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Lands and Natural Resources

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LANDS AND NATURAL RESOURCES

OVERVIEW

Few cases were decided by the Tenth Circuit in the natural resources and lands area; all nine cases selected for publication are presented in this section. The areas of litigation in the 1978-79 term included mining law, water pollution, public lands, and Indian lands.

I. MINING

The two cases in the mining law area arose out of the efforts of the federal government to invalidate existing mining claims. Both opinions focused primarily on the question of whether the claims contained "valuable mineral deposits,"[1] an element which must be shown if the locator of the claim is to receive a patent under the federal mining laws. Although the two opinions touched upon many of the same issues such as "value" and "marketability," the facts and the legislative histories regarding the type of mineral controlled.

A. Shell Oil Co. v. Andrus[2]

Plaintiffs Shell Oil and D.A. Shale, Inc., owners of unpatented oil shale mining claims, were applying for patents on the claims. To qualify for patents, the plaintiffs had to prove the claims contained a "valuable mineral deposit." The Tenth Circuit cited the rule established by the Supreme Court in *Cole v. Ralph*[3] that the locator of an unpatented mining claim has a vested property interest if the claim is properly located. The primary issue was whether present or pre-1920 Interior Department standards were to be used to determine what constitutes a "valuable mineral deposit." The court held that the Interior Department could not apply present standards to claims located prior to 1920 which would therefore retroactively invalidate the mining claims.[4] Because the oil shale deposits constituted a "valuable mineral deposit" prior to 1920 when the claims were staked, the Tenth Circuit held that Shell Oil and D.A. Shale, Inc. had a vested property interest. The court stated that a ruling by the Interior Department could not depart from the old standards and apply present standards; such a ruling would be beyond executive authority.[5]

The *Shell Oil* case might have an impact on future mining litigation in regard to retroactive application of department rulings. However, one lower court recently has construed narrowly *Shell Oil* by limiting the case to the facts, *i.e.*, that departmental rulings and congressional actions have treated

1. *See* 30 U.S.C. §§ 22, 29, 35 (1976). *See* Vlautin, *To Lease or To Locate*, 19 ROCKY MTN. MIN. L. INST. 393 (1974).
2. 591 F.2d 597 (10th Cir. 1979), *appeal docketed*, No. 78-1815 (June 4, 1979).
3. 252 U.S. 286 (1920).
4. 591 F.2d 597 (10th Cir. 1979), *appeal docketed*, No. 78-1815 (June 4, 1979).
5. 591 F.2d at 603-04.

oil shale in a manner different from other minerals.[6]

The litigation commenced in September 1964 when the Secretary of the Interior asserted that certain oil shale placer mining claims which had patent applications pending were invalid. The Secretary of the Interior argued that the claims contained no valuable mineral deposits either at the present time or prior to 1920 when the claims were located. Five months of hearings were held in front of an administrative law judge who determined that the oil shale claims owned by Shell Oil and D.A. Shale, Inc. were valid and that the patents should issue.[7] The Interior Board of Land Appeals reversed the decision of the administrative law judge thereby upholding the government's claims.[8] Shell Oil and D.A. Shale, Inc., as plaintiffs, filed a petition in the federal district court requesting a review of the Secretary's order cancelling the disputed claims. After the district court determined the claims were valid,[9] this appeal came before the Tenth Circuit.

To prove the "valuable" element under federal mining laws, the locator must show that the mineral deposit meets either the "marketability" test whereby the mineral can be "extracted, removed and marketed at a profit,"[10] or the closely related "prudent man" test whereby the mineral is of such quantity and quality that a prudent man would continue mining the mineral.[11] However, oil shale deposits did not meet either the "marketability" or the less onerous "prudent man" test prior to 1920. The Tenth Circuit stated that oil shale deposits would have to have been considered "valuable" prior to 1920 under other standards such as then existing Interior Department actions, practices, instructions, or decisions.[12]

By referring to the Department of Interior records from 1915 to the present, the Tenth Circuit determined that oil shale deposits had been designated as "valuable" by the Interior Department and by Congress even though no market existed at the time the claim was located and even though a prudent man would not have mined the mineral at that time. For example, the portion of the Mineral Leasing Act of 1920 which placed oil shale under a leasing system instead of the previous location system specifically stated that the validity of pre-1920 oil shale placer claims was not to be

6. In a later coal mining case with similar facts, the federal district court rejected plaintiff's contention that *Shell Oil* stood for the proposition that "an administrative agency . . . cannot retroactively apply a rule that represents a complete departure from a long-standing administrative practice." The court based its conclusion first, on the fact that special congressional approval was given to the Interior Department's handling of oil shale claim location in *Shell* and secondly, on the fact that the mining claims in *Shell* had been located 50 years previously. Utah Int'l, Inc. v. Andrus, No. 77-0225 (D. Utah June 15, 1979).

7. 591 F.2d at 598.

8. *Id.* The court cited the decision of the Interior Board of Land Appeals at 16 IBLA 112 (1974).

9. 426 F. Supp. 894 (D. Colo. 1977), *aff'd*, 591 F.2d 597 (10th Cir. 1979), *appeal docketed*, No. 78-1815 (June 4, 1979).

10. United States v. Coleman, 390 U.S. 599, 600 (1968). Note that this Court-determined standard though valid, does not apply to coal and other specified minerals since 1976 because regulations requiring lease applicants to meet a "present marketability" standard have been codified at 43 C.F.R. § 3520.1-1(c) (1978).

11. *See* note 30 *infra* and accompanying text.

12. 591 F.2d at 599.

impaired.[13] And the Interior Department, following the congressional mandate, patented other pre-1920 oil shale claims after the Mineral Leasing Act of 1920 became effective.[14] Also, a 1927 departmental decision held that oil shale deposits could be designated "valuable mineral deposits" based on the fact that oil shale would in the future constitute a very valuable resource and therefore an immediately profitable market was unnecessary.[15]

In addition to the departmental actions, congressional actions affirmed that oil shale deposits were to be considered valuable. A congressional investigation in the early 1930's motivated after a General Land Office official attacked departmental guidelines for issuances of oil shale patents focused specifically on these guidelines. Congress made no changes to the "valuable mineral deposit" requirement as a result of the hearings even though Congress has the authority to alter departmental standards.[16] In addition to its reliance upon the foregoing history, the Tenth Circuit also relied on their opinion in *Brennan v. Udall*.[17]

The Tenth Circuit concluded that lands containing oil shale deposits were "valuable mineral deposits" and could be validly located prior to the Mineral Leasing Act of 1920.[18] Therefore, because there were unpatented mining claims which had been properly located, the Tenth Circuit relied on the Supreme Court ruling of *Cole v. Ralph*[19] to hold that Shell Oil and D.A. Shale, Inc. had a vested proeprty right in the oil shale placer mining claims.

The Tenth Circuit also noted that a mere change in the philosophy of a department was not enough to invalidate the claims.[20] The original rules, instructions, and interpretations of the Interior Department that oil shale was valuable had been given "contemporaneous construction" in 1920 by the Interior Department. These departmental standards further had the "express and implied acquiescence" of Congress and no later reenactment of administrative rules was made by Congress after its investigation. Rather, the silence of Congress evidenced an affirmative adoption of the department's interpretation of the then existing requirements needed to obtain a patent.[21] The later policy changes by the department which no longer regard oil shale claims as a "valuable mineral deposit" were due to a change in the philosophy of department personnel only.[22] By trying to apply new standards retroactively, the Tenth Circuit stated that "the changes here sought to be made by the Department as to 1920 standards incorporated in

13. 30 U.S.C. § 193 (1976) (amended 1978) states that lands valuable for certain minerals, including coal and oil shale, are subject to disposition under the Mineral Leasing Act of 1920 "except as to valid claims existent on February 25, 1920."

14. 591 F.2d at 599-601.

15. 591 F.2d at 599 (citing Freeman v. Summers, 52 L.D. 201 (1927)).

16. 591 F.2d at 601-02.

17. 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967) (Tenth Circuit held that the Interior Department for over 50 years has classified lands containing oil shale deposits as a "valuable source").

18. 591 F.2d at 599.

19. 252 U.S. 286 (1920) (title dispute over mining claims on which patents were to issue).

20. 591 F.2d at 603.

21. *Id.* at 603-05.

22. *Id.* at 603.

the mining laws are well beyond executive authority."[23] The oil shale mining claims were therefore held valid based upon the pre-1920 designation of oil shale as a valuable mineral deposit.

B. Hallenbeck v. Kleppe[24]

In *Hallenbeck*, the Tenth Circuit again discussed the "valuable mineral deposit" requirement of the federal mining laws.[25] Because this case involved sand, gravel, and gold rather than oil shale, which had been given special treatment in the *Shell Oil* case, the Tenth Circuit based its holding on the "prudent man" and "marketability" tests often used by courts in determining a "valuable mineral deposit."

The Department of the Interior initiated the litigation by contesting patent applications on seven placer claims located by plaintiffs prior to 1955 in Lake County, Colorado. An administrative law judge declared the claims invalid because the claims did not contain a "valuable mineral deposit." The plaintiffs then commenced their suit in federal district court to enjoin the government from doing any work on the claims and later amended the district court complaint to challenge the decision of the Interior Board of Land Appeals which had affirmed the administrative law judge. The district court granted summary judgment to the government, stating that the administrative finding of the invalidity of the claims was supported by substantial evidence and should therefore be upheld.[26]

The first issue discussed by the Tenth Circuit on appeal was the plaintiffs' argument that the doctrines of laches and estoppel should apply to the federal government. The Tenth Circuit stated that the general rule is that the defenses of laches and estoppel are not applicable to the federal government in cases regarding public lands.[27] The rule may, at times, be relaxed; but in this case, there was no showing of the necessary elements to establish a foundation for laches.[28]

The plaintiffs' second contention that there was sufficient evidence to support their claim of a "valuable mineral discovery" merited the bulk of the *Hallenbeck* decision. The Tenth Circuit used both the "prudent man" and the "marketability" tests because the minerals at issue were both metallic and nonmetallic.

The court stated that the locator of a rare mineral claim must meet the "prudent man" test to establish a "valuable mineral deposit." The test is met when development of the mineral deposit would be pursued by a person of ordinary prudence.[29] The "prudent man" test, usually applied to rare

23. *Id.* at 604.
24. 590 F.2d 852 (10th Cir. 1979).
25. 30 U.S.C. §§ 22, 29, 35 (1976).
26. 590 F.2d at 854-55.
27. United States v. California, 332 U.S. 19 (1947) (determination of state and federal rights to certain submerged lands off the coast of California).
28. 590 F.2d at 855.
29. *Id.* at 856.

metallic minerals, is a complement of the well-known "marketability" test,[30] usually applied to minerals of widespread occurrence. After presentation of conflicting evidence by the parties, the admininstrative board concluded that no prudent man would presently develop the Hallenbecks' claims for gold.

As to the nonmetallic minerals of sand and gravel on the placer claims, the plaintiffs presented evidence showing that such minerals had been sold from neighboring claims; there was no evidence of sales from the contested claims. The Tenth Circuit, applying the "marketability" test, held that according to the evidence presented, no readily available market existed for sand and gravel from plaintiffs' claims.[31] Further addressing the plaintiffs' arguments as to the existence of a future market, the court required that "there be, *at the time of discovery*, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence . . . . [t]he question of marketability is one of fact."[32]

The plaintiffs' other arguments 1) that the government failed to carry its burden of proof, 2) that valuable mineral deposits on adjoining property were not fully considered, and 3) that the misapplication of the law by the administrative law judge was prejudicial error necessitating a trial *de novo* were also rejected by the Tenth Circuit. The administrative and district court decisions holding the claims invalid because there were no mineral deposits were affirmed.[33]

II. WATER POLLUTION

Two cases interpreting specific provisions of the Federal Water Pollution Control Act[34] were decided by the Tenth Circuit. The first case involved reporting requirements of the Act and the second case discussed the definitions of point and nonpoint sources.

A. Ward v. Coleman[35]

Under the Federal Water Pollution Control Act (FWPCA), notification must be made to the appropriate federal agency of any discharges of oil or other hazardous substances into the navigable waters of the United States.[36] Ward, operator of a drilling site from which oil had overflowed into a creek, contended that these self-reporting requirements violated his fifth amendment rights because information from the report was later used in assessing civil fines.[37] The Tenth Circuit, adhering to the doctrine that privileges under the self-incrimination clause of the fifth amendment should be liber-

30. United States v. Coleman, 390 U.S. 599, 600 (1968) (patent on federal lands was denied based on theory that quartzite was not a "valuable mineral deposit").

31. 590 F.2d at 856-58.

32. *Id.* at 859 (emphasis added).

33. *Id.* at 858-60.

34. 33 U.S.C. § 1251-1376 (1976) (amended 1978).

35. 598 F.2d 1187 (10th Cir. 1979).

36. *See* 33 U.S.C. §§ 1321(b)(3), (5), (6) (1976) (amended 1978) regarding Congressional declaration of policy against discharges of oil or hazardous substances.

37. 598 F.2d at 1190.

ally construed, agreed with Ward.[38] However, the court did not go so far as to invalidate the self-reporting requirements or the civil penalties sections of the FWPCA, stating that "it is permissible to assess civil penalties . . . provided that the evidence used to establish the discharge is derived from a source wholly independent of the compelled disclosure . . . ."[39]

The litigation commenced when Ward, after discovery and immediate clean up of the oil overflow, submitted his statutorily required report to the Environmental Protection Agency (EPA). The EPA notified the Coast Guard because the spill involved navigable waters and the Coast Guard subsequently assessed a civil penalty against Ward. After refusing to pay the fine, Ward filed suit in the federal district court and moved to convene a three-judge court. The federal government also filed suit to collect for the penalty. The two cases were consolidated.[40] Ward's motion for summary judgment and request for a three-judge court were denied. In a subsequent trial, the jury upheld the fine and found for the federal government.[41]

The Tenth Circuit first addressed the issue of the three-judge court. Under now repealed 28 U.S.C. § 2282, a three-judge court had to be convened where certain types of injunctions which could have the effect of paralyzing an entire regulatory scheme were requested.[42] However in *Ward*, the Tenth Circuit determined that the validity of portions of the FWPCA itself, and not the regulatory scheme, was under scrutiny. Therefore, the trial court's decision to refuse convening a three-judge court was affirmed.[43]

The next issue addressed was whether the civil penalties contained in the FWPCA were, in reality, criminal penalties. If this question was determined affirmatively, then the self-reporting requirements under the FWPCA could be drawn into question.[44] Analysis of this criminal/civil issue was broken into three parts: 1) whether congressional intent could be found in the statutory language, 2) what scheme was used to enforce the statute, and 3) whether congressional intent could be ascertained based on indicators enumerated earlier by the Court in *Kennedy v. Mendoza-Martinez*.[45]

The Tenth Circuit looked first at the statutory language which directs the Coast Guard to automatically assess a civil penalty of up to $5,000 per offense. Factors considered to determine the amount of penalty to assess included the size of business, the ability of the business to continue, and the seriousness of the violation.[46] Even though the collected monies went into a fund for regulating and remedying later oil spills, the Tenth Circuit held the

38. *Id.* at 1194.
39. *Id.*
40. *Id.* at 1188-89.
41. Ward v. Coleman, 423 F. Supp. 1352 (W.D. Okla. 1976), *rev'd and remanded*, 598 F.2d 1187 (10th Cir. 1979).
42. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (the seven tests were used to determine whether sanction of losing citizenship for leaving country during wartime was penal or regulatory in nature).
43. 598 F.2d at 1189-90.
44. *Id.* at 1190.
45. 372 U.S. 144 (1963).
46. 33 U.S.C. § 1321(b)(6) (1976) (amended 1978).

penalty to be "based on a retributive and punitive motivation,"[47] *i.e.*, seriousness of the violation.

Turning to the administrative enforcement scheme, the court again discussed the considerations used in determining the amount of penalty assessed but looked at the federal regulations and Coast Guard policy instead of at the statutory language. Again, the Tenth Circuit found the penalty based on "punitive considerations."[48]

In conclusively determining that the penalty was criminal rather than civil in nature, the court next applied the traditional tests set out by the Supreme Court in *Kennedy* to the fact pattern.[49] The tests to which the court gave considerable weight in deciding that the penalty was of a criminal nature were 1) whether the statute furthered an aim of punishment-retribution and 2) whether, because of the strict liability of the statute, the behavior regulated under the statute is already a crime. Both questions were decided affirmatively.

Based on this three-part analysis of the criminal/civil issue, the Tenth Circuit held that the notice which Ward was statutorily required to file could not be used to determine either liability or the amount of the civil penalty. However, the self-reporting requirements and civil penalty portions of the FWPCA were not set aside because civil penalties could still be assessed from evidence completely independent of the necessary report. The case was reversed and remanded to determine the question of independent evidence.[50]

B. United States v. Earth Sciences, Inc.[51]

In *Earth Sciences*, the Tenth Circuit ruled that certain activities such as mining could include point as well as nonpoint sources even though the statute seemingly defined mining activities as nonpoint sources. Therefore, the FWPCA could control these activities because it is designed to regulate pollution emitted from an identifiable point source. The United States filed this action alleging three violations of the FWPCA after a toxic substance used by Earth Sciences in its gold leaching operations was discharged into a nearby creek after an early thaw had caused both the primary and the reserve sump pumps to fill to capacity. The Environmental Protection Agency (EPA) first referred the matter to the Colorado Department of Health but later the EPA filed a notice of violations of 33 U.S.C. § 1311(a)[52] under the FWPCA identifying an open ditch between the pumps and the creek as a point source.[53] Earth Sciences complied with the resulting EPA order by

47. 598 F.2d at 1191.
48. *Id.* at 1192.
49. *Id.* at 1193.
50. *Id.* at 1194-95.
51. 599 F.2d 368 (10th Cir. 1979). *See generally* Miskovsky & Van Hook, *Regulation of Forestry Related Nonpoint Source Pollution Under the Federal Water Pollution Control Act Amendments of 1972*, 9 NAT. RESOURCES LAW. 645 (1976).
52. 33 U.S.C. § 1311(a) (1976) whereby "the discharge of any pollutant is unlawful."
53. A point source is defined as "[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft,

constructing a larger reserve sump pump and by assuring the EPA that it would monitor any seepage around the pumps. Thereafter, the United States filed suit in the federal district court.[54]

The issue which concerned the district court was whether the hazardous substance was discharged through a point source as opposed to a nonpoint source as defined under the FWPCA, because the Act only regulates hazardous substances discharged from a point source. Earth Sciences contended the discharge was from a nonpoint source for which a regulatory scheme has not yet been developed. The district court had interpreted a federal guideline requesting the EPA to develop a regulatory scheme for nonpoint sources such as mining activities as creating an exemption.[55] The district court therefore decided that pollutants from mining activites are always discharges from nonpoint sources and dismissed the action.[56]

On appeal, the federal government successfully argued that discharges from mining activities could be conveyed through a point source even though the discharges may initially be from a nonpoint source. Therefore, based upon this reasoning, mining activities were capable of regulation under the FWPCA.

The Tenth Circuit looked to the legislative history of the FWPCA in determining that Congress meant to classify nonpoint sources as polluting runoffs caused by rainfall which were difficult to isolate to any one polluter.[57] And further, because the purpose of the FWPCA was to protect navigable waters as fully as possible, the congressional intent was to broadly define a point source.[58]

The opinion briefly discussed Earth Sciences' other arguments. First, even though the government never adequately pinned down the point source—variously referring to the sump pump, a well, or a container—the Tenth Circuit had no trouble finding that the entire leaching system constituted a point source. Secondly, the court held that the stream need not be navigable to be controlled by the FWPCA; rather, the body of water into which a pollutant is discharged must only somehow affect interstate commerce. The Tenth Circuit then ruled that civil suits and administrative actions are not mutually exclusive remedies. The case was reversed in part and remanded.[59]

III. PUBLIC LANDS

Three cases were decided by the Tenth Circuit regarding public lands. Dissimilar issues were considered in the three cases: quiet title actions

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from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1976) (amended 1977).

54. 599 F.2d at 371.

55. 33 U.S.C. § 1314(f) (1976) *as amended by* Pub. L. No. 95-217. The administrator of the EPA is to issue guidelines for identifying and controlling pollution from mining activities and other activities such as agriculture and construction.

56. 599 F.2d at 371.

57. *Id.* at 372.

58. *Id.* at 371-73.

59. *Id.* at 374-76.

against the federal government as to a public road, value of sand and gravel deposits in a condemnation action by the United States, and the constitutionality of the Antiquities Act.

A. Kinscherff v. United States[60]

In a brief opinion, the Tenth Circuit held that plaintiffs bringing quiet title actions against the United States[61] must have some type of interest in the property: a right claimed as a member of the public is not a sufficient property interest.[62]

Plaintiffs Kinscherff and others owned land upon which the federal government had built a road to reach a dam. The government would not allow plaintiffs to use the road to bring in equipment to develop their own land. The quiet title action was brought to allow the public to use the road and to allow use by the property owners under the theory of an implied easement. The district court dismissed the litigation for failure to state a cause of action.

In a short reference to the legislative history, the Tenth Circuit stated that Congress intended that only a "typical" quiet title action, as defined by state law, could be pursued. Under New Mexico state substantive law only plaintiffs with an interest in the title to the property are able to bring quiet title actions; in this case, the "public" had no property interest.[63] Further, the state statute governing public roads states that after a road has been open to the public for one year the right-of-way vests in the state.[64] Supposedly, vesting of title in the state precludes vesting in the general public.

The court next addressed the implied easement issue and remanded the case because factual determinations had not been made as to the existence and extent of an implied easement. The Tenth Circuit did state that an easement is a property interest which can be determined under the federal quiet title statute.[65]

B. United States v. 494.10 Acres of Land[66]

The Tenth Circuit determined that the value of sand and gravel underlying property condemned by the federal government may be considered in setting compensation for the land only if demand for the sand and gravel will come in the near future.[67]

In a condemnation proceeding commenced by the United States for flood control, the administrative agency determined the land's "highest and best use" was for agriculture. No value was assigned to the underlying sand

60. 586 F.2d 159 (10th Cir. 1978) (per curiam).
61. The federal government has waived its sovereign immunity in quiet title actions under 28 U.S.C. § 2409(a) (1976).
62. 586 F.2d at 160-61.
63. *Id.* at 160.
64. N.M. STAT. ANN. § 67-2-5 (1978).
65. 586 F.2d at 161.
66. 592 F.2d 1130 (10th Cir. 1979).
67. *Id.* at 1132.

and gravel even though stipulations were made that the land contained significant amounts of these materials. The administrative agency had given considerable weight to the testimony of one witness who stated that no extra monies would be paid for farmland with deposits of sand and gravel. The district court affirmed the administrative finding based on the theory that only clearly erroneous decisions should be overturned.[68]

The court stated that the appropriate test for determining fair market value is the willing buyer/willing seller standard whereby value is established by an arm's-length transaction. The value assigned by an agency must include all elements which a willing buyer and a willing seller would take into account. One element is the "highest and best use," either existing presently or in the near future. Because the use of gravel from the property was speculative, not likely to occur in the near future, the court ruled that payment based on agricultural categorization accounted for all valuation factors. Since the disputed fact had been considered and ruled on by the administrative agency, the evidence was not reweighed. The condemnation award and district court decision were affirmed.[69]

C. United States v. Smyer[70]

A claim by defendants convicted under the Antiquities Act[71] that the Act was void for vagueness was denied. The Act protects old ruins and artifacts on government property.

The events leading to this litigation began when forest rangers found freshly dug holes at an archaeological site. The roads leading to the site were posted with signs warning that the excavation was protected by the Act. A truck found at the site was inventoried and towed away by the rangers. Artifacts were later taken from defendants' homes either without objection or under a search warrant. Defendants were subsequently found guilty of violating the Act.[72]

On appeal, defendants contended that the terms "ruin" and "object of antiquity" contained in the statute were vague and uncertain. The Tenth Circuit disagreed stating that "measured by common understanding and practice, the challenged language conveys a sufficiently definite warning as to the proscribed conduct."[73] The Act therefore gave someone reasonable notice that digging up 800-900 year-old artifacts, as defendants did, was illegal. Also, the court ruled that defendants were adequately warned by posted signs that they were in a national forest, and therefore on government land where the Act applied.[74] The district court convictions were affirmed.[75]

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68. *Id.* at 1131.
69. *Id.* at 1131-33.
70. 596 F.2d 939 (10th Cir. 1979).
71. 16 U.S.C. § 433 (1976) states that "[a]ny person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity" on government lands without permission may be fined or imprisoned.
72. 596 F.2d at 940-41.
73. *Id.* at 941.
74. *Id.*
75. *Id.* at 942-43.

IV. INDIAN LANDS

Two cases involving Indians and their lands came before the Tenth Circuit. Both decisions focused on interpretation of federal statutes and delegation of power to either the Indian tribe or to the Bureau of Indian Affairs. The first concerned liquor licensing on a reservation and the second involved the award of federal highway contracts to Indian companies.

A. United States v. New Mexico[76]

The Tenth Circuit held that Indian nations, through a federal delegation of power, and not the states, were empowered to regulate the sale of alcoholic beverages on Indian lands.[77]

By treaty, the Mescalero Indians of New Mexico are entitled to exercise sovereign powers within their reservation with the exception of the federal government's power as trustee. The tribe had adopted a liquor ordinance[78] under the authority of 18 U.S.C. § 1161.[79] The Indians commenced selling liquor at two bars on the reservation without a state license. The state later contended that the tribe was subject to state liquor laws and commenced this suit. The trial court determined that the tribe had sole jurisdiction over the sale of liquor on the reservation based on the ordinance and the financial burdens which would be placed on the tribe by the state licensing requirements.[80]

The issue raised by the state on appeal was whether the language in 18 U.S.C. § 1161 required complete conformance of the Indians' liquor laws with those of the state. Relying on *United States v. Mazurie*,[81] the Tenth Circuit stated that Congress had the authority to delegate generally liquor regulatory power to an independent governmental unit such as the tribe. In contrast, if the federal government intended to delegate any of its power to the states Congress would have to set forth clearly the authority being delegated.[82] Specific authority to control liquor sales on the reservation was not granted to New Mexico. The court briefly discussed arguments made by New Mexico based on legislative history and the twenty-first amendment, but these arguments were not persuasive. The trial court decision was affirmed.[83]

B. Glover Construction Co. v. Andrus[84]

In *Glover*, the Tenth Circuit held that a federal highway construction contract could not be awarded to an Indian construction company without

76. 590 F.2d 323 (10th Cir. 1978), *cert. denied*, 100 S. Ct. 63 (1979).
77. *Id.* at 326, 329.
78. 30 C.F.R. 3553 (1978).
79. Indians are allowed to use and sell liquor if the ordinances conform to those of the state in which the transaction occurs. 18 U.S.C. § 1161 (1976).
80. 590 F.2d at 325-26.
81. 419 U.S. 544 (1975).
82. 590 F.2d at 328.
83. *Id.* at 329.
84. 591 F.2d 554 (10th Cir. 1979), *appeal docketed*, No. 79-48 (July 10, 1979).

public advertising for bids.[85]

The facts leading to the litigation were undisputed. The federal government, in reliance on a memo issued by the Commissioner of the Bureau of Indian Affairs, invited only Indian firms to bid on a contract for constructing a five-mile highway.[86] No public advertising for bids took place even though advertising was required under the Federal Property and Administrative Services Act of 1949 (FPASA).[87] The district court held that the contract awarded to the Indian firm was invalid and that the government would have to advertise publicly for bids on all federal highways.[88]

The federal government on appeal contended that the memo's interpretation that only Indian firms were allowed to bid on contracts with the Bureau of Indian Affairs was correct. The interpretation had been based on the premise that the Buy Indian Act[89] was an exception "otherwise authorized by law" under the FPASA; public bidding was therefore unnecessary. In affirming the trial court, the Tenth Circuit used the following rules of statutory construction: if an express exception is made, other situations are not saved from the statute's operation;[90] construction of a statute must be made in light of conditions existing at the time of statutory enactment;[91] and the common meaning of the words is to be given to the statutory language.[92] Legislative history also pointed to congressional intent to exclude highway construction projects from the Buy Indian Act; the purpose of the Act was rather to purchase Indian "supplies" and "products."[93]

In a vigorous dissent, Circuit Judge McKay reasoned that the policy of the Buy Indian Act was to promote Indian productivity and that the rules of statutory construction had been applied in a rigid manner not in keeping with the remedial purpose of the Act. Relying on legislative history, Judge McKay found "clear purpose" to exempt any Indian products from the FPASA requirements.[94]

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85. *Id.* at 559.
86. The memo interpreted 25 U.S.C. § 47 (1976) (Buy Indian Act) and concluded that, if available, only Indian companies could bid on any contracts to be awarded by the Bureau of Indian Affairs. 591 F.2d at 555.
87. 41 U.S.C. §§ 252, 253 (1976).
88. 591 F.2d at 556.
89. 25 U.S.C. § 47 (1976).
90. 591 F.2d at 557.
91. *Id.* at 561.
92. *Id.*
93. *Id.* at 560-61.
94. *Id.* at 564.