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Indian Law

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INTRODUCTION

A number of significant cases in the field of Indian law were decided during the *Survey* year by the New Mexico federal district court and by the Tenth Circuit Court of Appeals on appeal from the district court. Four of the cases reviewed here involved the perennial conflict over jurisdiction within Indian reservations between the state, on the one hand, and the tribes and federal government on the other. The Tenth Circuit upheld the jurisdiction of state courts to adjudicate Indian water rights[1] and the state's power to impose its gross receipts tax on contractors engaged in construction on Indian lands.[2] Conversely, the court of appeals held state game and fish laws to be inapplicable within Indian reservations[3] and enjoined enforcement of a writ of garnishment issued by a state magistrate court against wages earned by an Indian on a reservation.[4] In another jurisdictional case, the Tenth Circuit upheld the power of a tribe to impose a severance tax on oil and gas producers on its reservation.[5]

Two district court decisions are discussed. In *Jicarilla Apache Tribe v. Supron Energy Corp.*,[6] the tribe alleged both antitrust and common law lease violations by oil and gas lessees on its lands, but the lessees prevailed on most issues. In *Jicarilla Apache Tribe v. United States*,[7] the tribe successfully sued the Secretary of the Interior to prevent storage of water from the San Juan-Chama Project in Elephant Butte Reservoir, alleging that diversion of the water adversely affected a tribal fishery on the Navajo River.[8]

In the final case reviewed in this article,[9] the Tenth Circuit held

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1. Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979).
2. Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. 1980).
3. Mescalero Apache Tribe v. New Mexico, 630 F.2d 724 (1980).
4. Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980).
5. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir.), *cert. granted*, 49 U.S.L.W. 3208 (No. 80-11, Oct. 7, 1980).
6. 479 F. Supp. 536 (D.N.M. 1979).
7. No. 75-742-P (D.N.M., filed May 8, 1980).
8. *Id.* This water was committed by contract to the City of Albuquerque.
9. United States v. Pino, 606 F.2d 908 (10th Cir. 1979).

that any state law crime may be the basis of a lesser included offense committed by an Indian on an Indian reservation based upon an interpretation of the United States Code.[10]

I. STATE JURISDICTION–WATER RIGHTS

Jicarilla Apache Tribe v. United States.[11] In this case the Tenth Circuit affirmed the district court's dismissal of an action brought by the tribe to adjudicate all water rights on the Navajo River in northern New Mexico.[12] In 1975, the New Mexico State Engineer had filed an action in state court in San Juan County to adjudicate water rights on the San Juan River[13] and the Jicarilla Tribe subsequently filed this case in federal district court. The tribe argued that the rights to the Navajo River could be adjudicated separately in federal proceeding because that river is physically a separate part of the San Juan system. The United States also was joined as a defendant in the tribe's action.[14]

The tribe asserted that its federal court suit was not foreclosed by the pendency of an adjudication in state court covering the same geographic area because the state court had no jurisdiction over the water rights of the three Indian tribes. The district court, however, held that the state courts had such jurisdiction under the McCarran Amendment,[15] and that the state court suit excluded an exercise of concurrent jurisdiction over a part of the San Juan system by a federal court.

While this case was pending on appeal, the Supreme Court held that the McCarren Amendment did authorize the adjudication of In-

10. 18 U.S.C. § 13 (1976).

11. 601 F.2d 1116 (10th Cir.), *cert. denied,* 444 U.S. 995 (1979).

12. The Navajo River is a tributary of the San Juan; it begins in the mountains of southern Colorado, flows for a short distance through New Mexico, mostly on lands of the Jicarilla Apache Reservation, then reenters Colorado and joins the San Juan. The San Juan in turn flows through northwestern New Mexico and ultimately joins the Colorado River in Utah.

13. The state case sought adjudication of all New Mexico rights on the San Juan including those of three Indian tribes: Navajo, Ute Mountain Ute, and Jicarilla Apache. The United States was joined in the action as a defendant both on its own behalf and as trustee on behalf of the three Indian tribes. Efforts by the United States to remove the case to federal court or to have the case dismissed on grounds that the state court did not have jurisdiction to determine the water rights of Indian tribes were unsuccessful. Reynolds v. United States, No. 75-184 (San Juan Cty. Dist. Ct., N.M., filed _____, 1975).

14. In addition to its request for a general adjudication of water rights on the Navajo River, the tribe also asked for declaratory and injunctive relief against the Secretary of the Interior to prevent diversions of water from the Navajo River through the San Juan-Chama Project in excess of amounts which could be beneficially used by parties in the Rio Grande Basin. This aspect of the case was remanded for trial and is discussed in the text following note 59 *infra.*

15. 43 U.S.C. § 666(a) (1976). The McCarran Amendment gives congressional consent "to join the United States as a defendant in any suit for the adjudication of rights to the use of water."

dian tribal water rights in state courts, in spite of the general lack of state jurisdiction over Indian lands.[16] Both the tribe and the United States argued before the Tenth Circuit that the Supreme Court decision was not applicable to water rights adjudications in New Mexico because both the 1910 Enabling Act for New Mexico,[17] and the state's Constitution[18] contain a specific disclaimer by the state of jurisdiction over Indian lands.[19] It was also argued that the general terms of the McCarran Amendment are not sufficient to repeal the terms of the disclaimers and to permit state court jurisdiction over Indian property rights.[20]

The court of appeals rejected this argument. It held that there is no conflict between state court jurisdiction over water rights, including water rights held for an Indian tribe, and the disclaimer provisions because the McCarren Amendment clearly permits joinder of the United States and because the United States is "the proper party to protect *all* federally reserved water rights, including those set aside for use by the Indian Tribes."[21] The court held that the McCarren Amendment implicitly modified the Enabling Act, vesting the state courts with jurisdiction over Indian water rights held in trust by the United States. The court therefore concluded that the state court had jurisdiction over all rights in the San Juan River system and that the federal court properly dismissed the portion of the tribe's complaint seeking separate adjudication of the Navajo River.[22]

II. STATE JURISDICTION–TAXATION

Mescalero Apache Tribe v. O'Cheskey.[23] In this case the court of appeals, sitting en banc, affirmed the lower court holding that the State of New Mexico had the power to impose its gross receipts tax on contractors who had done construction work for the Mescalero Apache Tribe on its reservation in southeastern New Mexico. The court held that, under New Mexico law, the incidence of the gross receipts tax is on the contractor; therefore, the tax was not an impermissible levy on the tribe itself.

16. Colorado River Conservancy Dist. v. United States, 424 U.S. 800 (1976).

17. 1910 N.M. Laws, ch. 310.

18. N.M. Const. art. 21, § 2.

19. These measures provide that Indian lands are to remain "under the absolute jurisdiction and control of the Congress of the United States."

20. The McCarran Amendment does not specify whether the water adjudications to which the United States can be joined are to be in state or federal court.

21. 601 F.2d at 1131 (emphasis in original).

22. The state court adjudication of the San Juan River, including water rights on the Navajo River, is pending at this time.

23. 625 F.2d 967 (10th Cir. 1980).

The court rejected the tribe's argument that the burden of the tax was in fact on the tribe. The tribe had solicited bids from contractors expressly requesting that the state tax not be included in the bid, but the tribe agreed contractually to indemnify the contractors should they be required to pay the state tax. The court indicated that it was concerned only with the "legal incidence" of the tax, which was on the contractors:

> An indirect burden obviously is initially on the one for whom the services are performed—thus on the Tribe or the Government. However, it is equally apparent that this indirect burden is again passed on to the users of the resort and again by them. The tax becomes disbursed. There is no way of telling where the ultimate economic burden falls. This is the reason why the initial incidence of the tax must be the determinative factor. It is the only significant matter for our consideration.[24]

In holding that the initial legal incidence of the tax was the only significant consideration, the Tenth Circuit relied on its decision in *United States v. New Mexico*.[25] The court of appeals decided in that case that the State of New Mexico had the power to impose its gross receipts tax on a contractor providing services to the federal government on federal lands. The court rejected the argument that the actual burden of the tax was passed along immediately to the federal government, which, of course, is immune from direct taxation by a state.

In *O'Cheskey* the court noted that state laws may not be applied on Indian reservations where they would "interfere with reservation self-government or impair a right granted or reserved by federal law."[26] The court reasoned, however, that any interference posed by the indirect burden of the state tax on the tribe was no different than "all other costs, levies, and taxes on persons with whom [the tribe does] business."[27] Strong dissents were registered by Judges McKay and Doyle, largely on the ground that, by relying on the legal incidence of the tax, the court ignored the fact that the actual burden of the tax had to be absorbed by the tribe.[28]

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24. *Id.* at 970.

25. 581 F.2d 803 (10th Cir. 1978).

26. 625 F.2d at 970 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1972)).

27. 625 F.2d at 972.

28. Reasoning from the premise that the state could not tax tribal activities on the reservation directly, Judge Doyle argued that

> the structure of the majority opinion, like the New Mexico statute, is purely formal in that it ignores the fact that the *burden* comes to rest on the Tribe; that the cost to the Tribe will necessarily be increased if the contractors are re-

Shortly after this case was decided, the Supreme Court ruled in favor of Indian tribes in two apparently similar cases.[29] In view of these decisions the Mescalero Tribe moved for reconsideration of the Tenth Circuit's *O'Cheskey* opinion, but the motion was denied.[30] In denying the tribe's motion for rehearing, the Tenth Circuit stressed that the two Supreme Court cases relied on the heavy involvement of, and regulation by, the federal government in the activities sought to be taxed: timber harvesting and sales of goods on the reservation. The court distinguished these decisions on the ground that the basis for preemption was considered fully in its original opinion and the argument rejected. The court felt no new elements were added to the analysis by the two decisions.

III. STATE JURISDICTION–WILDLIFE MANAGEMENT

Mescalero Apache Tribe v. New Mexico.[31] This case involved a challenge by the tribe to the state's attempt to assert its jurisdiction over hunting and fishing on the Mescalero reservation.[32] The district court declared the state laws inapplicable within the reservation and enjoined the state from attempting to enforce its game laws against any persons, Indian or non-Indian, either within the reservation or after they had left the reservation, for purported violations of state law committed while within tribal boundaries. The state appealed

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quired to pay the tax; that the program of the United States to develop tribal independence would be impeded.

Id. at 975 (emphasis in original). Judges Doyle and McKay argued that the tax violated the disclaimer of jurisdiction over Indian lands contained in N.M. Const. art. 21, § 2, and that the tax was preempted by exclusive federal jurisdiction over the reservation. Both judges felt that the tax was also a violation of the treaty between the Mescaleros (and other Apaches) with the United States, Treaty of July 1, 1852, 10 Stat. 979 (1852), in which the Tribe submitted itself "to the laws, jurisdiction and government of the United States of America."

29. The Court held that Arizona cannot impose its motor carrier license and use fuel taxes on a non-Indian contractor conducting timber operations on the White Mountain Apache Reservation, White Mountain Apache Tribe v. Bracker, 100 S. Ct. 2578 (1980), and cannot levy a sales tax on a sale of farm machinery made to the Gila River tribe on its reservation. Central Machinery Co. v. Arizona State Tax Comm'n, 100 S. Ct. 2592 (1980).

30. 625 F.2d at 991.

31. 630 F.2d 724 (1980).

32. The Mescalero Apache Tribe occupies a mountainous reservation in southern New Mexico and in recent years the tribe has promoted an extensive tourism program designed to create jobs and bring income to the reservation. As part of this program the tribe adopted hunting and fishing ordinances in 1977 to improve wildlife management on the reservation. A number of these ordinances are inconsistent with state laws. For example, the tribe does not require hunters to obtain state hunting licenses and the hunting seasons and bag limits differ. Shortly after the enactment of these ordinances, the state made clear its intention to enforce its own fish and game laws on the reservation.

and the Tenth Circuit affirmed the district court judgment for the tribe.[33]

The court of appeals recognized that state laws are inapplicable within Indian reservations "if the subject matter has been preempted by federal law or if the state regulations infringe on the tribe's right of self-government."[34] For purposes of the preemption analysis, the court noted that the applicable treaty and federal statutes were to be read against a "backdrop" of traditional tribal sovereignty over the territory of the reservation.[35] With respect to wildlife management, the court observed, tribal sovereign powers are especially great. The court of appeals agreed with the district court that before signing a treaty with the United States[36] the tribe "had inherent and complete authority to control any fish and game found within the confines of tribal territory."[37] This inherent tribal authority, the court concluded, was never abrogated by federal law.

The Tenth Circuit emphasized that the tribe's authority to regulate wildlife on its reservation was but one aspect of its inherent sovereign power over its territory. In discussing tribal powers the court cited its own recent decision in *Merrion v. Jicarilla Apache Tribe*,[38] as well as *United States v. Mazurie*[39] and *White Mountain Apache Tribe v. Bracker*.[40] "In regulating game on the reservation," the court concluded, "the Tribe thus seeks to exercise its sovereign power in an area in which it unquestionably has a 'significant interest.' "[41] The Tenth Circuit found that the tribe's inherent powers over reservation fish and game, the 1852 Treaty, the federal statutes recognizing the tribe's independence, and the Tribe's own constitution and wildlife management ordinances preempted exercise by the State of inconsistent regulatory powers.

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33. In this decision the Tenth Circuit joined the Fourth Circuit in refusing to follow a recent contrary decision of the Ninth Circuit, which had held Montana fish and game laws applicable to non-Indians hunting on an Indian reservation. *Compare* Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978) *with* United States v. Sanford, 547 F.2d 1085 (9th Cir. 1976). Unlike the Mescaleros, the tribe involved in *Sanford* did not have an active wildlife management program of its own with which the state laws might conflict.

34. 630 F.2d at 728 (quoting White Mountain Apache Tribe v. Bracker, 100 S. Ct. 2578, 2583 (1980)).

35. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690-91 (1965).

36. 10 Stat. 979 (1852).

37. 630 F.2d at 728-29.

38. 617 F.2d 537 (1980).

39. 419 U.S. 544 (1975).

40. 100 S. Ct. 2578 (1980).

41. 630 F.2d at 730.

The Tenth Circuit underscored the district court's finding that neither the state nor its lands contributed in any significant way to the creation and preservation of the reservation's wildlife. The district court had found that the tribe's elk and antelope herds were almost entirely the creation of the tribe, with assistance from the Bureau of Indian Affairs. The court of appeals found no basis for the state's contention that effective wildlife management required overlapping state and tribal regulation.[42]

IV. STATE JURISDICTION–GARNISHMENT

Joe v. Marcum.[43] The plaintiff in this case, a Navajo Indian, sought an injunction in federal court against enforcement of a writ of garnishment issued by the magistrate court of San Juan County against his wages earned at an open-pit mine on the Navajo reservation. The plaintiff had borrowed money from a finance company in Farmington, which is off the reservation, and had defaulted on the loan. A default judgment was entered against him in the magistrate court and the writ of garnishment against his wages was issued to enforce the judgment. The Tenth Circuit affirmed the district court's order enjoining the enforcement of the writ.

The court of appeals' decision rested on a determination that enforcing a state court writ of garnishment on the reservation would impinge upon the Navajo Tribe's right of self-government.[44] The court observed that the Navajo tribal government included a system of courts and that the Navajo Code permitted enforcement of judgments by execution on specific property. The Tribal Code does not, the court noted, permit garnishment of wages. The wage garnishment permitted by New Mexico law[45] would directly contradict the Navajo

42. The court of appeals distinguished recent decisions permitting states to impose gross receipts taxes on sales by Indians or tribal businesses to non-Indians within Indian reservations. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 100 S. Ct. 2069 (1980); Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. 1980). The court noted that because the products taxed were not *tribal* creations, no special tribal interest was involved to preclude their taxation by the states. Moreover, the court concluded that while "dual systems of pure taxation are not inherently conflicting," dual *regulatory* schemes –including regulation of reservation wildlife–"necessarily create mutual dislocations." 630 F.2d at 730. The court relied on United States v. New Mexico, 590 F.2d 323, 328 (10th Cir. 1978) (holding the State powerless to enforce its liquor laws on the Mescalero reservation), for the proposition that "regulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the Tribes. Congress may delegate this authority to the state, but when it does so it must be in specific terms." 630 F.2d at 730.

43. 621 F.2d 358 (10th Cir. 1980).

44. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971); Williams v. Lee, 358 U.S. 217 (1959).

45. N.M. Stat. Ann. § § 35-12-1 to -19 (1978).

Tribe's policy decision not to permit such garnishment. Application of the state law to permit garnishment of wages earned by a Navajo Indian from employment on the reservation was thus held to be an impermissible intrusion into the tribe's governmental powers.

V. TRIBAL TAXATION

Merrion v. Jicarilla Apache Tribe.[46] This case was brought against the Jicarilla Apache Tribe and its tribal council by energy companies who held leases to produce oil and gas from wells within the tribe's reservation. The tribe enacted an oil and gas severance tax on well production within the reservation and the lessees brought a suit in federal court to challenge the tax. The district court held the tax to be illegal, unconstitutional, invalid, and void. The Tenth Circuit reversed on appeal.

The court of appeals held that the tribe's power of taxation within its territorial jurisdiction was an attribute of sovereignty which it retained as an inherent power of self-government.[47] The court noted decisions of the Supreme Court which had held that certain governmental powers of Indian tribes were surrendered because they were inconsistent with "the superior interest of the United States." Examples include the inability of Indian tribes to convey their property without approval of the United States[48] and the absence of tribal criminal jurisdiction over non-Indians on their reservations.[49] The court held, however, that the Jicarilla's oil and gas severance tax was not inconsistent with any sovereign interest of the United States. The court rejected arguments that the tax was a violation of due process guaranteed the lessees under the fifth and fourteenth amendments or that the tax violated a "national interest in free and open trade."[50] The court noted that earlier decisions by both the Supreme Court[51] and the Eighth Circuit[52] had upheld tribal taxes on non-members doing business on the reservation.

The court of appeals also rejected arguments that the severance tax violated the commerce clause of the Constitution. The court held that the tax did not discriminate against interstate commerce because

46. 617 F.2d 537 (10th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3208 (No. 80-11, Oct. 7, 1980).

47. *See* United States v. Wheeler, 435 U.S. 313 (1978), which emphasized that the governmental powers of Indian tribes are retained attributes of their aboriginal political sovereignty, rather than grants of the federal government.

48. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); 25 U.S.C. § 177 (1976).

49. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

50. 617 F.2d at 542.

51. Morris v. Hitchcock, 194 U.S. 384 (1904).

52. Buster v. Wright, 135 F.2d 947 (8th Cir. 1905).

it was "settled that an occupation or privilege tax on the mining or severing of natural resources, although closely connected with interstate commerce, is a local activity properly subject to local taxation."[53] The court also rejected the argument that because New Mexico has the authority to impose an identical tax on lessees, the tribal tax was an improper burden on interstate commerce. A federal statute[54] permits severance taxes to be levied by states on production from Indian reservations created by executive order, such as the Jicarilla Apache reservation, but the court refused to find that this statute preempted similar taxes imposed by the Indians.

Finally, the court held that the lease terms, which provided that no change could be made in the royalty rates without written consent of both parties, did not preclude "a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing its revenues."[55] The court noted that "it is well settled that such an agreement does not prevent the exaction of a license tax 'unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation.' "[56]

VI. OIL AND GAS LAW

Jicarilla Apache Tribe v. Supron Energy Corp.[57] This case was filed in 1975 by the Jicarilla Apache Tribe against several energy companies holding oil and gas leases on the Jicarilla reservation in northwestern New Mexico. The complaint alleged various antitrust violations by the companies and also sought damages and an accounting for alleged breaches of the leases. The Secretary of the Interior also was named as a party defendant and charged with failing to carry out his trust obligations to supervise these oil and gas leases. Several of the companies reached a settlement with the tribe but the tribe's claims against the remaining companies were tried in May and June of 1979.

The leases in question were held primarily for the production of

53. 617 F.2d at 545 (citing Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923)).

54. 25 U.S.C. § 398(c) (1976).

55. 617 F.2d at 549.

56. *Id.* (quoting City of St. Louis v. United Rys., 210 U.S. 266, 280 (1908)). The Tenth Circuit's recognition in this decision of tribal power to tax business transactions with non-Indians occurring on a reservation was subsequently confirmed in another case by the Supreme Court. In Washington v. Confederated Tribes of the Colville Indian Reservation, 100 S. Ct. 2069 (1980), the court upheld the power of Indian tribes to impose a tax on nontribal purchasers of cigarettes on their reservations. In an analysis similar to that of the Tenth Circuit in *Merrion*, the Court observed that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 2081.

57. 479 F. Supp. 536 (D.N.M. 1979).

natural gas. The gas produced, however, was also processed through a gasoline extraction plant; the tribe's first antitrust claim was that Supron had monopolized the market in the San Juan Basin for liquid hydrocarbons processed from the gas produced on the reservation. The district court held against the tribe on this claim on a factual finding that Supron had never marketed more than 50% of the liquid hydrocarbons sold in the basin.

The court also rejected the tribe's claim that the companies had entered into a conspiracy to fix prices and to limit development of their gas leases. The court noted that while development decisions were conservative, they appeared to have been based on sound business considerations. The prices set in the various gas leases were found to "reflect not illegal conspiracies, but rather the considered judgment of the parties to these contracts that such prevailing terms and prices, at the time these contracts were consummated, were fair and reasonable to all parties."[58] The court also noted that the presence of "favored nation clauses" in the gas purchase contracts were incompatible with the allegation of conspiracy to fix prices.[59]

The court did hold that the defendant energy companies technically had violated section 8 of the Clayton Antitrust Act[60] because, at times, they shared at least one common director. However, since the court had found that there was no substantive violation of the antitrust laws, this violation caused no injury to the tribe and damages were inappropriate.[61]

The tribe also alleged a number of common law claims against the defendant energy companies for breach of the terms of their leases. The tribe claimed that the lessees failed to develop their leases diligently, that they failed to drill off-set wells to protect the leases from drainage, and that they failed to account for royalties accurately. The tribe also alleged that the Secretary of the Interior failed to require the lessees to perform their lease obligations.

On the issue of diligent development, the court noted the principle of law that "a lessee must continue to develop a lease if there is an expectation of finding gas without undue risk as well as an expectation of a payout within a reasonable time."[62] Applying this principle to the facts presented at trial, the court rejected the tribe's claim of lack of diligence. The price of gas increased dramatically since 1975

58. *Id.* at 542.

59. These clauses provided that the selling price would be escalated to the same level as higher prices received by other sellers as a result of subsequent purchase contracts.

60. 15 U.S.C. § 19 (1976).

61. The tribe did not seek injunctive relief for the section 8 violations.

62. 479 F. Supp. at 545.

and in earlier years the additional wells proposed by plaintiff's experts were not economical, even though they have become so today. In addition, "because of the dramatic rise in gas prices, future production of the reserves remaining under these leases will produce royalties to the tribe far in excess of royalties which would have accrued had the leases been more fully developed earlier."[63]

Notwithstanding the court's finding that the leases were developed diligently over the years, it went on to hold that the Secretary of the Interior had failed to fulfill his duty to insure such development. In response to the lawsuit, the Interior Department began to supervise development of these leases more closely. The court, however, held that this supervision had come too late and that diligent development of the leases was "fortuitous and did not result from timely action taken by the Secretary."[64]

Only on the question of proper accounting for royalties did the tribe prevail against the energy companies. This success came in the form of another judgment against the Secretary of the Interior. The tribe's leases with the producers, executed on a standard Bureau of Indian Affairs form, provided that the tribe's royalty would be based on the value of the gas produced. The lease provided that value might be determined for purposes of computing the royalty either on the value of the gas as produced at the wellhead or by the value of the products produced from the gas at an extraction plant. The lease said that "the actual amount realized by the lessee from the sale of [the natural gas] may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value."[65]

The Secretary had, in fact, for many years used the sales price of the gas realized by the producer-lessees as the basis for determining value and for computing royalties. Based on these lease provisions, the court granted a motion for summary judgment, holding that the Secretary was properly within his discretion in basing royalties on actual sales prices at the wellhead. The court reversed this ruling after trial.

The court noted that both the lease and the governing regulations provided two different methods for determining the value of the gas for royalty purposes. Royalties were to be computed on the higher of two values: sales price of the gas at the wellhead, or the value of the products from the gas after processing ("BTU-adjusted sales price" v.

63. *Id.* at 546. Similarly, with respect to the development of off-set wells to protect drainage from lease lands, the court held that, on the facts established at trial, no off-set wells had been required.

64. *Id.* at 547.

65. *Id.* at 549.

"net realization"). The court found that the Secretary had breached his fiduciary duties to the tribe by failing to require an accounting by the companies in both forms so a comparison could be made to determine which method resulted in the higher value of gas produced from the reservation. The court accordingly ordered the Secretary to require that the companies make an accounting by the "dual accounting method" for the years 1970 to the present.[66]

VII. WATER RIGHTS

Jicarilla Apache Tribe v. United States.[67] In the lawsuit discussed previously,[68] the Jicarilla Apache Tribe also sought declaratory and injunctive relief against the United States and the Secretary of the Interior to prevent allegedly improper diversions of water from the Navajo River above the tribe's reservation through the San Juan-Chama Project.[69] This aspect of the case was remanded to the district court by the court of appeals.

The tribe's suit against the Secretary sought an injunction against diversions of water being made through the project in excess of amounts which could be used beneficially by contracting parties.[70] The tribe alleged that its fishing on the Navajo River within the reservation was damaged by these "excess" diversions.

The issue on remand focused on the disposition of "San Juan-Chama Project Water" committed to the City of Albuquerque under its contract with the Bureau of Reclamation. Under the contract terms, the City of Albuquerque is entitled to receive slightly less than 50,000 acre-feet of water each year from the project and is committed to a repayment schedule which averages almost one million dollars

66. *Id.* at 553. This accounting has been made and furnished to the court and is now under review.

67. No. 75-742-P (D.N.M., filed May 8, 1980).

68. Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979). *See* text accompanying notes 11-22 *supra.*

69. The San Juan-Chama Project was authorized by Congress in 1962, Pub. L. 87-483, § 8, 76 Stat. 97 (1962), and construction was completed by 1970. The project consists of a series of diversion works and tunnels in Colorado designed to divert water from tributaries of the San Juan River and transport it for use in the Rio Grande Basin in New Mexico. Two of the three diversion points are on the Navajo River upstream from the Jicarilla Apache Reservation. Significant portions of the Navajo River flow have been diverted for use in the Rio Grande Basin since operations commenced in 1971. The San Juan-Chama Project is operated by the Water and Power Resources Service, formerly the Bureau of Reclamation, of the Department of the Interior.

70. Water is made available in the Rio Grande Basin to parties holding contracts with the Secretary of the Interior. The contracts require that the water users help repay a portion of the construction costs of the project as well as an annual charge for operation and maintenance. The contracting parties are irrigation districts on the Rio Grande and municipalities such as Albuquerque, Santa Fe, and Los Alamos within the Rio Grande Basin.

per year. At the present time, however, the City does not need any of the project water for municipal use. In fact, the full 50,000 acre-feet may not be needed until some time in the next century. In the meantime the City has sought to make interim uses of the project water, including selling it to other parties such as irrigation districts, storing it in reservoirs for future use, and putting it to recreational use. It tried to store the water in the Elephant Butte Reservoir, which is operated by the Water and Power Resources Service. A contract permitting the storage was negotiated with the Secretary of the Interior, but the tribe challenged it on the ground that the storage would involve excessive waste of the water because of evaporation from the Reservoir. The tribe also charged that the storage was not permitted by the terms of the San Juan-Chama Act, and that the City was required to obtain a permit authorizing the storage from the State Engineer.

After the trial, the district court entered a judgment which largely favored the position urged by the tribe. The court ruled that, notwithstanding the evaporation of water from Elephant Butte Reservoir, the storage of the City's San Juan-Chama water did constitute a "beneficial use" because of the recreation activities at the Reservoir that would be enhanced by the storage of additional water.[71] The court added that storage of water for recreation and fishing purposes was recognized as a beneficial use under New Mexico water law. On the issues of state and federal authority for this storage, however, the court ruled for the tribe.

The court held that neither the legislative history of the San Juan-Chama Project Act nor its specific terms authorized storage of the City's project water in Elephant Butte Reservoir.[72] The plans for the San Juan-Chama Project were set out in Bureau of Reclamation documents prepared in the 1950's. The planners contemplated that the City of Albuquerque would be a major user of the San Juan-Chama Project water, but they recognized that the City would not require its full 50,000 acre-feet for thirty or more years after completion of the project. The documents specifically noted that the City would be free to sell its excess water during the interim period. In a rare instance of inter-governmental unanimity the United States, the State Engineer, and the City of Albuquerque all argued that this provision in the reclamation plans should be interpreted broadly to allow the City to make reasonable beneficial use of its excess project water until the full supply was needed for its municipal system, including a use such

71. No. 75-742-P (D.N.M., filed May 8, 1980).
72. *Id.* at ____.

as storage in Elephant Butte Reservoir for recreational purposes, resales to other water users, or storage for future municipal needs. The district court held, however, that while resale of the City's water was authorized, storage in Elephant Butte was not because it was not specifically contemplated in the reclamation plans.[73] The City's contract with the Secretary for the storage, therefore, was held invalid.

VIII. CRIMINAL JURISDICTION

United States v. Pino.[74] The defendant was convicted in federal court of involuntary manslaughter by automobile while within "Indian country."[75] The defendant, relying on *Keeble v. United States,*[76] appealed his conviction on grounds that the trial court should have given an instruction on careless driving, based on a New Mexico statute,[77] as a lesser included offense to the involuntary manslaughter charge.

The government attempted to distinguish *Keeble* on appeal to the Tenth Circuit by noting that the lesser offense involved in *Keeble,* simple assault, was itself a federal crime[78] when it occurred within the "special maritime or territorial jurisdiction of the United States," including Indian reservations.[79] The government pointed out that careless driving was not a specific federal crime no matter where committed.

The court of appeals rejected the government's argument, ruling that the state crime of careless driving was also a crime when committed by an Indian on an Indian reservation under a federal statute.[80] A companion statute extends state criminal laws to areas "reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof."[81] The court of appeals, following *Williams v. United States,*[82] held Indian reservations to be such areas.

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73. *Id.* at ____.

74. 606 F.2d 908 (10th Cir. 1979).

75. "Indian country" is defined in 18 U.S.C. § 1151 (1976), to include, *inter alia,* "all land within the limits of any Indian reservation under the jurisdiction of the United States Government."

76. 412 U.S. 205 (1972). In *Keeble,* an Indian defendant was charged under the Major Crimes Act, 18 U.S.C. §§ 1153, 3242 (1976), with assault to commit serious bodily injury resulting in death on an Indian reservation. The trial court refused to give a lesser included offense instruction on simple assault, but the Supreme Court held that such an instruction should have been given. The Court held that the Major Crimes Act should not be interpreted to deprive Indian defendants of procedural rights granted to other defendants, such as the right to a lesser included offense charge.

77. N.M. Stat. Ann. § 66-8-114 (1978).

78. 18 U.S.C. § 113 (1976).

79. 606 F.2d at 915.

80. 18 U.S.C. § 13 (1976).

81. 18 U.S.C. § 7(3) (1976).

82. 327 U.S. 711 (1945).