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Inside this Issue

. IMPORTANT CASE LAW AS TO TRIBAL PROPERTY

The *Firehouse Lawyer* has seldom included an article about the jurisdictional and other legal issues relating to Native American/Tribal property. However, on recent occasions we have had a reason to study some of the leading (and recent) cases of the U.S. Supreme Court pertaining to Tribal law. We think that the case of *Oklahoma v. Castro-Huerta,* 597 U.S. ____, 2022 WL 2334307, 2022 US LEXIS 3222 (2022) is a very significant precedent, even though some might see it as an over-reaction to *McGirt v. Oklahoma,* 140 S.Ct. 2452, 207 L.Ed. 2d (2020) in which the Court held that all of the eastern part of the State of Oklahoma remained within the Creek reservation.

Although both *McGirt and Castro-Huerta* arose in the context of criminal prosecutions, we think the latter case may have applicability in civil matters, due to the Court majority's discussion of the principle that Tribal country is part of a state and is not entirely separate from the state, despite the law's recognition of the sovereignty of a Tribe. In an opinion authored by Justice Kavanaugh, in *Castro-Huerta* the Court held that unless federal law preempts state law, "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country." Four other conservative justices agreed with Judge Kavanaugh: Justices Roberts, Thomas, Alito, and the newest justice—Amy Coney Barrett.

Let's briefly review the facts presented in *Castro-Huerta,* which involved a crime

committed by a non-Indian on an Indian victim, within the boundaries of the Creek reservation, as those boundaries were clarified in the 2020 decision of the Court in *McGirt.* On appeal of his conviction, Castro-Huerta argued that the federal government had exclusive jurisdiction to prosecute him for such a crime, and therefore the state of Oklahoma had no jurisdiction to prosecute him in the first instance. The Court in this case disagreed.

The majority decided that ever since the "leading" case of *United States v. McBratney,* 104 U.S. 621 (1882), the Court held that States have jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country. The jurisdiction is concurrent. The Court here considered essentially two questions: (1) Does federal law preempt state authority? And (2) Do principles of tribal self-government preclude the exercise of such state authority?

But what we find most interesting about the *Castro-Huerta* decision is the use of the balancing test embodied in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980). The Court said it used the balancing test to "consider tribal interests, federal interests, and state interests."

Bracker was a case involving the State of Arizona's attempt to impose taxes upon a logging operation that occurred entirely within the reservation of the White Mountain Apache Tribe—the Fort Apache Reservation in northeastern Arizona. In this 1980, 6-3 decision of the Court, the majority held that the state law taxes were preempted by federal law, mainly because there was comprehensive regulation and supervision by federal agencies and employees over the business of timber harvesting. The interests of the state (primarily in producing revenue through taxes) were deemed to be clearly subordinate to the federal interests in this case.

The *Bracker* Court made important pronouncements as to the balancing of the interests when the context is civil and not criminal, and especially if the facts relate to the regulatory authority of a state when dealing with Indian country. We think the Court in *Castro-Huerta* was spot on by recognizing the importance of the analytical thinking set out in *Bracker*, so we are going to take the unusual step in this newsletter of sharing a long quotation from Justice Thurgood Marshall's majority opinion in *Bracker:*

> "'Although [g]eneralizations on this subject have become treacherous,' …*Mescalero Apache Tribe v. Jones,* 411 U.S. 145, … 148 (1973), our decisions establish several basic principles with respect to the boundaries between state regulatory authority and tribal self-government. Long ago, the Court departed from Mr.Chief Justice Marshall's view that 'the laws of [a state] can have no force' within reservation boundaries, *Worcester v. Georgia,* 6 Pet. 515, 31 U.S. 561 (1832). [Footnote 9] *See Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 481-483 (1976);…[citing other cases]. At the same time, we have recognized that the Indian tribes retain 'attributes of sovereignty over both their members and their territory.' [citing cases] As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as 'an *anomalous one and,*

> *of complex character,' for, despite their partial assimilation into American culture ,the tribes have retained a* 'semi-independent position…, not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or the state within whose limits they resided.' *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 173 (1973), quoting *United States v. Kagama,* 118 U.S. 375, 381-382 (1886)."

Thus, after eschewing any rigid rule to use to analyze whether a particular state law was applicable in Indian country, the *Bracker* Court held that federal law preempted the state tax laws of Arizona.

We feel, however, that under the reasoning of the *Bracker* Court, and applying a sort of balancing test sanctioned by the high Court in the *Castro-Huerta* case, there might be certain tendencies based upon the facts relevant to the dispute. Clearly, if there is explicit or implicit preemption by any federal statute, a state statute would have to give way to that superior authority. Moreover, we believe that a state *regulatory* law purporting to regulate activities or conduct by Indians within Indian country (within a reservation or upon trust land) might have to give way and allow tribal sovereignty to hold sway.

But what about state statutes that only incidentally impact Tribes or their commercial activities? For example, what about a statute that provides for a special purpose district to establish its boundaries or to withdraw territory from its boundaries? Does a special purpose district have the power and authority under state statute or statutes to withdraw a reservation from its boundaries? Is there any federal interest or inherent sovereign power in a tribe to override such a state statute or to preempt it? We think not, but suggest that the *Bracker* balancing test would have to be applied to the facts of the particular case. In other words, only by weighing and balancing the federal, state, and/or local interests could the question be answered. No rigid rule or bright line of the law seems to apply here. The interests of the state, local and federal governments would have to be analyzed, and the sovereignty of the Tribe as described in Justice Thurgood Marshall's *Bracker* decision would have to be considered.

No discussion of these leading U.S. Supreme Court cases seems complete without some consideration of the statements by Justice Gorsuch, who wrote the majority opinion in *McGirt* in 2020, but then a blistering dissent in *Castro-Huerta* last year. Clearly, Justice Gorsuch has a high degree of sympathy or empathy for the plight of Native American tribes in the United States. After all, his *McGirt* majority opinion starts out like this: "On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever." 140 S.Ct..at 2459.

Now, then, let us compare that with his strongly worded dissent in *Castro-Huerta* two years later in 2022. In that lengthy dissent, in which Justice Gorsuch was joined by liberal Justices Breyer, Sotomayor and Kagan, he claimed that the majority misread the history of

Supreme Court precedents amassed over the last 150 or so years. In essence, in his dissent Justice Gorsuch seemed to say that treaty Tribes have a sovereign power that is absolute upon their tribal lands unless preempted by a federal statute. He stressed that such tribes are not simply private organizations. They are sovereign nations with special powers and privileges. Probably recognizing the inconsistency of his opinion with that of the Court in *Bracker*, Justice Gorsuch argued that the case did not justify "balancing away" tribal sovereignty in favor of state criminal jurisdiction. We suggest that he might be right in the context of criminal cases arising due to crimes arising on tribal lands, i.e. within reservation boundaries, especially if a Native American is either the victim or the perpetrator. But in the context of civil litigation or disputes arising in a commercial or business context, we find the *Bracker* approach to be persuasive and appropriate.

Every time I reread the *Bracker* majority opinion penned by Justice Thurgood Marshall, I am struck by the balanced (and yet historical) approach of this wise jurist. Unlike Justice Gorsuch, he seemed to recognize that *Worcester v. Georgia* is not representative of the entire picture of the law in this field as of the 21st century. Maybe in 1832 it was true that "the laws of a state can have no force within reservation boundaries." But the last 150 years of Supreme Court jurisprudence cannot be ignored and the 20th Century Justice Marshall knew that.

TAX INCREMENT FINANCING UPDATE

We have written about tax increment financing and tax increment areas (TIAs) somewhat this year. We continue to get questions about actual city proposals (in both Eastern and Western Washington) to utilize this type of financing for public works projects, followed by diversion of the taxes received upon the incremental increase in assessed value to the city, as opposed to any other taxing district, over the term of the TIA.

The State Department of Revenue has issued some guidance to assist cities and others in interpreting and implementing these statutes by creating TIAs. Unfortunately, we feel that some cities are misinterpreting the guidance to make it look like special purpose districts or other taxing districts will actually receive some tax revenue in addition to the small base value tax upon the property before it is developed. The confusion seems to stem from a misunderstanding as to how "new construction" or other increases in value are handled under the tax laws and the TIA law—RCW 39.114.050.

The reality is, as we understand the workings of the TIA law, that the increased value of land (the increment value) will generate an incremental increase in taxes, but all of that increased tax revenue must first go to the city to reimburse the city for its outlay of funds (regardless of whether bond financing is used or other revenue sources) during the term of the TIA. Only later—when the TIA if fully paid off—will the remaining taxing districts receive any of the benefit of the increased valuation, to any significant degree. And that is why mitigation is warranted. *See* RCW 39.114.020 (5).