

## Tribal Sovereign Immunity: Will These Rights Survive Judicial Review?

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### BACKGROUND OF TRIBAL SOVEREIGN IMMUNITY

THE SOVEREIGN IMMUNITY of Native American tribes has been a well-engrained principle of federal Indian law for time eternal. Pursuant to this principle, tribes are viewed as independent sovereigns and therefore are accorded the same sovereign rights and immunities as state governments and local municipalities.<sup>1</sup>

The doctrine of sovereign immunity provides tribes with a “common law immunity” from suit.<sup>2</sup> It is well-settled federal law that tribes, as sovereigns, are immune from suit “without congressional authorization.”<sup>3</sup>

As explained by the Arizona Federal Court in *Hotvela*, “tribes are sovereign entities and therefore immunity protects a tribe from non-consensual actions in state and federal court.”<sup>4</sup> The Ninth Circuit Court of Appeals affirmed these principles underlying the application of sovereign immunity last year in a lawsuit involving an Arizona tribe.<sup>5</sup> As a general rule, no state, county or city may assert regulatory or jurisdictional power over a tribal government unless the federal government has expressly granted such rights by statute, or the tribe has expressly consented. The Tribal-State Compacts governing Class III gaming throughout Indian Country in the United States pursuant

to the Indian Gaming Regulatory Act (IGRA) are a prime example of tribes ceding certain sovereign rights through compromised legislation. Further, no one may sue a tribe without the tribe having expressly agreed to waive its sovereignty rights. This includes pursuing a suit in Tribal Court, as well as through non-judicial forums such as arbitration.

As everyone who has done business with and on behalf of Native American gaming operations knows, tribal casinos must be owned by the tribe pursuant to IGRA. As a result, the tribal gaming enterprises are typically structured as economic subordinates of the tribal government. This generally holds true regardless of whether the tribal casino is operated directly by the tribe, as a separate corporation or other entity formed under tribal law. By virtue

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<sup>1</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>2</sup> See *Village of Hotvela Traditional Elders v. Indian Health Svcs.*, 1 F. Supp. 2d 1022, 1027 (D. Ariz. 1997) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58).

<sup>3</sup> See *Santa Clara*, 436 U.S. at 58 (quoting *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940)). See also, *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 754 (1998) (precluding a company from suing a tribe in state court, explaining “as a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976) (As a “dependent, political, quasi-sovereign nation,” the tribe “enjoys sovereign immunity and cannot be sued without its consent or the consent of Congress.”).

<sup>4</sup> 1 F. Supp. 2d at 1027.

<sup>5</sup> See *Linneen v. Gila River Indian Community*, 276 F.3d 489, 491 (9th Cir. 2002), *cert. denied*, 2002 U.S. Lexis 4705 (June 24, 2002) (sovereign immunity barred suit against Gila River Indian Community, its Governor and Tribal Ranger).

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of being an “arm” of the tribal government, a tribal casino is typically entitled to obtain the sovereign immunity attributes accorded the tribal government.

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—seemingly have become less willing to protect and uphold this long-standing principle of sovereignty. A review of recent cases over the last decade or so evidences a serious erosion of this right—a right which has been so fiercely protected by the tribes. The United States Supreme Court may further chip away at the issue when it rules in the near future in *Bishop Paiute Tribe v. County of Inyo*.<sup>6</sup>

### **BISHOP PAIUTE DECISION**

The *Bishop Paiute* case began as an investigation into alleged welfare fraud by the Inyo County Sheriff’s Department in California. The county investigators seized records at the Bishop Paiute Tribe’s casino based on purported welfare violations. Three casino employees allegedly were receiving welfare while simultaneously working at the tribal casino. The sheriff’s office justified the seizure, contending that it was necessary to determine whether these employees were making more money than was allowable to continue to receive welfare benefits. In obtaining the records of the employees at issue, the county officials also seized the records of 78 other employees. No evidence of welfare fraud was ever substantiated following the seizure of these records.

As a result of the seizure of records, the Bishop Paiute Tribe filed suit against the Inyo County officials. The tribe alleged that the County had violated the tribe’s sovereign immunity because the County had no jurisdiction over the tribal government, including the tribal casino. The tribe also alleged that the search violated the Fourth Amendment’s prohibition against unlawful searches and seizures.

In response, the County argued that it was permitted to conduct the search—for which it had obtained a warrant from a County judge, as opposed to a Tribal Court judge—pursuant

to Public Law 280. This federal law is applicable in California (where the *Bishop Paiute* case arose) and a handful of other states. Generally, Public Law 280 grants certain law enforcement rights to the states over Indian lands located in that state. For obvious reasons, Public Law 280 has never been embraced by tribes, as it is considered an attack on tribal sovereignty rights.

A district court in California ruled in favor of Inyo County and held that the search and seizure was lawful. The tribe appealed to the Ninth Circuit Court of Appeals, which has traditionally been viewed as friendly to tribes when considering Indian law issues. The Ninth Circuit held that the County and its officials had violated the tribe’s sovereign immunity, as well as the Fourth Amendment. The Ninth Circuit decision, however, did not go so far as to invalidate the reach of Public Law 280.

The Supreme Court, which typically accepts only a very small percentage of the cases it receives, issued a writ of certiorari in *Bishop Paiute*, thus accepting review of the Ninth Circuit ruling. Based on the fact that the Ninth Circuit has the reputation as the most-reversed Circuit Court in the country, the Supreme Court is expected to issue a decision soon. Tribal advocates do not view the high court’s acceptance of the case as a good sign that the ruling will be affirmed.

### **NEVADA V. HICKS DECISION**

The Supreme Court’s decision to review the *Bishop Paiute* case raises a genuine concern in Indian Country that the Court is prepared to go beyond the Court’s 2001 decision in *Nevada v. Hicks*.<sup>7</sup> The *Nevada v. Hicks* ruling is viewed by tribes as a severe setback to accepted and traditional standards of Indian sovereignty on reservation lands. There, the Supreme Court held that a state game warden had a right, under federal law, to enter upon a reservation for the purpose of searching a tribal member’s home.

The warden had obtained a search warrant from the Nevada state court for the purpose of

<sup>6</sup> 275 F. 3d 893 (9<sup>th</sup> Cir. 2002), cert. granted, 123 S. Ct. 618 (Dec. 2, 2002) (oral argument held March 31, 2003).

<sup>7</sup> 533 U.S. 353 (2001).

seeking evidence that Floyd Hicks, a member of the Fallon Paiute-Shoshone Tribes of western Nevada, was poaching bighorn sheep. Tribal officials were contacted and shown the warrant. They then gave the warden authorization to search outside Hicks' home. The warden thereafter searched Hicks' home and damaged property therein while searching for evidence of wrongdoing by Hicks.

Hicks sued the warden in the Tribal Court and claimed that the warden had overstepped the authority in the warrant. The Tribal Court confirmed its jurisdiction over the matter. Thereafter, the State of Nevada argued to a federal court in Nevada that the Tribal Court lacked jurisdiction. On appeal, the Ninth Circuit determined that the game warden had overstepped his authority and ruled in Hicks' favor.

The United States Supreme Court had a different viewpoint of Hicks' situation than the Ninth Circuit, and reversed. In a unanimous ruling, the Court ruled that the tribe and the tribal police had no jurisdiction in the case and should not have even been consulted in the first place. In essence, the Supreme Court determined that state officials had the right to conduct on-reservation searches for an off-reservation crime. The Court reasoned that the state has jurisdiction over a tribal member on Indian lands when "state interests outside the reservation are implicated." Understandably, tribal advocates are concerned how far the Supreme Court may go in further extending this intrusion into tribal affairs by the state and others.

#### OTHER RECENT SUPREME COURT DECISIONS

Since the 1950s, there have been a number of cases viewed by the tribes as slowly chipping away at the protective shield of tribal sovereignty. However, Supreme Court observers reviewing case decisions over the last 15 years have opined that the chisel has now turned into a "sledgehammer" and the chinks have become "gaping holes."<sup>8</sup>

The most notable Supreme Court cases adversely impacting tribal sovereign immunity

prior to the *Nevada v. Hicks* ruling are summarized below in chronological order:

- *Oliphant v. Suquamish*, 435 U.S. 191 (1978). Held that tribes lack authority to prosecute non-Indian criminal defendants.
- *Washington v. Confederated Bands of the Colville Reservation*, 447 U.S. 134 (1980). Upheld imposition of state sales tax on non-Indians making transactions on the reservation, and on Indians making purchases on reservations other than their own.
- *Montana v. United States*, 450 U.S. 544 (1981). Held that Crow Tribe had no authority to regulate the hunting and fishing of non-Indians on non-Indian owned reservation land.
- *Rice v. Rehner*, 463 U.S. 713 (1983). Held that states have right to regulate liquor sales on reservation lands.
- *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989). Upheld jurisdiction of County concerning application of zoning regulations on certain parts of reservation lands.
- *Duro v. Reina*, 495 U.S. 676 (1990). Held that tribes had no criminal jurisdiction over non-member Indian activity on the reservation.
- *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 498 U.S. 1022 (1992). Held that General Allotment Act allowed a County to impose property taxes on Indian fee lands.
- *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Held that, when an accident occurs on a public highway running through Indian reservation land, the Tribal Court has no jurisdiction over civil claims against non-members.
- *Kiowa Tribe v. Manufacturing Techs*, 523 U.S. 751 (1998). Upheld sovereign immunity waiver of Kiowa Tribe, stating that "as a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"; however, in so doing, the Supreme Court strongly insinuated its dis-

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<sup>8</sup> See AMERICAN INDIAN REPORT, October 2001.

taste with the whole principle of sovereign immunity and indicated that Congress should take action to do away with the concept.

- *Atkinson Trading Company v. Shirley*, 532 U.S. 645 (2001). Held that Navajo Nation was prohibited from imposing hotel tax upon non-members on non-Indian fee land within the reservation.
- *C & L Enterprises v. Citizen Band Potawatomi*, 532 U.S. 411 (2001). Held that, although there was no express waiver of sovereign immunity in the contract between tribe and contractor, the parties' agreement to arbitration for dispute resolution was sufficient to waive sovereign immunity to suit.

On a more positive note for the tribes, the Supreme Court declined to accept the petition for review in *Lobo Gaming v. Pit River Tribe of California*.<sup>9</sup> In that case—which is not authorized for citation purposes pursuant to the California Rules of Court—the California Court of Appeals, Third Appellate District, held that the Pit River Tribe of California did not waive its immunity to suit in a contract with Lobo Gaming, Inc. Although the tribe did enter into an equipment lease that waived the tribe's sovereign immunity, this provision was never approved by the registered voters of the tribe. Under the Tribal Constitution, any waiver of sovereign immunity required the approval of a majority of the registered voters of the tribe. Absent the Tribal Council securing authority from the tribal membership, the California State Court viewed the sovereign immunity waiver as invalid and ineffective.

### CALIFORNIA CASES IN CONFLICT OVER SOVEREIGN IMMUNITY

In February, a California State Court judge in Sacramento (Loren McMaster) ruled that the Agua Caliente Band of Cahuilla Indians was subject to the same state campaign-finance laws that apply to other political contributors with respect to disclosure requirements. The state court specifically rejected the assertion that the doctrine of tribal immunity applied to

insulate the tribe from the jurisdiction of the California state courts. The state's Fair Political Practices Commission had sued the tribe seeking compliance by the tribe with the state campaign rules with respect to contribution disclosures.<sup>10</sup> The tribe's appeal to the California Third District Court of Appeals was denied without comment in late April.

On the same day that the *Agua Caliente* appeal was denied, a different State Court Judge in Sacramento came to an opposite conclusion. In a ruling involving the Santa Rosa Indian Community, State Court Judge Joe Gray determined that the Fair Political Practices Commission had no authority based upon tribal sovereign immunity principles to require the Santa Rosa Tribe to report its campaign donations and lobbying expenditures.<sup>11</sup>

The Fair Political Practices Commission has until late June to decide whether to appeal the *Santa Rosa* ruling. In the *Agua Caliente* case, the tribe may appeal to the California Supreme Court. Depending on any further appeal proceedings, the parties may proceed to trial.

### CONCLUSION

The tribes and their counsel will be waiting for the *Bishop Paiute* decision with much interest and obvious trepidation.<sup>12</sup> In addition to this judicial threat to sovereign immunity, the tribes have to be equally vigilant of legislative challenges. Each year Congress considers one or more bills that include language seeking to abolish or limit tribal sovereignty. To date, the tribes have been successful in beating back such challenges. But those challenges are likely to continue.

There is no guarantee the Supreme Court will continue its trend in eroding the long-

<sup>9</sup> 2002 Cal. App. Unpub. LEXIS 894 (May 7, 2002 filed).

<sup>10</sup> See *Fair Political Practices Comm. v. Agua Caliente Band of Cahuilla Indians*, No. 02A204545 (Cal. Super. Ct. 2003).

<sup>11</sup> See *id.*

<sup>12</sup> The *Bishop Paiute* decision was issued by the Supreme Court on May 19, 2003. The Court, in vacating and remanding the Ninth Circuit decision, did not reach the sovereignty issue and instead narrowly held that the Tribe could not sue under 25 U.S.C. 1983. [See full text case on page 297.]

standing tenets of tribal sovereignty when it rules in the *Bishop Paiute* case. However, one thing is guaranteed: The tribes and their advocates will battle long and hard to make sure that this precious right is not wholly eradicated either by Judicial or Legislative action. As noted by Ernest Stevens, Jr., Chairman of the National Indian Gaming Association, during the group's 12<sup>th</sup> Annual Meeting and Trade

Show earlier this year in Phoenix, respecting and understanding tribal sovereignty is critical. "We gave up this whole country to get what we have, we have that right. When you give up what we've given up in terms of country, in terms of lives, we've got to stand strong to protect that sovereignty."

Rest assured the war over tribal sovereignty rights has only begun.

