

*LAND USE REGULATION
ON
RESERVATION FEE LANDS:*

WHERE DO WE GO FROM HERE?

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Jurisdiction in Indian Country is complicated and often disputed. Jurisdictional issues arise in both the criminal and civil realms. In this paper, regulatory land use jurisdiction on fee lands within the boundaries of an Indian reservation is discussed. The reader should keep in mind that criminal and civil jurisdiction are not co-extensive. In addition, what is meant by 'civil jurisdiction' depends upon what type of activity is involved. Accordingly, it is important to be concise with terminology when dealing with questions of jurisdiction in Indian Country.

Regulatory land use jurisdiction in Indian Country has been the subject of various court decisions. The Ninth Circuit has recently clarified the jurisdictional picture in regard to fee simple lands owned by tribal members on an Indian reservation. In *Gobin/Madison v. Snohomish County*, 304 F.3d 909 (2002), cert. denied, 123 S. Ct. 1488 (2003), the Ninth Circuit held that the Indian tribe has exclusive land use jurisdiction over fee lands owned by tribal members on an Indian reservation except in exceptional circumstances. To understand the implications of this decision and the posture of other jurisdictional issues, some basics of civil jurisdiction in Indian Country should be kept in mind.

Civil Jurisdiction in Indian Country

'Indian Country' is a term of art defined in 18 U.S.C. § 1151.

Indian Country is:

All land within the limits of any Indian reservation, under the jurisdiction of the United States, (notwithstanding the issuance of any patent), and, including rights-of-way running through the reservation.

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.

All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Federally recognized Indian reservations are Indian Country under the statute. Civil jurisdiction within the boundaries of the reservation involves three sovereign entities: the U.S., the tribe, and the state or its political subdivisions acting for the state. Jurisdiction may be exclusive to a sovereign entity, or jurisdiction may be concurrent between two or more of the sovereign entities. Jurisdiction varies depending on the type of land involved and the owner of the land.

On an Indian reservation, there are three categories of land: *trust*, *restricted fee*, and *fee simple*.

Trust land is land which the United States has legal title as trustee. The United States owns that land for the benefit of (or in trust for) either an Indian tribe or individual Native American(s). Only Indian tribes and Native Americans can have land placed in trust. Once in trust, the land can come out of trust if it is conveyed to someone who is not eligible for trust status. Trust land can exist both inside and outside the boundaries of an Indian reservation. There is a process by which land is taken into trust administered by the Bureau of Indian Affairs (BIA). State and local governments are given the opportunity to comment and object to land being taken into trust. The weight which will be given to the concerns of local government varies depending on whether the land to be taken into trust is located within the boundaries of an Indian reservation or outside of a reservation. Because the land is legally owned by the United States, the Supremacy Clause exempts this type of property from regulatory jurisdiction by states or their subdivisions. In short, there is no state or local government land use regulation on trust land. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975).

Restricted fee land is land owned by an individual Native American or an Indian tribe which has a restriction on alienation, requiring the consent of the U.S. government (the Secretary of the Interior) before the land can be sold or alienated. Because of the restriction on alienation held by the United States, restricted fee land is treated in the same manner as trust property. Accordingly, state regulatory land use regulation is prohibited.

Fee simple land is owned outright without a restriction on alienation. Fee lands do exist on Indian reservations and are often owned by individuals or entities who are not members of the Indian tribe. The question as to

regulatory jurisdiction on fee lands owned by non-tribal members was considered by the United States Supreme Court in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). *Brendale* is a fractured decision without a majority ascribing to any one opinion, a majority existed only as to result. However, *Brendale* does establish the proposition that fee land owned by a non-tribal member in an “open” area of a reservation is subject to state regulatory authority. An “open” area is one in which members of the general public have access, as distinct from a “closed” area where only tribal members may have access. Although regulatory authority is vested in the state on fee lands in these open areas, depending on the circumstances, there may also be concurrent jurisdiction with the Indian tribe.

Gobin/Madison v. Snohomish County

The *Gobin* decision is the first appellate authority to address the issue of regulatory land use jurisdiction over fee lands owned by tribal members within the exterior boundaries of an Indian reservation. The land involved was an original part of the Tulalip Indian Reservation. Pursuant to federal legislation adopted after the establishment of the Reservation, land within the Reservation was allotted to various individuals who were members of the tribe. These parcels of land were subject to restrictions on alienation, and thus were restricted fee. The individual land in the case was allowed to be sold to non-Indians in 1948. This converted the land to fee simple. Gobin purchased the land in 1998.

Kim Gobin is a member of the Tulalip Tribes. In conjunction with her brother, Guy Madison, who is also a tribal member, they decided to do a development and build houses which would be sold on the open market, some in all likelihood to non-tribal members. The project was conceived as a commercial enterprise. The Tulalip Tribes have a comprehensive zoning ordinance. Gobin submitted her proposed development to the Tulalip Tribes’ land use process. Snohomish County and the Tulalip Tribes have an established process where each notifies the other of any proposed developments in the Reservation area. Upon receiving notification of the proposed development, Snohomish County wrote a letter and took the position that because the land was owned in fee simple, it fell under County jurisdiction. Gobin/Madison never made an application to Snohomish County for the project. Snohomish County took no further action. The Tulalip Tribes approved the development.

However, because of the County's position that it fell within County jurisdiction, Gobin/Madison claimed that they could not obtain financing for their development. Accordingly, they filed a declaratory judgment in the U.S. District Court for the Western District of Washington against the County to declare that the Tulalip Tribes had exclusive land use jurisdiction over the project. The Tulalip Tribes intervened as a plaintiff. In defending, the County sought a declaration that it had at least concurrent jurisdiction over the fee lands in question. The District Court ruled in favor of the plaintiffs. The County appealed. The United States filed an amicus brief on behalf of the plaintiffs and the Tulalip Tribes.

Legal Theories in the *Gobin* Case

Gobin is not a Public Law 280 case. PL 280 (18 U.S.C. § 1162, 25 U.S.C. § 1321-26, 25 U.S.C. § 1360) is a federal statute in which criminal and civil jurisdiction was given by the federal government to the states. Under the Act, some states were simply handed the jurisdiction. Other states, including Washington, had to accept the jurisdiction. Washington did so in a unique and complicated assumption of criminal and civil jurisdiction which is codified in Chapter 37.12 RCW. The jurisdiction assumed by the State of Washington is relevant particularly for criminal jurisdiction. However, the civil jurisdiction assumed by the State is limited. It basically applies to the civil jurisdiction of courts. It does not mean regulatory civil jurisdiction, such as land use regulations.

Accordingly, the legal theories advanced by Snohomish County did not rely upon PL 280. Rather, they were based upon two other recognized doctrines of regulatory jurisdiction: express congressional authorization and "exceptional circumstances".

Express Congressional Authorization

Under the Constitution, Congress has plenary power in regard to Indian affairs. If Congress has expressly authorized a state to exercise jurisdiction, it may do so. The argument advanced was that Congress expressly authorized state regulatory jurisdiction by making reservation land freely alienable, encumberable, and taxable under the General Allotment Act (25 U.S.C. § 331 et seq.). The GAA was an Act that allocated various lands to individual Indians and it also provided the mechanism whereby those

restrictions as to “taxation, alienation, and incumbrance” could be removed from the land.

When the issue arose as to whether fee lands on Indian reservations owned by tribal members were subject to taxation, the United States Supreme Court held that by making the land freely alienable under the GAA, there was express congressional authorization for these lands to be subject to ad valorem property taxes which are in rem, but not excise taxes which are in personam. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 253 (1992). Arguing by analogy to the *Yakima County* case, Snohomish County argued that Congress expressly authorized state regulatory jurisdiction when it made the lands freely alienable and subject to incumbrance.¹ Accordingly, the County argued Congress authorized “in rem” land use regulations over those lands.

The Ninth Circuit refused to extend the reasoning contained in the *County of Yakima*. It stated:

In this case, the County seeks an unprecedented extension of *County of Yakima*. It contends that Congress expressly authorized plenary state in rem land use regulation when it made Indian fee lands freely alienable. We disagree. Congress’s decision to make Indian fee lands freely alienable is not an express authorization or otherwise an ‘unmistakably clear’ indication that the County may enforce its in rem land use regulations over those lands.

In its ruling, the Ninth Circuit looked more to the nature of a land use regulation than its legal genesis. In *County of Yakima*, the Supreme Court held that property taxes could be levied on fee lands, but the Washington real estate excise tax was impermissible because that was taxing the activity of Indians, not the land itself. In *Gobin*, the Ninth Circuit held that the County’s land use regulations “resembled the excise tax”, more than regular property taxes.

¹ Interestingly, the reason why trust land is exempt from state land use regulation under the *Santa Rosa* decision is that a land use regulation was considered impermissible “incumbrance” on land owned by the United States.

Exceptional Circumstances

In “exceptional circumstances”, a state may assert jurisdiction over the on-reservation activities of tribal members notwithstanding the lack of express congressional intent to do so. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)). The asserted exceptional circumstances are weighed against traditional notions of Indian sovereignty and the Congressional goal of encouraging tribal self-determination, self-sufficiency, and economic development. *Id.* at 216.

In *Gobin*, the County argued that it had an array of interests: protecting endangered species, regulating County-maintained roads and storm sewers, providing a continuum of land use enforcement for all fee lands, complying with applicable health and safety codes, complying with its NPDES permit and the Clean Water Act, and the administrative burden imposed by constantly shifting jurisdiction based upon the status of the owner including fraudulent conveyance for the purpose of avoiding jurisdiction and compliance. The Ninth Circuit recognized all of these as “important County interests”. However, it did not find them “exceptional” or that they outweighed the Tribes’ interest in self-determination. It further restricted the test in holding that the County must “explain why these interests are exceptional for Reservation fee lands, given the County’s inability to regulate Reservation lands held in trust”.

The *Gobin* decision still leaves the “exceptional circumstances” doctrine alive, but perhaps in name only. If public health and safety (the basis of police powers) and fraud do not overcome tribal sovereignty, what does? It will take further refinement in the case law to determine whether or not the “exceptional circumstances doctrine” as a practical matter still survives.

Unanswered Questions

Although the *Gobin* decision answers one question, it leaves several others unresolved. Among the open questions are the following:

1. Who has jurisdiction when the land is owned by a tribal member in conjunction with a non-tribal member? This is

particularly relevant in Washington, where the doctrine of community property law would give a non-Indian spouse a property interest in fee simple lands.

2. Who has jurisdiction when the land is owned by an Indian corporation? Indian tribes have the right to create corporations. tribal membership is limited to individuals. Are Indian corporations tribal members or not?
3. How do you have meaningful enforcement when jurisdictions can be deprived of jurisdiction by simply transferring property back and forth between tribal and non-tribal members?
4. Will the decision be limited to fee lands on established reservations? Who has jurisdiction over fee properties owned by an Indian tribe that does not have a reservation?

Practical Considerations

Now that it has been established that regulatory land use jurisdiction does not apply to fee lands owned by tribal members on a reservation, local governments risk § 1983 liability if they assert land use control. Accordingly, if there is a reservation located in your County and a proposed project is located in the reservation area, it is suggested that the applicant be required to sign a statement that he or she is not a member of the tribe.

Counties would be prudent to map reservation lands, documenting what parcels are held in trust and fee simple lands owned by tribal members. These maps should be updated on a regular basis. Counties should seek cooperation with the tribe and the BIA in this effort.

Conclusion

Sorting out jurisdiction in Indian Country is an ongoing process. While some questions have been answered, others await future decisions. Until such time as jurisdictional issues are fully resolved, jurisdictions that have reservations and areas which might be considered Indian Country are advised to proceed cautiously and be aware of the jurisdictional complexities involved.