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by

Presenter: Russell A. Brien

Presenter's Title: Partner

Presenter's Office: Stinson Morrison Hecker LLP

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JURISDICTION IN INDIAN COUNTRY

Russell A. Brien
Stinson Morrison Hecker LLP
2600 Grand Avenue
Kansas City, Missouri 64108
rbrien@stinsonmoheck.com

The lawyer representing a local government in a transaction or dispute with an Indian tribe must have a clear understanding of the framework governing jurisdiction in Indian Country. This paper discusses some of the basic principles underlying that jurisdictional framework.

General Considerations

The first step in any analysis of Indian Country jurisdiction is to determine whether Indian Country is involved. There are three types of areas which constitute "Indian Country". First, Indian Country includes "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." 18 U.S.C. § 1151(a)[1]. A reservation is "any tract of land that, being a part of the public domain, is lawfully set aside as an Indian reservation." Donnelly v. United States, 228 U.S. 243 (1913).

Next, "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state" are part of Indian Country. 18 U.S.C. §1151(b). Dependent Indian communities are those areas that are neither reservations nor

[1] There is one exception to this general statement. Fee-patented lands in non-Indian communities or rights-of-way through Indian reservations are not included in the term "Indian Country" for purposes of federal liquor statutes.. 18 U.S.C. §§ 1154 and 1156.

allotments, that have have been set aside by the Federal Government for the use of Indians as Indian land, and that are under federal superintendance. Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998).

Finally, Indian Country includes "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. §1151(c). Indian title refers to the right of occupancy retained by Indians and Indian tribes with respect to their ancestral homelands, which right can be extinguished only by the federal government either by purchase or by conquest. Johnson v. McIntosh, 21 U.S. 543 (1823).

In 1832, the Supreme Court made clear that if a transaction or dispute involves Indian Country, a state and its political subdivisions will only have jurisdiction under certain limited circumstances. Worcester v Georgia, 31 U.S. 515 (1832). In Worcester, , Georgia convicted a Vermont missionary for, among other things, residing among the Cherokee without a license to do so from the governor of Georgia. The Supreme Court noted that Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." Id. at 557. Then, discussing the Commerce Clause[2] and the Treaty Clause[3] of the Constitution, the Court found that these provisions gave Congress complete authority to regulate Indian affairs. Id. at 559. The Court then held that the laws of Georgia had no force within the Cherokee nation, except with the assent of the Cherokees, or in

[2] "The Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes..." U.S. Const. Art. I, Sec. 8, Cl. 3.
[3] U.S. Const. Art. II, Sec. 2, cl. 2.

conformity with treaties and the acts of Congress. Id. at 561. As a result, the Court reversed the conviction of Worcester.

Criminal Jurisdiction

The narrow grounds for Indian Country criminal jurisdiction of states and their political subdivisions have been expanded since the Worcester decision. In order to understand this expansion, it is helpful to review the Indian Country criminal jurisdiction of the tribes and of the federal government.

Indian Tribes have jurisdiction to enforce their criminal laws against tribal members. United States v. Wheeler, 435 U.S. 313 (1978). This is the case whether the victim is an Indian or a non-Indian and in "victimless" crimes. Although the Supreme Court has held that Tribes do not have criminal jurisdiction over Indians that are not tribal members, Duro v. Reina, 495 U.S. 676 (1990), Congress has expressly authorized tribes to extend criminal jurisdiction over nonmember Indians. 25 U.S.C § 1301(2) and (4). Indian tribes clearly do not have criminal jurisdiction to prosecute non-Indians absent affirmative delegation of such power by Congress. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

The United States has extensive criminal jurisdiction in Indian Country. Under the Major Crimes Act, the United States has criminal jurisdiction over any Indian who commits, among other things, murder, manslaughter, kidnapping, maiming, incest, certain assaults, arson, burglary and robbery against the person or property of another Indian or any other person. 18 U.S.C. §1153(a). This statute was passed in response to a decision of the Supreme Court that the United States did not have jurisdiction over a murder committed in Indian Country by one tribal member against another tribal member. Ex parte Crow Dog, 109 U.S. 556 (1883).

In addition, under the General Crimes Act (sometimes described as the Federal Enclave Act or the Indian Country Crimes Act), the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States (i.e., federal enclaves), except the District of Columbia, are deemed to extend to Indian Country. 18 U.S.C. §1152. This jurisdiction includes crimes incorporated into the federal criminal code pursuant to the Assimilative Crimes Act, 18 U.S.C. §13. Duro v, Reina, 495 U.S. 676, 680 n.1 (1990). However, jurisdiction under the General Crimes Act does not extend to offenses committed by one Indian against the person or property of another Indian, to Indians committing an offense in Indian Country who has been punished by the local law of the tribe, or to any case where exclusive jurisdiction is retained by a tribe pursuant to treaty. Id.

Under the Major Crimes Act, the United States has jurisdiction over certain crimes committed in Indian Country by Indians against Indians or non-Indians. Under both the Major Crimes Act and the General Crimes Act, the United States has jurisdiction over many crimes committed in Indian Country by Indians against non-Indians. The United States generally has sole criminal jurisdiction of crimes committed in Indian Country by non-Indians against Indians pursuant to the General Crimes Act. With respect to victimless crimes committed by Indians, the Supreme Court has held that such crimes are in the nature of crimes by an Indian committed against an Indian so that the exception to federal jurisdiction in the General Crimes Act applies. United States v. Quiver, 241 U.S. 602 (1916). But see United States v. Thunder Hawk, 127 F.3d 705 (8th Cir. 1997) (finding jurisdiction under the General Crimes Act because the offense of

driving under the influence of alcohol was not against the person or property of another Indian).

In this general scheme, crimes committed by non-Indians against non-Indians in Indian Country are subject to the sole criminal jurisdiction of the States, at least where no exception to jurisdiction is contained in a treaty with a tribe. United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896). This jurisdiction likely extends to victimless crimes committed by non-Indians as well. See State v. Warner, 379 P.2d 66 (N.M. 1963);

In addition to this, in some states the preceding analysis has been altered by an act of Congress. In 1953, Public Law 83-280[4] ("P.L. 280") was enacted. Under P.L. 280, the United States ceded to California, Minnesota, Nebraska, Oregon and Wisconsin, with some limited exceptions, complete, mandatory criminal jurisdiction over acts committed in Indian Country. Alaska was added as a sixth mandatory state in 1958. P.L. 280 also authorized each other state to assume similar jurisdiction at their option. Ten states[5] have opted to assume at least partial criminal jurisdiction over Indian Country within their boundaries.

In 1968, P.L. 280 was amended in two important ways. First, no "option state" can assume jurisdiction without consent of an affected tribe. Second, states that acquired jurisdiction under P.L. 280 are permitted to "retrocede" some or all of this jurisdiction with the consent of the United States. Nebraska, Washington, Minnesota, Wisconsin and Oregon have retroceded portions of their P.L. 280 criminal jurisdiction.

[4] 18 U.S.C §1162, 28 U.S.C. §1360.
[5] Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington.

In addition to P.L. 280, attorneys representing political subdivisions in the states of Iowa, Kansas, Maine, New York and Oklahoma should be aware that Congress has passed legislation affecting criminal jurisdiction over Indian Country in each of those states.

Civil Jurisdiction

As with criminal jurisdiction, civil jurisdiction in Indian Country has evolved from the general rule of Worcester. Generally, with discrete exceptions, the federal government does not exercise civil jurisdiction with respect to Indian Country affairs.

Tribes still retain civil jurisdiction over tribal members, absent express Congressional intent to the contrary. Fisher v. District Court, 424 U.S. 382 (1976); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Tribes also retain civil jurisdiction to regulate activities, even of non-members, occurring on trust lands and significantly involving the tribe or its members unless divested by federal law or by implication of the tribe's dependent status with respect to the United States. Washington v. Confederated Tribes, 447 U.S. 134 (1980). In addition, tribes may exercise civil jurisdiction to regulate the activities of non-members on non-Indian fee lands either (1) where the non-members enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements, or (2) where conduct of the non-members on non-Indian fee lands when that conduct threatens or has some direct effect on the political integrity, economic security or health or welfare of the tribe. Montana v. United States, 450 U.S. 544 (1981) (hunting and fishing activities of non-members on non-Indian fee lands did not occur pursuant to necessary consensual relationship and such activities did not threaten the tribe's political or economic security enough to justify tribal regulation, state regulations applied); Brendale v. Confederated Yakima Indian Nation,

492 U.S. 408 (1989) (land use activities on non-member on non-member fee property within large area of non-member fee property not subject to tribal zoning regulations, county zoning regulations applied); Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001) (imposition of tribal hotel occupancy tax with respect to hotel located on non-member fee land not permitted).

With respect to State civil jurisdiction, the general rule of Worcester has been replaced with the parallel tests of preemption and infringement. State civil regulation over activities in Indian Country will be preempted if Congress has occupied the field. Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965) (state imposed tax upon gross sales of federally licensed trader in Indian Country preempted due to comprehensive federal regulation of Indian traders on reservations). In addition, absent an act of Congress, state jurisdiction may not be exercised in such a manner as to infringe upon the right of reservation Indians to make their own laws and be ruled by them. Williams V. Lee, 358 U.S. 217 (1959).(tribal courts, not state courts, had jurisdiction to hear claim of non-member federally licensed trader against tribal members for amounts due on credit). But see Bryan v. Itasca County, 426 U.S. 373 (1976) (P.L. 280 does not contain a broad grant of civil jurisdiction to states, but does permit courts of affected states to resolve private legal disputes between reservation Indians, and between Indians and other private citizens).

Conclusion

In Indian Country, states and their political subdivisions generally have limited civil and criminal jurisdiction. Unless there is specific federal legislation ceding criminal jurisdiction, such as pursuant to P.L. 280, states only have criminal jurisdiction in Indian Country with respect to crimes committed by non-Indians against non-Indians. In the

civil context, absent applicable federal legislation, the exercise of civil jurisdiction by states and their politicl subdivisions will be prohibited where Congress has preempted the field or where such exercise of jurisdiction infringes upon the right of reservation Indians to make their own laws and be ruled by them.