

OREGON STATE STATUTORY INTERPRETATION: BLIND TO HISTORY, BUT USEFUL IN APPLICATION

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Five federally-recognized Indian tribes in Oregon employ or are considering employing law enforcement officers. These tribes are attempting to find or create a statutory foundation which empowers tribal police officers to enforce state law on and off tribal lands. Their attempts in courts and in the Oregon Legislature illustrate the benefits—and limitations—of Oregon’s rules of statutory interpretation.

Tribes are “domestic dependant nations,”¹ subject to Congressional authority but not subject, in Indian country, to the political power of their state neighbors.² Because tribes are independent from states, and vice-versa, public safety can be undermined when police officers employed by either sovereign enter the other’s jurisdiction. *State v. Kurtz*³ is a case in point. The Court in *Kurtz* asked whether state law permits a law enforcement officer employed by the Confederated Tribes of the Warm Springs Indians to enforce two Oregon laws outside the Tribes’ reservation.

The Confederated Tribes of the Warm Springs Indian reservation is in central Oregon. The reservation encompasses 348,000 acres. It is separated from Jefferson County on the east by

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1. *Cherokee Nation v. Georgia*, 30 U.S. 1, 26 (1831).

2. *Worcester v. Georgia*, 31 U.S. 515, 562-63 (1832), *abrogated by Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

3. 228 P.3d 584, *rev’d*, 2011 Or. LEXIS 222 (2011), On March 25, 2011, the Supreme Court reversed the Court of Appeals. The presentation to which this note relates occurred before the Supreme Court released its opinion. Tribes have continued to press for adoption of SB 412 (2011).

the heavily-used Deschutes River. The reservation straddles many miles of State Highway 26 from the crest of the Cascade Mountains on the northwest to the bridge over the Deschutes on the southeast. Highway 26 is a major thoroughfare between Portland and central Oregon.⁴

A tribal officer driving north on Highway 26 inside the reservation observed suspicious action inside a southbound vehicle.⁵ The tribal officer reversed course, following the car and its two occupants.⁶ The observed car crossed the centerline of the road into the oncoming traffic lane of travel while still within the reservation.⁷ The tribal officer activated his patrol car's overhead lights, but the vehicle did not respond.⁸ It crossed over the Deschutes River on a bridge straddling the reservation on the west bank and Jefferson County on the east.⁹ The tribal officer continued the pursuit into Jefferson County, where the car stopped.¹⁰

The passenger fled the scene.¹¹ The driver, Kurtz, was arrested by the tribal police officer for two crimes defined by state law: attempting to elude a "police officer"¹² and resisting arrest by a "peace officer."¹³ ¹⁴ The Tribal Court denied the defendant's motion for judgment of acquittal,¹⁵ but the Oregon Court of Appeals reversed, holding that Kurtz could not be charged with either offense because the person he attempted to elude was not a "police officer" and the person whose purported arrest he resisted was not a "peace officer."¹⁶

4. 2009 *Traffic Volumes on State Highways*, OREGON DEPARTMENT OF TRANSPORTATION http://www.oregon.gov/ODOT/TD/TDATA/tsm/docs/2009_TVT.pdf (last visited April 2, 2011). The Oregon Department of Transportation reported that in 2009, 5,900 vehicles passed a point on Highway 26 near the bridge at which the events in *Kurtz* occurred.

5. *Kurtz*, 228 P.3d at 584. .

6. *Id.*

7. *Id.*

8. *Id.* .

9. *Id.*

10. 228 P.3d at 584.

11. *Id.* .

12. OR. REV. STAT. § 811.540 (2011).

13. OR. REV. STAT. § 162.315(2011).

14. 228 P.3d at 584..

15. *Id.* at 590..

16. *Id.* .

The Court of Appeals in *Kurtz* correctly identified its task as one of interpreting the meaning of the statutory phrases “police officer” and “peace officer.” In describing the framework it would apply to interpreting the two statutes, the court did not cite *PGE v. BOLI*,¹⁷ but it did cite *State v. Gaines*.¹⁸ The Court characterized *Gaines* as requiring it to analyze text first, then “context,” and then “any relevant legislative history.”¹⁹ Applying this framework, the Court first examined the text of statutes surrounding the particular laws in which the scrutinized phrases appeared, and then applied the principle of *ejusdem generis* to a non-exclusive definition of “police officer,” which the court concluded was part of the context.²⁰ The Court next turned to Webster’s Third New International Dictionary for relevant definitions, and quoted an individual senator’s observations about amendments offered to the 1971 bill from which the resisting arrest statute at issue in *Kurtz* stemmed.²¹ Before examining the “relevant legislative history,” the court neither expressly found any ambiguity in the statutory text, nor cited ORS 174.020(3).

Oregon appealed. The Oregon Supreme Court held oral argument on November 9, 2010 and the case was under advisement at the time this note was written. In the 2011 legislative session, the tribes also caused SB 412 to be introduced. The bill would grant tribal police officers jurisdiction to enforce state laws outside of tribal lands. It is instructive to ask what “legislative history” might be used by the courts if a version of SB 412 became law and subsequently were to require interpretation. The answers reveal benefits and limitations of Oregon’s approach.

One benefit of extending stare decisis effect to rules of statutory interpretation is that tribes, tribal and non-tribal police officers, prosecutors, defendants and their counsel, and judges all will share an understanding of how to analyze SB 412 if it becomes law. Whether *PGE v. BOLI*, *Gaines*, ORS 174.020(3),²² or some hybrid rule is the standard, the fact that Oregon’s judges

17. 859 P2d 1143 (1993).

18. 206 P3d 1042 (2009).

19. 228 P.3d at 585.

20. *Id.* at 585, 588-89. .

21. *Id.* at 589. .

22. Section 3 provides: “A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.”

will be compelled to apply or to expressly distinguish an explicit hierarchical framework for statutory interpretation will make more efficient the work of all the lawyers and parties.

A second benefit is evident in the lawmaking process itself. Participants in discussions about SB 412 have, in explicit anticipation that courts subsequently will do the same, applied Webster's Third New International Dictionary as an interpretative aid in framing potential amendments to the bill.

On the other hand, the process of creating SB 412 also reveals important limitations on Oregon's framework for statutory analysis.

SB 412, as originally introduced, was framed by representatives of the tribes in the course of the spring and summer of 2010. Their understanding of the bill's premises might be very revealing. An historian writing the history of this effort would undoubtedly relish having access to e-mails, private correspondence, and oral recollections of the participants in the process of creating the initial draft. And yet an Oregon judge applying that state's framework for statutory interpretation might give little, if any, credence to such evidence.²³ The President of the Senate assigned SB 412 to the Senate Judiciary Committee. Thereafter, the Chair of the Committee directed the Deputy Committee Counsel to convene a "working group" of interested persons to develop amendments. The group, or parts of it, met at least three times to negotiate the terms of the bill. No formal records of the working group's deliberations were kept. Participants focused some of their attention on a revised version of the bill created by interlineation, manually striking language, and physically cutting and pasting amendments. The working group's process is illustrated by the exhibit accompanying this note. Very little of the working group's effort will find its way into the formal legislative record.

The Oregon Legislature is too sparingly funded to permit retention of sufficient staff to produce detailed committee reports. The working group's interlineated working document will be stripped of many of its most revealing features as it is conformed

23. See Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 WILLAMETTE L. REV. 1, 18 (1996) (Suggesting that before a court could accept as authoritative a "snippet" of the history of a bill, "the court must make a case that [the snippet] actually represent[s] the views of the legislative body as a whole").

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by the Legislature's professional bill-drafting attorneys to form and style standards applicable to amendments in the Oregon Legislature. And even if one or more of the participants in the working group were to provide the committee with an account of the working group's deliberations and choices, the Oregon Courts have occasionally signaled that the views of advocates for or against a bill generally are not to be accorded much weight.²⁴ SB 412's fate, like that of Mr. Kurtz, was unknown at the time this note was written. As described in this note, Mr. Kurtz's exposure to criminal conviction, and SB 412's interpretation should it ultimately become law, both depend on an interpretative structure that can be as blind to real "history" as it is useful in application.

24. See *State v. Guzek*, 906 P.2d 272, 282 (1995) (views of one witness do not evidence the general intent of the Legislative Assembly); *State v. Stamper*, 106 P.3d 172, 178 (2005) (Court "hesitant to ascribe to the Legislative Assembly as a whole the single remark of a single nonlegislator at a committee hearing"). *But see* *Fast v. Moore*, 135 P.3d 387, 391-92 (2006) (reasonable to assume legislature adopted witness' understanding of the bill where witness represented organization that drafted the bill and testimony was uncontradicted); *Zidell Marine Corp. v. West Painting*, 906 P.2d 809, 814-15 (1995) (legislative intent voiced repeatedly by bill's sponsors and was not contradicted by a member of the legislature).