U.S. Expropriates Tribal Lands Legally

U.S. Supreme Court June 29, 1989 Decision on Yakima Indian Nation Zoning Powers annexes one-third of Yakima Territory.

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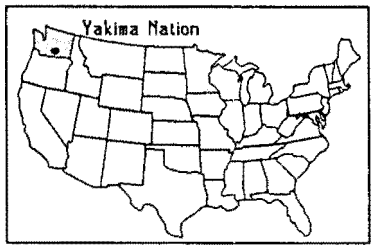
The United States government, through its court system, took another step toward annexing tribal territories in the Summer of 1989. The U.S. Supreme Court decided on June 29, 1989 that when non-Indians become the majority population inside the boundaries of an Indian Reservation, the State and its Counties may preempt a Tribal government's zoning authority in those areas where the non-Indian holds the majority of land in fee.

The Court also decided that where non-Indians are not the majority population holding land in fee, the Tribal government cannot be denied "its right under its local governmental police power to zone fee land."



The Court's decision involved three separate cases joined together under one suit. It took into account the two cases *Wilkinson v. Confederated Tribes and Bands of the Yakima Indian Nation* - No. 87-1697, and *County of Yakima et al, v. Confederated Tribes and Bands of the Yakima Indian Nation* - No. 87-1711 together. These two cases concerned the power of Yakima County to zone lands inside the Yakima Indian Nation where the majority of the population is non-Indian and where Mr. Wilkinson resides. The third case *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation et al.* - No. 87-1622 concerned a Mr.

Brendale and his fee land located inside the area of the Yakima Reservation where the majority is Indian.

The ruling factors used to determine the final decision of the court were these:

1. The U.S. Congress' enactment of the General Allotment Act of 1887 expressed the U.S. government's intent "to destroy tribal government," and the "fact that the Allotment Act was repudiated in 1934 by the Indian Reorganization Act is irrelevant, since the latter Act did not restore exclusive use of the lands in question to the Tribe."

2. Upon reviewing earlier U.S. Supreme Court Decisions (notably: Montana v. United States, Washington v. Confederated Tribes of the Colville Indian Reservation and United States v. Wheeler) they concluded that the court has made "no contention here that Congress has expressly delegated to the Tribe the power to zone the fee lands of non-members."

3. Under "special circumstances" involving lands that are "checker boarded" a tribe may have a "protectable tribal interest under federal law."

4. The U.S. Constitution's Supremacy Clause requires that a State or County "respect that [tribal] interest in the course of their activities," in areas of an Indian Reservation where the State or County has the power to exercise governmental authority.

5. Though a tribe may have reserved absolute power to exclude non-tribal members from a reservation, the General Allotment Act of 1887 "in some respects diminished tribal authority by providing for the allotment of Reservation lands in severalty to resident Indians, who were eventually free to sell to non-members." In the light of this assertion the court further observed: . . . it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to non-members who lack any voice in setting tribal policy.

This writer has on more than one occasion argued that Indian Nations have a substantial political problem with the United States government involving the General Allotment Act of 1887 that cannot be solved through the U.S. Courts. Indeed, I have argued elsewhere that "any conflict between a tribe and the United States, a State, a county or a municipality involving questions about the jurisdictional authority of a tribal government is a political problem which cannot, must not, be placed before U.S. courts for resolution. Where a conflict concerns tribal governmental powers, the U.S. courts are bound by the U.S. Constitution to protect U.S. interests even if by doing so the rights and powers of Indian Nations are diminished or utterly destroyed. The June 29, 1989 decision of the U.S. Supreme Court concerning Yakima Nation zoning authority inside the Reservation is a classic example of how this "legal resolution" works.

The Court's decision frequently refers to "the intention of Congress." The Court fails to rely on "Federal/Indian law" to render its judgment. The Court also refers to the U.S. Constitution Supremacy Clause and chooses to grant that it was the intention of the U.S. Congress to convey to the State and Counties certain powers inside Indian Reservations by virtue of the General Allotment Act of 1887.

Behind the Court's decision are these unspoken assertions which have no basis in Federal/Indian Law, but are reliant up assertions of raw U.S. political power over Indian nations:

1. The U.S. Congress exercises Plenary Power over Indian Affairs, and this power involves the absolute power to control the lives and property of Indian nations without the consent of affected Indian people.

2. By virtue of Congress' Plenary Power it may arbitrarily diminish tribal governmental powers and give tribal governments powers without consideration of tribal inherent powers.

3. The General Allotment Act of 1887 was intended to "destroy tribal government," and it was intended as a U.S. governmental method for annexing Treaty reserved tribal lands for use by U.S. citizens - placing those tribal lands under the direct governmental authority of a State and/or an County.

4. The powers and rights of States and Counties will be held superior to those of Indian tribes, especially where questions of jurisdiction over non-Indians and non-Indian property is concerned.

5. If it has become the policy of the United States, a State or a County to intentionally promote the migration of non-Indians into Treaty reserved lands. The extent to which that policy is successful in creating a majority non-Indian population inside Indian territory marks the extent to which tribal governmental powers are diminished and State and County powers increase inside Indian Reservations. In other words, by virtue of a U.S. law like the General Allotment Act which violates treaties, the U.S. government may systematically annex Treaty Reserved lands. The U.S. government will not be prevented by the U.S. Supreme Court from destroying tribal governments and liquidating tribal homelands.

The overall conclusion one is forced to recognize is that the U.S. Supreme Court and Federal/Indian Law do not constitute the "formidable body of law which ensures the protection and security of Indian Rights." This is especially true when a "political question" involving the "police powers of a tribal government" is placed before the court to decide.

Tribal/State Accord Alternative to Conflict

The Supreme Court's decision on Yakima confirms the wisdom of the tribal governments' decision to negotiate a political arrangement with the State of Washington through a government to government accord. It would appear that one important step to prevent erosion of tribal governmental powers inside the boundaries of Indian reservations is to formalize a government to government accord with states. Without such an accord formally negotiated and lawfully put in place, the Indian nations will remain at substantial risk to state and county intrusions into the tribal governmental domains.

The preliminary accord signed by Washington State's Governor and tribal heads of government (on August 4, 1989) is a good first step toward a lawfully established government to government accord. By

itself, the preliminary accord is not enough. It does not prevent the Attorney General of the State of Washington from taking advantage of the U.S. Supreme Court's Yakima zoning decision, for example. A full accord is required.

Though the Yakima Zoning Case resulted from a dispute between the County of Yakima, private individuals and the Yakima Indian Nation, the decision encourages an already strong network of anti-Indian organizations. The political interests of the Anti-Indian Network were well served by the Yakima zoning decision. I believe groups in this network like **S/SPAWN, Equal Rights for Everyone, Totally Equal Americans,** and the **Inter-State Congress for Equal Rights and Responsibilities** will likely apply pressure on county and State authorities to press federal court suits against tribes with substantial amounts of fee land and sizable non-Indian populations. The purpose will be to win further annexation of tribal territory.

The Anti-Indian Network was not simply an interested by-stander. They actively participate in the Court proceedings. By their participation they, in effect, won a very large case in the U.S. courts. These organizations have been arguing for some time that non-Indian majorities and their property cannot be governed inside Reservations by tribal authorities. Indeed, a primary assertion of the Anti-Indian Network was used in the Yakima zoning decision practically word-for-word:

> Nor does the Tribe derive authority from its inherent sovereignty to impose its zoning ordinance on petitioners' lands. Such sovereignty generally extends only to what is necessary to protect tribal self-government or to control internal relations, and is divested to the extent it is inconsistent with a tribe's dependent status - i.e. to the extent it involves the tribe's external relations with non-members - unless there has been and express congressional delegation of tribal power to the contrary. (Emphasis added)

The overt act of territorial annexation is rarely practiced in the United States, but "lawful expropriation" resulting in de facto annexation of tribal territories has become the common rule. Under the vail of law (all-be-it domestic U.S. law), the United States government is increasingly committed to a political agenda aimed at confiscating tribal territories. It is a political agenda which satisfies state governments and many U.S. citizens alike. Only Indian nations will lose.