What Every Minnesota Judge Needs to Know about Indian Law

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WHO AM I?
Appellate Tribal Judge for....

1. Pokagon Band of Potawatomi Indians
2. Hoopa Valley Tribe
3. Poarch Band of Creek Indians
4. Lower Elwha Tribe
Author of....
Today’s Roadmap

- 3 Foundational Principles of Federal Indian Law
- Tribal Courts 101
- Minnesota Concurrent Jurisdiction Issues
Part 1
Three Principles of Federal Indian Law

1. Congress has plenary power
2. Indian tribes have inherent authority
3. States are excluded
FEDERAL INDIAN LAW ORIGINS
The Marshall Trilogy

1. Johnson v. M’Intosh (1823)
2. Cherokee Nation v. Georgia (1831)
3. Worcester v. Georgia (1832)
FIRST PRINCIPLE

Congress has plenary power in Indian affairs
Johnson v. M’Intosh

Origin of Congressional Plenary Power Doctrine

Legend

- Tracts Purchased by Illinois Company (1773)
- Tracts Purchased by Wabash Company (1775)
- Townships Containing McIntosh Purchases of 1815 (at issue in case)
- Township Containing McIntosh Purchase of 1819 (not at issue in case)
Sources of Congressional Power

Indian Commerce Clause

Indian treaties

TREATY WITH THE SIOUX—MEEWAHANSON AND WAPAKONOTA, BANDS, 1831.

ARTICLE I. The peace and friendship existing between the United States and the Mee-wah-hausen and Wa-pah-konota bands of Dakota or Sioux Indians shall be perpetual.

ARTICLE II. The said Mee-wah-hausen and Wa-pah-konota bands of Dakota or Sioux Indians shall be forever subject to the jurisdiction of the United States.

ARTICLE III. (Reserved.)

ARTICLE IV. In further and full consideration of said cession and relinquishment, the United States agree to pay to said Indians the sum of one million four hundred and ten thousand dollars ($1,410,000) at the several times, in the manner and for the purposes following, to wit:

1st. To the chiefs of the said bands, to enable them to settle their affairs and comply with their present just engagements; and in consideration of their remaining themselves to the country set apart for them in reserve, which they agree to do within one year after the ratification of this treaty, without further cost or expense to the United States; and in consideration of their solemnly agreeing the first year after their removal, to live in a manner conformable to the laws and customs of the United States, and the said sum shall be paid, one half to the chief of the Mee-wah-hausen band, and one half to the chief of the Wa-pah-konota band, in such manner as they, hereafter, in open council, shall respectively request, and as soon after the removal of said Indians to the home set apart for them as the necessary appropriations therefor shall be made by Congress.

21st. To be laid out, under the direction of the President, for the establishment of mechanical labor workshops, the erection of mills and smith shops, and the building of a fort, and for such other objects as may be deemed most conducive to the prosperity and happiness of said Indians, thirty thousand dollars ($30,000).

The balance of said sum of one million four hundred and ten thousand dollars ($1,410,000) to remain in the Treasury of the United States, and to be paid in full over to said Indians on the first day of July, eighteen hundred and fifty-three ($1853), which shall be in full payment of said balance, principal and interest; and payments to be made and applied, under the direction of the President as follows, to wit:

5th. For educational purposes, the sum of sixty thousand dollars ($60,000).

6th. For the purchase of goods and provisions, the sum of ten thousand dollars ($10,000).

6th. For the purchase of lands and improvements, the sum of one million dollars ($1,000,000).
Minnesota Indian Land Cessions
SECOND PRINCIPLE

Indian tribes have inherent sovereign authority
The Cherokee Cases

Origin of Inherent Tribal Authority Doctrine
Inherent Tribal Authority

Felix S. Cohen, Handbook of Federal Indian Law 122 (Dept. of Interior 1942)

Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.
THIRD PRINCIPLE

States are generally excluded from Indian affairs
The Cherokee Cases

Origin of Exclusive Federal Authority Doctrine
The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.
Unless....

Congress says so.
“§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

“(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

<table>
<thead>
<tr>
<th>State of</th>
<th>Indian country affected</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>All Indian country within the State</td>
</tr>
<tr>
<td>Minnesota</td>
<td>All Indian country within the State, except the Red Lake Reservation</td>
</tr>
<tr>
<td>Nebraska</td>
<td>All Indian country within the State</td>
</tr>
<tr>
<td>Oregon</td>
<td>All Indian country within the State, except the Warm Springs Reservation</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>All Indian country within the State, except the Menominee Reservation</td>
</tr>
</tbody>
</table>
Counties Have Primary Criminal Jurisdiction in Minnesota Indian Country
Mille Lacs Band of Chippewa Indians tribal government building interior
Traditional Anishinaabe Governance

“quasi-judicial”
Oldest Tribal Courts

1844 Cherokee Nation of Oklahoma Supreme Court Building
Talton v. Mayes (1896)

Affirming Cherokee tribal court conviction for murder
1930s-Era Tribal Constitutions

Minnesota Indian Tribe and other Minnesota tribes
Williams v. Lee (1958)
Navajo Reporter, Vol. 8
Modern Tribal Courts

Navajo Supreme Court Visits Harvard Law School (1999)
Modern Tribal Governments:
Leech Lake Band of Ojibwe
More Tribal Police:
Lower Sioux and White Earth
Modern Governmental Influences

Veterans at White Earth powwow flag ceremony
Minnesota tribal courts

From the Minnesota American Indian Bar Association website:

http://www.maiba.org/tribalCourts.html
Tribal Judges

- Appointed
- Elected
- Member
- Nonmember
- Lawyer
- Non-Lawyer
Indian Civil Rights Act
A Sample of Minnesota Tribal Court Decisions
Torts

--- Am. Tribal Law ----, 2004
WL 5746060 (Mille Lacs C.A.)
Only the Westlaw citation is currently available.
Mille Lacs Band of Chippewa Indians,
    Court of Appeals.

Loretta KALK, Plaintiff-Appellant,
    v.
MILLE LACS BAND OF OJIBWE CORPORATE
    COMMISSION, Defendant-Appellee.
    
No. 03 APP 03. Sept. 16, 2004.

Synopsis
Background: Tribe member filed action against tribe
    corporate commission, alleging that negligent maintenance
    of grounds of inn caused her to fall. Tribe moved to dismiss. The
    District Court dismissed action based on statute of limitations.
    Plaintiff appealed.

Holdings: The Court of Appeals held that:
1 corporate commission did not make false representation that
    led tribe member to believe that cause of action could be
    timely prosecuted in tribal court, and
2 member's due process rights were not violated by
    irregularities in motion to dismiss proceedings.

Affirmed.
Contracts

--- Am. Tribal Law ----, 2008
WL 8565278 (Leech Lake A.D.)
Only the Westlaw citation is currently available.
Leech Lake Band of Ojibwe
Tribal Court, Appellate Division.

Roy GRANDBOIS, d/b/a Grandbois
Auto Sales, Defendant–Appellant,
v.
Hazel NORDMARKEN, Plaintiff–Appellee.


Synopsis

Background: Van buyer brought action against van seller for wrongful repossession, breach of an implied warranty of merchantability, and alleged failure to repair the van. The Tribal Court, Trial Division, Korey Wahwassuck, C.J., found in favor of seller on the claims, but entered judgment awarding buyer her $400 down payment for seller's failure to disclose odometer reading in initial transaction, as required by Minnesota law. Seller appealed.

Holdings: The Tribal Court, Appeals Division, held that:
1 the trial court acted within its discretion to amend pro se buyer's pleadings to conform to the evidence that was presented, and
2 judgment against seller was warranted for violation of Minnesota odometer law.

Affirmed.
--- Am. Tribal Law ----, 2008 WL 8565701 (Leech Lake Trial Div.)
Only the Westlaw citation is currently available.
Leech Lake Band of Ojibwe
Tribal Court, Trial Division.

LEECH LAKE BAND OF OJIBWE, Plaintiff,

v.

Bernard Jerome ROCK, Jr., Defendant.


Synopsis

**Background:** Leech Lake Conservation Officer issued citation to hunter, who had been issued a “special permit to hunt from vehicle,” for shooting from roadway, and confiscated hunter's firearm.

**Holding:** The Tribal Court, Trial Division, Korey Wahwassuck, C.J., held that hunter was guilty of violating Conservation Code prohibition on shooting from roadway.
Administrative/Constitutional Law

9 Am. Tribal Law 462
Leech Lake Band of Ojibwe
Tribal Court, Trial Division.

Elizabeth SHERMAN, Sandra Nichols,
Vikki Howard, and Harry Greene, Plaintiffs,
v.
ENBRIDGE ENERGY LLC, Leech Lake
Reservation Business Committee and Individual
Members of Committee, Minnesota Chippewa
Tribe, Norman Deschampe, President, Gary
Frazier, Executive Director MCT, Defendant.


Synopsis
Background: Petitioners, Band members, filed action against
energy company, the Reservation Business Committee
(RBC), and the Minnesota Chippewa Tribe seeking
permanent injunction to prevent energy company from
constructing proposed pipelines across and within the
boundaries of the Leech Lake Reservation, as permitted in
agreement entered into by the RBC. Defendants moved to
dismiss.

Holding: The Tribal Court, Trial Division, B.J. Jones, Deputy
Judge, held that constitutional right of Band members to
petition their government did not extend to administrative
decisions such as RBC decision to enter into pipeline contract.

Dismissed.
--- Am. Tribal Law ----, 2007 WL 7561596 (Leech Lake Trial Div.)
Only the Westlaw citation is currently available.
Leech Lake Band of Ojibwe
Tribal Court, Trial Division.

LEECH LAKE BAND OF OJIBWE, Plaintiff,
v.
Marvin LITTLEWOLF, Defendant
and
Leech Lake Band of Ojibwe, Plaintiff,
v.
Russell Northbird, Defendant.


Synopsis

**Background:** Two defendants were charged with riceing in a closed bed in violation of Leech Lake Conservation Code, and cases were consolidated.

**Holding:** The Tribal Court, Trial Division, Korey Wahwassuck, C.J., held that riceing provision in Conservation Code was sufficiently specific to warrant issuance of citation.
8 Am. Tribal Law 304
White Earth Band of Chippewa Tribal Court,
Civil Division.

UNITED STATES ex rel, Raymond AUGINAUSH,
individually and on behalf of all other
enrolled members, Intervenor/Plaintiff
and
White Earth Reservation Business Committee
aka White Earth Tribal Council dba Shooting
Star Casino; and United States ex rel.,
Enna J. Vizenor Chairwoman, Plaintiff
v.
Angelo MEDURE and Gaming World International,
Ltd., a Delaware corporation, Defendants.


Synopsis
**Background**: Tribe brought qui tam action against gaming
corporation and its owner, seeking compensation for breach
of contract and mismanagement of casino. Tribal member
intervened as representative of all tribal members. Tribe and
member moved for partial summary judgment.

**Holdings**: The Tribal Court, Anita Fineday, J., held that:
1 contract was unenforceable;
2 contract was unconscionable;
3 contract was procured by fraud;
4 gaming corporation was alter ego of owner, as required to
pierce corporate veil; and
5 tribal court had jurisdiction over claims against corporation.

Motion granted.
Customary Law

White Earth Ojibwe Customary Adoption Ceremony
Part 3
Concurrent Jurisdiction

Pic: Sen. Mary A. Olson (DFL), Rep. Larry Howes (R), Judge John P. Smith, Judge Korey Wahwassuck, Leech Lake Tribal Chairman George Goggleye, Jr., and Rep. Frank Moe (DFL) at the February 23, 2007 ceremony installing the Leech Lake Tribal Flag in Cass County District Court
Concurrent jurisdiction flowchart

Civil or Criminal?

Civil
- State Courts
- Tribal Courts

Criminal
- State Courts*

* Tribal courts, too
Is the Action Civil or Criminal?

Bryan v. Itasca County (1976)
Civil Regulatory v. Criminal Prohibitory

<table>
<thead>
<tr>
<th>Civil Regulatory</th>
<th>Criminal Prohibitory</th>
</tr>
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<tbody>
<tr>
<td>• Personal property tax <em>(Itasca (1976))</em></td>
<td>• Sex Offender Commitment <em>(In re Johnson (Minn. 2011))</em></td>
</tr>
<tr>
<td>• Motor vehicle registration *(State v. Johnson (Minn. 1999))</td>
<td>• Driving w/ Revoked License <em>(State v. Losh (Minn. 2008))</em></td>
</tr>
<tr>
<td>• Failure to yield *(State v. Robinson (Minn. 1997))</td>
<td>• Underage drinking <em>(State v. Robinson (Minn. 1997))</em></td>
</tr>
</tbody>
</table>
If Criminal, then State Courts have Jurisdiction
If Civil, then what?
If Civil, then Abstention Analysis

Gavle v. Little Six, Inc. (Minn. 1996): Abstention by a state court is appropriate when the exercise of state court jurisdiction would

“undermine the authority of the tribal courts over Reservation affairs”

or

“infringe on the right of Indians to govern themselves.”
### Abstention?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Sexual harassment claim</td>
<td>• Nonmember Indian – Speeding Ticket</td>
</tr>
<tr>
<td>(Gavle (Minn. 1996))</td>
<td>(State v. Davis (Minn. 2009))</td>
</tr>
<tr>
<td></td>
<td>• Civil forfeiture (Nason v. 1991 Buick)</td>
</tr>
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<td></td>
<td>(Minn. App. 2010)</td>
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</tbody>
</table>
The Future?

Tribal—State Court Cooperation
Federal Criminal Jurisdiction
Leech Lake Band/Cass County/Itasca County Wellness Court

BUILDING A LEGACY OF HOPE: PERSPECTIVES ON JOINT TRIBAL-STATE JURISDICTION

The Honorable Korey Wahwassuck, The Honorable John P. Smith, and The Honorable John R. Hawkinson†

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That is what I meant by putting a new memory in the minds of our children. We have to get to the point where we stop talking in anger. We have to put ourselves in the position to tell stories about freedom, success, love, safety, and the kind of future we want to have.

— Satsan (Herb George), quoting a Wet’suwet’en Chief†
Tribal Law and Order Act: More Concurrent Sovereigns?

“SEC. 401. ASSUMPTION BY STATE OF CRIMINAL JURISDICTION.

“(a) CONSENT OF UNITED STATES.—

“(1) IN GENERAL.—The consent of the United States”; and

(2) by adding at the end the following:

“(2) CONCURRENT JURISDICTION.—At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18, United States Code, within the Indian country of the Indian tribe.”.

(b) APPLICABLE LAW.—Section 1162 of title 18, United States Code, is amended by adding at the end the following:

“(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General—

“(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

“(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.”.
Chi-miigwetch!!!!