RECENT COURT RULINGS THREATEN SURVIVAL OF TRIBAL SOVEREIGNTY

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Since time eternal, tribal sovereignty has been strongly and vigorously protected by Native American Tribes. Pursuant to well-established tenets of federal Indian law, tribes are viewed as independent sovereigns, and therefore, are accorded the same sovereign rights and immunities as state governments and local municipalities.

Specifically, the doctrine of sovereign immunity provides tribes with "common law immunity" from suit. As a general proposition, tribes cannot be sued without the tribe expressly consenting to such suit, or an explicit Congressional authorization via statute or otherwise.

The $23 billion tribal gaming industry may have played a role in the gradual deterioration of these long-standing sovereignty principles. As tribes become more and more sophisticated in doing business through their casinos and other economic ventures, the courts-including the United States Supreme Court-have become less willing to permit tribes to use sovereign immunity as a litigation shield. Recent cases over the last decade evidence this shift, including two cases issued in December, 2006.

Agua Caliente Band of Cahuilla Indians v. Superior Court of Sacramento County and Fair Political Practices Commission

On Dec. 21, 2006, a sharply divided California Supreme Court ruled that Indian Tribes may be sued in state court by the California Fair Political Practices Commission (FPP Commission) for the violation of state election campaign reporting laws. The court determined that the state's interest in "clean elections" essentially "trumps" tribal sovereignty.

In its 4-3 decision, the California court found that the state has a strong interest in providing "a transparent election process with rules that apply equally to all parties who enter the electoral fray." The court further opined that providing an exemption to tribes from lawsuits seeking to enforce the contribution rules, would have "the effect of substantially weakening" the applicable laws.

The FPP Commission had filed suit against the Agua Caliente Band of Cahuilla Indians in 2002, contending that the tribe had failed to timely disclose more than $8.5 million in contributions made to California candidates and political committees between 1998 and 2002. The tribe sought dismissal of the claims on grounds that it was immune from suit and that the FPP Commission had no jurisdiction over the tribe as a sovereign entity.

The state court judge denied the tribe's motion, holding that the FPP Commission did have jurisdiction over the tribe. Subsequent appeals by the tribe were denied and the Supreme Court then was asked to review the issue, with its resulting decision adverse to the tribe.

In early January, the tribe filed a petition seeking reconsideration of the decision. It is unknown whether the petition will be granted. If the petition is granted, the matter will undergo another briefing stage. If the petition is denied, the tribe will need to determine whether to seek recourse in the United States Supreme Court.

The import of the California decision is evident and could have wide-ranging impact on tribal sovereignty

rights. Many legal observers view the ruling as an ominous development that chips away at the concept of sovereignty-which has previously exempted tribes from most state interference.

In this regard, California gaming tribes have become influential in the political arena, spending millions on lobbying, candidates, and ballot initiatives. Indeed, it has been reported that the California tribes spent more than $200 million on state politics over the past decade (which includes more than $70 million on the 2004 gaming propositions). The court's majority wrote in the opinion that "allowing tribal members to participate in our state electoral process while leaving the state powerless to effectively guard against political corruption puts the state in an untenable and indefensible position without recourse."

The court's minority disagreed, contending that the power to modify the long-standing principle of tribal sovereignty should be left to Congress, not the state. The dissent opined: "The ideal of tribal sovereign immunity and federal protection has existed side by side with the reality of Indians massacred and dispossessed from their land by state and private interests, or more recently of Indians living in poverty as second-class citizens."

As a practical matter, it is unclear how much the California decision will change the role of many tribes in the political arena. The majority of the gaming tribes active in state politics already voluntarily comply with the California laws requiring disclosure of lobbying efforts and campaign contributions. Nevertheless, the decision has the potential to have implications far beyond the realm of politics. Indeed, at least eight other California tribes have filed "friends of the court" amicus briefs in support of the Agua Caliente position.

Marilyn Vann v. Dirk Kempthorne

In another December opinion, the District Court for the District of Columbia held that the Cherokee Tribe and its officials are not immune from claims pursued by the "Freedmen" arising under the Thirteenth Amendment and the Treaty of 1866. This case essentially reviewed the legal status of race relations harkening back to the Civil War.

In the 1830s, the Cherokee Indians were forced to migrate from the southeastern United States to Oklahoma along what has become known as the "Trail of Tears." Among those persons forced to migrate were the black slaves of Cherokees, free blacks who were married to Cherokees, and the children of mixed race families. Collectively, these persons were known as the "Black Cherokees." Following the end of the Civil War and emancipation of the slaves, the Black Cherokees became known as the "Freedmen." They were made citizens of the Cherokee Nation through the Treaty of 1866 as condition of the Cherokee Nation's continued sovereignty within the United States.

Notwithstanding the treaty agreement, the Cherokee Nation persisted in denying certain voting rights to the Freedmen. At the crux of the lawsuit, the Freedmen contended that the Cherokee Nation deprived them of membership and citizenship rights within the tribe. Specifically, the Freedmen alleged that they were prevented from participating in certain tribal elections in 2003.

The Freedmen sought a court order declaring that the 2003 elections were invalid and that the Secretary of the Interior should not recognize the results of the elections until the Freedmen were permitted to participate in the voting. The Cherokee Nation intervened in the action, contending it was a necessary and indispensable party. The nation then claimed it could not be joined because it is immune from suit as a sovereign entity.

The nation's arguments were unavailing. The court found that, notwithstanding the treaty agreements, the Cherokee Nation remained "intransigent…with respect to fulfilling its obligations to its Freedmen citizens." This led to Congress passing a specific Act in 1888 requiring the nation to share its assets with the Freedmen and other tribal members. In reviewing this history, the court stated: "By repeatedly imposing

such limitations on the sovereignty of the Cherokee Nation in order to protect the Freedmen, Congress has unequivocally indicated its intent to abrogate the tribe's immunity with regard to racial oppression prohibited by the Thirteenth Amendment [abolishing slavery]. Although the right to vote is not explicitly mentioned by the Thirteenth Amendment, there can be no doubt that the right to vote is fundamental and cannot be denied on account of race."

In concluding that the Cherokee Nation is not protected by sovereign immunity from the Freedmen's claims arising under the Thirteenth Amendment and the Treaty of 1866, the court opined that, to find otherwise "would be to deny effect to the Thirteenth Amendment as well as Congress's repeated enactments to protect the Freemen's rights to full membership in the Cherokee Nation, which includes the fundamental right to vote."

The court distinguished its holding from numerous other decisions dismissing suits against tribes on the grounds that tribes cannot be joined due to sovereign immunity. The court noted that "what these courts apparently failed to consider, however, is that Congress clearly indicated its intent to abrogate the Cherokee Nation's immunity with respect to violations of the Thirteenth Amendment as evidenced by the Treaty of 1866."

Thus, sovereign immunity was not viewed by the court as a bar to joining the Cherokee Nation to the lawsuit. It is unknown whether the nation will seek to appeal the ruling at this juncture.

Conclusion

The significance of these recent cases cannot be emphasized enough among federal Indian law observers. That tribal sovereignty has seen consistent erosion for at least the last ten years, if not 20 years, is an undisputable fact. Examples of this trend at the United States Supreme Court level include *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)(holding that Tribal Court lacked jurisdiction over civil claims against non-members where an accident occurred on public highway running through the reservation); *Kiowa Tribe v. Manufacturing Techs*, 523 U.S. 751 (1998)(in upholding sovereign immunity waiver of the tribe, the court strongly insinuated its distaste with sovereign immunity principles and encouraged Congress to take action to do away or modify the concept); C&L *Enterprises v. Citizen Band Potawatomi*, 532 U.S. 411 (2001)(holding that although there was no express waiver of sovereign immunity, parties' agreement to arbitration for dispute, the resolution was sufficient to waive the Tribe's sovereign immunity to suit).

In the view of most federal Indian law observers, the current Supreme Court Justices are not likely to be sympathetic to tribal interests. Thus, it remains to be seen what the court may do regarding the further modification to the principle of sovereign immunity if either of these cases ultimately find their way to the high court docket.

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