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To Sue and Not Be Sued (In State Court)

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by Robert H. Abrams

Three Affiliated Tribes of the Fort Berthold Reservation
v.
Wold Engineering
(Docket No. 84-1973)

Argued March 24, 1986

This jurisdictional struggle finds an Indian tribe seeking access to North Dakota state court to sue non-Indians for breach of contract arising out of work done on Indian reservation lands. The state of North Dakota refused to entertain the suit, relying on a state "door-closing" statute that expressly conditions Indian access to state court upon the surrender of tribal immunity to be sued in state court. The Indians challenge the state's authority to so limit Indian access to state court.

The case is in the United States Supreme Court for the second time. Previously, the North Dakota courts upheld the door-closing statute on a variety of grounds, many of which implicated difficult questions of federal law. In its previous decision, the United States Supreme Court found that the North Dakota Supreme Court may have relied on an erroneous interpretation of federal law and therefore vacated the dismissal of the Indian's suit and remanded the case. The North Dakota Supreme Court reinstated its earlier decision, this time taking into account the dictates of federal law explicated by the United States Supreme Court.

The United States Supreme Court is now faced with a new set of federal law based challenges to the required waiver of Indian immunity to suit as a precondition to Indian use of state courts. While the case seems tied closely to a very complex array of statutes, the Court's resolution of the bottom line issues of state-Indian power relationships are of wider interest.

ISSUES

The ultimate issue is this case is simple: Can the state of North Dakota refuse to entertain lawsuits by Indian tribes or individual Indians in its civil courts if the would-be-plaintiff Indians will not submit to the jurisdiction of those same North Dakota courts for all purposes? Put slightly differently, can the ability of Indians to sue in the state court be conditioned on their waiver of immunity to suit in state court?

Resolving the ultimate issue may require the United States Supreme Court to ponder a number of fundamental precepts about the federal law limitations on the power of states as sovereigns in their relations with tribes and individual Indians. First, the Supreme Court must decide if the state's door-closing statute is preempted by, or otherwise inconsistent with, federal laws governing Indian rights. Invalidation on this basis would rest on the supremacy of federal law, especially the federal policy of respect for tribal sovereignty evident in numerous congressional enactments and previous United States Supreme Court decisions. If the North Dakota door-closing statute survives the Supremacy Clause, it must next pass muster under an equal protection scrutiny. Here, the Court must decide if North Dakota can open its courts to Indians on grounds different and more restrictive than those on which their courts are open to non-Indians.

FACTS

Long ago (1974) and far away in North Dakota, the Indians of the Fort Berthold Reservation contracted with Wold Engineering and other defendants in this lawsuit to design and install an on-reservation public works project. When completed, the project would provide much of the reservation with a reliable and safe domestic water system. When the system was completed in 1977 it was, even after attempts at repairs by defendants, alleged to be an unreliable failure for which damages were sought in 1980 in North Dakota state court. Thus, as it started out, this case was little more than a simple breach of contract action, raising the most ordinary sort of state law claims for damanges.

Wold Engineering did not immediately contest the merits, choosing instead to argue that the North Dakota trial court lacked jurisdiction over the lawsuit. The principal ground for this defense was the assertion that the situs of the alleged breach, being on the Indian reservation, ousted the state court from jurisdiction as a matter of federal law. The trial court agreed and dismissed the case.

The tribe appealed to the North Dakota Supreme Court which affirmed the decision but relied instead on the chapter 27-19 of the North Dakota Century Code which required a waiver of Indian immunity as a pre-

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condition for Indian use of the state courts. This rather unusual statute was held to be authorized by a federal statute popularly known as Public Law 280, wich did authorize some exercise of state judicial jurisdiction over activities on Indian reservations. (See, 321 N.W.2d 510 (N.D. 1982))

The United States Supreme Court granted certiorari a first time and speaking through Justice Blackmun, vacated the decision of the North Dakota courts. The opinion clarified certain aspects of the application of the overarching federal statutes and found that it appeared that the North Dakota Supreme Court might have based its decision on improper application of federal law (104 S.Ct. 2267 (1984)). The North Dakota Supreme Court after new briefs and argument reinstated its prior decision, admitting that the prior decision had been based on erroneous interpretation of *federal* grounds, but now finding that the same result could be reached purely on *state* grounds—the non-compliance by the tribe with section 27-19 (364 N.W.2d 98 (N.D. 1985),. Certiorari was again sought and granted.

BACKGROUND AND SIGNIFICANCE

Indian-state sovereignty disputes have a long and sometimes bitter history that need not be recounted. This case, at one level, is yet another wager of their sovereign wills. The state, here North Dakota, is proclaiming its sovereign prerogative to limit access to its courts to Indian plaintiffs that consent to North Dakota jurisdiction in the event that lawsuits are filed against them. The Indians on the other side are claiming that their sovereign immunity is not subject to abrogation by any action of a state.

It is hard to gauge the significance of this case. The specific state door-closing statute appears to be unique to North Dakota. Thus, its constitutionality is not of immediate moment elsewhere. Similarly, there do not appear to be numerous other states waiting in the wings to enact similar statutes in the event that Wold (and the state of North Dakota) prevail in the litigation.

If the statute is upheld, however, it represents another inroad of tribal sovereignty. Tribes and individual Indians can be forced to choose between retaining traditional immunity from state court jurisdiction over on-reservation disputes and having no access to state court for on-reservation disputes. This is not a dire Hobson's choice, for the Indian plaintiff can always retain the immunity and seek a remedy in either tribal or federal court, but it may require Indian plaintiffs to forego the most convenient and efficacious forum. Still, even this modest detriment to Indians represents an increase in the power of the states at the expense of the tribes and individual Indians.

ARGUMENTS

For the Affiliated Tribes *(Counsel of Record, John O. Holm, 17 Second Avenue West, Dickinson, ND 58601; telephone (701) 225-6066)*

1. Excluding tribal and individual Indian plaintiffs from state courts when a similarly circumstanced non-Indian would not be excluded violated the due process and equal protection guarantees of the Fourteenth Amendment.
2. The state door-closing statute invidiously discriminates against persons on the basis of race and must be subjected to strict judicial scrutiny (*i.e.*, it must be found to be necessary to support a compelling state interest) which it cannot survive.
3. The door-closing statute is preempted by governing federal law because it attempts to regulate Indian affairs in a manner that is not permitted by governing federal law.
4. The door-closing statute violates the "open courts" guarantee of the North Dakota Constitution.

For Wold Engineering *(Counsel of Record, Gary H. Lee, 200 Heritage Place, P. O. Box 939, Minot, ND 58702-0939; telephone (701) 852-3578)*

1. The denial of jurisdiction was based on an adequate and independent state law ground and therefore is not open to review by the United States Supreme Court.
2. The door-closing statute is not preempted by governing federal law; the statute accepts the offer made by Congress in P.L. 280 to the states to assume jurisdictional responsibility over Indian country.
3. The challenged statute is immune to equal protection invalidation because it represents a political compromise between the state of North Dakota and the Indian people.
4. The challenged statute is not subject to strict scrutiny because the use of the racial classification is traceable to a specific congressional authority.

AMICUS ARGUMENTS

In Support of the Affiliated Tribes

Two separate Indian amici filed briefs: the Standing Rock and Devils Lake Sioux Tribes and Tuttle Mountain Band of Chippewa Indians. Both attacked the North Dakota jurisdictional provision as violating due process and equal protection. The Sioux also claimed that federal law preempted the statute while the Chippewa claimed that the statute infringed on tribal sovereignty.

In Support of Wold Engineering

The state of North Dakota in support of its interest in the application of its jurisdiction statute urged affirmance. The principal argument asserted that North Dakota's statute was authorized by P.L. 280 and the North Dakota Constitution. The statute does not act as a total bar to Indian access to the state's courts, but merely conditions access on Indian waiver of immunity from suit in that same judicial system. Borrowing and adapting a phrase popular in equity civil contempt jurisprudence, the state argues that the tribes "hold the keys to the courthouse."