo in light of the tradition of female management of the land and livestock using the factors set out in *Keedah.*

For the foregoing reasons, this Court concludes Riggs is the appropriate person. When Riggs filed her action, Tom Attakai lived away from the Castle Butte area. He lived in Sanders and later in Fort Defiance, whereas Sista Riggs consistently lived in the family area. Riggs had already been managing not only her own herd, but the herd held in trust for the family.

By placing the grazing permit with Sista Riggs, there is assurance that the land and herd will remain with the family, and that the grazing permit will remain intact and not be fragmented. The record contains testimony that Tom Attakai and his father had attempted to either sell or rent the grazing permit to others outside the family and clan.

. . . The Court concludes that Sista Riggs should be the trustee of the permit.

III.

The Court affirms the Family Court's decision that Tom Attakai's sisters should be the beneficiaries of the permit. . . . It is reasonable for the Family Court to decide that Sista may hold the permit for use in the Castle Butte area and allow Tom's sisters to use the permit in the future if they decide to. The Court therefore affirms that part of the Family Court's decision. . . .

V.

The Window Rock Family Court judgment, granting Tom Attakai Grazing Permit No. 7-58 is REVERSED and VACATED. This matter is REMANDED to the Family Court to enter an order granting Grazing Permit No. 7-58 to Sista Riggs to hold as trustee for the sisters of Tom Attakai. . . .

[Concurring opinion of Justice BENALLY omitted.]

NOTES

1. In western U.S. Indian communities, grazing rights are a frequent source of litigation. For example, the Navajo Nation has extended to its Office of Hearing and Appeals the jurisdiction to decide many grazing lease disputes. *E.g.*, *Begay v. King*, 8 Am. Tribal Law 148 (Navajo Nation 2009).

4. In some cases, the probate code might allow a husband to obtain the grazing permit although he is of a different clan. Most likely he is permitted to hold the permit in trust for his children who are of the same clan as the deceased mother. In other cases a male member of the clan may be granted a permit so long as he meets the criteria set out in *Keedah*. It is not known how Old Man Paddock obtained the grazing permit in this case, but he made it clear it was to stay within the family.

2. In many tribal communities, especially rural reservations, attorneys are few and far between. Tribal courts are routinely confronted with representations by parties that they were unable to obtain counsel to prosecute or defend a matter. Tribal courts handle these claims in different ways. In *Smith v. Eckhart*, 2000.NACT.000006 (Crow Court of Appeals 2000), the court gave the defendants in a property line dispute extra time to secure counsel:

> Appellants have requested another chance to present their defense, since they were unable to retain counsel to assist them throughout the proceedings in the Tribal Court. It is an unfortunate fact that it is very difficult for most people to afford legal representation, especially when they are defendants in a lawsuit of someone else's making. In these circumstances, the most the trial court can do is to give the defendants reasonable time to obtain an attorney or lay advocate, or to prepare to present their case pro se. This accommodation must be tempered, however, by the opposing party's interest in obtaining a prompt and efficient resolution of the matter. The Tribal Council sought to achieve this balance when it enacted the Crow Rules of Civil Procedure.
>
> *Smith*, at ¶¶31.

2. ALLOTMENTS

Smith v. Eckhart

Crow Court of Appeals, No. 99-116, 2000 CROW 6; 2000.NACT.0000006
(September 29, 2000)

Before Stewart, C.J., Gros-Ventre, J., and Watt, J.

This is an appeal from the Judgment of the Tribal Court (Yellowtail, S.J.) entered on October 29, 1999, permanently enjoining the Defendants/Appellants from interfering with the Plaintiffs/Appellees' construction and maintenance of a fence between their two trust allotments on the property boundary line established by a U.S. Bureau of Land Management survey. . . .

A. Summary of Facts and Proceedings

. . . Plaintiffs Burton and Miriam Smith are the owners by heirship of Crow Allotment No. 1896 located on the Crow Reservation near Pryor, Montana. The Defendants are the heirs to Crow Allotment No. 1821, which is located adjacent to and immediately north of the west half of Smiths' allotment. Title to both allotments is held in trust by the United States of America. Defendant Addlee Plain Bull Eckhart currently lives in a home near the Smith property boundary.

There has been a dispute between the parties over the boundary between their two allotments since at least 1992. That spring, the Smiths tore down an old 3-wire fence on the northern portion of their property. They planned to build a new fence several feet north of the existing fence, along a property boundary line that had been marked by the local Bureau of Indian Affairs Realty Office in 1987. When the Smiths began laying out the new fence in the Spring of 1993, one or more of the Defendants objected. The fence was not built that year.

During the intervening years, the parties had several brief confrontations about the use of the property north of the old fence. Burton Smith testified that without the new fence, he could not make use of his allotment, because he couldn't keep livestock on his land or protect his crops from other people's livestock.

Eventually, at the Smiths' request, the BIA Agency Superintendent authorized a formal survey of the property line. . . . The . . . survey was performed during the summer of 1998 by Mr. R. Wayne Wilson. . . .

The property line established by Mr. Wilson's survey was apparently close to the line staked earlier by BIA Realty, being north of the old fenceline and closer to the house on Defendants' property. In fact, the line cut through a portion of the driveway to Ms. Eckhart's home.

During Memorial Day weekend of 1999, the Smiths rented equipment and started building a fence along the property line established by the BIA/BLM survey. There is no evidence that the Smiths notified any of the Defendants before beginning construction. After they had set a few posts, the BIA Police and a sheriff's deputy arrived, apparently summoned by one of the Defendants. The officers advised the Smiths that, in order to keep the peace, they should not do anything further until the dispute was resolved by the Crow Tribal Court. . . .

The Tribal Court held that the . . . survey performed by Mr. Wilson established the boundary between the parties' two allotments. . . . The court found no evidence that the old fence removed by the Smiths was ever intended as a boundary fence, and held that its location had no legal significance to the determination of the boundary between the two tracts. . . .

The Tribal Court interpreted a Tribal fencing ordinance as requiring that boundary fences be constructed on the property line. Therefore, the Tribal Court concluded, the Smiths were entitled to erect their fence, in compliance with the ordinance, on the line established by the BLM survey. . . .

Based on the foregoing, the Tribal Court entered judgment for the Plaintiffs/Appellees, permanently enjoining the Defendants "from doing any act, or in any way interfering with Plaintiffs' construction, maintenance or use of a boundary fence between their respective real estate on the boundary line established by the Bureau of Land Management Survey[.]" . . .

C. Discussion

With the preceding background, we turn to the arguments raised in the Appellants' brief. . . .

2. Failure to Join Other Owners

. . . As the Tribal Court recognized at the end of the June 25 hearing, its orders and judgment can only bind the four named Defendants (and anyone acting for them). Because this case was not brought as a quiet title action, and all the owners were not properly joined by the plaintiffs, it would not be appropriate for the doctrine of collateral estoppel to completely bar any further challenge to the boundary line by other heirs to the Plain Bull allotment. Rather, in any new case filed by those other heirs, they would have the burden of proving that the Tribal Court's judgment and the BLM survey were erroneous.

Therefore, since, the Tribal Court has not finally adjudicated the unnamed owners' interest in their trust allotment, their joinder was not necessary under Rule 25 of the Crow Rules of Civil Procedure.

3. Violations of Tribal Fencing Ordinance

Although not raised as an issue in their appellate brief, the issue of the Smiths' non-compliance with the Tribal fencing ordinance was raised by the Defendants/Appellants at the June 25th hearing, and was addressed in the Tribal Court's decision. Because it was the only substantive issue raised by the Defendants in this case, and because of its importance in future disputes such as this, we will review the Tribal fencing ordinance as it applies to the facts of this case.

At the June 25th hearing, the Defendants introduced as evidence Ordinance No. 1, "Fencing Ordinance for the Crow Reservation," and the Tribal Council resolutions adopting and ratifying it. The Tribal fencing ordinance was apparently enacted to avoid disputes just such as this. It sets up a comprehensive procedure for construction of boundary fences, and recognizes certain rights with respect to the costs and ownership of the new fences.

Section VI of the Ordinance requires that all boundary fences be built on the property line. Boundary fences built beyond the line onto Indian land must be removed upon demand by the Indian owner or lessee. If the fence is between two tracts of Indian-owned land, then the Indian owner of the other tract is responsible for construction, maintenance and the cost of half the fence (Section III). Regardless of who pays the cost of the fence, it is deemed to be jointly owned (Section V). The Ordinance also sets out specifications for boundary fences, including the number of wires and spacing, post and stay spacing, corners and cattle guards (Section VII).

Section I of the Ordinance specifically requires 10 days' written notice to the adjoining landowners before beginning construction, and gives those landowners 60 days to complete their half of the fence. According to Section IX, if the other landowners fail to construct their half of the fence within the 60 days allowed, they waive any claim for trespass by the requesting party's livestock grazing across the boundary.

Section VIII of the Ordinance also provides:

> No fences built or existing upon lands within the exterior boundaries of the Crow Indian Reservation shall be removed without the prior written consent of each adjoining landowner whose lands the fence serves as a boundary for.

In his cross-examination of Burton Smith at the June 25th hearing, Mr. Turns Plenty elicited Mr. Smith's admission that he was not aware of the fencing ordinance, and never notified the Defendants prior to tearing down the old fence.

With respect to this alleged violation, the Tribal Court found that the old fence was not a boundary fence covered by the Fencing Ordinance, because the property line had never been surveyed before, and there was no evidence that the parties (or their predecessors) ever intended the old fence to serve as the boundary between their properties. . . . The Tribal Court went on to hold that the Plaintiffs were entitled to construct a boundary fence on the line established

by the BLM survey, because Section VI of the Ordinance requires that boundary fences be constructed on the property line. . . .

This court will not set aside the Tribal Court's findings of fact unless they are "clearly erroneous." *Lande v. Schwend*, 1999 CROW 1, ¶47; see also Fed. R. Civ. P. 52(a). This court may affirm on any ground supported by the evidence. *Id.* at ¶48, citing *Crow Tribe v. Gregori*, 1998 CROW 2, ¶97.

In this case, BLM surveyor Wilson testified that the boundary between these two allotments had never been officially surveyed; in such circumstances, it was his opinion that the old fence was not relevant to the true property boundary. Plaintiff Smith testified that the old fence did not necessarily follow a straight line like a property boundary, that it was in a bad state of disrepair, and that [it] had to be rebuilt anyway in order to hold cows and calves. There is no evidence in the record contradicting any of this testimony. Based [on] this record, we cannot say that the Tribal Court's findings on this subject were clearly erroneous.

Also, the Tribal Court's conclusion (implicit in its holding) that the Ordinance only applies to boundary fences was a fair reading of the language in Section VII, which requires the consent of the other landowner "whose lands the fence serves as a boundary for." If the fence did not serve as a boundary between the properties, there was no requirement under Section VIII to obtain the Defendants' consent before removing the fence.

In many cases, though, it will not be clear from the record whether or not a fence was intended to serve as the boundary fence, just because it was not located precisely on the property line. Section VI contemplates this situation, by providing that if a mislocated boundary fence is encroaching on Indian-owned land, the Indian owner has the right to have it removed to the property line.[3] This right to remove a mislocated boundary fence to the property line, and the further requirement in Section VI that boundary fences be built on the property line, would appear to override the requirement in Section VIII for obtaining the consent of the other property's owners before removing a mislocated fence. However, this court is not called upon to resolve this potential conflict in the Ordinance in the present case, because the old fence was not a boundary fence whose removal was subject to Section VIII.

This does not dispose of another violation of Ordinance as revealed in the record — the Smiths' failure to give 10 days' written notice before beginning construction of the fence. According to Section I.A, the notice must "set forth in detail the plans for construction and maintenance of said fence[.]" The fact that this provision is the first matter covered in the Ordinance indicates that the notice requirement fulfills another important purpose of the Ordinance — to keep the peace. We agree with the point made by Mr. Turns Plenty in the

3. If the mislocated boundary fence is encroaching on non-Indian land, Section VI purports to waive the non-Indian's trespass claims, and the mislocated fence remains jointly owned. Although Mr. Smith testified that he is not an enrolled member of the Crow Tribe, he also testified that he was a descendant of the original allottee and inherited the allotment. Therefore, it would appear that both properties involved in this case are clearly "Indian-owned" for purposes of the Ordinance.

hearing, that it is a very serious matter not to notify you neighbor in advance before you begin pounding fence posts a few feet away from her home.

In this case, though, the Smiths' failure to give written notice is not sufficient grounds to reverse the Tribal Court's judgment. Although Mr. Smith acknowledged that ignorance is no excuse for violating the law, it is true that Tribal ordinances are not always readily available to the public, or, for that matter, to this court.[4] More importantly, the record reflects that the Defendants were aware that the Smiths wanted to build a fence for several years, had verbally discussed the possibility of an electrified fence, and that various incidents over the years made it difficult for the parties to communicate. Finally, any surprise and distress suffered by the Defendants because of the lack of written notice would tend to be offset by the inconvenience and distress suffered by the Plaintiffs while the Defendants prevented them from using a portion of their land, especially after the BLM survey established the property line.

For the foregoing reasons, the judgment of the Tribal Court is AFFIRMED. No costs.

NOTES

1. Many western tribal communities have been *allotted* by the federal government. Prior to the allotment era, which became official congressional policy in 1887 (but had been official federal administrative policy since the 1850s), most Indian communities were reservation based, with relatively large (compared to now) land bases collectively owned by the Indian tribe. The federal government subdivided these reservations, allotting 80 or 160 acres (or some other number) to Indian heads of household, and selling the remainder of the reservation mostly to non-Indians as "surplus lands." The allotted land for Indians typically came with a 25-year "trust period" in which the land would be held in trust by the United States and after which time the land would be freely alienable and taxable by the state. After Congress eliminated the allotment policy officially in 1934, there remained two kinds of tribal allotment properties — trust allotments and fee allotments. Trust allotments retain the immunity from taxation, but fee allotments do not. The *Smith* case demonstrates how modern tribal law includes disputes over allotted lands.
2. In *Barber v. Simpson*, 2006 WL 6358373 (Nevada Intertribal Court of Appeals 2006), the court rejected a claim by occupants of a trust allotment who asserted an aboriginal Indian title claim to the trust allotment property owners who were also Indians:

> The facts before the court are unique. No case could be found where one individual Indian has asserted an aboriginal title against patent holders who are also Indian. There are three basic standards which must be met

4. Resolution No. 96-20, which ratifies and reaffirms the Fencing Ordinance, directs the Chairman to mandate that a copy of the Fencing Ordinance be attached to all grazing and farming leases prior to signature. This court takes judicial notice that the Ordinance has not been publicized consistently in this manner.

for aboriginal title to exist: (1) Appellant's ancestors must have lived on land in question from time immemorial to the exclusion of all others; (2) They must also have enclosed, cultivated and improved the land; and (3) They must have lived on the precise land for which aboriginal title is claimed. . . .

Although certain areas of SAC-6 may have become occupied by individuals, the evidence does not support a finding that the particular five acres to which Mr. Barber is now asserting aboriginal title had belonged to his lineal ancestors from time immemorial. Mr. Barber testified that his relatives lived on the land from the issuance of the patent and that his grandfather had told him they lived on the land before the issuance of the patent, but he does not explicitly state which land. . . .

The evidence presents no information as to whether or not Mr. Barber's ancestors excluded others from the land. Even if the evidence had supported a finding that they had lived on the land from time immemorial, if they did not exclude all others, no right of occupancy can exist. To exclude someone from property would suggest some form of an affirmative action to make sure that others do not occupy it. None is mentioned here. . . .

As there is no proof that the ancestors of Mr. Barber lived on the property from time immemorial or that, if they did live there, it was to the exclusion of all others. . . .

While the land in question which Mr. Barber's family occupied may once have been enclosed, the testimony does not show that the property was completely enclosed. Mr. Barber testified that fire and flood have left only a partial fence. . . . Mr. Simpson testified that there were no fences to his knowledge. . . . The property is not now fully enclosed. . . . The lack of full enclosure suggests that currently there is no effort to exclude parties from the property.

The land may have at one time since the issuance of the patent been under cultivation, but there is no evidence in the record showing how the property is currently being used. There is also no testimony showing how it had been cultivated, except some references to livestock. The testimony does not sustain a finding that the property is currently cultivated.

Some improvements have been made to the property. There are some old structures on the land and the trailer in which Mr. Barber lives. Some buildings were moved there many years ago from another place. One house burned down. . . . The mere existence of the improvements is not sufficient without proper enclosure and cultivation. . . .

Although his ancestors may have been on some portion of what became the allotment, it is by no means clear from the record that Mr. Barber's family lived on the five acres he is claiming before the issuance of the patent. Jenny Johnson, Mr. Barber's grandmother, lived on the land, but Mr. Barber testified that he did not know where she was born. . . . He himself is not sure that the patent was issued for the same land that his ancestors occupied. . . .

[A]boriginal title is not to be liberally endorsed. Its original purpose was to follow the public policy of assisting in the settlement of Indians, an issue which no longer exists. [I]t should be found only in the rarest of circumstances. Those circumstances are not found in the record before the court. Accordingly, the Court finds that no aboriginal title exists.

Barber, 2006 WL 6358373, at *2-5.

D. TRIBAL HOUSING

Coquille Indian Housing Authority v. Harrison

Coquille Indian Tribal Court, No. H 98-005, 1999.NACQ.0000001 (April 6, 1999)

The opinion of the court was delivered by: Don Owen Costello, Chief Judge, Coquille Indian Tribal Court . . .

. . . For the reasons set forth below, the Court is of the opinion that plaintiff be awarded Judgment against defendants, and each of them, in the sum of $2,244.45 and, further, that defendants' counterclaims be dismissed and that plaintiff have Judgment thereon.

The Parties' Claims

[The tribal housing authority brought suit to evict the defendants, and for money damages resulting from damage to the property. Defendants raised various state law defenses to the eviction.]

The Court has territorial jurisdiction to hear this case because the facts which give rise to this dispute arose on the reservation of the Coquille Indian Tribe. CITC 610.200.1(b). The Court has subject matter jurisdiction because the dispute is an action in law falling within the Court's broad judicial authority. Constitution of the Coquille Indian Tribe, Article VII, Section 4; CITC 610.200.1(1), (2).

Facts.

Having considered all of the evidence, the Court finds the following facts to be proven by a preponderance of the evidence.

Defendants, and each of them, signed a Coquille Indian Housing Authority Rental Lease (Lease) on October 29, 1996, for the rental of the subject premises at 2609 Mexeye Loop, Coos Bay, Oregon. . . . The Lease term was for one month commencing October 24, 1996, with automatic continuation ". . . from month to month thereafter subject only to respective rights of the parties to terminate . . ." as provided therein. . . .

Paragraph IV A of the Lease provides in relevant part that the ". . . Resident shall refrain self, household members and guests from destroying, defacing, damaging or removing any part of the unit or community development. The Resident shall be charged for the cost of damage repair and restoration."

Paragraph IV C provides in relevant part that the ". . . Resident or any member of the Resident's household or a guest or other persons under the Resident's control shall not engage in violence or any criminal activity, including drug-related criminal activity, in the housing community or CIHA office area. Such activity is a serious Lease violation and is grounds for termination of the Lease and immediate eviction. The term 'drug-related criminal activity' means the illegal manufacture, sale, distribution, use, or possession with the intent to manufacture, sell, distribute, or use [] a controlled substance (as defined in Section 102 of the Controlled Substance Act (21 U.S.C. 802)." . . .

[Paragraph] IV C provides in relevant part that an "expedited grievance procedure will be available to tenants evicted under Section IV, paragraph C

of the Lease . . . where the eviction is for violence or criminal activity or a drug-related criminal activity."

Paragraph IV D of the Lease states that resident ". . . agrees to pay reasonable charges for repair of damage to the dwelling unit caused by the Resident, his family or any persons in the dwelling unit or on the dwelling property with the permission of the Resident."

Paragraph V E of the Lease provides in relevant part that ". . . in the event the Resident or any member of his household or guest has committed, or attempted to commit or threatened to commit any acts that physically injure any person lawfully upon the premises or any other premises of the CIHA or substantially damage any property of the CIHA, another Resident, or any person lawfully upon premises or other premises of the CIHA including drug dealing, this Lease may be terminated on 24-hour written notice." Paragraph V F provides in relevant part that immediately upon termination of Lease becoming effective, "the Resident shall quietly and peaceably remove himself, his family and his property from the premises and surrender possession thereof and the equipment and furnishings therein, in the condition as leased, reasonable wear and tear excepted. All amounts owed by CIHA by the Resident shall immediately become due and payable."

The premises were new when defendants took possession on October 24, 1996. Although defendants took good care of the place initially, defendants had continuing problems in complying with the conditions of the Lease during their tenancy. Shawn F. Scott, Director of CIHA, and his employees tried to help defendants more than most residents and [testified] that extraordinary efforts were made to accommodate them. For example, in early 1998, CIHA served a notice of termination on the defendants. Defendants filed a formal grievance of the notice of termination. Defendants avoided eviction in that instance by entering into an agreement to take certain steps in their personal lives, including drug counseling for Mr. Harrison, as a condition of continued tenancy.

On October 30, 1998, defendant Hobart Harrison became involved in an altercation with Calvin Summers and Thad Duggan at the Calvin Summers' residence, which is located across the street from defendants' premises. The Summers home is premises of the CIHA. The altercation was instigated by defendant Hobart Harrison. During this altercation, Hobart Harrison intentionally physically injured Calvin Summers and Thad Duggan in the Summers home. After the physical altercation, defendant Hobart Harrison intentionally damaged the personal property of Calvin Summers by puncturing the tire of Mr. Summers' vehicle with a knife.

Later the same evening, shortly after 8:00 p.m., Tribal Police Officer Christopher Stayton found a syringe with the plunger sitting next to it, a green handled spoon with a melted handle and what appeared to be a small piece of cotton in the bowl of the spoon and a small plastic bindle with a white powdery residue inside in the bathroom of the Harrison residence. The residue was tested to be methamphetamine, but the results were not available to CIHA until November 20, 1998. . . .

On November 3, 1998, Shawn F. Scott, Executive Director of CIHA, issued and signed a NOTICE OF TERMINATION OF LEASE AND TERMINATION OF

TENANCY . . . , which was received by defendants on that date. The notice informed defendants that their Lease and tenancy were being terminated for ". . . violent, criminal, and drug-related activities." Pursuant to the notice, defendants were given 72 hours to vacate the premises, failing which CIHA would file a lawsuit in Tribal Court for eviction. . . .

Defendants voluntarily vacated the premises at the end of the 72-hour period, on the afternoon of November 6, 1998, when CIHA's agent, Robert D. Van Loo, came to inspect the premises. When they vacated, defendants left numerous items of personal property on the premises, as well as large quantities of household garbage and waste. There was extensive damage within the premises, including such things as damaged carpet, numerous holes in the walls, missing screens, damaged linoleum and other deterioration beyond normal wear and tear. . . .

Although there is some dispute as to when the damages were caused, defendants do not dispute that they caused them. The exact timing of the damages is not significant. The premises were new when defendants took occupancy and were damaged when they vacated. Pursuant to the Lease, defendants are responsible for paying for these damages.

I find that the reasonable value to repair the damage to the premises which existed as of the time defendants left the premises on November 6, 1998, and to place new locks on the premises, is $2,633.38. That sum is owed by defendants to plaintiff, plus $43.98 for prorated rent, $3.50 for prorated CSD and $38.59 for water, less $475.00 for deposit paid by defendants. The resulting balance due is $2,244.45. . . .

CIHA terminated the Lease and evicted the defendants in accordance with the provisions of the Lease and of Tribal Law.

By instigating and intentionally engaging in a physical altercation with Calvin Summers and Thad Duggan, and intentionally and violently damaging the tire of the vehicle owned by Mr. Summers, defendant Hobart Harrison engaged in conduct in violation of provisions in paragraphs IV C and IV E of the Lease prohibiting violence in the housing community. Pursuant to paragraph IV E of the Lease, CIHA was lawfully entitled to terminate the Lease and both defendants' tenancies upon 24-hour notice.

A more liberal 72 hours' notice was given. The notice complied with the Lease conditions and with Coquille Indian Tribal Evictions Procedures (Resolution CY9542, August 26, 1995) regarding advice of rights to tenants because the notice informed Harrisons of the reasons for termination of Lease, and informed them that they had the right to reply to the notice as they wish, the right to examine and receive copies of any CIHA documents relevant to the termination and eviction, the right to a hearing according to CIHA grievance procedures, and the right to be represented by a person of their choosing at their expense. Defendants were aware of the formal grievance procedures and chose not to exercise their rights pursuant to the procedures. The defendants voluntarily vacated the premises, in compliance with the terms of the notice. Their tenancies ended when they vacated. Pursuant to paragraphs IV and V of the Lease, defendants are responsible for paying plaintiff in the total sum of $2,244.45.

Defendants left personal items behind, and did not take reasonable steps to reclaim their possessions. I conclude that they abandoned those possessions.

Plaintiff is not indebted to defendants for defendants' abandoned personal possessions.

The Residential Landlord and Tenant Act of the State of Oregon and the eviction procedures of Chapter 105 of Oregon Revised Statutes do not apply to this case. Accordingly, defendants' affirmative defenses and counter-claims should be dismissed.

Because defendants have interposed claims based upon state law which, if applied, may serve as a partial or total bar to plaintiff's recovery and entitle defendants to recover against plaintiff, the Court addresses the issue of applicability of state law in this case.

Whether state law applies in this Tribal Court case is a matter to be determined by this Court. In analyzing this issue, the Court takes judicial notice of the laws of this Tribe and applicable Federal Laws and laws of the State of Oregon, pursuant to Coquille Evidence Code (CEC) 202(1). . . .

The Preamble of the Constitution of the Coquille Indian Tribe states: "The Coquille Indian Tribe is and always has been a sovereign self-governing power . . . [i]n recognition of this sacred responsibility . . . the members of the Coquille Indian Tribe, being a federally recognized Indian tribe pursuant to Coquille Indian Restoration Act of June 28, 1989, 103 STAT. 91, . . . adopt this constitution in order to reaffirm our tribal government and to secure the rights and powers inherent in our sovereign status guaranteed to us by federal and tribal laws." . . .

Article VII of the Constitution provides for a Tribal Court. Article VII, Sec. 4 provides that the Court shall have the following powers:

> The tribal court and such inferior courts as the tribal council may from time to time ordain and establish shall be empowered to exercise all judicial authority of the tribe.
>
> The judicial power of the tribal court shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances of or applicable to the Coquille Indian Tribe and customs of the Coquille Indian Tribe.

. . . The Tribe's sovereignty is not inferior to that of the State of Oregon. That the Tribe has the sovereign authority to self-govern and to enact or not enact legislation cannot be questioned.

Although the Coquille Indian Tribal Code provides that the laws of the State of Oregon ". . . may be used for guidance . . . ," CITC 620.010.2(c), the decision of whether this Court will seek that guidance in a given case is one which requires careful thought. After considering the issue carefully, it is the opinion of this Court that the provisions of Chapter 90 of Oregon Revised Statutes cited by defendants should not be used to guide the Court in reaching its decision in this case.

The cited sections of Oregon Revised Statutes are legislative acts of the Oregon Legislature. The legislative body of the Coquille Indian Tribe, the Tribal Council, has itself legislated certain procedures regarding evictions. . . . The legislature of the Coquille Indian Tribe considered issues of landlord and tenant rights and chose not to include in its legislation provisions similar in substance to those enacted by the Oregon Legislature in the cited provisions, ORS 90.322(7), 90.435 and 90.425.

This Court interprets the Constitution and the Tribal Court Ordinance (CITC Chapter 610) as mandates which establish a separation of the Tribal Council and the Tribal Court. For this Court to incorporate ORS Chapter 90 into this case would be an improper usurpation of the Tribal Council's legislative authority. This Court should not impose its judgment over that of the Tribal Council in an area which is the Tribal Council's sole province.

Each of the cited sections of Oregon Revised Statutes has its genesis in Oregon Laws 1973, Chapter 559. The Oregon Legislature in that year legislated remedies not previously available in this state. The Legislature of the Coquille Indian Tribe has not yet enacted such legislation. Whether it will do so in the future is a matter to be determined only by the Tribal Council.

NOTES

1. In *Raphael v. Grand Traverse Band of Ottawa and Chippewa Indians*, 1999 WL 34986350 (Grand Traverse Band Court of Appeals 1999), the court held that the beneficiary of a tribal property lease assignment did not have a property interest in the land:

> The Trial Court Judge ruled that the assignment had failed under its terms and that there was not a need for an eviction hearing or a trial on the matter. The exhibit showed that the lease required an improvement as a residence within one year of its taking effect. There was no dispute that there was no improvement except for the placement of a travel trailer or camping unit which was undisputed as not qualifying for the Appellant's residence. The issue remains whether there was an interest, or whether it ever vested before the date of the eviction.
>
> A leasehold interest would always have a value and be subject to some level of rights. The testimony and the exhibits show that the interest was not created by the Tribe and that there was a legal action between the Tribe and the Grantor of the interest. It was undisputed that the federal court decision voided the rights of the Leelanau Indians, Inc. (LLI) to create leases before this lease was created. Any lease had to be created by the Appellee. There is no record that the Tribal Council or the housing agency created or ratified a lease. There was some evidence that the Council intended to ratify some leases, but no record that the vote was ever officially taken. . . .
>
> . . . Simply put, there was no loss to the Appellant. The lease restricted the valuation of the property to the lessee's residential use only. All leases were for tribal members and were not assignable without Council discretionary approval. . . .
>
> There was no property interest by the Appellant on the date of the eviction. This issue is affirmed.

Raphael, 1999 WL 34986350, at *1-2.

2. In *Honie v. Hopi Tribal Housing Authority*, 1 Am. Tribal Law 346 (Hopi Tribe Appellate Court 1998), the court vacated the trial court's decision to certify a decision by a Hopi village regarding the assignment of a property lease:

> A trial court has the authority to certify village orders in matters reserved to the villages. *Gaseoma v. The Hopi Tribe*, 1 Am. Tribal Law 268 [1997] . . . , citing Article III, Section 2(c) of the Hopi Constitution. . . . Certification

allows the trial court a means by which to formally recognize a village decision and to proceed to the enforcement of such village decisions with injunctive relief or other remedies.

A trial court, however, must hold an evidentiary hearing to determine whether all interested parties have been provided with a fundamentally fair opportunity to participate in the village decision-making process before the court can recognize and certify the village decision. At a minimum, all interested parties should be provided with adequate notice and a meaningful opportunity to be heard in the village decision-making process. . . . Only after the petitioner has established, through an evidentiary hearing, that the village has properly ensured that all interested parties have been provided with a fundamentally fair process in the village's decision-making process may the court certify the village decision and proceed to consider any available remedies in the courts.

Honie, 1 Am. Tribal Law at 351-52.

E. JURISDICTION

1. JURISDICTION UNDER TRIBAL LAW

Ross v. Sulu

Hopi Tribe Appellate Court, No. 88-AP-010, 1991.NAHT.000002 (July 5, 1991)

Before Sekaquaptewa, Chief Justice, and Abbey and Bender, Judges.

Factual and Procedural Background

This case involves a complaint for trespass to land filed in the Hopi Tribal Court by Plaintiff Sulu on behalf of the Tewa Kachina Clan of First Mesa Village. It calls for a determination of the jurisdiction of the Tribal Court, under the Hopi Constitution, to resolve conflicting land claims by different clans within a Hopi village. The case grows out of the following circumstances:

On September 4, 1987, the Hopi Butterfly-Badger Clan of First Mesa assigned to defendant Patsy Ross, a member of that Clan, a half-acre of land within the Village of First Mesa to be used as a home. The assignment was made on a Tribal Housing Authority Land Assignment form, and was signed by the male and female Butterfly-Badger Clan leaders and Kikmongwi of the Village of First Mesa. On September 8, 1988, Ross moved a mobile home onto the assigned land.

On September 9, 1988, Plaintiff Tom Sulu, Tewa Kachina Clan leader, filed a complaint in the Hopi Tribal Court on behalf of the Tewa Kachina Clan. The complaint alleged that the land onto which Ross had moved her mobile homes "lies within the territorial possession of the Tewa Kachina Clan" and that because Ross did not have the consent or authority of the Tewa Kachina Clan to reside on the land, she was a trespasser. The complaint sought a temporary restraining order and permanent injunction prohibiting Ross from setting up her mobile home on Tewa Kachina Clan land, an order requiring Ross to move her home, and damages. . . .

At trial, the court sought to determine which of the two competing clans — the Tewa Kachina Clan or the Hopi Butterfly-Badger Clan — had the right to assign the land in question. The court found that at some time in Hopi history the Hopi leaders had assigned certain lands in the First Mesa area to the Tewa people. The court then found, on the basis of evidence of recent use, that the land in question was in a Tewa area. The court granted Plaintiff Sulu's motion for directed verdict, found defendant Ross to be committing trespass, and enjoined her from maintaining a home on the land in question.

Defendant Ross's appeal to this court, raises the following issues:

1. Defendant alleges that the issues raised by the property dispute between the Tewa and Hopi Clans concern religious and political matters that are non-justifiable. Defendant alleges that, in any event, Hopi custom and Hopi Constitution require such property disputes to be resolved by traditional Village procedures rather than the Tribal Court.

2. Alternatively, defendant requests that the court find for her on the basis of Article III, Section 2 of the Hopi Constitution, which reserves to the Villages the assignment of farming land. Because the assignment to defendant was approved by the Village Kikmongwi, the traditional head of the Village recognized by Article III, Section 3 of the Hopi Constitution, defendant requests a finding that the land was assigned to her in accordance with the Constitution and, therefore, that defendant is not a trespasser.

3. Defendant requests alternatively that the court find that the Village of Tewa is a separate village, and dismiss the case for lack of subject-matter jurisdiction because disputes between villages are committed to the jurisdiction of the Hopi Tribal Council under Article VI, Section 1(h) of the Hopi Constitution. . . .

Discussion

Article III, Section 1 of the Hopi Constitution recognizes the Village of First Mesa as a single, self-governing village, consisting of the consolidated villages of Shitchumovi, Tewa and Walpi.[3] Article III, Section 2 of the Constitution reserves certain powers to such villages, including the power to assign farming land.[4] The parties in this case agree that the land in question here is farming land within the meaning of this provision. Accordingly, the power to assign the land at issue in this case is reserved to the Village of First Mesa.

With regard to the procedures through which land is to be assigned by the villages, Article VII, Section 1 of the Hopi Constitution provides that assignment of the use of farming land "shall be made by each village according to its established custom."[5] Hopi villages are free to adopt modern constitutions and governmental organization but, unless they do, they are considered as being

3. Article III, Section 1, provides: "The Hopi Tribe is a union of self-governing villages sharing common interests and working for the common welfare of all. It consists of the following recognized villages: First Mesa (consolidated villages of Walpi, Shitchumovi and Tewa) Mishongnovi, Kyakotsmovi, Sipaulavi, Bakabi, Shunopavi, Hotevilla, Oraibi, Moenkopi."

4. Article III, Section 2 provides: "The following powers . . . are reserved to the individual villages: . . . (d) To assign farming land, subject to the provisions of Article VII. . . ."

5. Article VII, Section 1 provides: "Assignment of the use of farming land within the traditional clan holdings of the villages of First Mesa, Mishongnovi, Sipaulavi, and Shunopavi . . . shall be made by each village according to its established custom. . . ."

under the traditional Hopi organization. That traditional organization recognizes the Kikmongwi of each village as the leader of the village.[6] The Village of First Mesa has not adopted a village constitution. The village, therefore, remains under the traditional Hopi organization, with the Kikmongwi as village leader.

These provisions of the Hopi Constitution, reserving certain powers to the Hopi villages, determine the outcome of the present case. The underlying dispute here is between two clans of the same, traditionally organized village. Each clan claims the right to assign the land in question. The determination of which clan has that right is to be made, not by the tribal court system, but by the village according to its established custom. Therefore, when the Tribal Court became aware that the case turned on an intravillage dispute between clans over a matter reserved for village decision, it should have dismissed the case for lack of jurisdiction, requiring the parties to seek resolution of the dispute through established customary village procedures. The Tribal Court's attempt to decide this dispute pursuant to its own procedures and substantive standards violated the expressly reserved constitutional right of the village to resolve the matter pursuant to its established custom. The reservation of village powers over certain matters [i]s an essential aspect of the Hopi Constitution, which recites that the Hopi Tribe is "a union of self-governing villages." Reservations of village authority are not to be lightly disregarded.

It might be argued here that the Village of First Mesa had already made such a resolution. Defendant Ross introduced a 1987 judgment, signed by the First Mesa Village Kikmongwi, assigning the land in dispute to her. From the record before us, however, we cannot tell whether or not this document was intended to constitute a village resolution of the disagreement as to rights in the land between the Hopi Butterfly-Badger Clan and the Tewa Kachina Clan. It is entirely possible that the Kikmongwi signed the document without being aware of the Tewa Kachina Clan's conflicting clauses. This 1987 document, therefore, cannot be considered on this record to constitute a village resolution of the conflict that gives use to this case.

Prior to trial in this case, the Tribal Court "remanded the matter to members of First Mesa Village in an attempt to reach a negotiated solution. That effort failed. This attempted negotiation did not satisfy the Hopi constitutional requirement that the matter be resolved according to the villages traditional procedures. The Tribal Court selected the negotiating parties, retained jurisdiction in the case, and ordered the parties to give a status report within a specified period. What is required is a decision [resolving] the dispute by the village according to procedures that it determines. . . .

The village procedures should be conducted through the leadership of the Kikmongwi, as explicitly recognized by the Hopi Constitution. Our decision today that the Tribal Court did not have jurisdiction to decide this dispute is limited to those cases where a disagreement between clans over which has the right to assign land is at the core of the case. Such clan disagreements are to be

6. Each village shall decide for itself how it shall be organized. Until a Village shall decide to organize in another manner, it shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its leader." Hopi Constitution, Art. III, Sec. 2.

resolved through established village custom rather than through tribal court adjudication. Our decision, however, does not apply in situations where there is no similar intravillage dispute between clans, each of which asserts the right to assign the land. If the person accused of trespassing on another's land has no claim of right flowing from a clan assignment, or if the validity of plaintiff's assignment through customary village procedures is undisputed, the plaintiff may have recourse to the Tribal Court to resolve a trespass claim. Thus, the ordinary trespass case can be brought in Tribal Court. . . . Only after the village resolves the underlying dispute pursuant to established custom can the parties come to Tribal Court for enforcement of their rights, [as] determined by the village, through trespass or other actions. . . .

The decision of the Tribal Court is vacated and the case is remanded to that Court with directions to dismiss for lack of jurisdiction.

NOTES

1. In *Medel v. Granados*, 2006 WL 6358377 (Nevada Intertribal Court of Appeals 2006), the court held that it had jurisdiction over all tribal lands in accordance with the tribal jurisdictional statute even where some of the land at issue was federal trust property:

> This Court agrees that the Washoe Tribe asserts broad jurisdiction over actions occurring within the Tribe's territorial jurisdiction, specifically allotments. The Tribe's Constitution defines "territorial jurisdiction" by stating that it applies to all tribal lands:
>
> > The Washoe Tribe takes jurisdiction over all Washoe Indian country, which shall extend to all tribal lands, including . . . the Washoe Pine Nut Allotments, held in trust by the United States, but on the Pine Nut Allotments, for hunting and fishing regulation purposes only. Territorial jurisdiction shall also extend to all lands hereafter acquired by or for the Washoe Tribe. Constitution and Bylaws of the Washoe Tribe of Nevada and California, Art. I, Sect. 1.
>
> . . . The provisions of Section 1 of Article I of the Washoe Constitution were intended to assert broad general jurisdiction over all Washoe Indian country which includes the Washoe Pine Nut allotments. The language concerning hunting and fishing is clearly intended to narrowly apply to regulation of that subject matter, not to limit the overall civil and or criminal jurisdiction of the Washoe Tribe. . . . It is well settled law, as to civil disputes arising in Indian Country that tribal courts play such a vital role in tribal self-government, that interfering with a Tribe's jurisdiction is to interfere with an inherent attribute of sovereignty. . . . Here, the Pine Nut allotments are Indian Country within the above definition and are subject to the authority of the governing sovereign, the Washoe Tribe. Subsequently, Washoe, as a federally recognized tribe with inherent sovereign authority over its members and its territory is subject only to limitations imposed by Federal law. . . . Since this litigation involves only Indians, at least the same standards should be considered in confirming tribal jurisdiction. It is well settled law that tribal jurisdiction over tribal members is first and foremost a matter of internal tribal law. . . .

> Further, we find no limitations imposed by Federal law. There is no general Federal statute limiting tribal jurisdiction over tribal members. There is no treaty or statute conceding the Washoe Tribe's civil jurisdiction over the Pine Nut Allotments. . . . There cannot be cessation of tribal jurisdiction by implication. Here, the Tribe has never ceded its civil jurisdiction. Thus, the Tribe's Constitutional provision concerning regulation of hunting and fishing on the Pine Nut allotments cannot be read in isolation and cannot be construed as ceding all of the Tribe's authority and jurisdiction.

Medel, 2006 WL 6358377, at *3-4.

2. However, in *Monteau v. Monteau*, 5 Am. Tribal Law 26 (Confederated Salish and Kootenai Tribes Court of Appeals 2004), the court held: "When proceeding *in rem*, the trial court cannot determine rights in property not within the territorial jurisdiction of the Tribes. The trial court lacked jurisdiction over the real property it awarded to the husband and the bank accounts it awarded to the wife. The trial court properly dismissed the action to the extent it dealt with property division." *Monteau*, 5 Am. Tribal Law at 34.

2. JURISDICTION UNDER THE FEDERAL *MONTANA* TEST

Hoover v. Colville Confederated Tribes

Colville Confederated Tribes Court of Appeals, No. AP99-001, 29 Indian Law Rep. 6035, 2002.NACC.0000004 (March 18, 2002)

En Banc Before: Chief Justice Anita Dupris, Justice Elizabeth Fry, Justice Dennis Nelson, Justice Howard Stewart, Justice Earl McGeoghegan, Justice David Bonga, Justice Edythe Chenois, Justice Conrad Pascal, and Justice Wanda Miles, who contributed greatly to this opinion. Justice Miles passed away on November 12, 2001.

The opinion of the court was delivered by: Fry, J. . . .

Procedural History

Non-Indian Daniel Hoover (Hoover) filed an action in federal district court alleging the Colville Confederated Tribes (Tribes) lacked jurisdiction to regulate fee lands owned by him and located within the Colville Confederated Tribes Reservation. The district court determined the Colville Tribal Court had authority to determine its jurisdiction regarding Mr. Hoover's claim and ordered him to exhaust those remedies available in Tribal Court before seeking relief in the federal system.

The Tribes subsequently filed an action in Tribal Court seeking an injunction to restrain Hoover from developing his real property without complying with the provisions of the Colville Land Use and Development Code. The Tribal Court granted an injunction and Hoover appealed to this court arguing that the Tribes are without legal authority to regulate non-Indian fee lands located within their reservation.

Daniel Hoover died in 2000. The personal representative of his estate, Jerry Thon, has substituted in as plaintiff. . . .

[I.] Statement of Relevant Facts

[A.] History

Prior to the presence of the white man, the ancestors of the tribes and bands of the Colville Confederated Tribes[5] occupied an area comprised of what is now Eastern Washington, Southern Central British Columbia, and portions of Idaho and Oregon.

In 1872, President Grant created the Colville Confederated Indian Reservation by Executive Order — without a treaty and without the consent of the tribes and bands of Indians residing in the area. The original reservation was over three million acres in size, but was reduced to its present size of approximately one million four hundred thousand acres under an agreement dated May 9, 1891, when gold was discovered in the northern half of the Reservation.

The Reservation is located within portions of Okanogan and Ferry Counties in north central Washington State. . . . Approximately seventy-nine percent (79%) of the reservation lands are now held in trust for the Tribes and its members. The remainder is held by federal agencies or is owned in fee by Indians and non-Indians.

[B.] The Hellsgate Reserve

In 1977, the Tribes designated the southeast corner of the Reservation as the Hellsgate Game Reserve. The area was chosen because of its remote character, limited access, limited development, small population, natural geographic boundaries and critical range habitat. It is critical winter range habitat for deer, elk, and other wildlife.

The Reserve . . . is situated entirely within the exterior boundaries of Ferry County and contains slightly more than one hundred thousand acres.

Approximately 87% of the land within the Reserve is in trust status, 11% of the land is in non-Indian and Indian fee ownership, and the remaining 2% is owned by the Federal Bureau of Reclamation.

The Reserve contains no cities, towns, or areas of concentrated development or settlement. At the time of hearing, there were fourteen permanent homes and five summer cabins within its boundaries. Almost all the buildings existed prior to the Tribes' designation of the areas as a reserve and enactment of its Land Use and Development Code.

The Reserve is managed specifically for conservation of wildlife and native plants. The area plays an integral role in preserving game populations and maintaining the hunting and gathering traditions of the Tribes. It consists of diverse topography and habitat with rugged hill country, dry land range, clear streams and coniferous forests. It contains abundant and diverse wildlife, including elk and deer. Tribal members, whose average annual income is approximately $7,000.00, depend significantly on wildlife and plant life within the Reserve for cultural needs and sustenance.

The Tribes have managed and regulated the Reserve to preserve its natural and cultural values. They have implemented strict wildlife management practices, including restriction of camping and off-road vehicle use. . . .

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5. The Colville Tribes consist of twelve distinct Tribes or Bands: San Poil, Nespelem, Colville, Okanogan, Methow, Wenatchee, Chelan, Entiat, Moses, Palouse, Chief Joseph Band of Nez Perce, and the Lakes.

The Hellsgate Reserve plays a significant role in the continuation of the Tribes' culture. It is a place designated to preserve their hunting and gathering traditions and allow for extended family camps. The camps are a valued part of tribal life and cultural survival; traditions which have passed down through generations.

The Reserve contains a variety of plants[7] used by tribal members for food, as medicine, and in traditional ceremonies required for continued survival of the Tribes' culture.

The plants and animals protected and preserved through comprehensive management of the Reserve are not only a food source, but also play a vital and irreplaceable role in the cultural and religious life of tribal members. Annual medicine dances, root feasts and ceremonies incorporate animal and plant life found within the Reserve. These dances, feasts, and ceremonies play an integral role in the well being and survival of the Tribes and their members.

[C.] Management and Regulation of the Reserve

The Tribes have managed and regulated the Hellsgate Reserve to preserve its natural and cultural values. Wildlife and fish are important to the Tribes' culture and provide an important food source to its members. The Tribes expend about three million dollars per year managing game, fish, and other species found within the Reservation. A significant portion of this money is earmarked for management activities and land acquisition within the Reserve.

In 1977, the Tribes, in cooperation with the United States Department of the Interior, acquired fifty head of elk from the Wind Caves National Monument in South Dakota to re-establish an elk herd on the Reservation for supplementation of subsistence deer herds. The Tribes' Fish and Wildlife Department determined the Hellsgate area was best suited for the elk, based upon extensive winter range habitat of the area. Since then, the elk, subject to comprehensive tribal management, have flourished, greatly increasing in number within the Reserve and in other areas of the Reservation. Estimates place the size of the herd within the Reservation at over eight hundred animals.

Hunting and fishing in the Reserve are limited. There is, for instance, a six-month subsistence deer season in effect elsewhere on the Reservation, while deer hunting within the Reserve has been limited to an annual nine-day buck hunt. Elk hunting, at the time of hearing, was limited to a restrictive lottery system. The Tribes do not permit non-member hunting on trust and fee lands within the Reserve. The no-hunting restriction on fee lands is through implementation of an intergovernmental agreement with the State of Washington.

. . . Tribal resource and law enforcement personnel devote significant portions of their time to [conservation and resource] management activities in the Reserve. These activities are funded by trust funds derived primarily from sales of timber and from grants and contracts through the Indian Self-Determination Act.

The Tribes permit timber harvests within the Reserve, provided they are conducted in a manner consistent with tribal wildlife management practices. Timber resources represented the largest revenue source for the Tribes at the

7. Culturally important plants include black camas, wild carrots, Indian potatoes, willow, rose bush, pine nut, black moss, huckleberry, and chokecherry.

time of hearing. All timber sales go through the Integrated Resource Management Planning (IRMP) process designed to minimize harm to the environment and to ensure compatibility with the purposes of the Reserve. The Tribes review timber harvest sales on fee lands within the Reserve in accordance with an intergovernmental agreement with the Washington State Department of Natural Resources and the Washington State Department of Ecology.

In 1992, the Tribes, Ferry County and Okanogan County entered into an Intergovernmental Land Use Planning Agreement (ILUPA) which provided for resolution of land use conflicts for private lands and a joint permit process for lands within Reservation boundaries. As a result of the agreement, the Tribes and the counties agreed on permit conditions for over two hundred developments and land use changes within the Ferry County side of the Reservation. In 1997, Ferry County unilaterally withdrew from the agreement, which remains in effect between the Tribes and Okanogan County.

Ferry County does not fund, participate in, or assist in the management or development of natural resources or wildlife within the Reserve. Land use plans for Ferry County treat the Reserve no differently than other rural areas within the county. It provides no zoning controls comparable to those of the Tribes.

[D.] Land Use and Development Code

. . . Prior to the adoption of the Land Use and Development Code in 1992, the Tribes issued public notices and held public meetings to solicit comments from both Indian and non-Indian communities. Land planning efforts included participation by the Reservation community and county governments.

The Code established zoning within the Reservation, including commercial, industrial, residential, special requirement, rural, forestry, game reserve, and wilderness. The zones set forth different levels of development and regulation consistent with the community values established in the Comprehensive Plan.

The Code requires all persons proposing subdivision and development within the Reservation, including the Reserve, to apply for a permit through the land use review process. Proposed land use activities are reviewed and permits are issued by the Colville Planning Department to ensure compatibility with the Code. There is provision for review of adverse decisions by the Land Use Review Board. Individuals questioning an appeal by the Land Use Review Board decision may seek judicial review in Tribal Court, a constitutionally separate branch of tribal government.

The Tribes permit a wide variety of development in highly populated areas of the Reservation having an adequate infrastructure. Some uses in less populated areas are severely restricted. In order to protect and provide for the general welfare of Reservation residents and to preserve the continued existence of the Tribes, a balance was achieved between the interests expressed by the general public and the protection of important cultural values. As a result, the Tribes have restricted development in certain areas. The Reserve is one such area and remains largely uninhabited and undeveloped in conformity with the Code.

The Tribes incorporate a holistic objective to planning based on ecosystems, watersheds, and natural boundaries. In 1994, the Tribes adopted an

Integrated Resource Management Plan (IRMP) based on their community values. The IRMP is an interdisciplinary method of evaluating impact to ecosystems and watersheds as a whole. The Plan has three phases[:] 1) data collection and analysis of past and current natural resources, 2) drafting a management document based upon membership values and desires, and 3) implementation and monitoring. A basic premise of the IRMP is that tribal members are experts when it comes to the use of their land.

[E.] Hoover's Development

Daniel Hoover purchased 72.75 acres of land within the boundaries of the Reserve in 1987. The land had been an allotment of a tribal member and was converted to fee status in 1925 under the Bureau of Indian Affair's policy of forced fee patents.*

Hoover built a residence on the property without notifying tribal officials and subdivided the land through Ferry County, selling two 20-acre parcels to non-Indians. Each parcel was developed with a single recreational-use cabin. One owner obtained a tribal permit to build with conditions for mitigating the impact on wildlife. In 1991, tribal officials became aware of the non-permitted land use by Hoover and notified him in writing of tribal land use requirements.

Hoover's remaining property consists of 32.75 acres adjoining tribally managed shorelands on Lake Roosevelt.[10] In 1992, Hoover sought to develop his property further by constructing a second residence without obtaining tribal permits. The Tribes and Ferry County attempted to resolve the permitting issues through an intergovernmental agreement mediation process (ILUPA). The process was cut short when Hoover sued the Tribes and Ferry County in federal court.

In December 1995, the Tribes became aware that Hoover was again attempting to subdivide his property further, without going through the Tribes' permitting process. The proposed subdivision of four lots comprised a "major sub-division" under the Tribes' Land Use and Development Code and required a conditional use permit. Under the Ferry County Zoning Code, it was considered a "minor sub-division," requiring little review and no evaluation of how it would impact the Reserve.

**Author's Note:* The D.C. Circuit in *Covelo Indian Community v. Watt*, 1982 U.S. App. LEXIS 23138 at *8 n. 8 (D.C. Cir., Dec. 21, 1982) (citations omitted), defined forced fee patent claims as such:

> Forced fee patent claims refer to attempts to revoke fee patents erroneously issued by the Secretary of the Interior for lands that the United States had previously held in trust for the Indians. Congress has in the past allotted certain lands to individual Indians in trust. The United States holds these lands for the use and benefit of the allottee. While these lands are in trust status they are exempt from state ad valorem taxes and are subject to various restrictions. In 1906, Congress provided that the Secretary of the Interior could issue fee simple patents to an Indian before the trust period expired if the Secretary were satisfied that the allottee was competent and capable of managing his affairs. The issuance of a fee simple patent removed all restrictions, including immunity from taxation. The Secretary could issue a fee patent.

10. Lake Roosevelt is a lengthy man-made lake created by the construction of Grand Coulee Dam during the 1930's. The dam, in combination with others further down the Columbia River, virtually eliminated the annual salmon runs which had been a substantial food source for the Tribes.

The Tribes . . . notified [Hoover] in February 1996 that acting to subdivide, sell, and develop lots within the Reserve without obtaining requisite tribal permits constituted a violation of tribal law.

Hoover ignored the notice from the Tribes and submitted a final subdivision plat to Ferry County for recording. He indicated he planned to sell lots in a shoreline housing development without applying for approval from the Tribes.

[F.] Impact of Uncontrolled Fee Land Development with the Reserve

The population of north central Washington, including that of the Reservation, is growing rapidly. Ferry County more than doubled its population between 1970 and 1997, according to census data. Planning and zoning regulations were enacted by the Tribes to help address the impact of growth within the Reservation while attempting to preserve traditional community values.

Uncontroverted credible expert testimony and scientific studies presented at the hearing strongly indicate that unchecked increases in housing development within the Reserve will significantly adversely impact wildlife species and native plants. Specifically, species such as deer, elk, bear, cougar, and bald eagle are sensitive to human habitation and will decline in numbers with increased and uncontrolled housing development. Wildlife studies show increased housing will result in fewer mule deer. Studies also show forest and songbird species will decrease in number and bald eagles will nest further from shorelines when nearby housing developments appear.

Uncontrolled development will increase the number of roads, traffic, and off-road activity—all of which impact native wildlife and plants. Roads cause increased runoff and dust, which impact streams and watersheds. Roads divide wildlife corridors and create barriers to migration routes. Roads kill natural plant life and spread non-native noxious weeds, which crowd out native plants.

Increasing housing without land use controls will result in more septic systems, noise, dust, artificial lighting, wood use, smoke, and pets in natural areas. These factors negatively impact wildlife habitation.

The impact resulting from lack of land use control on fee lands within the Reserve is magnified because the fee lands are disproportionately located in low-lying areas adjoining water. Low elevation riparian lands within the Reserve are important components of the arid ecosystems on which wildlife depend, and are the most important winter range for deer and elk.

Native plants and animals within the Reserve are essential to ceremonies and other traditions of the Tribes. Tribal cultural practices such as camping, hunting, vision quests, and gathering medicines are not compatible with uncontrolled development and increased housing density. Uncontrolled development places at risk important components of the Tribes' cultural and religious traditions.

Unregulated development of fee lands within the Reserve would significant impact adjoining tribal trust lands. Increased car exhaust, wood smoke, water use, waste discharge, human activity, traffic, dust, garbage, and erosion from grading and construction, do not stop at fee land boundaries. The inability of the Tribes to apply comprehensive planning regulations to fee lands within the Reserve will substantially impair the Tribes' ability to preserve the general character, cultural and religious values, and natural resources associated with the Reserve.

The inability of the Tribes to fairly and impartially enforce comprehensive planning regulations to all lands within the Reserve presents a clear danger to the continued cultural identity and existence of the Tribes, and threatens the health and welfare of their members.

[II.] Issue

The sole issue before this court is whether real property owned by a non-Indian in fee is subject to zoning regulations of the Tribes when the property is within a Game Reserve situated entirely within the exterior boundaries of the Colville Confederated Tribes Reservation.

[III.] Discussion of Issue

. . . Federal courts have found congressional delegation of authority for tribes. *See Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 229 F.3d 1210 (9th Cir. 10/03/2000), (hereinafter *Bugenig I*), and *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 09/11/2001), (hereinafter *Bugenig II*), *United States v. Mazurie*, 419 U.S. 544 (1975), *Rice v. Rehner*, 463 U.S. 713 (1983). The statutory language delegating the requisite authority was viewed by Justice White, writing in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), wherein he cited two statutes where Congress expressly delegated authority to Indian Tribes. . . .

The second statute cited by Justice White is the Clean Water Act, 33 U.S.C. §1377 et seq. It authorizes Indian tribes to be treated as states in setting clean water standards for federal Indian reservations. The term "federal Indian reservation" is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. §1377(h). . . .

Congress has clearly delegated its authority to regulate water quality on federal Indian reservations to tribes meeting certain requirements. Challenges to its authority to do so have been rebuffed. *See Montana v. United States Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998), and *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

The Tribes received authority from the federal Environmental Protection Agency in 1991 to enact water quality regulations for the entire reservation in accordance with the provisions of the Tribes' Constitution and Codes. This included fee lands owned by non-Indians within the boundaries of the Reservation. The Tribes were delegated authority to zone for control of water quality standards over Indians and non-Indians on the Colville Indian Reservation. We would be well advised to allow the Tribes to exercise zoning controls over land use even as they are appropriately exercising authority over water quality on their Reservation. *Cavenham Forest Products, Inc. v. Colville Confederated Tribes*, 1 CCAR 39 (Colville Confederated 02/22/1991). (recognizing Tribes' authority to require compliance with the Tribes' Land Use Ordinance by a non-Indian business on the Reservation). The *Cavenham* decision was based upon general principles of tribal sovereignty and applicability of the tests in the [*Montana v. United States*, 450 U.S. 544 (1981)] case.

Yet, there is an additional consideration in determining whether the Tribes' jurisdiction to regulate non-member fee land within the Reserve goes

beyond the Clean Water Act. For this, we look to the *Montana* exceptions, and actions of the United States government in determining the character of Reserve.

[A.] The *Montana* Exceptions

The first *Montana* exception (consensual relationships) is not applicable to this case.

The second exception authorizes tribal regulation of "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." *Montana* at 565. The findings of fact show clearly that the requirements of the second exception have been fulfilled inasmuch as Hoover's proposed conduct (that of developing land for construction of additional residences within the Reserve) would affect the health and welfare of the members of the Tribes.

[1.] Health and Welfare

The average annual income of tribal members is thousands of dollars below the national poverty level and their employment rate is near fifty percent. Reduced economic circumstances and cultural traditions cause many members to depend on subsistence hunting of large game animals, primarily deer and elk. The dependence upon subsistence hunting is greater now than before construction of Grand Coulee Dam that, together with the construction of other dams downstream on the Columbia River, destroyed the salmon runs which had previously provided a substantial subsistence food source.

Hoover's planned development would have an impact on the ecology and environment because any increase in the number of homes within the Reserve would directly affect the deer and elk population. Were he granted permission to construct his development, the Tribes would have no ground to prevent other non-member fee owners from developing their properties within the Reserve. It is clear from the evidence adduced at trial that the Tribes had little choice in preventing Hoover from proceeding. They either had to allow him and others to build in the Reserve, and thus destroy or greatly diminish an important, necessary food and culture source, or prevent him from building and thus preserve a valuable source of subsistence hunting and cultural participation.

In addition to game animals, tribal members use many varieties of plants within the Reserve as a food source. The importance of the plants lies in their use for maintaining and preserving cultural traditions

[2.] Health and Welfare — Spirituality and Cultural Preservation

The trial court found[:]

> Plants and animals preserved through comprehensive management in the reserve are not only a source of food, but also play a vital and irreplaceable role in the cultural and religious life of Colville people. Annual medicine dances, root feasts, and ceremonies of the Longhouse religion all incorporate natural foods such as deer and elk meat and the roots and berries found in the Hellsgate Reserve. The ceremonies play an integral role in the current well being and future survival of Colville people, both individually and as a tribal entity. Finding of Fact 36.

Bugenig II is the only federal court in our experience to refer to the spiritual health of a tribe. It is well known in Indian Country that spirituality is a constant presence within Indian tribes. Meetings and gatherings all begin with prayers of gratitude to the Creator. The culture, the religion, the ceremonies — all contribute to the spiritual health of a tribe. To approve a planned development detrimental to any of these things is to diminish the spiritual health of the Tribes and its members.

The spiritual health of the American Indian is bound with the earth. Their identity as a people becomes invisible in the city, away from nature. It is the land and the animals which renew and sustain their vigor and spiritual health. . . .

The evidence is highly persuasive that the encroachment of human habitation would have a detrimental effect on the animals, plants, and herbs used for sustenance, medicinal, and ceremonial purposes — the continued existence of which is vital to the spiritual health of the Tribes and their members.

[B.] Implicit Authority

The United States Supreme Court has clearly stated that, aside from the *Montana* exceptions, Indian tribes may regulate non-member activities on reservations only when Congress has explicitly granted the tribes explicit authority to do so. We believe this approach unduly restrictive because it ignores the clear reality of circumstantial evidence. In almost all matters, courts should look at the totality of circumstances rather than seeking a specific mantra . . . and we see no rational reason to do otherwise here.

The Tribes' action in denying Hoover permission to develop his properties can be affirmed, at least in part, because of its authority under the Clean Water Act. Further analysis is instructive.

[1.] The Pacific Northwest Electric Power Planning and Conservation Act

Particularly germane to this case are the millions of dollars the federal government has provided the Tribes to purchase 9,272 acres of fee lands within the Reserve for the purpose of wildlife habitat enhancement.

The money for repurchase of fee lands within the Reserve was appropriated by Congress and distributed through the Bonneville Power Administration, an agency of the federal government. Congressional funding and authorization of this program is through the Pacific Northwest Electric Power Planning and Conservation Act of 1984, 16 U.S.C. 839 et seq. (hereinafter PNEPPCA).

The Act authorizes development of "regional plans and programs related to energy conservation, renewable resources, other resources, and protecting, mitigating, and enhancing fish and wildlife resources. . . ." 16 U.S.C. §839(3)(A).

The Reserve has been an ideal candidate to satisfy one of the Act's intended goals — the enhancement of fish and wildlife habitat. Funds have been appropriated through PNEPPCA to the Tribes for the purpose of protecting "renewable resources . . . and . . . enhancing fish and wildlife resources" within the Reserve. In accordance with a five-party agreement[16] with federal agencies and the Spokane Tribe of Indians, the Tribes retain primary management

16. The Lake Roosevelt Cooperative Management Agreement['s] participating parties consist of the National Park Service, the Bureau of Reclamation, the Bureau of Indian Affairs, the Spokane Tribe of Indians, and the Confederated Tribes of the Colville Indian Reservation.

authority of the portions of Lake Roosevelt within the Colville Indian Reservation. This includes Hoover's shoreline property.

[2.] Zoning Conflicts

The Clean Water Act expressly authorizes the Tribes to regulate water quality and sewer systems on the reservation, including the Reserve. We have found no other express congressional authority for the Tribes to regulate non-member fee lands. Arguably, this means all other zoning authority to regulate non-member fee lands within the Reserve resides with Ferry County. We see this as unworkable. Ferry County unilaterally withdrew from participation in the successful Interim Land Use Planning Agreement when Hoover filed his complaint in federal court. Ferry County has since approved development within the Reserve that is incompatible with the goals of the Tribes and federal government in maintaining the area in its natural pristine condition. It is well known in Indian Country that county governments do not, as a general rule, cooperate with Indian Tribes and do not provide the same level of services within reservations as they do in other areas of a county. We do not believe it [is] realistic to expect Ferry County Commissioners to be sympathetic with the Tribes' goal to regulate development within the Reserve in accordance with its land use regulations.

What then is the role of Ferry County regarding its zoning regulations applicable within the Reserve as to lot size and other building regulations? What is its interest in regulating zoning within a hundred thousand-acre game reserve, and how can it effectively adhere to its comprehensive plan when it does not have the authority to issue water quality regulations?

Clearly, the interests of Ferry County within the Reserve are minimal and are insignificant compared to those of the Tribes. The Tribes have multiple interests in the Reserve, not the least of which is retaining its culture, physical and spiritual health and welfare.

Again, we are of the opinion we should look at the totality of circumstances. We see the circumstances as this — the Tribes have express delegated authority to regulate water quality within the Reservation. The Tribes have enacted a Comprehensive Land Use and Development Code that is neutral in its application to Indians and non-Indians. The Tribes have closed the Reserve to unrestricted development and actively work to enhance its wildlife. The Reserve has a "vital and irreplaceable role in the cultural and religious life of Colville people." The large game animals within the Reserve are an important food source for the Colville people. Finally, Congress has appropriated millions of dollars for purchase of fee lands within the Reserve in order to help maintain the area in a natural state.

What are the interests of Ferry County vis-à-vis the Tribe? The Reserve is comprised of over one hundred thousand acres with less than twenty-five residential structures within it. Access to these permanent and summer homes is by a single road that traverses the length of the reserve. The Colville Tribal Police Department provides police protection. Emergency medical services are provided by the Colville Tribal Emergency Services.

Most of the structures, including Hoover's proposed development, are at or near the end of the road. Other than occasional road maintenance and sporadic police protection, the County appears to have little presence or

interest in the Reserve. It does not appear to have any interest in determining the character of the land and certainly none in preserving the pristine nature of the land.

[3.] Characterization of the Reserve

The Tribes' ancestors and members have sustained themselves from the land for thousands of years. They harvested the roots and the berries from the plants for food and medicine; they caught salmon from the Columbia River, and they killed deer for meat. In 1977, with the Columbia River dammed and the salmon long gone, the Tribes acquired fifty head of elk to establish a large game animal to supplement the deer herds.

The elk were released in the Hellsgate area (the Reserve) because it was best suited to survival of the herd. This is the first record of initial efforts to characterize the area as a game reserve. The herd had now grown to over eight hundred animals and is subject to a closely regulated annual hunt.

In addition to introducing the elk herd, the Tribes and the federal government, for over ten years, have participated in a land buy-back program within the Reserve. The purpose of the program is to purchase fee lands and return them to their natural state. Over nine thousand acres have been purchased for this purpose — primarily with federal funds. The Tribes and the federal government are in the midst of a long-range plan to define and characterize the area as a natural habitat for plants and animals.

The Tribes, in addition to the buy-back program, have developed land use regulations for the Reserve. Public notice and public hearings were held prior to the adoption of the regulations. An appeals process with access to the tribal court was allowed. The regulations apply equally to tribal members and non-members — there is no preferential treatment.

The record is devoid of Ferry County's long-range plans for fee lands within the Reserve. However, a letter from the Ferry County Prosecuting Attorney dated August 12, 1991 was written in response to the Tribes' request for comments on its proposed Land Use and Development Code[, urging] the Tribes not to adopt the proposed Code as "there may be areas where enactments by other entities afford better protection of the environment and more orderly growth management." We have seen no evidence that this has occurred in the ten years since the letter was written.

We deduce from the record that there will be no additional land becoming available for development within the Reserve and that more fee lands will be purchased from non-Indians to be returned to their natural state. The result of this is predictable — services provided by Ferry County to non-Indians owning property in the Reserve will be diminished, along with the County's interest in the property. This will have little impact on non-Indians in the area, as public services such as fire and ambulance are being provided by the Tribes.

[IV.] Conclusion

The trial court correctly entered its Order permanently enjoining Daniel Hoover and those acting in concert with him from developing, improving, or otherwise changing the land use of his property within the Hellsgate Reserve without first obtaining the necessary permits from the Colville Tribes in conformity with the provisions of the Colville Land Use and Development Code. The order is AFFIRMED.

NOTES

1. Aside from the *Hoover* court's application of the *Montana* Test, the court adopts a "totality of the circumstances" test. What are the contours of the test, given the facts in this matter? Are they useful for application to other land uses in the Hellsgate Reserve? Or anywhere else in Indian country?
2. The *Hoover* court's application of the second *Montana* exception would seem to be sharply undermined, or even in direct conflict, with the United States Supreme Court's decision in *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), which rejected claims by the Navajo Nation that it had taxing authority over non-tribal citizens on non-Indian-owned lands within the Navajo reservation. There, the Court denied that the fact that the Nation provided most of the public safety protections to the non-citizens had any relevance. Should that matter here? As we frequently must ask, why is the tribal court engaging in the *Montana* analysis at all? Or in the congressional delegation analysis?
3. The *Montana* Test does not apply when all parties to the matter are tribal citizens. This is an important jurisdictional fact that the parties may not assume to be relevant. In *Atkinson v. Beveridge*, 2000.NAFP.0000007 (Fort Peck Court of Appeals 2000), the court noted an instance in which the parties failed to properly plead this key jurisdictional fact:

> It should be noted at the outset that nowhere in the Tribal Court record does it disclose that Roberta, Roy Emerson and Rose are tribal members. Accordingly, we labored under the assumption that we were dealing with the issue of whether our Tribal Court had subject matter jurisdiction involving a dispute over fee patented land owned by non-members. In her initial brief, Roberta briefly mentioned *Montana v. U.S.*, 450 U.S. 544, as standing for the proposition that Indian tribes lack power to regulate non-Indian hunting and fishing on reservation land owned in fee patented status. Roberta goes on to state that similar to the holding in *Montana*, "the Fort Peck Tribal Court lacks power to regulate access and recreational activities on property owned in fee patented status on the Fort Peck Indian Reservation." Regrettably, this reference to Montana further bolstered our assumption. Following oral argument, we learn that Roberta, Roy, and Rose are all members of the Fort Peck Tribes. Had we known the membership status of these litigants from the outset, we would not have placed the emphasis on *Montana*. It should be obvious that *Montana* has no application involving disputes over fee patented land within the exterior boundaries of the reservation when such land is owned by, and all of the litigants are tribal members, or have consented to Tribal Court jurisdiction. Although we sincerely regret sending our litigants on the proverbial "wild goose chase," we note with some relief that, those who were invited to that hunt were also those who scattered the geese in the first instance.

   Atkinson, at ¶20.
4. In *Delorme v. Stearns Bank*, 2002.NATM.0000001 (Turtle Mountain Band of Chippewa Indians Court of Appeals 2002), the court adjudicated an

on-reservation personal property repossession dispute by a non-Indian business:

> It appears from the cases discussing the *Montana* consensual relationship standard that the cause of action being asserted against the non-Indian must be pertaining to the consensual relationship between the Tribe and the non-Indian in order to confer subject matter jurisdiction upon the Court. . . . [*E.g.*,] *FMC v. Shoshone-Bannock Tribe*, 905 F.2d 1311 (9th Cir. 1990) (tribal court had jurisdiction over non-Indian who failed to comply with Indian preference law because non-Indian was working on tribal contract at the time). . . .
>
> However, not only is there a consensual relationship between the instant parties to this dispute in the form of a lease agreement, there is action taken by the Defendant on the Turtle Mountain Indian reservation, related to that consensual relationship, that allegedly violated tribal law. The tribal court, therefore, appears to have jurisdiction over the instant dispute under the first prong of the *Montana* test.

Id. at ¶¶26, 28.

5. In *Hoopa Valley Tribe v. Bugenig*, 5 NICS App. 37 (Hoopa Valley Tribal Court of Appeals 1998), the court affirmed the authority of the tribe to prohibit logging in an area the tribal council labeled a "buffer zone" around a tribal sacred site:

> [T]ribal elder Byron Nelson, Jr., testified,
>
> > The White Deerskin Dance is a world renewal dance. And the intent of the dance . . . is to put everything back in balance that's gotten out of balance from dance to dance. And that's the main emphasis of the dance, it is not only for the good of the Hoopa Tribe, but for all people.
>
> Mr. Nelson further stated:
>
> > This dance is the most important dance site of . . . all dances that the tribe has, particularly the White Deerskin Dance. The site is very ancient. There's scientific evidence that indicates it could be one of the oldest dance sites, oldest ceremonies in the country. The White Deerskin Dance is called Along the River Dance. As you can clearly see, this particular site isn't really along the river.
> >
> > When I was doing research on the history book, I kept running across these legends that told when the river went out the other way, meaning going left as it left the valley instead of the right direction. It goes now easterly toward Weitchpec.
> >
> > And so I had these geologists go out and study the area, and they found that the river did in fact go out to the left up through where Beaver Creek is now and come out in Martins Ferry in the Klamath River. And they stated that it was at least fifty-thousand years ago that the river did go off this way.
> >
> > So this dance and the trail would very well have gone along the river a long time ago. And the dance site was along the river at one time. So this site is very old. . . . This points to indicating that this is a very ancient site and it's been going on for thousands of years and it should be protected.

The book referred to in Mr. Nelson's testimony, entitled *OUR HOME FOREVER: The Hupa Indians of Northern California* (Nelson, Byron; Hupa Tribe, copyright 1978) contains an extended reference to the significance of the White Deerskin Dance to the Hupa people:

> Beyond the coastal mountains of northwestern California, the Trinity River runs through a rich valley which has always been the center of the Hupa world, the place where the trails return. There, the legends say, the people came into being, and there they have always lived. From this central valley, Hupa land spread out in every direction. Starting at the junction of the Klamath and Trinity rivers, the boundary of Hupa territory ran west through the Bald Hills. It turned south along the divide between Pine and Redwood creeks, following the divide to the Grouse Creek area. There it headed east, crossing the Trinity at Cedar Flat. It ran north through the Trinity Alps, around Trinity Summit, and back to the river junction following a line west of Red Cap Creek. Within this land were fields of grass; groves of pine, madrona, and oak; streams, which supported many fish, birds, and animals; and mountain forests of pine, yew, fir, and oak filled with wildlife. The Hupa used all of these resources, but they made their homes and villages beside the Trinity River, in the valley from which they took their name.
>
> At the very heart of that valley was *Takimildin*. This village known as the "Place of the Acorn Feast" was the site of three Hupa ceremonies; the place from which the tribe's main spiritual leader was chosen, and the spiritual center for the people of the valley. For longer than any man could remember, the sacred house had stood there. For thousands of years, spiritual leaders and members of the tribe had come here to pray and meditate, and dancers had met outside the big house on the night before the most sacred White Deerskin Dance to practice. From time to time, fire or flood destroyed the wooden walls of the big house, but the Hupa people always rebuilt it on its original, sacred foundations.
>
> Long before the White Deerskin Dance began in late August or early September, the people of *Takimildin* and *Medildin* began their preparations.
>
> Throughout the years the men worked on the regalia the dancers would use. They stuffed the heads of unusually marked white deerskins which gave the dance its name. These carefully prepared, decorated deerskins were considered tribal property. The dancers held them in trust. Although a child could inherit dance regalia, no individual could buy or sell the skins. Because the White Deerskin Dance revolved around *Takimildin* and the sacred house, the spiritual leader of *Takimildin* began the preparations for the dance each year. Then each district set up three of the six camps which would be used during the ten-day dance. Women prepared baskets of salmon and acorn soup and venison for the feasts. Dancers checked their costumes and rehearsed their steps. Peacemakers worked to settle any unresolved feuds, since the dance could not begin as long as conflict, dissension, or bad feeling remained in the valley. Those who had called the dance had to make a payment to any family in which there had been a death during the year. Holding a dance without this settlement would have offered an insult to the family's grief. Only when all of these things had been done could the dance begin.
>
> The dancers met at *Takimildin*, and all of the people went by canoes to *Xowunkut*, the first dance place. There the spiritual leaders prepared the

> dance grounds, the women organized the feast, and the dancers dressed and painted themselves. When all was ready, dancers from one of the two districts took their places. At the center of the line stood the singer. He wore a headband of painted buckskin decorated with strips of wolf hair, and an open twine net which reached to his shoulders. On either side of him, the dancers who carried the deerskins formed a line. They wore headbands, but no nets. When the singer began, the dancers moved back and forth. Two dancers, who wore headdresses of sea lion tusks with closely twined nets which hung to their waists, carried red or black obsidian blades. Starting at opposite ends, they danced back and forth in front of the line of men holding the deerskins. When the dancers from the first district had completed a set, dancers from the other district took their places. The dance went on in this way through the afternoon.
>
> After an evening of feasting and celebration, the people moved downriver to *Tsemeta*, just below the mouth of Hostler Creek, for the next dance. They danced, feasted, and played games there. Then came the Boat Dance. Dancing in four large dugout canoes, the dancers drifted downriver toward Meskut. Near the village the four canoes came toward the bank together and then backed out into the river ten times, then paddled forward and back before they landed. Then the people went to the dance grounds for the Mock Dance. This dance received its name because the dancers performed it like the regular dance, but substituted funny or improper things for those usually done. They might, for example, carry ordinary rocks in place of the rare obsidian blades. After dancing at *Meskut*, the people moved to *Tceindeqotdin* and *Tselundin* to repeat the dances and feasts. At *Tceindeqotdin* they enjoyed a day of rest, gambled and played games. Then they walked to the next dance site at the end of the valley beneath Bald Hill. For the last dances of the ceremony, they moved to *Noltukalai*, the place "among the oak tops" on Bald Hill. There, the legends say, the immortals watched the people of the valley dance with the precious white deerskins and the sacred obsidian blades.

Bugenig, 5 NICS App. at 38-41.

The Hoopa Tribal Council, after a significant public comment and approval process, adopted laws designed to protect these sacred sites.

> In September 1994, the Hoopa Valley Tribe notified all land owners within that portion of the reservation known as Bald Hill of a proposal which would, among other things, establish a buffer zone of one-half mile around the tribe's sacred White Deerskin Dance area and trail. . . .
>
> The harvest management plan included as one of its goals, to "*protect cultural and religious resources within the proposed sale area*." . . .
>
> Among the issues was listed the following:
>
> 5. Buffer for Deerskin Dance Trail:
>
> > — A one-half mile no-action buffer on either side of the trail and surrounding the site is proposed for any projects initiated by this process. Public input as to the adequacy of buffer is requested.
> >
> > — Timber harvest may be proposed on fee land within the trial buffer. Can the Council regulate harvest on fee land to protect

cultural sites? Forestry will consult with the BIA regarding this potentially precedence-setting action.

In addition to notifying all tribal allottees, the non-tribal owners of six parcels of fee land within the Bald Hill area, including the Gould Family Trust, were mailed a copy of the project proposal and request for public involvement, which was captioned as follows:

> BALD HILL LANDOWNERS: This letter outlines proposed timber harvest activities that could affect you or your property. Please review and contact Tribal Forestry or your Council Representative if you have any questions or comments.

. . . Coincident with the notice and public hearings being conducted, the Hoopa Valley Tribe prepared an archaeological evaluation of the proposed timber harvest area and enlisted the participation of the Bureau of Indian Affairs in initiating a consultation with the State of California under Section 106 of the National Historic Preservation Act. The BIA letter stated in part:

> The results of [the] studies documented the presence of two archaeological/cultural sites in the APE that are evaluated as potentially eligible for inclusion on the National Register of Historic Places. The site of the White Deerskin Dance Grounds and trail is considered very significant to the tribe.

The letter further stated:

> As you can see from the enclosed AE document, the Hoopa Valley Tribe has prepared a plan to restrict any logging activities in the vicinity to the White Deerskin Dance Ground and associated trail that should avoid all impacts to the area, with the exception of minor visual impacts to the surrounding setting. The tribe will provide a one-half mile buffer around the site for logging activity avoidance and will also restrict logging traffic in the area during the actual dance activities.

On January 28, 1995, following extensive consultations with tribal leaders involved in tribal ceremonial dances, two public hearings and other public discussions in open tribal council meetings, the Hoopa Valley Tribal Council adopted a modified timber harvest plan for FY-95 that included the following listed mitigation measures:

> CULTURAL 1) A ONE-HALF MILE BUFFER AROUND THE WHITE DANCE GROUND ON BALD HILL AND THE TRAIL LEADING TO IT WILL BE MAPPED AND ADHERED TO IN ALL ACTIVITIES ASSOCIATED WITH THE 1995 BALD HILL TIMBER SALE. NO TIMBER HARVEST UNITS OR OTHER TIMBER SALE-RELATED ACTIVITY (EXCEPT LOG TRUCKS AND OTHER VEHICLES PASSING THROUGH BUFFER ZONE ON MAIN ROADS) WILL BE LOCATED WITHIN THE BUFFER ZONE. THIS PROHIBITION OF ACTIVITIES WILL APPLY TO TRIBAL TRUST LAND, TRUST ALLOTMENTS, AND FEE LAND WITHIN THE ½ MILE BUFFER.
>
> CULTURAL 2) ON THE FRIDAY AND SATURDAY* WHEN THE WHITE DEERSKIN DANCE IS HELD ON BALD HILL, LOG HAULING FROM THE BALD HILL 1995 TIMBER SALE WILL CEASE, TO MINIMIZE DISTURBANCE TO THE DANCERS AND THOSE ATTENDING THE DANCE.
>
> *Actual dates will be determined by Dance Leaders.

> The Hoopa Valley Tribal Council gave notice of this action to all Bald Hill land owners both by letter and by publication in a local newspaper on January 25 and February 1, 1995.

Bugenig, 5 NICS App. at 42-44.

The court applied federal law in finding tribal authority to create the buffer zones:

> Both Appellant Bugenig and Respondent Hoopa Valley Tribe correctly point to the United States Supreme Court decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) as providing the legal standards by which the facts of this dispute must be measured. The court below relied upon the *Brendale* clarification of the so-called *Montana* exceptions in concluding that jurisdiction over the logging activities conducted on Appellant Bugenig's fee land was properly the subject of tribal jurisdiction. . . .
>
> In *Brendale*, the Court . . . held that the Yakima Tribe possessed zoning authority over the Brendale property. The similarities between the Brendale property, located in an area of the Yakima Indian Reservation that remains 97 percent tribally controlled, and where "the tribe has preserved the power to define the essential character of that area" (*Brendale* at 3013) and the Bugenig land, located on a reservation that remains nearly 99 percent tribal and within an area of paramount spiritual importance to the Hupa people draws our attention.
>
> In developing a standard of comparison for determining the right of a fee landholder to develop his parcel "without regard to an otherwise common scheme" (*Brendale* at 3014), Justice Stevens asked, "More simply, the question is whether the owners of the small part of fee land may bring a pig into the parlor." He went on to state:
>
> > [T]he fact that a very small proportion of the closed area is owned in fee does not deprive the tribe of the right to ensure that this area maintains its unadulterated character. This is particularly so in a case such as this in which the zoning rule at issue is neutrally applied, is necessary to protect the welfare of the tribe, and does not interfere with any significant state or county interest. (*Brendale* at 3015.)
>
> At trial, the court found that "[b]y conducting logging activities not in compliance with tribal law, the defendant acted in contravention of tribal law, threatening and physically disturbing the integrity and sacred status of the White Deerskin Dance area and Trial [sic]." The court also found that the activity "threatened the health and welfare of the tribe and the Hoopa Valley People's customs and traditions. (Decision and Order at page 10.)
>
> The court further stated, "The Hoopa Valley Tribe has the power and authority to define areas of sacred significance and through establishment of the buffer no-cut zone in the Bald Hill area, has exercised that power. . . ."
>
> Our attention is drawn to the footnote accompanying the case law cited by the Supreme Court in support of the second *Montana* exception, wherein the Court stated:
>
> > As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservation livable. *Arizona v. California*, 373 U.S. 546, 599 (1963).

> Given that logic, it would seem to follow that a timber harvest regulation, neutrally applied, the purpose and effect of which is to preserve the sanctity of the Hoopa Tribe's most sacred spiritual location for the present and future use of tribal members would be a right retained by the Hupa people to ensure that their reservation remained livable. Or as Justice White would have it, the Hoopa Valley Tribe has neither relinquished nor abrogated, in the fact of Appellant Bugenig's effort to "bring a pig into the parlor" to the White Deerskin Dance Ground, its inherent sovereign authority "to ensure that this area maintains its unadulterated character." (*Brendale* at 3015.)

Bugenig, 5 NICS App. at 46, 48-49.

Roberta Bugenig challenged the jurisdiction of the Hoopa Valley Tribe in federal court, but the Tribe prevailed in an important *en banc* opinion by the Ninth Circuit Court of Appeals. *See Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 927 (2002). The court's reasoning was not that the Tribe had satisfied the *Montana* Test, but that Congress in ratifying the Hoopa Valley Tribe's Constitution in the Hoopa-Yurok Settlement Act effectively delegated federal authority to the Tribe to regulate non-Indians within the Hoopa Square.

3. JURISDICTION OVER OFF-RESERVATION TRIBAL LANDS

Niagara Aerospace Museum v. Seneca Niagara Falls Gaming Corp.

Seneca Nation of Indians Court of Appeals, No. 0179-05-01 (April 13, 2007)

Before Irma L. Cooper, Presiding Judge; Luana Jimerson; and Irene Warrior*
Per Curiam

I. Procedural History and Relevant Facts

. . . On July 19, 2005, Appellee Seneca Niagara Falls Gaming Corporation (hereinafter "Seneca") brought suit in the Peacemakers' Court, Cattaraugus Reservation, against Appellant Niagara Aerospace Museum (hereinafter "Aerospace"), seeking to evict Aerospace from the Seneca Office Building located in Niagara Falls, New York.

It appears that Seneca owns the building in fee simple. Seneca had purchased the office building using funds appropriated for the reacquisition of lost Seneca lands in accordance with the Seneca Land Claims Settlement Act of 1990, 25 U.S.C. §1774f(c). Aerospace held a lease entitled it to occupy the first three floors of the office building. . . .

On the merits, the Peacemakers' Court found that a valid lease agreement exists between Seneca and Aerospace, that Aerospace violated the lease agreement, and granted Seneca's petition to evict Aerospace from the premises. . . .

II. Jurisdiction

As always, this Court must consider first whether the courts of the Seneca Nation have jurisdiction over this matter. *See* Const. of the Seneca Nation of

* *Disclosure:* The author of this book participated in the case as a consultant to the Seneca Court of Appeals.

Indians of 1848 (hereinafter "Seneca Constitution") §IV, ¶6; Judiciary Act §4.1; Civil Procedure Rules §§2-101–2-108. We conclude for the reasons below that Seneca courts do have jurisdiction to resolve this dispute.

The Peacemakers' Court held that it had jurisdiction over the dispute because the land had been purchased using Seneca land claims settlement funds and, in addition, because:

> [T]his land was subsequently accorded restricted fee status by operation of law, which means that it is Indian country, held in the same legal manner as previously existing Nation lands, such as the Cattaraugus, Allegheny and Oil Springs Indian Reservations of the Seneca Nation of Indians, and thus is subject to the jurisdiction of the Seneca Nation.

[Lower court opinion] at 3 (citing February 5, 2004 Internal Memorandum of the United States Dept. of Interior and November 12, 2002 Letter from United States Secretary of Interior Gayle A. Norton to then–Seneca Nation [p]resident Cyrus Schindler).

Seneca Nation courts have expansive jurisdiction and must decide matters "arising under th[e] Constitution, the customs or laws of the Nation, and to any case in which the Nation, a member of the Nation or any person or corporate entity residing on, organized on, or doing business on any of the Reservations shall be a party." Seneca Const. §4, ¶6. In promulgating the rules of civil procedure for Seneca courts, the Seneca Nation of Indians Tribal Council explained that Seneca courts are courts of "general jurisdiction." Civil Procedure Rules §2-101. Seneca courts have jurisdiction over persons and property of Seneca members and Seneca corporations and the persons and property of those nonmembers and non-residents engaged in disputes with Seneca members and corporations. *See id.* ("The Peacemakers Courts of the Seneca Nation of Indians shall have . . . jurisdiction . . . over all persons including corporation(s) . . . over all property . . . of members and non-members in dispute, and causes of action arising between persons including corporations . . . , and disputes and causes of action between non-resident and Tribal members. . . .").

The territorial jurisdiction of Seneca courts includes the persons and property at issue in this dispute. Section 2-103(a) provides, "The jurisdiction of the Seneca [courts] as exercised in these rules of civil procedure shall extend to all lands now within the Seneca Nation of Indians Reservations or *which may hereinafter be added thereto* . . ." (emphasis added). Of critical import is the next subsection: "To the extent not prohibited by federal and state law the jurisdiction of the Seneca Nation of Indians and its Peacemaker[s] Courts shall extend beyond the territorial limitation set forth [in subsection (a)] to effectuate the jurisdictional provisions [of sections 2-104–2-108]" (emphasis added). Finally, section 2-104(b)(3) provides for personal jurisdiction in a case like this one:

> (b) . . . [T]he Peacemaker Courts shall have civil jurisdiction over the following persons . . . :
>
> . . .
>
> (3) Any person who owns, uses or possesses *any property* with the Nation for any civil cause of action . . . arising from such ownership, use or possession. ([E]mphasis added.)

What is clear from these provisions is that the Seneca Constitution and the Seneca Civil Procedure Rules authorize Seneca courts to take jurisdiction in these matters. For our purposes, the jurisdiction of the Seneca Nation's courts is limited only by express prohibitions of federal and state law. *See* CIVIL PROCEDURE RULES §2-103(b). Absent an express federal or state prohibition, this Court must hold that the jurisdiction of Seneca courts expands beyond the boundaries of Seneca Reservations and may include territories owned by the Nation in fee simple located outside of the federally-recognized boundaries of the Nation's Reservations.

Aerospace nonetheless argues that this Court has no *territorial* jurisdiction over this matter.[1] . . . Aerospace's arguments rest in large part on federal Indian law. In particular, Aerospace insists that only the Secretary of Interior can issue a finding or determination that off-reservation Seneca-owned fee lands are "reservation" lands for purposes of determining the jurisdiction of Seneca courts. . . .

Aerospace is mistaken about both the plain language of this Court's rules and about federal Indian law. In this instance, we must determine Seneca court jurisdiction not in accordance with federal Indian law, but in accordance with Seneca law. *See generally* SENECA CONST. §IV, ¶6. One oft-misunderstood tenet of federal Indian law is that federally-recognized limitations on tribal jurisdiction apply only in federal courts. *Cf. Johnson v. M'Intosh*, 21 U.S. 543, 593 (1823) (noting that a sale of land by an Indian to a non-Indian might not be enforceable in American courts, but it would be enforceable under tribal law). Aerospace insists that the Secretary of Interior has not declared that the Seneca Office Building property enjoys "Reservation" status, . . . but the question of whether the federal government recognizes "Reservation" status is fundamentally irrelevant to our query.

Seneca rules require this Court only to review federal and state law (and Seneca law) to determine if there is an express prohibition on the exercise of tribal court jurisdiction in this kind of matter. Aerospace proffers no such federal or state prohibition and we find none as well. Seneca court rules are clear that this Court must interpret the extent of Seneca court jurisdiction liberally in order to effectuate the purposes of the Constitution and the court rules. *See* CIVIL PROCEDURE RULES §2-103(b). To accept Aerospace's argument would be to accept a limitation on Seneca court jurisdiction that is not mandated by either Seneca or foreign law. We decline this day to accept Aerospace's invitation to recognize illusory limitations on Seneca court jurisdiction. . . .

NOTE

1. The *Niagara Aerospace Museum* court did not delve into the question of whether federal law foreclosed the tribal court's jurisdiction over the non-tribal citizen leaseholders. But other courts must engage in that analysis. In *Smith v. Eckhart*, 2000.NACT.000006 (Crow Court of Appeals 2000), the court examined its jurisdiction over a boundary dispute between two

1. A careful review of the arguments advanced by Aerospace indicates that Aerospace does not contest the personal or subject matter jurisdiction of Seneca courts. . . .

trust allotments and in which the United States technically owned the land in trust:

> Crow Tribal Code [s]ection 3-2-204 confers jurisdiction to determine ownership rights and other interests in real property "limited only by federal law."
>
> In this case, the Tribal fencing ordinance provides another source of jurisdiction under Tribal law. Section X of Ordinance No. 1, adopted by Tribal Resolution No. 75-22 (April 12, 1975), provides:
>
> > Jurisdiction is hereby conferred upon the Crow Tribal court, also known as the Court of Indian Offenses, and with the assistance of the Department of Interior through the Federal Courts, to adjudicate all disputs [sic] arising hereunder with the authority to apply any applicable federal law or regulation, any Tribal custom or law, or any applicable law of the state.
>
> . . . Thus, both specific grants of jurisdiction refer to limitations of federal law, or assistance by the Federal Courts. These references, and the federal courts' jurisdiction to adjudicate interests in Indian allotments under 25 U.S.C. §345 and 28 U.S.C. §1353, raise a question of whether Tribal Court jurisdiction is pre-empted by, or concurrent with, that of the Federal courts.
>
> We first reviewed a similar question in *Warren v. Gardner*, Civ. App. Dkt. No. 95-095 (Aug. 21, 1997), 1997 CROW 1, which involved a dispute over payment for an appraisal of Crow trust land. In *Warren*, this court held that a contract to appraise trust land did not directly or indirectly affect title to the land, and therefore was not subject to any exclusive federal-court jurisdiction which may exist to adjudicate interests in Indian allotments. *Id.* at ¶¶17-18.
>
> Later, in *Lande v. Schwend*, Civ. App. Dkt. No. 92-30 (Mar. 4, 1999), 1999 CROW 1, this court sustained the Tribal Court's jurisdiction of a dispute involving payment for and tortious interference with a competent lease on Crow trust land. We distinguished the cases barring Tribal courts from ordering federal officials to take certain actions. We also reviewed conflicting authority from the Eighth Circuit on Tribal Courts' jurisdiction to divide trust land in a divorce, or to recognize an easement across trust lands. *Id.*, ¶¶37-38 and 41. Our holding in *Lande* was based on the lack of controlling federal statutory or decisional law to the contrary, the importance of trust land to Tribal sovereignty, *see United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992), and the special provisions of the Crow Allotment Act allowing Crows to lease their own trust land without BIA approval. *Id.* at ¶¶42-43.
>
> Before determining jurisdiction in the present case, it is important to understand the scope of the Tribal Court's judgment. This case was not brought as a "quiet title action," *i.e.*, to forever establish the legal boundary between the two allotments against all claimants. Although the Crow Tribal Code does not prescribe a special form for quiet title actions, such a complaint filed under State law would need to name all known owners of the property as defendants, along with "all other persons, unknown, claiming or who might claim any right . . . adverse to Plaintiff's ownership[.]" *See* MONT. CODE ANN. §70-28-104.
>
> In the present case, the Complaint only sought to enjoin the person who lived on Allotment 1821 from interfering with the fence construction, and the Plaintiffs never made any attempt to serve process on all the other owners. The judgment on its face only binds the four named Defendants. As further explained below, other persons who own an interest in Allotment 1821 could still bring a new case to challenge the location of the boundary

line if they can show that the Tribal Court's judgment and the BLM survey were erroneous. Thus, the Tribal Court's judgment in this case came close, but did not permanently adjudicate title to trust land.

Smith, at ¶¶18-25.

4. JURISDICTION OVER FEE LAND WITHIN RESERVATION BORDERS

Atkinson v. Beveridge

Fort Peck Court of Appeals, No. 328, 2 Am. Tribal Law 197, 2000.NAFP.0000007 (May 16, 2000)

The opinion of the court was delivered by: Gary P. Sullivan, Chief Justice

[The lower court granted an order restraining Robera Boyd Beveridge from blocking Rose and Denver Atkinson from crossing the Beveridge parcels to reach the Atkinson parcel.]

Brief Factual History and Procedural Overview

Appellant Roberta Boyd Beveridge (Roberta), a Tribal member, owns parcels 9, 10, and 11, Township 27 North, Range 51 East, M.P.M., Roosevelt County, MT, all of which is fee patented land lying within the exterior boundaries of the Fort Peck Reservation. Adjacent to Roberta's land is several acres that have accreted over the years. On or about June 28, 1999, she requested that the Fort Peck Tribes Executive Board grant her an easement over Tribal Lands in order that she might care for her livestock and otherwise maintain her property. On June 28, 1999, the Fort Peck Tribes granted the appellant the easement requested, conditioned upon her agreement to allow public access over her fee patented land.

At some point following the issuance of the easement by the Fort Peck Tribes, Roberta constructed a fence across her property, effectively denying access to anyone attempting to use the access road by vehicle. Roberta states that by constructing this fence she was not denying public access over her land, but rather, she was simply restricting such access to pedestrian traffic. She contended that vehicles entering onto her property became a nuisance too great to bear and that such vehicular traffic disturbed her quiet enjoyment of the property.

Rose and Denver Atkinson own property adjacent to Roberta's parcels and the land which has accreted. Roberta's fence effectively blocks Rose and Denver's vehicular ingress and egress from their property. . . .

Discussion

. . . Roberta contends that, "although the Tribal Court has personal jurisdiction, it lacks subject matter jurisdiction regarding the resolution of the ownership right of land accreting to (Roberta's) fee patent property." She goes on to assert that Rose and Denver's claim "involves the use and ownership rights of land owned by (Roberta) in fee patent status as well as land accreting thereto."

To support her position, Roberta cites *Woodtick v. Crosby*, 544 P.2d 812, a 1976 Montana Supreme Court case, which in turn, cites two United States Supreme Court cases, *Dickson v. Luck Land Co.* (1917) 242 U.S. 371; 37 S. Ct. 167 and *Larkin v. Pough* (1928) 276 U.S. 431; 48 S. Ct. 366. None of these cases involved Tribal Court jurisdiction, nor do they purport to confer general jurisdiction to State Courts regarding fee patented land within Indian Country.

In *Woodtick*, the plaintiff, a member of the Crow Tribe, petitioned a Montana District Court to cancel a deed given to defendant, alleging that by this deed the defendant became the non-Indian owner of more acreage of land within the Crow Indian Reservation than permitted under the provisions of the Crow Allotment Act and, therefore, pursuant to the explicit language of that Act, the deed was void. The District Court dismissed plaintiff's case stating that it lacked subject matter jurisdiction. The Montana Supreme Court acknowledged that Montana state courts "have jurisdiction over (fee patented land lying within the boundaries of an Indian reservation) only to the extent granted by Congress." The Woodtick court, in reversing the dismissal, went on to hold that Montana law ruled in that case because Congress has explicitly said that it does, citing the language of 25 U.S.C. 349, ". . . when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal of the State. . . ."

The obvious import of §349, as stated by the Ninth Circuit[,]

> is to define the status of the individual Indians in their relation to the state. Having been released from tutelage, the Indians are thereafter to be regarded as members of the community with the privileges and duties incident to citizenship. *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 [(1942).]

There is nothing in the language of §349 that would even remotely suggest that the U.S. Congress was granting exclusive jurisdiction to State courts over matters involving fee patented land lying within the exterior boundaries of an Indian reservation. If Congress had intended to grant exclusive jurisdiction in such matters, it could have easily done so. In fact, Congress has granted limited jurisdiction to the States regarding Indian country. [The court notes 25 U.S.C. §1322, a provision in which Congress did extend state court jurisdiction into Indian Country.]

. . . As shown by §1322, Congress' grant of jurisdiction to the States "over civil (matters) between Indians or to which Indians are parties" within the exterior boundaries of an Indian reservation, comes only with the consent of "the tribe occupying the particular Indian country. . . ." We have no knowledge of the Fort Peck Tribes giving their consent to the State of Montana pursuant to this statute. Additionally, the grant of jurisdiction pursuant to §1322 requires action on the part of the State and Montana has accepted very limited jurisdiction as evidenced by M.C.A. 2-1-301 *et seq*.

Roberta states that she plans on filing a quiet title action in the near future regarding her property and her rights thereto and the adjudication of those issues may necessarily involve trust restricted lands. She goes on to state that her quiet title action would lie only in federal court. This is true because "state court would lack jurisdiction to adjudicate the disposition of Indian trust lands and the Tribal court would lack jurisdiction to adjudicate issues involving the

fee patent property." In view of §1322(b) we agree that jurisdiction could not lie in State court. . . .

CONCUR: Gary M. Beaudry Associate Justice, Carroll J. DeCoteau Associate Justice

NOTE

In *McLeod v. Dupuis*, 4 Am. Tribal Law 103 (Confederated Salish and Kootenai Tribes Court of Appeals 2003), the court held in accordance with tribal statute that it had jurisdiction over a landlord-tenant dispute on fee lands within the Flathead Indian Reservation:

> The Tribal Trial Court did not err in exercising jurisdiction over this proceeding. Article I, Territory, of the Confederated Salish and Kootenai Tribes Constitution provides that the Tribes' jurisdiction "shall extend to the territory within the original confines of the Flathead Reservation as defined in the Treaty of July 16, 1855" as well as to other lands not relevant to this proceeding. Section 2-1-104, Civil Jurisdiction, CSKT Laws Codified provides in relevant part: . . .
>
> > (2) To the fullest extent possible, not inconsistent with federal law, the Tribes may exercise their civil, regulatory, and adjudicatory powers. To the fullest extent possible, not inconsistent with federal law, the Tribal Court may exercise subject matter and personal jurisdiction. The jurisdiction over all persons of the Tribal Court may extend to and include, but not by way of limitation, the following:
> >
> > (a) All persons found within the Reservation.
> >
> > (b) All persons subject to the jurisdiction of the Tribal Court and involved directly or indirectly in: . . .
> >
> > (ii) The ownership, use or possession of any property, or interest therein, situated within the Reservation;
> >
> > (iii) The entering into of any type of contract within the Reservation or wherein any aspect of any contract is performed within the Reservation.
>
> Thus, under this governing law, the Tribal Trial Court had both personal and subject matter jurisdiction over this proceeding. At the time the lawsuit was filed, both parties resided on the reservation. As indicated above, the leased property is located within the exterior boundaries of the reservation. The dispute arises from the lease of that property and concerns the use of the property.

McLeod, 4 Am. Tribal Law at 105.