What Satisfies the "Political Integrity" Test?

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In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court established the general proposition that the *inherent* sovereign powers of an Indian tribe do not extend to the activities of non-members, subject to two exceptions. It is the second exception which is of concern here. Tribes may exercise civil jurisdiction over non-members when non-members engage in conduct on fee lands within a tribal reservation that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66.

Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (*en banc*), *cert. denied*, 535 U.S. 927 (2002), tested tribal authority over non-Indians on fee lands within reservation boundaries. The Tribe prohibited logging within one-half mile of an ancient ceremonial site known as the White Deerskin Dance Trail. Eventually, the Tribe won *Bugenig* because a special statute ratified the Tribe's authority over non-Indian property use.

The *Bugenig* district court avoided the inherent power doctrine and the *Montana* exceptions. However, the Pacific Legal Foundation viewed the case as an opportunity to narrow the *Montana* exceptions. The Tribe countered that the ceremony was critical to its character, its existence, and hence, its political integrity.

For thousands of years the Hoopa people have lived in the valley near where the Trinity and the Klamath Rivers join. The Hoopa people have cleansed themselves of wrong feelings and performed a world renewal ceremony that unites them and places the world back in balance. This ceremony is the White Deerskin Dance, a biennial event spanning ten days. The ceremonies of the White Deerskin Dance are performed in sequence at specific sites down the river valley. On the tenth day, the White Deerskin Dance culminates at *Noltukalai*, the place "among the oak tops" on Bald Hill. "There, the legends say, the immortals watched the people of the valley dance with the precious white deerskins and the sacred obsidian blades." *Bugenig v. Hoopa Valley Tribe*, 25 Ind. L. Rptr. 6140 (Trib. Supreme Ct. Apr. 23, 1993). *Noltukalai*, the most important of the sites of the White Deerskin Dance, is less than one-half mile from Roberta Bugenig's property.

The Tribal Supreme Court explained the history and cultural importance of the White Deerskin Dance that the Tribe sought to protect with the logging buffer zone. The performance and significance of the Hoopa ceremony is well recognized by academics. *E.g.*, A. Kroeber & E. Gifford, World Renewal: A Cult System of Native Northwest California (Univ. Calif. Publ. Anthro. Rec. 1949), *reprinted in* R. Heizer & M. Whipple, The California Indians (2d ed., Univ. Calif. Press 1971); Wallace, William J., Hupa, Chilula, and Whilkut in 8 Handbook of American Indians at 174 (Smithsonian Institution 1978).

Bugenig did not deny the academic recognition of the White Deerskin Dance but suggested that "religious aspects of the dance have been overplayed by defendants." However, any distinction between the cultural, social, and religious aspects of the White Deerskin Dance should have no bearing on tribal inherent jurisdiction under the second *Montana* exception. Bugenig admitted that the Dance is "a memorable social event," and that the "socio-economic aspects of the ceremonials of the Hupa are perhaps the most important of all." Quoting Goldschmidt and Driver, The Hupa White Deerskin Dance at 129. But Goldschmidt and Driver also state:

> It seems clear that this ceremonial, as to a lesser degree other Hupa dances, presents the mechanism for the formation of social groups in this otherwise amorphous society, and by the display of wealth and prestige makes public the relative social status of these unformalized social groups.

Id. Also: "The ceremonial life as a whole and the White Deerskin dance in particular are of major importance to an understanding of the social cohesion of the group, the character of which is so unusual as to be worthy of special consideration. *Id.* at 104 (emphasis added).

In other words, the academic community has long recognized that Hoopa identity and "social cohesion" are linked to the White Deerskin Dance. While it has important religious aspects, the White Deerskin Dance links politically the otherwise loosely connected villages and clans into one people. The defining event in the political unification of the Hoopa people is the White Deerskin Dance.[1]

The question remains whether a defining event in the political unification of a tribe triggers the second *Montana* exception where there is a potential direct effect on it? The three-judge panel that initially ruled against the Tribe in *Bugenig*, thought not. *See Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000) (withdrawn opinion). Judge O'Scannlain noted that the Supreme Court in *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1977), stressed that the second *Montana* exception is narrowly construed:

> The exception authorizes a tribe to do such things as punish tribe members, regulate their domestic relations and promulgate rules regarding tribal membership or inheritance within the tribe. *See* [520 U.S.] at 459. These tasks are fundamentally different from a tribe's attempt to regulate a nonmember's use of her fee-owned land; regulating such land use even when justified by reference to some tribal interest, simply does not implicate "tribal self-government" or "internal tribal relations" in the same direct way that the activities enumerated in *Strate* do.

Slip Op. at 12746. Rejecting any possible effect that logging by other land owners in the buffer zone might also have upon the White Deerskin Dance, Judge O'Scannlain believed that weight can be given only to the effect that Bugenig's logging of her own particular parcel might have. He stated:

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[1] *See generally* Powers, Stephen, Tribes of California at 78-79 (1877) (U. Cal. reprint 1976). The Indians of California at 59-62 (Davis, Lee, consultant; Time Life 1994).

> Under this analysis, we cannot say that Bugenig's logging fundamentally threatens the Tribe's ability to govern itself in any way. We are confident enough in the governmental strength of the Tribe to conclude that its political integrity would not be "imperiled" as required under [*Yellowstone County v. Pease*, 96 Fed. 3d 1169 (9th Cir. 1996)], by a selective timber harvest on a parcel of less than three acres.

Slip Op. at 12747-48.

Because the Ninth Circuit *en banc* chose not to adopt Judge O'Scannlain's analysis or rely on the *Montana* exceptions, the *Bugenig* litigation ultimately provides no authority for the proposition that tribes retain inherent sovereignty where actions threaten political integrity. Indeed, other than the fractured Supreme Court decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), there exist few, if any, cases upholding inherent tribal authority under the second *Montana* exception. Nevertheless, historical, anthropological and sociological data should be usable to support tribal authority when an action threatens the political integrity of a group which, like an Indian tribe, must exist as a political entity if it is to maintain a political relationship with the United States.

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