Winter 1983

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Recommended Citation
Available at: https://digitalrepository.unm.edu/nrj/vol23/iss1/18
REGULATORY JURISDICTION OVER INDIAN COUNTRY RETAIL LIQUOR SALES

The Ninth Circuit holds that 18 U.S.C. § 1161 does not give the state licensing and distribution jurisdiction over retail liquor sales on Indian reservations. Rehner v. Rice, 678 F.2d 1340 (9th Cir. 1982).

HISTORY

Control of liquor law has historically been one of the most comprehensive federal activities in Indian affairs. The federal "activity" has amounted to "pervasive and exclusive control over liquor transactions in Indian territory." This control stems from several sources of power: (1) the Presidential power to make treaties; (2) the congressional power to regulate interstate commerce; (3) the congressional power to regulate commerce with Indian tribes; (4) the ownership, as a sovereign, of lands to which Indian title has not been extinguished; and (5) plenary federal power arising out of the guardian-ward relationship between the United States and Indian tribes.

However, the backbone of federal legislation dealing with Indian liquor transactions is the congressional "power to regulate commerce . . . with the Indian tribes." As early as 1802, President Thomas Jefferson was authorized by Congress to take measures "to prevent or restrain the vending and distributing of spirituous liquors among all or any of the said Indian tribes." Congress exercised its power over Indian commerce to eventually prescribe a total prohibition of any introduction, possession, or sale of liquor among Indian tribes. Congress apparently adopted the traditional belief that a great deal of Indian disorder was the result of traffic in the demon fire-water. Accordingly, as in many other areas of federal Indian law, Congress effectively denied any recognition of Indian sovereignty in the matter of alcohol.

In 1953 Congress realized that "[t]ermination of the subjection of Indians to Federal laws applicable only to Indians certainly appears to be desirable" and that "all legislation discriminating against our Indian citizens should be abolished." Comprehensive legislation was enacted to sever the special relationships that had traditionally existed between

2. Rehner v. Rice, 678 F.2d 1340, 1343 (9th Cir. 1982).
3. United States Express Co. v. Friedman, 191 F. 673, 674 (8th Cir. 1911).
5. U.S. CONST. art. I, § 8, cl. 3.
6. Id.
7. Id.
8. 2 Stat. 139, 146 (1802).
the federal government and the Indian tribes.\textsuperscript{11} Consistent with the idea of severing these relationships, Congress passed 18 U.S.C. § 1161. Section 1161 provides that Indian tribes can seek exemptions from the long-standing congressional prohibitions against any Indian association with liquor. This section reads:

The provisions of Sections 1154, 1156, 3113, 3488, and 3618,\textsuperscript{12} of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

This statute fostered the present controversies, controversies which indicate that the federal government is taking steps, although minimal, to provide for greater Indian autonomy. This autonomy is naturally of the usual kind—with federal strings attached—but continues to be upheld as at least limited autonomy.

**FACTUAL SETTING**

The Ninth Circuit recently considered three cases involving § 1161 and the question of Indian liquor transactions—\textit{Rehner v. Rice}, a California dispute, and \textit{Muckleshoot Indian Tribes v. State of Washington} and \textit{Tulalip Tribes v. State of Washington}. These three cases were combined and decided in one opinion on June 8, 1982 (hereinafter referred to as the \textit{Rehner} opinion).

\textit{Rehner}: Eva Rehner is a federally licensed Indian trader operating a small general store in the Pala Reservation in California. The Pala Band of Mission Indians adopted a tribal ordinance allowing the retail sale of liquor on the reservation in conformity with California law. The ordinance was approved by the Secretary of the Interior as provided by § 1161. Rehner then sought an exemption from California laws requiring licenses for retail sales of liquor. The California Department of Alcoholic Beverage Control (ABC) denied the exemption.

Rehner brought suit in California federal district court for injunctive and declaratory relief against Rice, the ABC director. The trial court dismissed Rehner's action for failure to state a claim, holding that Rehner

\textsuperscript{11} Among the enactments were the Termination Acts, the name given various congressional acts which were designed to end the status of the Indians "as wards of the United States," and Public Law 280, which was designed to give states civil and criminal jurisdiction over Indian affairs. See, e.g., 67 Stat. 588 (1953). These attempts did not meet with much success.

\textsuperscript{12} These sections of 18 U.S.C. set up the general scheme of prohibiting the dispensing or possessing of intoxicants in Indian country.
must obtain a liquor license before she could sell liquor at her Pala Reservation general store. She appealed to the Ninth Circuit.

**Muckleshoot and Tulalip Tribes:** The Muckleshoot and Tulalip tribes passed tribal ordinances permitting the sale of liquor by the tribes on their respective reservations. These ordinances were approved by the Secretary of the Interior and the Bureau of Indian Affairs. Pursuant to the ordinances, each tribe set up retail liquor stores on their reservations. The tribes sold liquor without obtaining licenses from the Washington State Liquor Control Board, but operated the liquor stores in a manner consistent with state standards of conduct applicable to liquor sales. In late 1978, agents of the Liquor Control Board seized quantities of liquor moving in interstate commerce from an Oklahoma liquor wholesaler to the two tribes, claiming that the tribes were selling the liquor in violation of the state’s monopoly on the sale of liquor.

Both tribes sought injunctive relief against the State of Washington and others. Washington counter-claimed, seeking injunctive relief as well as monetary relief. The federal district court ruled in favor of the Muckleshoot and Tulalip tribes, holding that the Indians had exclusive regulatory jurisdiction over liquor sales and did not need licenses from the state. Washington appealed the decision with respect to both tribes.

**DISCUSSION**

The central issue addressed by the Ninth Circuit in these cases was whether § 1161 granted exclusive jurisdiction to the states over licensing and distribution of liquor in Indian country. California and Washington contended that § 1161 requires that Indian tribes wishing to permit the introduction of intoxicants must observe state regulatory requirements involving liquor licensing and distribution, as well as state substantive laws such as hours of operation and drinking ages. The Ninth Circuit held that under § 1161, exclusive regulatory jurisdiction over Indian country liquor transactions rested with the Indian tribes—not with the states.

The Ninth Circuit addressed the scope of § 1161 with several basic principles of Indian law in mind. These principles have been instrumental in recent recognition and acknowledgment of Indian autonomy and sovereignty, not only in the area of intoxicating liquors, but other areas as well.13 First among these principles is the requirement that ambiguities in statutes are resolved in favor of Indians.14 Secondly, state jurisdiction

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over Indian reservations has historically been disfavored.\textsuperscript{15} Accordingly, state law and jurisdiction can be extended over Indian reservations only by express congressional provision.

The Ninth Circuit then applied these general principles to: (1) a grammatical discussion of §1161; (2) a comparison of §1161 with similar federal statutes; and (3) a review of other administrative and judicial interpretations of §1161.

Grammar and Syntax: The Ninth Circuit's initial analysis of \textit{Rehner} involved a review of the actual wording of the statute: "provided such act or transaction is in conformity both with the laws of the State . . . and with an ordinance duly adopted by the tribe having jurisdiction."\textsuperscript{16} The appeals court dismissed the states' contentions that the phrase "laws of the State" is tantamount to a recognition of exclusive state licensing jurisdiction. Such a reading of the statute, the court held, was precluded by the grammatical illogic of vesting "laws of the State" with a jurisdictional component while simultaneously denying any jurisdictional component in the phrase "ordinance duly adopted by the tribe." The court noted that the two phrases were qualified by the word "both," and that grammatical logic dictated that each phrase be coextensive. Congress, continued the Ninth Circuit, could not therefore have intended each phrase to equate with regulatory jurisdiction because exclusive jurisdiction vested in two entities is illogical and "unlikely."

Furthermore, the Ninth Circuit noted that grants to states of jurisdiction over Indians must be express; an inference of a grant to the states of exclusive regulatory jurisdiction is unwarranted in light of the fact that the statute is not cast in the form of such a grant. Rather, §1161 provides an exemption to certain federal criminal statutes dealing with liquor transactions in Indian country.\textsuperscript{17} The court held that if §1161 \textit{was} a grant of jurisdiction, it was a grant to the Indian tribes, because the only phrase containing jurisdictional wording was "by the tribe having jurisdiction." Additional support for the latter construction rests on authority that "tribal power over internal affairs . . . is inherent and may exist without a grant from Congress."\textsuperscript{18}

Similar Statutes: The court then proceeded to examine congressional statutes similar to §1161 in an attempt to support its conclusion that the states have no regulatory jurisdiction over Indian liquor affairs. First, the court noted that the Termination Acts are replete with language expressly granting jurisdiction to the states as well as references to the "laws of

\textsuperscript{16} Application of Indian liquor laws, 18 U.S.C. § 1161 (1953).
\textsuperscript{17} \textit{See note 12, supra.}
\textsuperscript{18} \textit{Rehner v. Rice}, 678 F.2d 1340, 1344 (9th Cir. 1982).
the states.” Such references, as opposed to the direct grants, have never been assumed to suffice as grants of jurisdiction.19

The court also used Public Law 28020 to discredit the argument of Washington and California that § 1161 is a wholesale conferral of jurisdiction upon the states. Public Law 280 expressly granted civil and criminal jurisdiction over Indians to several states. The court notes the “conspicuous disparity”21 in language between Public Law 280 and § 1161. The Ninth Circuit stated that Congress knows how to employ precise language when it wants to confer jurisdiction, as it did in Public Law 280. Not only did Congress expressly grant such jurisdiction by Public Law 280, but it classified the jurisdiction into civil and criminal jurisdiction. The court in Rehner clearly indicates that licensing and distribution jurisdiction (regulatory jurisdiction) is separate and distinct from civil or criminal jurisdiction.

Similarly, Public Law 280 supports a conclusion that the “laws of the State” of § 1161 refers to substantive state standards alone, rather than regulatory jurisdiction. The drafters of Public Law 280 carefully and explicitly differentiated between civil and criminal jurisdiction and state substantive laws. This distinction was the heart of the ruling of Bryan v. Itasca County,22 where the Supreme Court held that Congress did not intend for Public Law 280 to confer regulatory jurisdiction by providing for adoption of the civil and criminal laws of the state.

In Bryan, the Supreme Court held that Public Law 280 did not grant such regulatory jurisdiction because Congress did not so expressly provide. There was no legislative history of Public Law 280 pointing to any intention to extend State jurisdiction over Indians through oblique reference to state law. Similarly, the legislative history underlying § 1161 contains no discussion of regulatory jurisdiction over liquor transactions. The Ninth Circuit considered the lack of evidence of Congressional intent to equate “state law” with “regulatory jurisdiction” crucial to its holding in Rehner.

The Ninth Circuit also discussed the Assimilative Crimes Act23 and the Major Crimes Act.24 The Major Crimes Act places certain specified crimes committed by Indians under the criminal jurisdiction of the federal court. The Assimilative Crimes Act allows federal courts to apply state substantive laws to prosecute criminal behavior not specified under the Major Crimes Act. However, these acts do not confer any jurisdiction upon the

21. 678 F.2d at 1346.
states; federal courts retain control over offenders. The appeals court held that these Acts best illustrate the purpose § 1161 intended for the phrase "state law." Rather than have the tribes create new laws which might conflict with existing state regulations, the tribes would only have to assimilate the substantive liquor laws of their respective states. Jurisdiction does not pass to the states. Rather, this assimilation is more a matter of legislative efficiency than of a grant of power.

Precedents: The Ninth Circuit further supported its construction of § 1161 by reviewing recent Supreme Court decisions. Besides reviewing Bryan, the court discussed U.S. v. Mazurie and U.S. v. New Mexico. Mazurie, while not expressly holding so, did contain language suggesting that regulatory jurisdiction was vested in the "Indian tribes . . . to regulate the introduction of liquor into Indian country, as long as state law was not violated."27

U.S. v. New Mexico, a Tenth Circuit case, addressed the same question the Ninth Circuit did in Rehner. In U.S. v. New Mexico, the Tenth Circuit court recognized that a long line of Supreme Court cases provides that Congress may delegate regulatory authority over Indian affairs to states only in specific terms, and that § 1161 did not delegate such authority in express, specific terms. The Ninth Circuit agreed with the Tenth Circuit that § 1161 does not provide for state licensing and distribution jurisdiction in Indian territory.

Other Issues: The court summarily discussed the application of the 21st Amendment to the central issue of whether § 1161 granted regulatory jurisdiction over Indian liquor transactions to the states. Even assuming § 1161 granted concurrent jurisdiction to the states, the Ninth Circuit observed that the Supreme Court has "flatly held" that federal enclaves are not subject to the force of the 21st Amendment. Therefore, the appeals court dismissed any serious discussion of the implications of the amendment on § 1161.

The Ninth Circuit also ruled that Washington’s counterclaims against the two tribes could not be maintained in light of tribal sovereign immunity. Consent to suits must be unequivocally granted; § 1161 contains no such consent. The court held that the present cases fell outside any exceptions to the sovereign immunity rule.

CONCLUSION

The decision reached by the Ninth circuit in Rehner appears to be the only possible decision when considered in light of Congress' avowed

27. 419 U.S. 544, 547 (1975).
intention to sever the special federal-Indian relationships. Although possibly intended as a method of achieving the assimilation of Indians into the U.S. mainstream, § 1161 at least recognizes the ability of the Indian tribes to govern and control their own lives as far as intoxicants are concerned. Economic interests seem to be at the heart of the state claims for regulatory jurisdiction, rather than concerns for uniform, statewide enforcement. Section 1161 provides states ample uniformity by the required adoption of state substantive laws in all tribal ordinances enacted relating to the distribution of liquor, while at the same time preserving a bit of tribal autonomy. The reasoning of the Ninth Circuit in Rehner—that if Congress had wanted to go any further than providing for the adoption of the state substantive liquor laws, it would have done so—is persuasive.

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