

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Vance Gillette,

Plaintiff,

v.

No. 4:08-CV-102

N. D. Disciplinary Board
Counsel, Brent Edison,

Defendant.

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION**

SUMMARY OF ARGUMENT

1. Federal laws bar ND regulation on an Indian Reservation. Defendant Edison pursues a ND disciplinary petition against attorney Gillette over tribal court litigation, when tribal law regulates attorneys. An injunction should issue since ND lacks authority on the Ft. Berthold Indian Reservation.
2. Equal Protection bars arbitrary conduct by state agents. ND Rule 4.4 allows ND to file a petition for reciprocal discipline only after “another jurisdiction” acts. Defendant Edison does not prosecute white attorneys over conduct in another jurisdiction, but attempts to prosecute Indian attorney Gillette over conduct on the Reservation.

Issue: does federal law bar Edison's attempt to regulate attorney conduct on the Fort Berthold Indian Reservation, when tribal law regulates attorney conduct?

Facts.

The Three Affiliated Tribes (Tribe) licenses and regulates attorneys who practice law in the Ft. Berthold District Court (tribal court). In 2007 attorney Vance Gillette sued for employees who were fired and won settlements. Some refused to pay and Gillette sued the ex-clients in tribal court over fees. Gillette v. Fox and R. Hall. All are tribal members, including the plaintiff.

In response Richard Hall filed a grievance, citing the tribal fee case, with the ND Disciplinary Board. In February 2008 the tribal fee case settled all claims. Verified complaint.

Plaintiff Gillette is an attorney licensed in North Dakota (ND) and other courts. Defendant Edison attempts to prosecute Gillette by a ND petition based on the R. Hall grievance. Edison contends Gillette filed frivolous claims in tribal fee case, on the Fort Berthold Indian Reservation (F B Res).

ND Disciplinary Rule 4.4 states that ND can file a petition after discipline is imposed in "another jurisdiction." Defendant Edison did not utilize Rule 4.4, and instead pursues an initial ND petition against plaintiff

over conduct on the Reservation.

On November 20, 2008 defendant Edison sent a letter to Gillette requesting admission of service of a ND disciplinary petition. Gillette did not admit service. On November 25, 2008 plaintiff filed the instant suit for declaratory and injunctive relief.

ARGUMENT

1. Federal laws bar state regulation on the F B Indian Reservation.

Preemption rule. A state lacks authority on a Reservation unless Congress authorizes it by federal law. California v. Cabazon Band of Mission Indians, 480 U. S. 202 (1987) (state gambling laws did not apply on CA reservation). 28 USC Section 1360 did not grant civil regulatory authority to California. Id. Accord New Mexico v. Mescalero Apache Tribe, 462 U. S. 324, 333 (1983). State lacked authority to regulate Indians or non-Indians who hunted on Reservation with tribal licenses.

In 1953 P. L. 280 granted some States criminal and civil jurisdiction on Indian Reservations. 28 U. S. C. Sec. 1360. North Dakota (ND) was not granted authority over reservations, but had an option to do so by legislation. ND enacted a law that said the state could exert jurisdiction if a tribe consented. None did. Later, 25 U. S. C. Sec. 1322 required tribal consent to state authority. The Tribe has not consented. Here, Section 1360 bars ND

from regulating attorney conduct on the Reservation, Cabazon, *supra*.

Mescalero Apache bars a State from imposing its regulations on a Reservation. ND, through defendant Edison, cannot regulate the conduct of attorney Gillette on the F B Reservation.

Defendant Edison pursues a ND petition, based on the grievance by Indian R. Hall (over case in tribal court). Edison cannot bootstrap the grievance into “consent” to state jurisdictions. 25 USC Sec. 1322 requires *tribal* consent. See Malaterre v. Malaterre, 239 N. W. 2d 139 (ND 1980) (state lacked authority over custody suit between tribal members on Reservation). 28 U. S. C. Section 1360 preempted state authority. *Id.* at 143.

State jurisdiction is preempted when it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests are sufficient to justify the assertion of state authority, Cabazon, *supra*.

Federal and tribal interests. Federal law and policy promotes tribal self-government. Under federal law the Tribe contracts to provide court, police and others services on the Reservations. The Tribe has regulatory laws including a Tribal Bar Board that regulates attorneys who practice in tribal court. The Tribe resists challenges to tribal law. Duncan Energy v. Three Affiliated Tribes, 27 F 3d 1341 (8th Cir. 1994) (non-Indian sued over tribal employment laws and oil tax; tribal forum proper place to resolve disputes

arising on the Reservation).

State interests. Defendant Edison may argue state interests are high because of the need to regulate ND licensed attorneys, no matter where they practice.

When on- reservation conduct involves Indians, state interests are minimal. White Mountain Apache v. Bracker, 448 U.S. 136, 144 (1980). Here, the underlying conduct arose on the Reservation: tribal court case over jobs; second suit over fees; and all are tribal members. ND lacks a bona fide interest.

Infringement test. When a state or agent attempts to regulate conduct on an Indian Reservation involving Indians, this infringes on tribal authority. Williams v. Lee, 358 U. S. 217 (1959) (state lacked jurisdiction in suit when non-Indian sued Indian over conduct on Navajo Reservation) and Cabazon, supra. Defendant Edison's move to enforce state law infringes on the authority of the Tribal Bar Board.

A. Injunction factors.

The injunction elements are: a) a threat of irreparable harm; balance between harm to plaintiff and injury to defendant; probability of success on the merits; and the public interests. Dataphase Sys. Inc. v. C. L. Sys., Inc., 640 F2d 109 (8th Cir. 1981). A preliminary injunction issued over a

disruption of election service to a tribal facility. Baker Electric Co-op, v. Chaske, 28 F 3d 1466, 1472 (8th Cir. 1994) (dispute over who had authority to regulate electric service on the Res). The Court cited Cabazon noting that state laws may be applied to a Reservation only if Congress expressly provides for state authority. Id. at 1478.

A preliminary injunction barred a prosecutor from proceeding with criminal charges on tribal agents in a tax dispute. Winnebago Tribe v. Stovall, 216 F. Supp. 1226 (D KS 2002) (criminal charge filed by KS prosecutor). The court said whether the state can tax is a matter of federal, not state, law. Id. at 1239. Relief issued to bar an “unwarranted criminal prosecution.” On appeal, the Court rejected the argument that the state’s interest in enforcing its criminal laws were paramount. Winnebago Tribe v. Stovall, 341 F 3d 1201 (10th Cir. 2003). The threshold issue is whether federal law barred the state tax. Id. at 1205. Here, federal law controls on whether ND has authority on the F B Res, discussed next.

Probability of success. In this case, federal law does not allow ND to regulate attorney conduct on the F B Reservation. See 28 USC Sec. 1360 and Cabazon and prior discussion. Tribal laws regulate attorney conduct on the Reservation. State laws are preempted by federal law, Mescalero Apache, (tribe regulated hunting on Res. by hunting licenses).

Plaintiff has shown a probability of success as federal law controls this case. In Re Otter Tail (Baker Electric v. Otter Tail), 116 F 3d 1207 (8th Cir. 1997) (dispute over electric service on Res). The Court stated the issue was not what “North Dakota’s regulatory authority requires,” but whether federal law makes the proceeding or regulation at issue beyond the state’s authority. Id. at 1215. Federal statutes and Cabazon bar ND from regulating attorney conduct on the Reservation. Under Otter Tail and Winnebago Tribe, an injunction is necessary to rein in defendant Edison.

Irreparable Injury. Without relief Gillette will be forced into a needless trial because ND lacks jurisdiction. A trial entails expense, time and a other resources. The key facts are not in dispute: Edison attacks Gillette over conduct from “tribal court” litigation on the F B Res. On these facts, a ND disciplinary prosecution is “unwarranted.” Winnebago Tribe, Cabazon, and Chaske. There is also harm to tribal and federal interests, noted below. Relief should issue to restrain Edison’s improper conduct. This will maintain the status quo: the Tribe has regulatory authority on the Reservation, Mescalero Apache and Duncan Energy v. Three Aff. Tribes.

Balance of Harm. Because ND lacks authority in the first place there is no harm to ND or state interests. See discussion under Williams v. Lee. On the other hand, Gillette faces an oppressive prosecution as a state trial

infringes on Gillette's rights under federal statutes and case law. The attempted prosecution also impacts Gillette's liberty interests.

Public interest. For decades federal and state case law has barred ND authority on a Reservation, Malaterre (1980). Yet, defendant Edison pursues a defective ND petition. Plaintiff Gillette, a tribal member, has rights under federal statutes and case law. These rights raise federal and tribal interests. The public has a significant interest in the viability of tribal self-government, Cabazon, and Winnebago Tribe, 216 F. Supp. at 1233. It does not serve the public interest to allow defendant Edison to run amok.

2. Equal Protection bars arbitrary conduct by state agents.

Defendant Edison is a white attorney who acts under color state law. 42 U. S. C. Sec. 1983.

A claim is stated when a plaintiff is treated differently from others similarly situated, and there is no rational basis for the difference in treatment. Village of Willowbrook v. Olech, 120 S. Ct. 2073 (2000) (dispute over easement for water).

ND Disciplinary Rule 4.4 provides for a petition after "another jurisdiction" imposes sanctions. Disciplinary Bd. v. Dvorak, 1998 ND 134, 580 N. W. 2d 586. Minnesota sanctioned a ND licensed attorney over conduct in Minnesota. After MN acted, then ND filed a petition under

Rule 4.4 for reciprocal discipline.

Defendant Edison does not prosecute white attorneys (ND licensed) by an *initial* petition, over misconduct in another jurisdiction. Only after another jurisdiction acts, does Rule 4.4. permit a petition. Dvorak (MN conduct). Edison's conduct is arbitrary: he singles out Gillette by an initial petition, over conduct in another jurisdiction (Reservation).

The Reservation is "another jurisdiction" akin to a State, under Cabazon and 28 USC Sec. 1360.

Defendant Edison, a state agent, is subject to injunctive relief. Will v. Michigan Dept. of State Police, 491 U. S. 58, 70 (1989) (prospective relief against state agent proper in Sec. 1983 suit). Under Will and Olech, the plaintiff has shown a probability of success: Edison abuses his authority under state law, and this violates Gillette's rights under the Equal Protection Clause. See prior discussion on injunction factors.

CONCLUSION

Federal statutes and case law ND authority on the Fort Berthold Indian Reservation. The Tribe has authority to regulate attorney conduct on the Reservation under Mescalero Apache Tribe. A preliminary injunction is necessary to halt the overreaching conduct by defendant Edison.

Dated December 11, 2008.



s/ Vance Gillette
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Certificate of Service

I certify on December 11, 2008 I mailed a copy of plaintiff's motion for preliminary injunction (with 2 exhibits) and memorandum in support to defendant Brent Edison, P. O. Box 2297 Bismarck, ND 58502



s/ Vance Gillette, Pro Se