



## Tribal Sovereignty at Risk

by Knute Knudson

Those of us who have been involved in Indian gaming over the past 25 years understand that tribal sovereignty is the necessary foundation upon which tribal governments provide gaming. The protection and preservation of tribal sovereignty is critical to the continued health of Indian gaming – gaming which helps meet the financial needs of tribal governments and tribal members across the country.

Of the many wise and persistent advocates for tribal rights, it's hard to imagine any more passionate and dedicated to that cause than Jess Green. Jess passed away over a year ago at the too-young age of 59. But, his message lives on. And those of us privileged to work with him will not soon forget his message nor his fervor in driving home that message.

Jess, a tribal lawyer, judge, and legislator, described the importance of tribal sovereignty for Indian gaming in a 1996 law review article. In that article, "*Economic Development and Gaming*" (9 St. Thomas L. Rev. 149 1996-1997), Jess wrote "The economic expansion of Indian gaming has relied on the most basic principle of all Indian law - tribal sovereignty. As far back as 1832, the United States Supreme Court identified Indian nations as 'distinct, independent political communities.' Even the U.S. Constitution, with respect to Congress' power to regulate commerce, recognizes Indian tribes on the same footing as foreign nations and states." Jess pointed out, "The economic benefits to Indian tribes provided by gaming have been significant because tribes were able to rely on their sovereignty to create an economic advantage for themselves." He warned, "As tribal sovereignty is depleted and attacked by court decisions and congressional action, the viability of investing in tribal gaming will be questioned."

Heeding Jess' warning, tribes and those who serve the Indian gaming industry are keeping a close eye on the U.S. Supreme Court case *Michigan v. Bay Mills Indian Community*. This case involves a casino developed by the Bay Mills Indian Community in Michigan on land the tribe asserts is Indian land for purposes of IGRA. However, the NIGC has deemed the land at issue not Indian land. The State of Michigan seeks to sue the tribe in federal court. However the 6th Circuit Court of Appeals ruled IGRA doesn't provide for such a suit and that the tribe's sovereignty bars such suit.

Consequently, the Bay Mills case presents two questions - (1) Whether a federal court has jurisdiction to enjoin activity that violates the Indian Gaming Regulatory Act (IGRA), but takes place outside of Indian lands; and (2) whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands. The case was argued in December, 2013 and a decision is expected sometime this year.

What concerns many about this case is the possibility that the

Supreme Court could use the case to diminish or damage tribal sovereignty. This concern and a proposed solution to the conflict at issue that would not diminish tribal sovereignty form the basis of an amicus brief submitted for consideration in the Bay Mills case by four tribal associations including the National Congress of American Indians, the National Indian Gaming Association, the Affiliated Tribes of Northwest Indians, the Counsel of Athabascan Tribal Governments, and 51 individual tribes.

In their brief, the associations and tribes plainly describe what's at risk in the case vis-à-vis tribal sovereignty. "This is a remarkable case. Michigan and its *amici* urge this Court to revisit the fundamental contours of tribal sovereign immunity." Given the gravity of what's at stake, these associations and tribes urge the Supreme Court to exercise care: "Against the pressure to reconsider tribal immunity root and branch stand the principles of judicial caution firmly adhered to by the Court on matters of jurisdiction and remedy."

Even for a layman, that legal language tells the tale of the risk for tribal sovereignty inherent in this case and hopefully describes the careful course the Court will follow in crafting its ruling. That amicus brief presents a variety of arguments against amending the scope of tribal sovereign immunity and proposes means to address the dispute between Bay Mills and Michigan using existing law and channels that would leave the contours of tribal sovereign immunity intact yet provide a resolution to the dispute. Twelve other tribes joined to file a separate amicus brief urging the Court to see the conflict resolved through the dispute resolution procedures contained in the compact agreed to between the tribe and the state.

The legal battle was joined on behalf of Michigan by the State of Oklahoma who filed an amicus brief supporting Michigan and by a group of fifteen other states led by Alabama who filed their own amicus brief. The Alabama-led brief describes these states' view that a ruling for the Bay Mills tribe would not preserve tribal sovereignty, but would potentially expand tribal sovereignty. On this point the states request that the Supreme Court "... should not extend the 'slender reed' of tribal immunity any further."

The threat to tribal sovereignty occurs any time IGRA and its interpretation are the subject for litigation. Let's hope the Supreme Court exercises the caution urged by tribes and that the economic benefits to Indian tribes that Jess Green described as flowing from tribal sovereignty continue unabated by any reduction in that sovereignty. ♣

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