VOLUME NO. 37 OPINION NO. 28

WORKER'S COMPENSATION ACT - Applicability on Indian Reservations; INDIANS - Applicability of Worker's Compensation Act on Indian Reservations; REVISED CODES OF MONTANA, 1947 - Section 83-801.

HELD: The Montana Worker's Compensation Statutes do not apply to Indian businesses being conducted within an Indian reservation.

25 May 1977

John P. Moore, Esq.
Glacier County Attorney
Glacier County Courthouse
Cut Bank, Montana 59427

Dear Mr. Moore:

You have requested my opinion on the following question:

> Is the Montana Worker's Compensation Act applicable to Indian ranch operations conducted by Blackfeet Indians on the Blackfeet Indian Reservation?

Because of the importance and legal complexity of this question, an extended analysis of the legal issues is necessary.

Perhaps the most frequently cited opinion on state jurisdiction over Indian affairs is _Williams_ v. _Lee_, 358 U.S. 217 (1959). In that case a non-Indian merchant operating on the Navajo Reservation sued an Indian in state court to collect a debt incurred on the reservation. In rejecting the state court's jurisdiction to hear the action, the Court observed that while the broad principles of _Worcester_ v. _Georgia_, 6 U.S. 515 (1832) have been modified over the years where "essential tribal relations" were not involved, the basic principle of the opinion has remained (358 U.S. at 219). The Court then laid down the test (_Id_.):

> Essentially, _absent governing Acts of Congress_, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. (Emphasis added.)

Though the court was persuaded by the argument that allowing the state jurisdiction would undermine tribal court authority (358 U.S. at 223), it gave significant consideration to federal preemption of the regulation of Indian affairs. The court noted that Arizona has not acted under "Public Law 280" (67 Stat. 588) to accept jurisdiction over the reservation (358 U.S. at 221-223).

Since _Williams_, lower courts have often seized upon the "test" quoted above, and have determined questions of state jurisdiction primarily upon the issue of whether the

exercise of the particular jurisdiction in question infringed on the Indians' right to "make their own laws and be ruled by them." (See, e.g., Iron Bear v. District Court, 162 Mont.335 (1973), special concurrance by Mr. Justice Haswell at 346.) Whatever confusion exists resulted from the Williams Court's failure to indicate whether Public Law 280 was a "governing act of Congress" so as to obviate application of the test of infringement upon the right to reservation self-government.

The Court clarified this situation in Kennerly v. District Court, 400 U.S. 423 (1971), which involved a debt action in Montana State Court against an Indian defendant on a debt incurred within the Blackfoot Reservation. While the state relied upon a tribal council resolution giving state courts concurrent jurisdiction of civil actions on the reservation to meet the Williams infringement test (400 U.S. at 425), the Court found that test inapplicable since there was a "governing Act of Congress" in the form of Public Law 280 (400 U.S. at 427).

Congress enacted Public Law 280 (67 Stat. 589; See 28 U.S.C. sections 1360) to provide a means for states to assume jurisdiction over Indian reservations. Some states were given direct grants of jurisdiction over the reservations within their borders. Montana, however, was among the group of states which had to act in order to assume that jurisdiction. Section 6 of the Act gave federal consent to any state, where necessary, to amend its federally imposed constitutional or statutory impediments to assumption of civil or criminal jurisdiction over Indian reservations. Section 7 gave similar consent to any other state without such impediments to assume jurisdiction upon enactment of "affirmative legislation" obligating and binding the state. Even though Montana's Enabling Act (section 4) and its 1889 Constitution (Ordinance 1, second paragraph) contain clear language disclaiming all right and title to Indian lands and recognizing that Indian lands remain under the "absolute jurisdiction and control" of Congress, the state's position in years past has been to deny the need for constitutional amendment and rely instead upon section 7 of Public Law 280. See State ex rel McDonald v District Court, 159 Mont. 156 (1972); sections 83-801 et seq., R.C.M. 1947. In 1968, Congress enacted Title IV of the Civil Rights Act of 1968 which is now the "governing Act of Congress" under Kennerly with regard to all other jurisdictional disputes.

Kennerly addressed the procedures necessary for state acquisition of jurisdiction, and adopted a strict construction. Pre-1968 law required the State to undertake "affirmative

legislative action" at the very least, but the state did not do so with regard to the Blackfoot reservation (400 U.S. at 425). Further, the tribe must consent to the action through a tribal referendum and not simply through action by the tribal council (400 U.S. at 429). Thus, there is apparently no room for an argument of "substantial compliance."[1]

Refinements to both Williams and Kennerly came two years later in McClannahan v. Arizona Tax Commission, 411 U.S. 164 (1973), wherein the Court struck down Arizona's application of its income tax to an Indian whose income was earned solely from reservation sources. The Court was careful to preface the opinion with the caution that it did not apply to Indians without a reservation and tribal government (see Organized Village of Kake v. Egan, 369 U.S. 45 (1962)), or non-Indian activity on the reservation, or to Indian activity outside the reservation (411 U.S. at 167-68; see Mescalero Apache Tribe v. Jones, 411 U.S. 145).

Like the prior cases, McClannahan reaffirmed the basic Indian freedom from state control established by Worcester, (411 U.S. at 168), but disclaimed static and rigid notions of tribal sovereignty, which have been adjusted to account for the state's legitimate interests in regulating non-Indians on the reservation (411 U.S. at 171, citing Williams). Indian sovereignty is the backdrop against which applicable statutes and treaties must be read, but the trend in resolution of state jurisdictional questions is away from sovereignty and toward reliance upon federal preemption (411 U.S. at 171-72).

The McClanahan Court concluded that Congress has consistently acted upon the assumption that the state had no jurisdiction over the Navajo Reservation, citing the disclaimer provisions of Arizona's Enabling Act, which are identical to Montana's (411 U.S. at 175-76). The Court

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[1] As to the original Public Law 280 requirements, Kennerly did not directly address the issue of whether Montana must comply with Section 6 thereof, which requires the state to remove constitutional impediments to the exercise of jurisdiction over reservations, as discussed supra. Kennerly simply stated that prior to 1968 assumption of jurisdiction was governed by section 7. I submit that since this does not exclude the applicability of section 6 also, and since Montana in the Kennerly situation had taken no action in either regard, the question was not settled. See State ex rel McDonald v. District Court, supra. (1973).

then, albeit in a footnote (411 U.S. at 176, n. 15), distinguished the holding in Organized Village of Kake v. Egan, supra, wherein it was held that "absolute" federal jurisdiction as referred to in the Enabling Acts does not mean "exclusive" federal jurisdiction. This rule, which had been heavily relied upon by the states asserting jurisdiction, applies, under Mcclanahan, only to non-reservation Indians and does not purport to apply to a functioning reservation situation.

As to the Williams non-infringement test, the Court held that it applies "principally" to situations involving non-Indians, and allows the state to protect its interest to the point of affecting tribal self-government (411 U.S. at 179). The Court clearly concluded, however, that the Congressionally-provided method for acquisition of jurisdiction (25 U.S.C sections 1321-1326) cannot be ignored simply because tribal self-government is not infringed (411 U.S. at 180).

In the subsequent opinion in U.S. v. Mazurie, 419 U.S. 544 (1975) the Court further refined the preemptive federal control over reservation affairs to include transactions on non-Indian lands located therein (419 U.S. at 555-56). The Court relied upon Congessional power to "regulate Commerce... with the Indian Tribes" (U.S. Constitution, Art.I, section 8) to uphold the definition of "Indian country" in 18 U.S.C. section 1151, which includes all land within a reservation notwithstanding the issuance of "any patent" to land and including all rights of way. Accordingly, the Court found that Congress' power to regulate alcoholic beverages on the reservation could be delegated to the tribe, which possesses "a certain degree of independent authority over matters that affect the internal and social relations of tribal life." (419 U.S. at 557.) The Court was not persuaded by the argument that the persons affected were non-Indians who thus could not become tribal members or participate in tribal decision-making. According to the Court (419 U.S. at 558), relying upon Williams, that distinction is "immaterial" since the Court and Congress has "consistently guarded the authority of Indian governments over their reservations... If this power is to be taken away from them, it is for Congress to do it."

Two recent opinions from the Court dealing with state jurisdiction have arisen in Montana. In Fisher v. District Court, 424 U.S. 382 (1976), the Court reversed a Montana Supreme Court holding that the state had jurisdiction over an adoption proceeding in which all parties were tribal members and reservation residents. The Court noted that in state-tribal conflicts in litigation between Indians and non-Indians, absent a governing act of Congress, the

Williams infringement test applies. Litigation involving only Indians must "at least" meet this standard, and the Court found that state jurisdiction would in fact infringe upon the Northern Cheyenne Tribal Court. The adoption, the Court held, is within the exclusive jurisdiction of the Tribal Court. While it remains to be seen whether this holding will be interpreted as a reservation and broadened application of Williams, it should be noted that the Court recognized that Williams applies to situations involving non-Indians, and further that Montana had not acted to assume jurisdiction under Public Law 280 or Title IV of the Civil Rights Act of 1968.

In Moe v. Confederated Salish and Kootenai Tribes, 44 U.S. L.W. 4535 (1976), the Court concluded that Montana may not impose a property tax on motor vehicles owned by tribal members living on a reservation, or a vendor license fee applied to a reservation Indian conducting business for the tribe on reservation land, or a sales tax as applied to on-reservation sales by Indians to Indians. In so doing, the Court made several noteworthy holdings. First, it was not swayed by the state's argument that McClanahan was distinguishable on its facts because the Navajo reservation in that case was a much more closed, non-integrated community than the Flathead reservation in Montana. The Court was more impressed with the fact that the Salish and Kootenai Tribes, like the Navajo, had not abandoned their "tribal organization."

Second, the Court laid to rest the effect of section 6 of the General Allotment Act (25 U.S.C., section 349), which provides that upon the issuance of a fee patent to a reservation Indian, he "shall have the benefit of and be subject to the laws, both civil and criminal, of the state or Territory" in which he resides. While the broad reach of this language has largely been ignored by the Courts, Moe held, in effect, that the "many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands" have sub silentio repealed section 6. Otherwise, the Court observed relying upon Seymour v. Superintendent, 368 U.S. 351 (1962), a totally impractical result would be realized in which state jurisdiction would depend upon who owns the individual tract of land upon which the transaction occurred. In the criminal area, such a "checkerboard" approach would make it necessary to search tract books to determine jurisdiction for each offense.

Perhaps the most important recent decision bearing upon the present question is Bryan v. Itasca County, 44 U.S.L.W. 4832 (1976). In Bryan the Court held that Public Law 280's

Congressional grant to Minnesota of civil jurisdiction over an Indian reservation did not confer jurisdiction to impose a personal property tax on a reservation Indian. In contention was the scope of the state's admitted statutory jurisdiction over civil causes of action, and its power to apply its "civil laws...that are of general application to private persons of private property." The Court reviewed the legislative history of Public Law 280 and found "an absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations." The Court concluded, therefore, that taxation and other regulatory controls were prohibited under Public Law 280. A state apparently has civil jurisdiction thereunder only to provide a forum to adjudicate civil causes of action between Indians or to which Indians are parties. Montana, of course, has not assumed civil jurisdiction over any reservation pursuant to Public Law 280.

II.

Against this backdrop of the ruling Supreme Court law, we must consider several of the more recent applicable decisions in Montana. An interesting starting point is State ex rel. McDonald v. District Court, 159 Mont. 156 (1972), which involves Public Law 280 jurisdiction, and the language in Montana's enabling act. The ultimate question in McDonald was whether the state had jurisdiction to try the defendant, an enrolled tribal member, for crimes committed on the reservation. The Court held, in effect, that Montana's disclaimer language, was not an impediment to state jurisdiction since Congress could act to repeal Public Law 280 at any time. Thus, the Court reasoned, the Indian lands remained under "absolute" federal jurisdiction, and no amendment to Montana's constitution or statutes was necessary. Since the Flathead reservation was the only one to which the state extended criminal jurisdiction under Public Law 280 (section 81-803, R.C.M. 1947), the Court found sufficient jurisdiction. We must not, however, lose sight of what McDonald does and does not hold. Like Kennerly, it concerns the procedures necessary to acquire jurisdiction under Public Law 280. McDonald does not concern any broader questions of state jurisdiction, and indeed assumes implicitly that the state was required to comply with Public Law 280 in order to have jurisdiction.[2]

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2. The Court did make a single gratuitous comment that the State had exercised criminal jurisdiction on the reservation "for years." This was not, however, an apparent factor in the decison.

McDonald does not establish State jurisdiction in the question under consideration since Montana has not acted under Public Law 280 or the successor statutes to assume any civil jurisdiction over Indian Affairs.

Two cases decided the same year emphasize the narrowness of McDonald. In Crow Tribe v. Deernose, 158 Mont. 125 (1972) the Court held that the state had no jurisdiction over a foreclosure action involving Indian trust land. Citing the disclaimer in the Enabling Act and the fact that the state had not acted to assume jurisdiction under the Congressional grants, the Court concluded (158 Mont. at 31):

> It is abundantly clear that the state court jurisdiction in Indian affairs on reservations does not exist in the absence of an express statutory grant of such jurisdiction by Congress together with strict compliance with the provisions of such statutory grant.

In Blackwolf v. District Court, 158 Mont. 523 (1972), a juvenile delinquency proceeding "transferred" by the tribal court to the state court, the Supreme Court agreed (158 Mont at 527) with petitioner's contention that the case was governed as to jurisdiction solely by Public Law 280 and 25 U.S.C. sections 1321-1326. The Court broadly held (158 Mont. at 525-26):

> At this point we emphasize that all matters concerning the exercise of jurisdiction by State courts over enrolled Indian citizens who reside within the exterior boundaries of an Indian reservation are controlled solely by federal law, as to acts or transactions within the exterior boundaries of the reservation.

The Court's reponse to the state's policy argument is applicable to the present question (158 Mont. at 527-28):

> The State's argument as it concerns the withholding or conferring of social benefits due our Indian citizens by the State of Montana is sound and well taken as a social principle. Yet, this argument overlooks the basic fact that this Court is totally without authority to implement legislative changes as to the federal laws that govern. Once the Indian citizens comply with the mandatory procedures enacted by Congress and approved by the United States Supreme Court, Montana can and will join in the solution of these problems.

In an unusual opinion decided on year later, Iron Bear v. District Court, 162 Mont. 335 (1973), the Court held that the state had jurisdiction over the divorce of two tribal members who were reservation residents. The Court resurrected the Williams test, even though only Indians were involved; held that Public Law 280 and the successor statutes did not apply because they did not affect "residual" state jurisdiction in effect prior to 1953; and held that the disclaimer language from the Enabling Act applies only to a proprietary interest in Indian lands and is not a disclaimer of governmental control. The Court concluded with a three-part test (162 Mont. at 346) which must be met prior to a Court's assumption of jurisdiction. It must be determined:

1. Whether applicable federal treaties and statutes have pre-empted state jurisdiction;

2. Whether state jurisdiction would interfere with tribal self-government; and

3. Whether the tribal court exercises or has exercised jurisdiction so as to preempt State jurisdiction.

Mr. Justice Haswell's thoughtful concurring opinion argues that the majority's "continued indiscriminate application" of Williams to all Indian jurisdictional cases is a mistake which will result in more reversals by the U.S. Supreme Court, such as Kennerly. The controlling consideration, he further asserted, was that Congress had not preempted the field of divorce, that such power remains in the tribe, and that it had been ceeded to the state prior to 1953.

As to the Williams issue, Mr. Justice Haswell is correct in noting that it has no application to situations involving only Indians, as the Montana Court has subsequently recognized. (See Bad Horse v. Bad Horse, 163 Mont. 445 (1974), cert. denied, 419 U.S. 847.) The residual jurisdiction argument was disposed of in Fisher, supra, wherein it was held that residual state jurisdiction, if any existed, had been preempted by subsequent federal legislation. The credibility of the Montana Court's argument on the Enabling Act language is not as easy to determine, although it has been criticized at length. See Goldberg, "Public Law 280; The Limits of State Jurisdiction Over Reservation Indians," 22 U.S.L.A.L. Rev. 535, 567-575 (1975). Goldberg argues that the legislative history of Public Law 280 demonstrates that Congress considered the disclaimers a federal insula-

tion against state jurisdiction, rather than a mere disclaimer of proprietary interest in Indian lands. This is bolstered by the proviso to section 6 of the Act which states:

> That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Although many western states have adopted a position like that in Iron Bear, (See Goldberg, 22 U.S.L.A. L.Rev. at 570, n.159), the Kennerly and McClanahan decisions, supra, make this argument difficult to sustain. In Kennerly the issue was not proprietary control over lands, but State jurisdiction over a debt action. Similarly, in McClanahan the issue was imposition of the state income tax. Both Montana in the former case and Arizona in the latter have disclaimers, which, the Court found, required compliance with Public Law 280. It is submitted that even in absence of the disclaimers, the federal preemption theory now relied upon by U.S. Supreme Court would mandate compliance with Public Law 280. McClanahan, supra, 411 U.S. at 172, 180.

In conclusion, it is clear that the Supreme Court has held that Congress has effectively preempted the question of a state's assumption of civil jurisdiction over Indians on an Indian reservation. Kennerly, McClanahan and Bryan make it clear that Public Law 280 and Title IV of the Civil Rights Act of 1968 are "governing acts of Congress" with which the state must comply prior to assumption of such jurisdiction. It is further evident from Bryan that even if such jurisdiction were assumed by statute, it would not extend state regulatory laws to the reservation.

THEREFORE, IT IS MY OPINION:

> The Montana Worker's Compensation statutes do not apply to Indian businesses being conducted within an Indian reservation.

Very truly yours,

MIKE GREELY
Attorney General