1990

State of Utah v. James F. Gardner : Citation of Suplimental Authorities

Utah Court of Appeals

James F. Gardner; Attorney Pro Se; Attorney for Appellant.
R. Paul Van Dam; Attorney General; Attorney for Appellee.

James J. Gardner
Attorney Pro-Se:
P.O. Box # 250
Draper, Utah, 84020.

In the Utah Court of Appeals.

State of Utah.	
Plaintiff and Appellee.	Case No.# 900379-CA;
Vs.	
James J. Gardner.	Priority No.# 2.
Defendant and Appellant.	

Citation of Supplemented Authorities.

Appellant Hereby Submits Pursuant to Rule 24 (j), Rules of the Utah Court of Appeals, Citation of Supplemented Authorities which are Relivent and Significant to the Following Issues on Direct Appeal.

Supplemented Attatchments Setforth Pertain in Paint, to the General Jurisdictional Authorities Over the Uintah and Ouray Indian Reservation, the Fact that Utah Recognizes the Reservations Political Existence, Utahs Participation in and Objecting to Senate Bill 962, and House Resolution 972, Relating to Permanent Indian Jurisdiction over all Indians Committing Offenses Within the Reservation Boundries. and the Presidents Approval of H.R. 972, on October 28, 1991, enacting Public Law 102-137. Authorities

Relevant to Issues Raised in Appellants Brief, (Point III), and Appellants Reply Brief, (Point I);

Foundation of Appellants Supplementation of Authorities Surrounding Federal Statutory Significance, and Interpretation of Public Law 102-137 (October 28. 1991), and Utah's Double Standard of Implementation and enforcement of Plenary Authorities Over Indians in Indian Country.

Appellant Declares and Certifies that the Attached Letters and/or Documentation, are in Fact, true and Correct Photo-Copies of Originals Submitted and/or Received From the Congress of the United States, U.S. Senate Select Committee On Indian Affairs, and/or Individual Persons Concerned;

Appellant Further Declares in Manner of Good Faith, that the Belated Supplementing of the Record is Not For Purpose of Delay and/or Other Reason; But has Recently Been Brought to Appellants Attention through Due Diligence;

Respectfully Submitted

Dated this 19th Day of November 1991.

James F. Gardner

James F. Gardner

Attorney Pro-Se;

Exhibit B

HERBERT WM. GILLESPIE
DUCHESNE COUNTY ATTORNEY
P.O.Box 206
Duchesne, Utah 84021
(801)738-2435

April 9, 1991

Committee on Interior and Insular Affairs
U.S. House of Representatives
Washington, D.C. 20515

Position Regarding: H.R. 972, Extending Tribal Court Criminal Jurisdiction over Non-Tribal Member Indians after Duro v. Reina

Dear Committee Members:

As the elected County Attorney of Duchesne County, Utah, I wish to express concerns about H.R. 972, which extends on a permanent basis tribal court criminal jurisdiction over non-tribal member Indians. In Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985), cert. denied 107 S. Ct. 596 (Dec. 1, 1986), the 10th Circuit Court held that nearly all of the land area and residents of Duchesne County are located within the exterior boundaries of the Uintah and Ouray Indian Reservation of the Ute Indian Tribe. This issue is still contested and pending before the Utah Supreme Court. Nevertheless, even under the 10th Circuit decision, the majority of the land area in our County is open, non-trust lands and the great majority of the approximately 13,000 people are non-Indian. Only a very small fraction of our county residents are members of the Ute Indian Tribe. Other residents of our community include and/or have included members of other tribes; "Mixed Bloods", who are anthropologically of Indian ancestry, but whose "Indian" status has been terminated by Federal Law; and others having Indian blood, but no tribal membership, with varying degrees of association with or identification with the Ute Indian Community, non-Ute Indians in the community, and the non-Indian community.

To those who reside on an Indian Reservation without being members of the reservation Tribe, Tribal Court jurisdiction is an extremely important concern -- far too important to be dealt with in summary fashion without considering all aspects of the issue. The United States Supreme Court has held that the full protections of the United States Constitution and Bill of Rights do not extend in full measure to Indian tribal courts. The Indian Civil Rights Act, as the tribal courts choose to apply that act, without review in most cases by either State or Federal Courts, is the lesser protection. The idea of Congress subjecting any citizen, whether Indian or non-Indian, to the jurisdiction of a Court in which his or her constitutional rights do not fully apply is deeply troubling. We consider this legal situation dangerous to the civil liberties of both Indian and non-Indian

citizens of our community and others residing on Indian Reservations.

Inherent Tribal Sovereignty may be sufficient reason to justify the jurisdiction of an Indian tribal court over members of that tribe. However, it is a different matter for Congress to reach beyond inherent sovereignty and deliberately subject United States Citizens to Courts not governed by the Bill of Rights.

Limiting tribal court authority to tribal members is also the approach which appears most administratively workable on a practical level in our area. There is a vast diversity of definitions of "Indianhood". Under the proposed legislation, tribal courts would appear to be able to extend their jurisdiction by how they choose to define "Indian". This may or may not cure any void presently existing in jurisdiction, depending upon whether the tribal court definition of "Indian" for criminal purposes is the same as the state court definition. In our local experience, where there is a large group of anthropological Indians who have had their "Indian" status terminated, and other persons who identify with the Indian Community, sorting out who is and who is not subject to tribal and State court authority is a quagmire. On the contrary, who is and who is not an enrolled member of the Ute Indian Tribe would be administratively very easy to determine.

If any "emergency" action needs to be taken to fill a jurisdictional void, such action should grant jurisdiction over non-member Indians to the applicable State Court, at least in the case of "open" reservations such as the Uintah and Ouray Reservation. Duchesne County stands ready to enforce law and order on anyone within our County as permitted by State and Federal Law.

Your consideration of this position, and subjecting this matter to further study, rather than hastily subjecting non-member Indians to tribunals apparently not bound by the full guarantees of our Constitution, is appreciated.

Sincerely,

Herbert Wm. Gillespie
Duchesne County Attorney

cc: Clinton S. Peatross, Chairman, Duchesne County Board of County Commissioners
Paula Smith, Deputy Attorney General, State of Utah
Tom Tobin, Attorney at Law

OFFICE OF THE ATTORNEY GENERAL

STATE OF UTAH

PAUL VAN DAM
Attorney General

JOHN F. CLARK
Counsel to the Attorney General
Department of State Counsel

JAN GRAHAM
Solicitor General
Department of Appeals & Commissions

JOSEPH E. TESCH
Chief Deputy Attorney General
Department of Public Advocacy

May 8, 1991

Senator Daniel Inouye
Chairman, Senate Select Committee
on Indian Affairs
United States Senate
838 SHOB
Washington, D.C. 20510-6450

RE: Congressional Response to Duro v. Reina

Dear Senator Inouye:

Enclosed is a Position Paper on Duro v. Reina Issues submitted on behalf of the Attorneys General of the states of Utah, Montana, Washington, North Dakota, and South Dakota. We understand that the Senate Select Committee on Indian Affairs is holding a hearing on Thursday, May 9, 1991, on the impact of the Duro v. Reina decision and on legislation concerning criminal jurisdiction over Indians on Indian reservations. We would like the attached Position Paper to be made part of the record for this hearing.

Sincerely,

PAUL VAN DAM
Utah Attorney General

Enclosure
cc: Committee Members

Senator Dennis DeConcini	Senator John McCain
Senator Quentin Burdick	Senator Frank Murkowski
Senator Thomas Daschle	Senator Thad Chochran
Senator Kent Conrad	Senator Slade Gorton
Senator Harry Reid	Senator Pete Domenici
Senator Paul Simon	Senator Nancy Kassebaum
Senator Dan Akaka	Senator Don Nickles
Senator Paul Wellstone	

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Solicitor General
Department of Appeals & Commissions

JOSEPH E. TESCH
Chief Deputy Attorney General
Department of Public Advocacy

POSITION PAPER ON DURO v. REINA ISSUES

Submitted on Behalf of the Attorneys General of Montana, North Dakota, South Dakota, Washington, and Utah.

The above listed Attorneys General are concerned about effective law enforcement on Indian reservations. On many reservations, the majority of the population is made up of non-Indians. Where reservation residents include non-Indians and Indians, law enforcement has been split among tribal, state and federal authorities.

Crimes by non-Indians have generally been the responsibility of state and county law enforcement. Crimes by tribal member Indians have been the responsibility of tribal or federal authorities, depending on the seriousness of the crime. The maximum sentence that a tribal court can impose is one year and a $5000 fine. However, some states have assumed criminal jurisdiction over all reservation residents, including all Indians, pursuant to congressional authorization in Public Law 280. Non-tribal member Indians have been treated as non-Indians in some cases and as tribal-member Indians in other cases.

In May 1990, the United States Supreme Court held in Duro v. Reina that a tribal court does not have inherent criminal jurisdiction over Indians who are not members of that tribe. The Court found that the Salt River Pima-Maricopa tribal court did not have criminal jurisdiction to prosecute a member of the Martinez Band of Cahuilla Mission Indians on a weapons charge. However, the Court did note that federal authorities could have prosecuted the defendant for murder. In Duro, the United States Supreme Court stated that "[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."

The Duro ruling left open the question of the extent of state jurisdiction over crimes committed on reservations by non-tribal member Indians in non-Public Law 280 states. States may arguably have criminal jurisdiction over non-tribal member Indians because state jurisdiction would not be preempted by tribal law or, in some cases concerning non-major crimes, by federal law.

In August 1990, the Conference of Western Attorneys General adopted a resolution urging caution in considering emergency legislation to deal with any problems the Duro case may have created until the case's impact could be assessed. During the last session of Congress, additions to the Defense Appropriation Bill added language to the Indian Civil Rights Act that may have the effect of allowing tribal courts to exercise criminal jurisdiction over non-tribal member Indians for a one-year period ending

43-361 236 STATE CAPITOL • SALT LAKE CITY UTAH 84114 • TELEPHONE 801-538-1015 • FAX NO 801 538-1121 225

September 30, 1991. H.R. 972 deletes the one-year period limitation on last year's legislation and other similar legislation may have the same goal.

Preliminary information collected in Western states indicates that the state, federal and tribal law enforcement resources on non-Public Law 280 Indian reservations differ greatly. Some reservations have no tribal police or no tribal courts or have such resources only on a portion of the reservation. On some reservations, federal or state officials handled law enforcement concerning non-member Indians both before and after the Duro decision. On other reservations, tribes handled misdemeanor offenses by non-tribal member Indians prior to Duro and subsequent to the *1990 amendments*. Therefore, one simple response to the Duro decision is likely to be difficult.

The above listed Attorneys General are concerned about the congressional reaction to the Duro decision as reflected in the 1990 amendments for three reasons. First, those amendments may have been intended to subject non-tribal member Indians to tribal court criminal jurisdiction without the protections accorded in the Bill of Rights. The Duro Court noted that tribal courts are typically governed. not by the Bill of Rights, but by the lesser requirements of the Indian Civil Rights Act. The Duro Court has already questioned Congress's ability to subject citizens to courts not governed by the Bill of Rights.

Second, an attempt to retroactively recognize Indian tribes' inherent jurisdiction conflicts with the United States Supreme Court's definitive conclusion in Duro that Indian tribes do not have inherent criminal jurisdiction over non-tribal member Indians. Third, if the 1990 amendments are viewed as a congressional delegation of authority and not a recognition of inherent authority, such an interpretation may create double jeopardy problems and bar all federal criminal prosecutions. See United States v. Wheeler.

Because of the many problems created by the 1990 amendments and tribal opposition to state criminal jurisdiction over non-tribal member Indians. the above-listed Attorneys General recommend the following:

a. The 1990 amendments should be allowed to lapse and Congress should explicitly recognize federal criminal jurisdiction over non-tribal member Indians by amending the General Crimes Act as marked on the attached sheet.

b. Any legislation concerning tribal court jurisdiction over non-tribal member Indians should (1) explicitly indicate that the Bill of Rights applies to such tribal court jurisdiction; (2) provide for federal jurisdiction where no tribal courts exist; and (3) provide for tribal court jurisdiction only when federal prosecutors decline to prosecute in order to avoid double jeopardy problems.

c. States willing to handle criminal jurisdiction over non-tribal member Indians should be expressly allowed to continue to share such jurisdiction with the federal government.

One possible version of 18 U.S.C. §1152 is listed below:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, to the extent the alleged offense was committed by a member of the tribe for whose benefit, or for whose members' benefit, the Indian country in which the crime allegedly occurred was set aside, nor to any Indian committing an offense in the Indian country who has been punished by the local law of his tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

United States Senate

SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6450

October 30, 1991

Ms. Edson Gardner
Box 472
Ft Duchesne, UT 84026

Dear Ms. Gardner:

Thank you for your letter regarding support for S. 962 and H.R. 972, companion Senate and House measures that would remove the September 30, 1991 limitation on the effects of a 1990 amendment to the Indian Civil Rights Act in which the Congress reaffirmed the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians, as the term "Indian" is defined for purposes of the federal Major Crimes Act, 18 U.S.C. 1153.

I have consistently made clear my position of full and strong support for a permanent resolution to the jurisdictional void created by the Supreme Court's ruling in Duro v. Reina. Accordingly, I am pleased to report that the President signed H.R. 972 into law on October 28, 1991. The Public Law number is 102-137.

Thank you for taking the time to write to the Committee.

Sincerely,

DANIEL K. INOUYE
Chairman

Certificate of Service:

This Certifies that I Mailed, and/or Caused to Be Mailed. A true and Correct Copy of the Foregoing: Citation of Supplemental Authorities; Postage Pre-Paid, to:

R. Paul Van Dam
Attorney General
J. Kevin Murphey.
Assistant Attorney General.
236 State Capital, Bldg.
Salt Lake City, Utah. 84114.

On this 19th day of November 1996.

James F. Gardiner

James F. Gardiner
Attorney Pro-Se: