TRIBAL SOVEREIGN IMMUNITY: CAN YOU SUE A TRIBAL EMPLOYEE?

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TRIBAL SOVEREIGN IMMUNITY: CAN YOU SUE A TRIBAL EMPLOYEE?

By Thomas Weathers

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SUMMARY: Sovereign Immunity for Indian tribes extends to tribal agencies, tribal businesses, and tribal officials. In most jurisdictions, including the Ninth Circuit, this immunity also extends to tribal employees. In a California state court, however, tribal employees may not be immune from suit even when acting within the scope of their duties. Indian Law attorney Thomas Weathers examines the state of tribal immunity in California.

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ARTICLE: Generally speaking, Indian tribes cannot be sued absent tribal consent. This immunity extends to tribal agencies, tribal businesses, and tribal officials. In most jurisdictions, including the Ninth Circuit, this immunity also extends to tribal employees.

In a California state court, however, tribal employees may not be immune from suit even when acting within the scope of their duties. Whether a lawsuit may proceed against an employee turns on whether the tribal employee was:

(1) acting within the scope of her official authority, and

(2) performing discretionary or policymaking functions within or on behalf of the tribe.

IMMUNITY PRINCPLES

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by other sovereign powers. *Great Western Casinos, Inc. v. Morongo Band of Mission Indians, 74 Cal.App.4th 1407, 1419 (1999).* Because tribal sovereign immunity is a matter of federal law, it is not subject to diminution by the states. *Ameriloan v. Superior Court, 169 Cal.App.4th 81, 89 (2009).*

An Indian tribe cannot be sued - whether in tort or contract, law or equity - unless Congress has authorized the suit or the tribe has clearly waived its immunity. *See Campo Band of Mission Indians v. Superior Court, 137 Cal.App.4th 175, 182 (2006).* A waiver of tribal immunity cannot be implied but must be unequivocally expressed. *Warburton/Buttner v. Superior Court, 103 Cal.App.4th 1170, 1182 (2002).*

Tribal sovereign immunity extends to an Indian tribe's commercial activities. *Big Valley Band of Pomo Indians v.*

Superior Court, 133 Cal.App 4th 1185, 1191 (2005). This includes a tribal casino located on tribal land. *See Redding Rancheria v. Superior Court, 88 Cal.App.4th 384, 388-89 (2001).* This also includes a tribal business located on non-tribal land. "The doctrine of tribal sovereign immunity is not limited to government-related activity occurring on tribal lands, but also protects the tribe's off-reservation, for-profit commercial conduct." *Ameriloan, 169 Cal.App.4th at 89 (2009).*

TRIBAL OFFICIALS

Tribal sovereign immunity also extends to individual tribal officials acting in their official capacity and within the scope of their authority. *Trudgeon v. Fantasy Springs Casino, 71 Cal.App.4th 632, 643 (1999).* However, "there is inherent in the term 'tribal officials' a recognition that not all individuals associated with a tribe are entitled to immunity." *Turner v. Martire, 82 Cal.App.4th 1042, 1049 (2000).* There may be a difference between "tribal official" and "tribal employee." Most jurisdictions follow the majority rule that tribal employees acting in their official capacities and within the scope of their authority enjoy the immunity of the tribe. *See, e.g., Filer v. Tohon O'odham Nation Gaming Enterprise, 129 P.3d 78, 85 (Ariz. App. 2006); Chayoon v. Sherlock, 877 A.2d 4, 8 (Conn. App. 2005).*

In fact, the Ninth Circuit recently clarified in a case of first impression for this circuit that "tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority." According to the Ninth Circuit, the principles that motivate the immunizing of tribal officials from suit - protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official - apply just as much to tribal employees when they are sued in their official capacity. *Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718, 727 (9th Cir. 2008).*

California, on the other hand, appears to follow the minority view. Under California law, a "tribal official" to whom immunity should extend is one who performs a high-level or governing role in the affairs of the tribe. To qualify as a "tribal official" for immunity purposes, the tribal employee must show that he or she "performed discretionary or policymaking functions within or on behalf of the Tribe, so that exposing [him or her] to liability would undermine the immunity of the Tribe itself." *Turner, 82 Cal.App.4th at 1054.*

PRACTICAL EFFECTS

California is at odds with the Ninth Circuit. In the Ninth Circuit, a tribal employee acting in her official capacity within the scope of her authority is automatically immune. In California, that same employee must prove that she not only acted within the scope of her authority but that she also performed discretionary or policymaking functions. This difference may be unworkable and unfair to those lower level employees who work for Indian tribes. Given that tribal sovereign immunity is a matter of federal law not subject to diminution by the states, a good argument can be made that the recent Ninth Circuit decision trumps the earlier California appellate court decision. The California Supreme Court may need to resolve the issue.

Whether in federal court or state court, a tribal employee acting in her official capacity and within the scope of her authority should enjoy the tribe's immunity even if she did not act in a discretionary or policymaking role. But for now, a lawyer bringing or defending a lawsuit against a tribal employee in a California court needs to address the discretionary or policymaking issue.

RELATED LINKS: For additional discussion of Tribal Sovereign Immunity generally, see
- 1-7 Cohen's Handbook of Federal Indian Law § 7.05

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Alexander, Berkey, Williams & Weathers on Barona Band of Mission Indians v. Yee

2009 Emerging Issues 3292

Alexander, Berkey, Williams & Weathers LLP on Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008): The Ninth Circuit Decides to Apply State Sales Taxes to Materials Purchased for Construction of a Tribal Casino.

By Thomas Weathers Esq. and David House Esq.

January 19, 2009

SUMMARY: The 9th Circuit restricts the application of Indian law Tax Immunities in Barona Band of Mission Indians v. Yee.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Overview. In light of recent court decisions, a trend is developing to restrict the scope or application of Indian law tax immunities. This trend may be an offshoot of the U.S. Supreme Courts recent case law that seemingly chips away at tribal sovereignty and the capacity of Indian tribes to govern transactions and occurrences on their reservations, or it may be the perception that tribes are, put simply, rich casinos that they are essentially sophisticated and lucrative business enterprises that should pay their fair share in taxes. This perception can be misleading, as of the more than 500 federally-recognized Indian tribes within the United States, many tribes do not have casinos, and many of the existing tribal casinos generate only modest income for their reservations. Viewing tribes as rich casinos also ignores the more complex political, social and historical context: Tribes are governments that promote the welfare of their membership and the stewardship of their land base, they represent multi-faceted cultures, and they are distinct entities that maintain a unique historical place and legal status based in part on the long history of the United States treating with tribes and recognizing tribal sovereignty.

Yet in *Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008)*, the Ninth Circuit repeatedly underscored a casino construction projects monetary scope and the substantial revenues of the casino to which the improvements were made in reaching the decision that state sales taxes apply with respect to the materials purchased for the expansion project on tribal lands. For example, the court made references to the Tribes multi-million dollar casino expansion and to its highly lucrative gambling enterprise, and, in punning a casino gambling slogan, the court observed that *enough of these real players had played and lost* for the Tribe to plan a $75 million expansion to the casino floor and hotel, replete with a new wedding chapel, parking structure and other resort amenities. *Id. at 1186-87* (italics added).

Generally, the amount of money that a building project costs is irrelevant to applying the law of Indian tax immunities. Nonetheless, the court emphasized the cost of the project and the lucrative aspect of the particular tribal

casino at issue. However, there is a clear possibility that this cases holding may, in the future, not be limited to the factual circumstances of a successful casino.

Background. The Barona Band of Mission Indians (Barona Band or the Tribe) operates the Barona Valley Ranch Resort & Casino (the Casino) on its reservation lands within San Diego County, California. In 2001 the Tribe entered a prime contract with a general contractor to expand the Casino. *Barona Band* at 1187. The general contractor then entered into subcontracts for various construction tasks, including a subcontract with Helix Electric, Inc., (hereinafter, Helix Electric) for electrical work. *Id*.

The prime contract directly addressed the issue of state sales taxation, and it set forth a process for the purpose of achieving immunity from state sales taxes relating to the construction materials. This process included the following terms:

Delivery of construction materials to occur on tribal lands.

Contractor, together with all subcontractors, designated as the Tribes purchasing agent for the procurement of construction supplies.

Purchases officially consummated, with title transferring, on the Tribes property.

Shipping orders and delivery receipts required to state, THIS SALE IS NOT COMPLETE, AND TITLE DOES NOT PASS, UNTIL DELIVERY IS ACCEPTED BY THE BUYER ON THE BARONA INDIAN RESERVATION.

Contractor not permitted to make advance payments to suppliers for materials or equipment that have not been delivered or stored at the site on tribal property.

Id. at 1187-88. The Tribe agreed to provide indemnification from state sales tax liability so long as the established process was followed. *Id. at 1188.*

Subsequently, Helix Electric, Inc. completed approximately $4 million dollars in electrical work on the expansion project without paying state sales taxes. *Id*. Thereafter the California State Board of Equalization (the Board) conducted an audit and issued a Notice of Determination to Helix Electric. demanding the payment of approximately $200,000 in sales and use taxes. *Id*. Helix Electric. looked to the general contractor for indemnification, and the general contractor sought reimbursement from the Tribe. *Id*. The Tribe then sued individual members of the Board in their official capacities seeking a determination that the taxation was invalid. *Id*.

The District Court invalidated the taxation, holding that the taxes were preempted under the balancing-of-interest test set forth in *White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). Barona Band* at 1186, 1188. The Board then appealed to the Ninth Circuit. *Id*. at 1188.

Case Analysis. The Ninth Circuit reversed the District Court, upholding the state sales taxes assessed against the purchases of construction materials by Helix Electric, which materials were installed at the tribal casino on Indian lands. *Id*. at 1186, 1193-94. The court reached this holding despite the carefully-arranged contractual provisions concerning the purchase and transfer of title for the construction materials on the reservation. Evidently, the court reasoned that because the Tribe contractually agreed to provide indemnification against the assessment of tax liability, the Tribe would ultimately incur the tax costs for amounts assessed against the general contractor and the various subcontractors. *Id*. at 1188-89 and 1191.

1. The Court Held that the Per Se Immunity from Taxation of Tribal Purchases in Indian Country Did Not Apply. As the Ninth Circuit recognized, the U.S. Supreme Court announced in another Indian law tax case that when Congress does not instruct otherwise, a States excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country. *Id*. at 1189 (quoting *Oklahoma Tax Commn v. Chickasaw Nation, 515*

U.S. 450, 453 (1995)). Thus, a dispositive question was whether the legal incidence of the state sales tax fell on the Barona Band in connection with the purchase of the construction materials. For a detailed discussion of State Taxing Authority in the context of Indian law, *see Cohens Handbook of Federal Indian Law*, § 8.03.

The Ninth Circuit reasoned that [t]he party bearing the legal incidence of a state tax may well differ from the party bearing the economic burden of that tax. *Barona Band* at 1189. Accordingly, the fact that the tax cost would ultimately be paid by the Barona Band did not mean that the taxs legal incidence, which is the legal obligation to pay the tax, rested with the Tribe. The court held that the legal incidence was on the subcontractor, Helix Electric for reasons including that under California law a construction contractor . . . is the consumer of materials furnished later to a client pursuant to a construction contract and sales tax or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor. *Id*. at 1190 (citation omitted). The *per se* tax immunity from sales taxation of Indian tribes in Indian country did not apply because the court determined that the tax fell on the subcontractor, not on the Tribe.

Furthermore, the court decided that the subcontractors acting as the Tribes Purchasing Agent by contractual arrangement was not sufficient to defeat the tax. The court stated that it declined --

to extend the *per se* test, rooted in due respect for Indian autonomy, to provide tax shelters for non-Indian businesses. The parties may not alter the economic reality of a transaction a subcontractor performing electrical work for a general contractor to reap a windfall at the publics expense. The incidence of taxation depends upon the substance of a transaction. . . . To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of . . . tax policies. *See Commr v. Court Holding Co., 324 U.S. 331, 334 (1945).*

Barona Band at 1190.

2. Reversing the District Court, the Ninth Circuit Held that the State Tax was not Preempted because the Balance of Interests Favored the State. Next, the court employed a balancing-of-interest test to determine if the state taxation as applied to the subcontractor Helix Electrics purchase of materials for construction work at the Barona Bands casino was preempted by operation of federal law. The court explained that [t]he test calls for careful attention to the factual setting, requiring a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. *Id*. (quoting *White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980)).* The court also listed factors to aid in balancing the respective interests:

the degree of federal regulation involved,

the respective governmental interests of the tribes and states (both regulatory and revenue raising), and

the provision of tribal or state services to the party the state seeks to tax.

Barona Band, 528 F.3d at 1190 (quoting *Salt River Pima-Maricopa Indian Community v. Arizona, 50 F.3d 734, 736 (9th Cir. 1995)* (internal citation omitted).

In balancing the interests, the court found the Tribes interests regarding imposition of the sales tax to be weak, the federal interests similarly minimal, and the state interest in the application of its general sales tax to be greater than the combined federal and tribal interests. *Barona Band* at 1192. In summary, the court reasoned as follows:

Backdrop

The court noted the smoke shop cases that expressed disfavor toward tribal manipulation of tax policy to gain an artificial competitive advantage over all other businesses in a State. *Id*. at 1190-91 (quoting *Washington v. Confederated*

Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980)).

Tribal Interests

The court determined that the Tribes right of territorial autonomy is significantly compromised by the Tribes invitation to the non-Indian subcontractor to theoretically consummate purchases on its tribal land for the sole purpose of receiving preferential tax treatment. *Barona Band* at 1191. The court distinguished the *Barona Band* case involving the purchase of construction materials with cases addressing state taxation of non-Indians performing work on Indian land. *Id*.

The court recognized the Tribes interest in economic self-sufficiency and understood that, if it allowed the sales tax, the actual cost of the tax would be incurred by the Tribe. *Id*. at 1191-92. However, the court determined that the concern of the Tribe having to pay the tax costs carries minimal weight in the context of a $75 million casino expansion, because the tax cost would have been the responsibility of the non-Indian subcontractor but for the Tribes agreement to provide indemnification for tax liability. *Id*. at 1192.

The court noted that the taxs legal incidence fell on the non-Indian subcontractor. *Id*.

Federal Interests

The court reasoned that federal interests are greatest when the government comprehensively and pervasively regulates the sphere that the state is seeking to tax or regulate, and that no comprehensive or pervasive regulations were at issue in the *Barona Band* case. *Id*. The court found that through the Indian Gaming Regulatory Act (IGRA) the federal government regulates Indian gaming and that the state tax is not on Indian gaming activity or profits, but rather on construction materials purchased by a non-Indian electrical subcontractor, which could be used for a multitude of purposes unrelated to gaming. *Id*. The court reasoned that IGRA is a gambling regulation statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern. *Id*.

The court recognized the federal interest in tribal economic self-sufficiency, but found that interest fades when the commercial activity is rigged to trigger a tax exemption. *Id*. The court also repeated that the concern with respect to self-sufficiency necessarily lessens in the specific context of a multi-million dollar casino expansion. *Id*.

State Interests

The court ruled that the balancing of interests tips in favor of the state where the state levies a neutral sales tax on non-Indians purchases which but for contractual creativity would have occurred on non-Indian land. *Id*.

The court found that the state has a legitimate interest in raising revenue to provide general governmental services. *Id*. at 1192-93. (The court noted that the state interest is strengthened where a nexus exists between the taxed activity and the provided government function, and acknowledged that in the *Barona Band* case there was not a connection between the taxes raised and the government services provided. *Id*. at 1193.)

The court also found that the state has an interest in preventing the manipulation of its tax laws to aid a casino in shopping tax exemptions to local businesses that otherwise would remit sorely needed revenue to the state. *Id*.

3. Indian Gaming Regulatory Act Did Not Preempt the Taxation. The Tribe separately argued that the IGRA alone preempted the state taxation. *Id*. The court disagreed, finding that the IGRAs comprehensive regulation of Indian gaming does not extend to third-party purchases of construction materials for gaming facilities. *Id*. The court also found that the balancing-of-interest test developed in *Bracker* was the appropriate analytical framework to apply with respect to the question of whether the sales taxes were preempted by operation of federal law. *Id*.

Discussion. It is noteworthy that the court described the contractual arrangement regarding the state sales taxation

as an effort by the Tribe to merely market[] a sales tax exemption to non-Indians as part of a calculated business strategy and as a strategic effort to receive construction services from non-Indians at a competitive discount by circumventing the state sales tax. . . . *Id*. at 1186. Use of words like calculated and circumventing suggest a pointed and disapproving take on the Tribes tax immunity arrangement. Another take is that the Tribe was merely attempting to diligently exercise and protect its sovereign rights relating to a tribally-funded project on its lands.

Points to consider with respect to the courts application of the *Bracker* balancing-of-interest test include the following:

The outcome of legal incidence test should not affect balancing. In finding a weak tribal interest, the court appeared to count the fact that the taxs legal incidence fell on the non-Indian subcontractor. *Id*. at 1192. This is a factor that should not be weighed in favor of the state because the legal incidence of a tax typically falls on a non-tribal party in a preemption tax case relating to on-reservation transactions. If the legal incidence fell on a tribe relating to purchases in Indian country then the *per se* test would apply and no balancing of interests would occur. However, because the court in the *Barona Band* case determined that the legal incidence fell on the non-Indian party, the preemption balancing-of-interests test was applied. The outcome of the legal incidence test should inform a court as to which legal analysis to apply, but should not favor the state when the interests are then balanced.

There are examples of off-reservation vendors selling goods on-reservation and not being subject to state taxation. The Ninth Circuit stated that the Barona Bands right of territorial autonomy is significantly compromised where the Tribe sought to make purchases on the reservation to obtain preferential tax treatment. As a general matter, there is nothing unusual about off-reservation vendors making sales on a reservation and state taxes not applying. For example, the Supreme Court held that a state tax did not apply to an on-reservation sale of farm machinery to a tribal enterprise by a corporation that did not reside on the reservation because the taxation was preempted by the Indian trader statutes. *Central Machinery Company v. Arizona State Tax Commission, 448 U.S. 160 (1980).*

The self-sufficiency interest should apply to tribal casinos. The court stated that the concern with respect to self-sufficiency necessarily lessens in the specific context of a multi-million dollar casino expansion. *Id*. This assertion was made without any supporting citation. However, in recognizing a tribes interest in economic self-sufficiency in a preceding sentence, the court cited *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 218-19 (1987)* a case concerning the operation of a tribal casino and finding a tribal interest in economic self-sufficiency relating to a tribal casino operation. Regardless, the *Barona Band* court appears of the view that the self-sufficiency factor is less important with respect to expensive casino improvements.

The marketing tax exemption precedent that the court relies upon is from a distinguishable line of case law. The smoke shop cases, in which the Supreme Court expressed disfavor toward a tribe marketing a tax exemption, are factually distinguishable from the *Barona Band* case as the Ninth Circuit recognized. In *Colville,* for example, the issue was whether a state should be able to tax the sale of cigarettes to non-Indians where the tribal retailer had obtained the cigarettes by wholesale purchase from a non-Indian distributor.

The *Barona Band* case is different. Unlike in *Colville*, the sales taxes, or the costs of the sales taxes, are paid by the Tribe and not by non-Indian customers. Even though the legal incidence is on the non-Indian subcontractor in the Barona Band construction situation, that is an upstream tax that almost certainly would be passed on to the Tribe as a business matter, irrespective of whether an indemnification agreement was in place.

The regulation of construction contractors on the reservation may be a tribal interest. The court stated that IGRA is a gambling regulation statute, *not a code governing construction contractors, the legalities of which are of paramount state and local concern. Id*. at 1192 (italics added). Though the court did not explain, its reference to local concern in state and local concern presumably refers to local state concern, such as county concern, with respect to regulating construction contractors. However, in the Barona Band circumstance, the locality that arguably has the greatest interest in the legalities and governance of construction contractors is the Barona Band, which governs the land on which the

casino is located and operates the casino. Though the opinion did not discuss this matter, it is common and typically required for tribes to adopt building and safety codes applicable to tribal casinos. Had the court addressed this, perhaps it would have perceived a tribal interest in the regulation of contractors performing work on the reservation.

The court indicated that it found the transactions at issue to occur on tribal lands. The court ruled that the balancing interest tips in favor of the state where the state levies a neutral sales tax on non-Indians purchases which but for contractual creativity would have occurred on non-Indian land. *Id*. This statement appears to establish in the courts view that the relevant transactions occurred on tribal lands. The location of the state taxation (or regulatory) event is important. Given that the court adopted the view that the contractual arrangement served to make the transactions occur on the reservation, this commentary does not address issues relating to transactions occurring outside of Indian country.

The states general interest in raising revenue may not be enough to defeat tribal and federal interests. The court found that the state has a legitimate interest in raising revenue to provide general governmental services. *Id*. at 1192-93. The Supreme Court and the Ninth Circuit previously found that the general interest of a state in raising revenue, alone, may not be sufficient to outweigh tribal and federal interests. *See, White Mountain Apache Tribe, supra, at 150; Hoopa Valley Tribe v. Nevins, 881 F.2d 657, 661 (9th Cir. 1989).*

Practical Tips. The *Barona Band* court described the tribal casino as a sophisticated, multi-million dollar enterprise. This factor appears to have influenced the courts finding that the sales taxes applied even though the taxes were imposed on the purchase of materials for use in construction work relating to a tribal enterprise in Indian country. Accordingly, it is reasonable to consider the possibility in future cases that the economic circumstances of a tribal enterprise may influence a courts disposition in a construction sales tax case. A court may justify differential treatment of a lucrative casino based on the balancing-of-interest test, asserting that in the rich casino context, requiring a tribe to pay state taxes is a minimal tribal interest given the ability of a tribe to pay the taxes in that instance. In this regard, it is worth considering that in the *Barona Band* case the court viewed the relative interest in tribal self-sufficiency as minimal, evidently because of the lucrative nature of the casino enterprise. However, as noted, there is the risk of this case being applied more broadly.

In addition, it may be generally suggested:

That the *Barona Band* case may be prudently read to indicate that certain contractual arrangements that may have worked with respect to achieving tribal sales tax immunity in the past at least with respect to the purchase of construction materials, may, at least in certain circumstances, not result in similar tax immunity going forward.

That tribal interests may be best served by proceeding with caution in this area, and in seeking careful advance legal review with respect to the possible application of Indian tax immunities, particularly involving sales taxes in the construction context. Federal courts may continue to interpret and apply tax immunities more narrowly.

That tribes should carefully consider whether to offer indemnification of third-party contractors, suppliers, or retailers in the event sales taxes are imposed. In the *Barona Band* case, the tax indemnification agreement appears to have shifted the tax-cost burden from the subcontractor and contractor to the Tribe, and the fact that the Tribe would ultimately pay the tax cost based on the indemnification agreement did not stop the court from ruling to deny the tax immunity.

That sales and purchase arrangements meant to meet tax immunity requirements should be directly and clearly within the scope of the applicable immunity. In the *Barona Band* case, for example, the contract designated the contractor and subcontractors as purchasing agents of the Tribe to bring the non-Indian contractors within the tribes immunity with respect to on-reservation purchases. The Tribes approach may have been reasonable, yet the court rejected the arrangement, stating that the contracting parties may not alter the economic reality of a transaction in order to alter the tax liabilities.

That with respect to the purchase of construction materials, generally speaking, the best approach to bolster the

position that Indian law tax immunity applies may be for a tribe itself to negotiate, purchase, and take delivery of the materials on the reservation or on the tribes trust land. In other words, to make arrangements so that the *per se* immunity applies. However, this would still require careful consideration on how to structure and conduct the arrangement, as well as of the relevant advantages and the risks of tax litigation and possible liability.

Any particular situation, including those concerning state taxation or immunity of an Indian tribe or tribal entity, or of the taxation of non-Indians where the tax costs are passed on to a tribe or a tribal entity, should be carefully analyzed and considered in light of the specific facts, circumstances and laws at issue, including whether the activities at issue occur on or off the reservation. Such consideration should be made with reflection regarding the trends in this area of the law as represented, in part, by the sales taxation permitted with respect to the construction work at the Barona Bands casino.

RELATED LINKS: For more information on Indian Law Tax Immunity, see

- Cohen's Handbook of Federal Indian Law Chapter 8 -- Taxation

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John P. LaVelle on Plains Commerce Bank

2008 Emerging Issues 2699

Indian Law at the Turning Point: The Supreme Courts Precarious Denial of Tribal Authority over Nonmembers in Plains Commerce Bank v. Long Family Land and Cattle Company

By John P. LaVelle

August 14, 2008

SUMMARY: In a 5 to 4 decision, the Supreme Court held in Plains Commerce Bank that neither of the Montana exceptions validates tribal authority over a discrimination claim related to a nonmember-owned banks sale of non-Indian fee land on the reservation. This Emerging Issues Analysis is by Professor John P. LaVelle, a member of the executive editorial committee for the current edition of Cohens Handbook of Federal Indian Law.

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ARTICLE: *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S.__, *128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008)* is the tensely awaited first Indian law decision of the Supreme Court since the appointment of Chief Justice John Roberts and Justice Samuel Alito to the Court as replacements for the late chief justice William Rehnquist and retired justice Sandra Day O'Connor, respectively. Interest in the case has been further heightened by the fact that it deals with perhaps the most controversial of all modern doctrines of federal Indian law, the judicially devised limitations on the inherent authority of Indian tribes to govern the conduct of nonmembers within reservation boundaries. The Court's ultimate conclusion that the Cheyenne River Sioux Tribe lacked jurisdiction to adjudicate a discrimination claim rooted in tribal law against a nonmember-owned bank on the tribe's reservation seems in keeping with a three-decades-long string of defeats for Indian tribes in the Supreme Court in cases dealing with tribal assertions of authority over nonmembers (with the notable exception of *United States v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004)*, discussed below). Nevertheless, the decision presents a number of surprises, which this commentary addresses in terms of the decision's doctrinal impacts as well as its jurisprudential and political implications.

(1) IMPACTS ON THE DOCTRINE OF TRIBAL CIVIL JURISDICTION. The prevailing approach for determining whether an Indian tribe, absent authorization by treaty or federal statute, can exercise civil jurisdiction over the on-reservation conduct of nonmembers of the tribe is the one inaugurated by the Supreme Court in *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).* As modified by subsequent decisions, e.g. *Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997)*, the *Montana* test permits tribes to regulate nonmembers' on-reservation activities or adjudicate claims stemming from such activities only when either:

(1) a consensual relationship exists between the nonmembers and the tribe (or its members), allowing the tribe to

regulate nonmember activities arising from that relationship; or,

(2) the nonmembers' conduct threatens or has some direct on the political integrity, the economic security, or the health or welfare of the tribe. *Montana, 450 U.S. at 565-66.*

In the *Plains Commerce* litigation, both the federal district court and the Eighth Circuit Court of Appeals held that the Cheyenne River Sioux Tribe properly exercised sovereign jurisdiction pursuant to the first *Montana* exception over a discrimination claim brought by a company owned by tribal members against a nonmember-owned bank. *Plains Commerce, 440 F. Supp. 2d 1070 (D.S.D. 2006), aff'd, 491 F.3d 878 (8th Cir. 2007).* On review the Supreme Court reversed the Eighth Circuit's decision, concluding that neither of the *Montana* exceptions validated the tribe's jurisdiction.

The most striking feature of the Supreme Court's decision is its narrowness. As Justice Ginsburg pointed out in dissent, the fighting issue in the case, as played out in the tribal courts, was whether the bank, in violation of tribal law, had discriminated against the member-owned company with respect to the bank's mortgage lending practices. *128 S. Ct. 2709, 2731* (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Specifically, the Long Family Land and Cattle Company alleged that, based solely on race and tribal affiliation, the bank had (1) unfairly withdrawn its initial offer to sell land to the company on a twenty-year contract for deed, (2) substituted a two-year lease with an option to purchase that required the company to make a large balloon payment within 60 days of the expiration of the lease, and (3) sold the land to non-Indians on more favorable terms after the Indian-owned company failed to satisfy the terms exacted by the bank. *Id.* The Eighth Circuit ruled that the tribe properly exercised adjudicative jurisdiction over the company's tribal-law-based discrimination suit as an appropriate other means of regulating nonmember conduct within the meaning of *Montana*'s first exception, an exception triggered in this case by the consensual nature of the longstanding commercial relationship between the bank and the member-owned company. *491 F.3d at 889-90.* Rather than focusing on the alleged discrimination at the heart of the company's complaint, however, the Supreme Court characterized the dispute as one that concern[ed] the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals. *128 S. Ct. at 2714.* Further depicting the company's tribal tort suit as one that operates as a restraint on alienation, the Court held that neither of the *Montana* exceptions applies to a claim that relates directly to the sale of non-Indian fee lands on Indian reservations. *Id. at 2721.* Drawing a distinction between nonmember *conduct* or *activities*, on the one hand, and the *sale of non-Indian fee land*, on the other, the *Plains Commerce* majority held that while the former *may* fall within the scope of *Montana*'s exceptions, the latter simply *cannot*: *Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land. *Id.*

The upshot of the novel analytic approach employed by the Supreme Court majority in *Plains Commerce* is that it effects a narrow, fact-specific limitation on the scope of both *Montana* exceptions, prohibiting Indian tribes from exercising civil jurisdiction over the sale of non-Indian fee lands on Indian reservations or over any claim directly related to such sale. The narrowness of this newly announced sale-of-non-Indian-fee-land limitation on tribal authority is suggested by the fact that the Court could cite no precedent addressing the issue, although the Court characterized this absence of relevant precedent -- somewhat misleadingly -- as signifying that in no case have we found that *Montana* authorized a tribe to regulate the sale of [non-Indian] fee land. *Id. at 2722.* Noteworthy, too, is the Court's implicit rejection of Plains Commerce Bank's request for a broad ruling forbidding *any* assertion of tribal authority over the conduct of nonmembers on non-Indian fee land. *See* Petitioner's Brief at 20-26, *Plains Commerce*, 554 U.S. ___ (2008). By limiting its holding to assertions of tribal authority that directly relate to the sale of non-Indian fee lands, the Court left intact and indeed reaffirmed the proposition that *Montana*'s exceptions permit tribal regulation [and, hence, adjudication as a presumptive matter] of nonmember conduct inside the reservation that implicates the tribe's sovereign interests. *Plains Commerce, 128 S. Ct. at 2721.*

Still, practitioners of federal Indian law should not ignore dicta and other indicators in the majority opinion that may suggest further restrictions on tribal authority through potential future judicial modifications of the *Montana* test. For one thing, *Plains Commerce* is not the first Supreme Court case to announce a fact-specific limitation on Indian tribes' inherent civil jurisdiction. In 2001, the Court in *Nevada v. Hicks* deployed a similar approach, concluding that the

Montana doctrine strictly prohibits tribes from regulating or adjudicating the activities of state officials who enter a reservation for the purpose of conducting an investigation pursuant to an allegation of off-reservation crime, even when the investigation takes place on land owned by a tribal member. *533 U.S. 353 (2001).* Approving the ultimate denial of tribal court jurisdiction in *Hicks* but vigorously objecting to the majority's analysis for treat[ing] as dispositive the fact that the nonmembers in this case are state officials, Justice O'Connor wrote: The Court's reasoning does not reflect a faithful application of *Montana* and its progeny. Our case law does not support a broad *per se* rule prohibiting tribal jurisdiction over nonmembers on tribal land whenever the nonmembers are state officials. *Id. at 392, 396* (O'Connor, J., concurring in part and concurring in the judgment). Significantly, both Justice Stevens and Justice Breyer, who joined Justice O'Connor's *Hicks* concurrence, likewise joined Justice Ginsburg's *Plains Commerce* dissent (joined also by Justice Souter), suggesting snowballing dissatisfaction on the Court with the piecemeal approach to limiting tribal authority within the *Montana* framework. For the time being, however, *Plains Commerce* makes it clear that denial of tribal jurisdiction over nonmembers through incremental, judicially adopted rules remains a continuing, unpredictable threat to the inherent sovereign authority of Indian nations. *See* Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty, 50 Am. U. L. Rev. 1177 (2001)* (discussing dangers of ostensibly minimalist approach in Indian law).

Passages of dicta in the majority opinion, moreover, portend further manipulations of the *Montana* framework detrimental to tribes' assertions of authority over nonmembers. Although *Plains Commerce* does not address the general issue of *Montana*'s applicability to tribal jurisdiction over nonmember conduct occurring on tribal or member-owned land (since the land implicated in the case was non-Indian fee land), the Court intimates in no uncertain terms that a presumption against tribal authority would indeed apply in such instance. The Court thus states that *Montana*'s general rule restricts tribal authority over nonmember activity taking place *on the reservation*, and is particularly strong when the nonmember's activity occurs on land owned in fee-simple by non-Indians . . . . *Plains Commerce, 128 S. Ct. at 2719* (emphasis added). This statement continues the suggestion that *Montana* applies to nonmember conduct tribal, trust, or Indian-owned land on Indian reservations -- even more so than did similar dicta in *Hicks*, where the Court, for the first time, applied *Montana* to nonmember conduct on land owned by a tribal member but expressly limited its holding to the question of tribal-court jurisdiction over state officers enforcing state law. *Hicks, 532 U.S. at 358 n. 2; see also* Cohen's Handbook of Federal Indian Law, §4.02[3][c][ii], p. 237 (2005 ed., Nell Jessup Newton, et al., eds.) (hereinafter Cohen's Handbook) (discussing limiting language in *Hicks*).

Of equal concern is dicta in *Plains Commerce* intimating future restrictions on the scope of *Montana*'s second exception, i.e., *Montana*'s recognition of tribes' inherent civil authority over nonmember conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana, 450 U.S. at 566.* While *Plains Commerce* holds that *Montana*'s second exception, like the first one pertaining to consensual relationships, simply is not triggered in a case involving the sale of non-Indian fee land (as distinguished from cases dealing with nonmember activities or conduct), *see Plains Commerce, 128 S. Ct. at 2726* (stating tribes' sovereign interests encompassed by second *Montana* exception do not reach to regulating the sale of non-Indian fee land), the Court goes on to opine that, were it to apply the second exception, it would permit a tribe to exercise civil jurisdiction over nonmember conduct only when such conduct *menaces* the political integrity, the economic security, or the health or welfare of the tribe.' *Id.* (quoting *Montana, 450 U.S. at 566)* (emphasis added). Stressing further its restrictive view of *Montana*'s second exception, the Court writes:

The conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community. One commentator has noted that th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.

Id. (quoting *Montana, 450 U.S. at 566;* Cohen's Handbook, §4.02[3][c][i], at 232 n. 20).

This deployment of dicta is troubling on a number of levels. First, the purported reliance on the phrase imperil the subsistence from *Montana* to ratchet up the second exception seems misplaced, since the *Montana* Court itself viewed the circumstances of that case as insufficient to satisfy the exception *not* merely because nonmember hunting and

fishing on non-Indian fee land failed to imperil the subsistence of the Crow Tribe, but because the tribe had traditionally accommodated itself to the State's near exclusive' regulation of that conduct, *Montana, 450 U.S. at 566,* implying the Court's dispositive assessment that such conduct in fact hardly threatened or affected tribal interests *at all*. *See* Cohen's Handbook, §4.02[3][c][i], at 232 n. 20 (observing that *Montana* reasoned that the existence of state rather than tribal authority on non-Indian fee lands had had practically *no* effect on tribal jurisdiction over hunting and fishing on Indian lands, and that the tribe had long accommodated itself to the exercise of state jurisdiction on fee lands). This is the very point made in the footnote in *Cohen's Handbook*, cited in *Plains Commerce*, implicitly criticizing, in turn, dictum in a footnote from *Atkinson Trading Company v. Shirley, 532 U.S. 645, 658 n. 12 (2001),* that likewise misappropriates the imperil the subsistence phrase from *Montana* to posit an elevated threshold for satisfying *Montana*'s second exception. *See* Cohen's Handbook, §4.02[3][c][i], at 232 n. 20 (questioning *Atkinson* dictum that unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands). *Plains Commerce* thus appears to attempt to turn a *point of criticism* from *Cohen's Handbook* into a *suggestion* for elevating the threshold for the second *Montana* exception. In view of *Plains Commerce*'s misplaced reliance on both an incidental, non-dispositive phrase in *Montana* and a decontextualized point of criticism in *Cohen's Handbook*, the Court's assertion, in dicta, of an elevated threshold for satisfying *Montana*'s second exception should be regarded with skepticism.

Given the Court's use of a piecemeal approach in denying tribal authority in both *Plains Commerce* and *Nevada v. Hicks*, a more general, overarching concern is the impoverished capacity of this kind of formalistic analysis to accommodate or even recognize tribes' legitimate interests in governing nonmember conduct to prevent or redress harm to tribes and tribal members in Indian country. Although the *Hicks* Court purported, at least, to engage in a process of weighing a tribe's interests against competing state interests in determining whether state officials could be sued in tribal court for allegedly violating a tribal member's rights on his own land within a reservation, in the final analysis the Court in effect nullified [tribal interests] through a *per se* rule, *Hicks, 533 U.S. at 395* (O'Connor, J., concurring in part and concurring in the judgment), declaring the state's asserted interest to be considerable under the Court's balancing test while declining to weigh or identify any tribal interests at all. *Id. at 364.* A similar nullif[ying] of tribal interests seems to have resulted from the Court's application of its newly devised rule pertaining to the sale of non-Indian fee land in *Plains Commerce*. Thus, the Court denies the Cheyenne River Sioux Tribe civil jurisdiction to adjudicate what the Court repeatedly terms the mere resale of non-Indian fee land, *Plains Commerce, 128 S. Ct. at 2724,* neglecting to discuss or even mention any of the several substantial and legitimate governmental interests in the consensual relationship between the parties, as articulated by the tribe itself. *See* Brief for Amicus Curiae Cheyenne River Sioux Tribe in Support of Respondents at 11-20, *Plains Commerce*, 554 U.S. ___ (2008) (discussing tribe's significant interests in, inter alia, the economic security of tribal members and protecting tribal members from discrimination based on their status as Indians). While *Plains Commerce*'s fact-specific limitation on tribal jurisdiction assuredly is narrow, Indian law practitioners should beware of the profound potential for multiple deployments of the incremental approach to more broadly license judicial disregard of tribes' otherwise important interests in exercising governing authority over the on-reservation conduct of nonmembers.

Despite the blow to tribal authority delivered by *Plains Commerce*, there are a few countervailing features of the Court's decision and reasoning that should not be overlooked. Most importantly, the Court did not foreclose the civil authority of Indian tribes over nonmembers in general, as the petitioner bank had requested, *see* Petitioner's Brief at 20-26, *Plains Commerce*, 554 U.S. ___ (2008), nor even the adjudicative authority of tribal courts over nonmember defendants in particular, as tribal advocates might have feared based on a footnote in *Nevada v. Hicks* seemingly hinting in that direction, *see Hicks, 533 U.S. 358 n. 2* ([W]e have never held that a tribal court had jurisdiction over a nonmember defendant.); *cf.* Brief for Idaho County, Idaho, et al., *Amici Curiae* in Support of Petitioner at 5, *Plains Commerce*, 554 U.S. ___ (2008) (urging Court to establish a bright-line rule that precludes tribal adjudicatory jurisdiction over nonmember defendants). Language in the majority opinion also impliedly rejects a request made by *amici*, in support of the petitioner bank, to limit the first *Montana* exception to instances where nonmembers *expressly* consent to tribal authority, *see* Brief *Amicus Curiae* of Association of American Railroads in Support of Petitioner at 4-27, *Plains Commerce*, 554 U.S. ___ (2008); Brief *Amicus Curiae* of the States of Idaho, et al., in Support of Petitioner

at 3-23, *Plains Commerce*, 554 U.S. ___ (2008); instead, the Court stated that a nonmember may consent to tribal laws or regulations either expressly *or by his actions*. *Plains Commerce, 128 S. Ct. at 2724* (emphasis added). A final noteworthy matter is *Plains Commerce*'s approving invocation of *Buster v. Wright, 135 F. 947 (8th Cir. 1904),* along with the Court's description of *Buster* as validating a tribe's authority to levy a permit tax on nonmembers for the privilege of doing business within the reservation. *Plains Commerce, 128 S. Ct. at 2721.* Since *Buster* in effect acknowledged a tribe's authority to tax nonmember conduct *on non-Indian fee land, see Buster, 135 F. at 952* (Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders . . . by the ownership [or] occupancy of the land within its territorial jurisdiction by citizens or foreigners.), the Court's positive reference to *Buster* in *Plains Commerce* without any further qualification would appear at least to leave intact the tension between *Buster* and *Atkinson*, a case that disparaged *Buster* in the course of denying the Navajo Nation jurisdiction to impose a hotel occupancy tax on nonmember guests of a facility located on non-Indian fee land within the Navajo Reservation. *See Atkinson, 532 U.S. at 653 n. 4. See generally* Cohen's Handbook, §8.04[2][b], at 715, 717-19 (discussing conflicting approaches to tribal taxation of nonmembers in *Buster* and *Atkinson*); John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting-Room Floor, 38 Conn. L. Rev. 731, 747-51 & n. 115 (2006)* (same).

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Professor LaVelle's publications address Indian people's involvement in the American political system, crosscurrents in the United States Supreme Court's Indian law and federalism jurisprudence, and collaboration between Indian tribes and conservation organizations for restoring tribal sacred lands, including the Black Hills of South Dakota. His latest research focuses on alterations in longstanding doctrines of Indian law stemming from recent Supreme Court decisions, especially those dealing with the extent and limits of tribal and state jurisdiction in Indian country.

Alexander, Berkey, Williams & Weathers LLP on San Manuel Indian Casino v. NLRB

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Alexander, Berkey, Williams & Weathers LLP on San Manuel Indian Bingo and Casino v. National Labor Relations Board, 475 F.3d 1306 (D.C. Cir. 2007)(rehearing en banc denied (June 8, 2007))

By Scott W. Williams and David H. House

August 4, 2008

SUMMARY: Alexander, Berkey, Williams & Weathers LLP on the D.C. Circuits decision to apply the National Labor Relations Act to an Indian tribal enterprise: *San Manuel Indian Bingo and Casino v. National Labor Relations Board, 475 F.3d 1306 (D.C. Cir. 2007)*(rehearing en banc denied (June 8, 2007)).

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Overview. The question of what law (federal, state, and/or tribal) applies to activities of Indian tribes and tribal organizations has become unduly complex, and the answers seemingly inconsistent. n1 The Circuit Court for the District of Columbia in *San Manuel* held that the National Labor Relations Act applied to the operations of a Tribally-operated gaming casino, an enterprise which provided to the Tribe funding for tribal government, full employment, complete medical coverage [for all Tribal members], [tribally-funded educational] scholarships, improved housing, and significant infrastructure improvements on the *San Manuel Reservation. 475 F.3d at 1308.* The decision departs from principles of federal Indian law which were thought to have been well-established. *See, e.g., National Labor Relations Board v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002)*(*en banc*)(the National Labor Relations Act (NLRA) does not preempt a tribal government from enacting a right-to-work ordinance). Hence, the determination of what law applies in Indian country is made even more difficult to predict.

The *San Manuel* court, relying on the facts that non-Indians were employed by, and were customers of the casino, concluded that application of the NLRA to the Tribes source of revenue for Tribal governmental operations represented only a modest, and therefore acceptable, impairment of Tribal sovereignty. *Id. at 1315*. In light of this decision, counsel attempting to determine the applicability of the NLRA (or any number of other federal employment laws) to Indian tribal operations or enterprises is well advised to consider the factual circumstances and legal analysis in *San Manuel*.

Background. The San Manuel Band of Serrano Mission Indians (San Manuel Band) owns and operates the San Manuel Indian Bingo and Casino (San Manuel Casino) on its reservation in San Bernardino, California. *Id. at 1308*. The Tribes gaming enterprise was established pursuant to the federal Indian Gaming Regulatory Act (IGRA), *25 U.S.C. § 2701 et seq*, and a Tribal-State compact required by the IGRA. In accordance with federal law and its obligations under the compact, the Tribe enacted a gaming act and a labor ordinance to govern its relations with its casino employees. *See id. at 1314*; *San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055, 1056 (2005).* Neither IGRA, nor the Tribal-State

compact, nor the NLRA itself specifically state that the NLRA applies to Indian gaming enterprises.

The San Manuel Casino is a tribal governmental economic development project, as the court acknowledged. *475 F.3d at 1308.* In accordance with federal law, the Tribe established the casino as a means of promoting tribal economic development, self-sufficiency, and strong tribal government[. . .]. *25 U.S.C. § 2702(1).* The San Manuel gaming enterprise achieved these Congressional objectives. The San Manuel Reservation is small (one square mile), and unsuited for other forms of economic activity; prior to the construction of the Casino, the Tribe was without significant resources (except for modest federal funding) and most tribal members were recipients of welfare benefits. *475 F.3d at 1308.* The Tribe now has a strong government; Tribal members are fully employed; and revenues from the casino have more than replaced the public benefits upon which individual members previously relied. In addition, the casino substantially contributes to the regional economy in that a significant number of nonmembers are employed. *Id.* Not surprisingly, many, and perhaps the great majority, of the casinos patrons are nonmembers who come from outside the reservation. *341 N.L.R.B. at 1056; 475 F.3d at 1308.*

The case arose from a complaint filed with the National Labor Relations Board (NLRB or Board) alleging that the San Manuel Casino engaged in unfair labor practices in violation of the *NLRA. 475 F.3d at 1309, 341 N.L.R.B. at 1055.* The complaint charged that the San Manuel Casino aided and assisted one union, the Communications Workers of America (CWA), through providing the CWA access for organizing casino workers while denying similar access to another union, Hotel Employees & Restaurant Employees International Union (HERE). *Id.*

The Tribe moved to dismiss the complaint for lack of NLRB jurisdiction and the Board denied that motion. *341 N.L.R.B. at 1055, 1064.* The Board issued a cease-and-desist order based on its finding of unfair labor practices by the Tribe. *San Manuel Indian Bingo and Casino, 345 N.L.R.B. No. 79 (2005)* The Tribe then sought review of the order in the District of Columbia Court of Appeals and the Board filed a cross-application for enforcement. *475 F.3d at 1310.*

Case Analysis. The District of Columbia Court of Appeals held that the NLRA applied to the Tribal gaming enterprise. *475 F.3d at 1308, 1318.* A petition for rehearing *en banc* was denied. No petition for certiorari was filed with the Supreme Court. Accordingly, the Boards order that, *inter alia*, required the San Manuel Casino to cease and desist from engaging in unfair labor practices became enforceable. *Id. at 1308-10*, 1319.

1. Affect on Tribal Sovereignty. An Indian tribe is a sovereign authority. *Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc., 523 U.S. 751 (1998).* The fundamental question which the Court addressed was whether the NLRA, if applied to San Manuels source of revenue, would impinge upon the Tribes status as a sovereign government. *Id. at 1311*. In answering this question, the court identified a tension between a settled principle of Indian law, that a general statute in terms applying to all persons includes Indians and their property interests (citing *Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960))*, and two other longstanding principles set forth in the Indian canons: (1) that ambiguities in a federal statute must be resolved in favor of Indians and (2) that a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty. *475 F.3d at 1310.*

Because the NLRA is devoid of any reference to Indian tribes, one might have concluded that the first canon would direct that the Act not be construed to apply to Indian tribes. The court, however, concluded that the canon itself does not apply to a statute of general applicability, but rather is limited to construing statutes enacted for the benefit of Indians or the regulation of Indian affairs. *Id. at 1312*. The court cited no authority.

The court devoted more attention to the second canon: that a clear expression of Congressional intent is necessary before construing a federal statute to impair tribal sovereignty. The court reasoned that it can reconcile this principle with *Tuscarora* by recognizing that, in some cases at least, a statute of general application can constrain the actions of a tribal government without at the same time impairing tribal sovereignty. *Id*. The court in part underpinned this finding on the basis that [t]ribal sovereignty is far from absolute, that Congress has plenary authority over Indian affairs, and that a tribes claim of sovereignty is at its weakest when a tribal government goes beyond matters of internal

self-governance and enters into off-reservation business transaction with non-Indians. *Id. at 1312-13*. n2

Continuing, the court noted that Tribal government activities often fall between a purely intramural act of reservation governance and an off-reservation commercial enterprise. *475 F.3d at 1313.* For the in-between case, the court stated that the inquiry [as to whether a general law inappropriately impairs tribal sovereignty] is not dependent on mechanical or absolute conceptions of tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake. *Id.* (quoting *White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980))*(alteration in original). The court thereby appears to import a test from a Supreme Court case that did not analyze a question of the application of a federal statute but rather whether state taxation applied to certain on-reservation activities. n3

Proceeding, the court announced the following:

The determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, then application of the law might not impinge on tribal sovereignty.

475 F.3d at 1313 (citations omitted). As to the scope of functions that qualify as governmental, the court emphasized that it used the term in a restrictive sense to distinguish between the traditional acts governments perform and collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope. *Id.*

Based on its articulation of a limited view of tribal sovereignty and its emphasis on the San Manuel Casino being a commercial undertaking, the court concluded that [t]he total impact on tribal sovereignty at issue here amounts to some unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority . . . *Id. at 1315*. In other words, the court found that the NLRA does not impinge on the Tribes sovereignty *enough* to indicate a need to construe the statute narrowly against application to employment at the Casino. *Id*. (emphasis added). Thus, the court established the principle that a modest impact on sovereignty, including displacement of Tribal governmental authority and acknowledged impingement on sovereignty, was an acceptable price to be paid for the application of federal law to the Tribal enterprise.

2. Tribes as NLRA Employers. The courts analysis also addressed a second question: [D]oes the term employer in the NLRA reasonably encompass Indian tribal governments operating commercial enterprises? The Board construed the term employer to include the San Manuel Casino. *Id. at 1315-16*, 1318.

The court acknowledged that the NLRA was enacted by a Congress that in all likelihood never contemplated the statutes potential application to tribal employers *Id. at 1310*. In view of that complete silence on the question, the court applied step two of the *Chevron* analysis: if the Boards interpretation is a permissible construction of the statute, we must give that interpretation controlling weight. *Id. at 1316* (citations omitted) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984)).*

The court focused on whether the San Manuel Band fell within the NLRA government exception for a state or a political subdivision thereof. *475 F.3d 1316.* The court deemed the Boards restrictive reading that an Indian tribe was excluded from the NLRAs government exception to be a permissible interpretation. *Id. at 1318*. Also, given that the court had concluded that there was only a modest impingement of tribal sovereignty, the court found that there was no presumption that the NLRA did not apply. *Id. at 1317*. In addition, the court rejected an argument that the IGRAs tribal-state compact provisions and requirement for the enactment of tribal ordinances or adoption of ordinances regulating gaming activities served to limit the scope of the NLRA. *Id. at 1317-18*. The court held that the NLRB permissibly concluded that the Tribe was an employer, noting specifically that the court was not expressing an opinion on the wisdom of the Boards decision. *Id. at 1318*.

Discussion Points. In view of the Congressional promotion of gaming as a primary focus of economic development in Indian country, the *San Manuel* decision may have lasting impact on tribal efforts to protect and strengthen tribal sovereign authority. We suggest some points for consideration:

1. The *San Manuel* court acknowledged that it applied a different framework in analyzing this case. *Id. at 1315*. In our view the courts analysis departs from the previously settled, traditional approach to determining whether a federal law applies to an Indian tribal activity. For laws of general applicability, historically the analysis focused on *Tuscarora* and its succeeding line of cases. The *San Manuel* panel appears to have incorporated into its analysis balancing-of-interest standards that are more typical to cases addressing the application of state law to a tribal activity. *See, e.g., 475 F.3d at 1313.* The *San Manuel* courts analysis is unique in that it departs from what were thought to be settled principles of law; it should be evaluated with a critical eye.

2. At the outset the court identifies a key question as whether the NLRA will violate federal Indian law by impinging upon protected tribal sovereignty? However, somewhat perplexingly, the court upholds application of the NLRA while nevertheless conceding that the NLRA will impair tribal sovereignty. The court justifies the impairment as negligible or modest or not enough of an impingement. The court further, and with little analysis, concludes that the sovereign acts of the Tribe funded and made possible by the gaming enterprise are somehow secondary to a commercial undertaking. *Id. at 1314-15*.

There is a question here of internal consistency as well. In its conclusion, the court ignores its acknowledgement of adverse impacts on tribal authority, and states instead that [b]ecause applying the NLRA to San Manuels Casino *would not impair tribal sovereignty*, federal Indian law does not impair the Board from exercising jurisdiction. *Id. at 1315* (emphasis added).

The broader point, though, is that this court allowed a measurable degree of impairment to tribal sovereignty in light of the commercial nature of the casino employer, and the numbers of non-Indian employees and customers.

3. In addressing whether a federal law of general applicability applies to an Indian tribe, the NLRB at the administrative decision level of the *San Manuel* case adopted the analysis and specifically the exceptions to *Tuscarora* set forth in *Coeur dAlene Tribal Farm, 751 F.2d at 1115 (9th Cir. 1985). 341 NLRB at 1060.* That case opined that

[a] federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.

Coeur dAlene Tribal Farm, 751 F.2d at 1116 (citation omitted)(quoting *United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980)).* The *San Manuel* panel acknowledged its framework differed from the *Coeur dAlene* approach that has been applied in a number of decisions. *475 F.3d at 1315.* Over time, it will be interesting to see the framework future court decisions will employ in addressing the applicability of federal labor laws, including the NLRA. Whether the *San Manuel*, and for that matter the *Coeur dAlene*, approach adequately safeguard tribal sovereignty will be a fair point of question and challenge, particularly where the federal law at issue creates burdensome requirements and disrupts or impedes tribal regulation.

4. The court essentially set aside the canon of construction that ambiguities in a federal statute must be resolved in favor of Indians. The court indicated its view that the canon is limited to construing statutes enacted for the benefit of Indians or the regulation of Indian affairs. The court noted that it found no Supreme Court case applying the principle of pro-Indian construction when resolving an ambiguity in a statute of general application. *Id. at 1312*. The court did not note that there are circuit cases applying this canon to interpretation of statutes of general application. The Tenth Circuit, for example, has stated that [t]he canon applies to other statutes, even where they do not mention Indians at all.

See Pueblo of San Juan, 276 F.3d at 1191-92 (10th Cir. 2002)(citing *EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989).*

Practical Tips. Among other things, counsel representing an Indian tribe or tribal enterprise may want to consider the following:

1. In cases where an applicable treaty right can be identified, the treaty right may possibly prevent the application of the NLRA or other law of general applicability to an Indian tribe or tribal enterprise. Depending on the factual circumstances, this may be particularly important in light of the *San Manuel* panels narrow and grudging approach to tribal sovereignty.

2. The *San Manuel* decision may be confined to its facts. The court repeatedly emphasized the commercial success of the enterprise, the number of non-Indian employees, and the numbers of non-Indian customers. Other tribal enterprises may be configured differently, have different clientele, and play different roles in tribal governmental affairs. *See, Snyder v. Navajo Nation, supra, 382 F3d. 892* (NLRA not applicable to tribal law enforcement agency); *Yukon Kuskokwim Health Corporation and International Brotherhood of Teamsters, 341 NLRB 1075 (2004)*(NLRB declines to exercise jurisdiction over off-reservation Indian health care corporation). Also, in other circumstances specific treaty rights may be at issue. However, it is noteworthy that the facts presented here will often be mirrored in matters involving casinos and gaming on tribal lands.

3. Tribal sovereign authority may be preserved by the exercise of that authority. Though the existence of a tribal labor ordinance did not appear to affect the *San Manuel* court, the adoption, application and enforcement of tribal law may demonstrate that the application of outside (state or federal) law is unnecessary

4. To the extent possible, consider whether it is advisable to litigate questions of jurisdiction and sovereignty at least with respect to activities that may be interpreted as commercial (rather than substantially governmental) in nature and that involve some degree of nonmember or non-Indian employment and/or patronage. In order to prevent an unwelcome outcome and establishing bad precedent, tribes and their counsel might consider whether it is possible to work with federal or state agencies to achieve an acceptable resolution; this act may itself be seen as an exercise of tribal sovereign authority.

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n1 . For example, the federal Fair Labor Standards Act was found not to be applicable to the Navajo Nations law enforcement officers because such application would constitute an unacceptable interference with tribal self-government. *Snyder v. Navajo Nation, 382 F.3d 892 (9th Cir. 2004).* But the federal Occupational Safety and Health Act (OSHA) was held to apply to an on-reservation farming operation owned and operated by an Indian tribe, with the Ninth Circuit emphasizing that farming activities were not an aspect of tribal self-government and that the tribe had no treaty with the United States. *Donovan v. Coeur dAlene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).* In contrast, in a different circuit, OSHA was held not to apply to an on-reservation tribally-owned timber operation that primarily employed Indians with the court concluding that application of OSHA would abrogate treaty rights. *Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982).*

n2

[2]. For this last reason, the court cited to a case involving the application of state law, *Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).*

n3

[3]. The quoted Supreme Court passage reads in fuller detail as follows: More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. *448 U.S. at 144-45* (citations omitted).

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Weathers on Governor of Kansas v. Kempthorne, 505 F.3d 1089

2008 Emerging Issues 1440

Weathers on Governor of Kansas v. Kempthorne, 505 F.3d 1089

By Thomas Weathers

December 11, 2007

SUMMARY: The Quiet Title Act, *28 U.S.C. § 2409a*, waives the sovereign immunity of the United States in most real property disputes, but not in disputes involving trust or restricted Indian lands. In Governor of Kansas v. Kempthorne, the Tenth Circuit Court of Appeals strictly applied this Indian lands exception even though the United States raised the Quiet Title Act for the first time on appeal.

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ARTICLE: Overview. The 10th Circuit Court of Appeals opinion in *Governor of Kansas v. Kempthorne, 505 F.3d 1089, 2007 U.S. App. LEXIS 24933 (10th Cir 2007)* is noteworthy for several reasons. First, it clarifies that sovereign immunity is an issue of jurisdiction and may be raised at any time in a proceeding, even for the first time on appeal. Second, a waiver of sovereign immunity under the Quiet Title Act for a given case is determined as of the date the complaint is filed; if Indian land is taken into trust *after* the complaint is filed, the Indian lands exception to the Quiet Title Act wavier of sovereign immunity will not apply. Third, applying the Indian lands exception, the court in this matter reached an admittedly unjust result, leading two of the three sitting judges to draft a concurring opinion essentially providing to the plaintiffs a blueprint for how they might circumvent the application of the Indian lands exception and revive the case. It is rare, if not unheard of, for a concurring opinion (with two of the three judges no less!) to give advice to the losing litigants on how they might avoid the majority opinion of dismissal and resurrect the case. Federal Indian Law practitioners must pay close attention to the Indian lands exception to the waiver of sovereign immunity and jurisdictional components of the Quiet Title Act in any lawsuit involving Indian lands.

Majority Opinion. The case centers on the 1996 decision of the Secretary of the Interior to take land in Kansas City, Kansas into trust for an Oklahoma Indian tribe to be used for gaming purposes. Plaintiffs, the Governor of Kansas and the resident Indian tribes in Kansas, filed suit requesting injunctive relief to block the Secretarys action before the Secretary took the land into trust pursuant to Pub.L. 98-602, §§ 105(b). The District Court granted the injunction, and the Oklahoma tribe filed an emergency appeal with the Tenth Circuit Court of Appeals. The Tenth Circuit vacated the temporary restraining order on appeal, allowing the sale and transfer into trust to be completed. However, in dissolving the TRO, the court expressly ruled that the status quo of the parties would be preserved:

subject to the conditions which constitute the law of this case, that the respective rights of the parties to obtain judicial review of all issues which have been raised in the complaint below shall be preserved, including standing of all

parties, jurisdiction, compliance by the Secretary with all requirements of law, and the ultimate question of whether gaming shall be permitted on the subject land.

See *Sac & Fox Nation v. Norton, 240 F.3d 1250, 1257 (10th Cir. 2001)*. The case proceeded and the District Court dismissed the lawsuit on procedural grounds unrelated to the Quiet Title Act.

On Appeal, the Tenth Circuit reversed the procedural dismissal and remanded for further consideration by the Secretary on certain matters affecting the propriety of taking the land into trust. On remand, the District Court entered judgment, remanding the case to the Secretary on August 23, 2001. The District Court closed the case.

On remand, the Secretary again concluded that she had acted properly in taking the land into trust. The original plaintiffs then tried to file a challenge in the District Court under the original case number, but the District Court would not hear the matter based on its earlier ruling closing the case. The court ordered the plaintiffs to file suit under a new case number. Plaintiffs complied, resulting in the instant litigation, in which the District Court affirmed the Secretarys decision to take the land into trust for the Oklahoma tribe. The plaintiffs appealed again to the Tenth Circuit on the central question of whether the Secretary acted properly in taking the land into trust.

The Secretary raised, for the first time on appeal, the jurisdictional argument based on the Indian lands exception of the Quiet Title Act. The Secretary argued that the lawsuit was barred by the sovereign immunity of the United States because the land was in trust when the second, and only relevant, lawsuit was filed. Even though the Secretary had been litigating the second case for several years and had failed to raise the Quiet Title Act in any briefing or motion before any court, because the Quiet Title Act raised jurisdictional issues, the Tenth Circuit agreed to consider the argument and ruled that the Indian lands exception barred the courts jurisdiction.

The Quiet Title Act states in relevant part:

The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. *This section does not apply to trust or restricted Indian lands . . . . 28 U.S.C. § 2409a(a)* (emphasis added).

In other words, the United States waives its sovereign immunity in real property disputes except for those involving Indian lands. In instances involving trust or restricted Indian lands, the sovereign immunity of the United States is not waived and is a bar to any lawsuit challenging title to the lands. Absent an express, statutory waiver of sovereign immunity, a court has no jurisdiction to hear a matter.

The Governor of Kansas and the Kansas tribes argued that the Quiet Title Act Indian lands exception did not apply because they first filed their lawsuit on July 12, 1996, before the Secretary took the land into trust. The Court of Appeals ruled, on what appears to be a matter of first impression for the Tenth Circuit, that the presence of a waiver of sovereign immunity under the Quiet Title Act for a given case is to be determined *as of the date the complaint is filed*, noting that the complaint in the present matter was filed in 2003 well after the land was taken into trust in 1996 so that the Indian lands exception to the Quiet Title Act did, in fact, bar the lawsuit. The United States had not waived its sovereign immunity so the court lacked jurisdiction.

Plaintiffs argued that even if the Quiet Title Act exception applied, the 1996 order from the Tenth Circuit ostensibly preserving the status quo required the court to hear the matter anyway. The panel disagreed, holding that only Congress could waive the sovereign immunity of the United States; not a court and not a government official. In the absence of an express statutory waiver of sovereign immunity, a court lacks authority to permit a suit against the United States. Admitting the result seemed inequitable, the Tenth Circuit nevertheless concluded that it lacked jurisdiction to address the merits and remanded with instructions to vacate the judgment and dismiss the lawsuit.

Concurring Opinion. Interestingly, two of the three judges filed a concurring opinion advising the plaintiffs how they might circumvent the majority opinion. While the concurring judges agreed that the current case was procedurally

separate from the prior case mandating dismissal under the Quiet Title Act they noted that in substance the current case was really a continuation of the prior case. While legally mandated, the majority opinion was grossly inequitable given the belief by all the parties that the Tenth Circuits 1996 order preserved the status quo and the failure of the Secretary to raise sovereign immunity for over four years. As a result, the two judges wrote separately to outline what they believe to be extraordinary circumstances justifying *vacatur* of the final judgment in the prior case under Rule 60(b).

Federal Rule of Civil Procedure 60(b) permits a court to vacate a final judgment on any of several grounds, including any reason justifying relief from the operation of the judgment. The Tenth Circuit had previously held that Rule 60(b) should be liberally construed when substantial justice will thus be served. According to the concurring judges, the circumstances of this case were sufficiently extraordinary that manifest injustice would result absent *vacatur*.

In effect, the concurring judges instructed the plaintiffs on a way to circumvent the majority opinion by vacating the prior judgment and reviving that case. If that case was reopened, the Indian lands exception to the waiver of sovereign immunity under the Quiet Title Act would not apply because the complaint was filed *before* the Secretary took the land into trust. The matter could then proceed on the merits and the Tenth Circuit could hopefully resolve this long-running litigation once and for all.

Practical Tips. If counsel is involved in an ongoing dispute over lands that may be placed into trust, as is often the case with proposed casino or gaming sites, it is crucial to file the complaint before the land is placed into trust. Preserving the original case, thereby avoiding the Indian Lands exception to the waiver of sovereign immunity in the Quiet Title Act, will help avoid the unjust result realized in this case.

In summary:

1) Sovereign immunity is an issue of jurisdiction and can usually be raised at any time in the proceeding, even on appeal.

2) Particularly important to the Indian law practitioner, the Indian lands exception to the Quiet Title Act will bar any action contesting title to trust or restricted Indian lands unless the complaint is filed prior to the lands being taken into trust by the Secretary of the Interior.

3) Do not concede dismissal of your original action. A seemingly benign dismissal by the District Court in this matter effectively deprived the plaintiffs of their right to contest the decision by the Secretary of the Interior. In hindsight, plaintiffs should have contested the dismissal by taking an immediate appeal or explaining to the trial court the possible impact of the Indian lands exception if the court entered judgment and closed the case.

4) Finally, the little-used provision of *Federal Rule of Civil Procedure 60(b)* may be useful for those parties aggrieved by inequitable, albeit legally mandated, disposition of their claims. So long as a party can show that manifest injustice will result and the party did not take some affirmative action to cause the manifest injustice then a court may well set aside a judgment under Rule 60(b) and revive a case.

In light of the Tenth Circuits holding, a practitioner suing the United States or an officer thereof must first address whether Congress has waived the sovereign immunity of the United States. What a court has said or what a lawyer for the United States has said is not relevant. If Congress has not expressly waived the sovereign immunity of the United States, a practitioner cannot proceed with the lawsuit. In the context of a challenge involving Indian lands, counsel needs be sure he or she files the complaint before the land is taken into trust. Otherwise, the lawsuit will likely be dismissed for lack of jurisdiction.

Another lesson to be learned from this case is that a practitioner suing the United States should make every effort to keep an original case open when an appellate court remands to a trial court for further consideration by a government official of a decision. Rather than let the trial court enter judgment and close the case, counsel should ask the trial court

to keep the case open while the matter is remanded to a government official for further review. Assuming counsel does not like the decision of the government official on remand, counsel could then take the matter back up to the same trial judge who heard the matter before (who is also presumably familiar with the facts). The case will remain one and the same thereby avoiding any argument as to when a complaint was filed and when land was taken into trust. At a minimum, judicial economy is served by maintain the open status of the case and keeping the same judge involved.

Cross-References

For further information on taking fee land into trust for the benefit of an Indian tribe, *see Cohens Handbook of Federal Indian Law 2005 edition, §15.07 (LexisNexis Matthew Bender).*

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