State and Local Land Use Regulations of Restricted Property

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Federal Restricted Property

- Alaska Native Allotment Act, Act of May 17, 1906, 43 USC Sec.270-1 to 270-3, repealed with savings clause, 43 USC 1617(a)
- Alaska Native Townsite Act, 43 USC Sec 733,735, repealed under FLPMA, section 701, with savings clause. *See Aleknagik Natives Ltd v. U.S. 886 F.2d 237 (9th Cir. 1989)*

State Regulation Preempted

- PL 280:
  - 28 USC 1360(b): General rule: concurrent civil and criminal jurisdiction in Indian Country
  - 28 USC 1360(b): “Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian Tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation…; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.”

Preemption Applied

- State Courts lack jurisdiction over Native Allotments. Foster v. State Department of Transportation, 34 P.3d 1288 (Alaska 2001); Heffle v. State, 633 P2d 264 (Alaska 1981).
- Taxation by local government prohibited. People of South Naknek v. Bristol Bay Borough 466 F.Supp. 870 (D. Alaska 1979).

Rights of Way

- Rights of way across restricted property governed by federal law, see 25 USC sec. 311, et seq (Secretary of Interior has authority to grant)

Regulating Land Use

- State and local regulation of use of restricted lands prohibited except by approval of Secretary of Interior
  - 25 CFR 1.4(a): provides a blanket prohibition against any state or local regulation of "zoning or otherwise governing, regulating, or controlling the use of any real or personal property … that is held in trust or is subject to a restriction against alienation imposed by the United States."
  - 25 CFR 1.4(b) allows the secretary to adopt local regulations, but requires consultation with the Indian owner of the property to be effected, first.
- Santa Rosa Band of Indians v. Kings County, 532 F. 2d. 655 (9th Cir. 1975), cert. den. 429 US 1038 (upholding 25 CFR 1.4

Regulating Land Use

- C.f. Op. Atty Gen. File No. 366-247-85, 1985 WL 70057 (opining that "As to the vast majority of Native allotments and townsite lots—those outside of Annette Island Reserve or beyond the jurisdiction of any organized tribal government—we believe you can rely on the following conclusion: state regulations generally apply, except to the extent that they constitute "encumbrances" on the land. Encumbrances include zoning and other restrictions on the land which decrease its value or inhibit usefulness to the owner. Regulations which are aimed at personal activity rather than the land are more likely to be held valid, as are regulations which clearly benefit the land or its owners or neighboring landowners; regulations whose purpose is the protection of public health or safety are even more likely to be upheld. [….]
- Issue: What is meant by the phrase "beyond the jurisdiction of any organized tribal government." Who decides that? Suggest this is pretty loaded.

Relation Back

- Applicable to both land use and to rights of way
- Under 1906 Act, the filing of an application segregates the land and the land becomes trust land. See State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985)
- Upon vesting of the allotment, via a certificate of allotment, the rights relate back to when the use of the land commenced. 43 CFR 2561.1(e).
- Thus, where the Native's use and occupancy commenced before the creation of an RS 2477 trail, a road or other granted right of way, the allotment is not subject to the right of way. Golden Valley Electric Assn (on reconsideration) 98 IBLA 203 (1978)
- Exception: reinstated and reconstructed applications are subject to "any Federal appropriation, trail, right-of way, easement or existing third party interest of record, including third party interests created by the State, without regard to the date on which the Native allotment applicant initiated use and occupancy." 43 USC 1617(f)(2).
- See Alaska Native Allotments Conflicts with Utility Rights of Way Have not Been Resolved through Existing Remedies GAO-04-923 (2004) (discussing trespass by Utility company on Native Allotments, duties of BIA Rights Protection officers, and possible remedies); c.f. Athens, John, "The Ninth Circuit Errs Again: The Quiet Title Act as a Bar to Judicial Review" 19 Alaska L. Rev 433 (discussing the legal Limbo arising from lack of federal jurisdiction to sue federal government to determine questions of Indian title under the Federal Quiet Title Act, 28 USC 2409a(a) ("This section does not apply to trust or restricted Indian lands….")

Eminent Domain

- Restricted property may only be condemned under federal law and through federal court-25 USC sec 357
- 25 USC sec. 357 permits condemnation proceedings in federal court pursuant to the law of the state.
- AS 09.55.240 et seq.

Conclusion

- Allotment authority is exclusively federal
- State and local land use regulations and rights-of-way authority are preempted by federal law
- Relation back theory preserves the trust to date of commencement of use and occupancy
- Therefore, subsequent entry is in trespass, and subsequent land use regulations encumbering the restricted property are unenforceable.