Case No. S-10-280

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STOREVISIONS, INC.,
Plaintiff/Appellee,

v.

OMAHA TRIBE OF NEBRASKA A/K/A OMAHA NATION,
Defendant/Appellant.

AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT OMAHA TRIBE OF NEBRASKA A/K/A OMAHA NATION MOTION FOR REHEARING

APPEAL FROM THE
DISTRICT COURT OF THRUSTON COUNTY, NEBRASKA
Honorable Darvid D. Quist

Counsel for Amici Curiae

Jennifer Bear Eagle, #24031
Fredericks Peebles & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
Telephone: (402) 333-4053
Facsimile: (402) 333-4761

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COMES NOW the Santee Sioux Nation of Nebraska and the Winnebago Tribe of Nebraska ("Amici Curiae") and hereby respectfully submit this Brief as Amici Curiae in support of Defendant/Appellant Omaha Tribe of Nebraska's ("Omaha Tribe") Motion for Rehearing. Because the issue of sovereign immunity is of critical importance to all Nebraska Indian tribes, Amici Curiae respectfully requests that this Court grant the Omaha Tribe's Motion for Rehearing.

Amici Curiae relies on the summaries of the record set out in the Brief in Chief and Answer Brief.

INTRODUCTION

The Omaha Tribe challenges the Court's Opinion filed March 25, 2011, which was predicated on the doctrine of apparent agency in waiving tribal sovereign immunity from suit. Amici Curiae urge this Court to reconsider its opinion, given the importance of tribal sovereign immunity, and reject the doctrine of apparent agency as applied to waiver of tribal sovereign immunity.

ARGUMENT

I. SOVEREIGN IMMUNITY

A. The Origins of Tribal Sovereign Immunity Reflect Its Inherent Nature.

The United States Supreme Court has long recognized Indian tribes as "possessing common law-immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). As a matter of federal law, absent congressional abrogation or a clear and unequivocally expressed waiver of sovereign immunity, Indian tribes are not subject to civil suit in any state, federal, or arbitral tribunal. *C & L Enterp., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). Tribal immunity is a matter of federal law and is not subject to diminution by the States. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). Sovereign immunity presents a jurisdictional question and, absent a waiver, presents an absolute bar to suits against tribes. *Kiowa Tribe,* 523 U.S. at 754; *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052-53 (9th Cir. 1985).

The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as sovereign governments. Governmental immunity from suit is something that is consistently recognized as 'inherent' to sovereignty. "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the

general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union." THE FEDERALIST NO. 81 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan U. Press 1961). Tribal sovereign immunity is no less inherent than any other governmental immunity and indeed, "predates the birth of the Republic[.]" *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 694 (1st Cir. 1994). Indian tribes are "distinct, independent political communities, retaining their original natural rights." *Worcester v. Ga.,* 31 U.S. 515, 559 (1832). "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. . . . Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo,* 436 U.S. at 56, 58. Tribes, like states, the federal government, and foreign nations, continue to enjoy a natural immunity from suit, an immunity that has been derived from the recognition under federal law of each entity's sovereign status.

As the tribal sovereign immunity doctrine has emerged in six United States Supreme Court cases since 1977, it has become clear that tribal entities are immune from lawsuits and court process in both state and federal courts unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*

Tribe of Okla., 523 U.S. at 758; *C&L Enters*, 532 U.S. at 418; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877 (1986); *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977). The precedent of the Court couches tribal sovereign immunity as a veritable truth or natural law of sovereignty. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty,* 37 Tulsa L. Rev. 661 (2002).

The United States Supreme Court has consistently affirmed tribal immunity, deciding that Congress is the sole appropriate body to determine whether to abrogate it, because Congress is in a better position "to weigh and accommodate the competing policy concerns and reliance interests." *Kiowa Tribe*, 523 U.S. at 759. The federal framework provides that sovereign immunity extends to tribes' commercial as well as governmental activities, and to activities occurring outside Indian Country (*id.* at 760; *Puyallup Tribe*, 433 U.S. at 172-173) and that it applies to suits for damages as well as those for declaratory and injunctive relief (*Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991)). Tribal sovereign immunity applies irrespective of the competing sovereignty of the other litigant; Indian tribes are immune from lawsuits filed by

states. *Florida v. Seminole Tribe*, 181 F.3d 1237, 1241 (11th Cir. 1999). Federal law holds that arms of tribes are cloaked with tribal immunity (*Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Worrall v. Mashantucket Pequot Gaming Enter.*, 131 F. Supp. 2d 328 (D. Conn. 2001)) and that tribal immunity likewise protects tribal officials acting within the scope of their authority. *Fletcher v. United States*, 116 F.3d 1315, 1334 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996).

Although vested with plenary authority with respect to Indian tribes, Congress has, to date, declined to implement any changes to the federal common law regime on tribal sovereign immunity. The natural, inherent quality of tribes' immunity persists with respect to tribes themselves, tribal entities, and tribal officers acting within the scope of their authority. Any abrogation of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58. Therefore, it is crucial to carefully consider any assertion that tribal sovereign immunity has been waived and/or abrogated in any manner whatsoever.

B. Burdens on tribal sovereign immunity harm Indian tribes

Any judicially imposed burden on tribal sovereign immunity does violence to the Tribes' ability to govern their affairs because that immunity represents the most fundamental protection mechanism for tribal interests. Tribal immunity exists by virtue of the sovereign status of Indian tribes because, for all governments, sovereign immunity is a vital part of the right of self-government. *See* THE FEDERALIST NO. 81 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan U. Press 1961). It protects governments' right to determine how (e.g. through legislation, judicial action, mediation, or other methods) conflicts that inevitably arise in the exercise of their sovereign authority may be resolved. As such, it has been recognized, from the earliest days of the United States, as an essential feature of any sovereign's authority. *Id.*

Instead of recognizing the doctrine of tribal sovereign immunity from suit and dismissing the case at bar, the court applied the doctrine of apparent agency and held that apparent authority is enough to waive tribal sovereign immunity. This misapplication is contrary to the nature and purpose of governmental immunity and effectively undermines and diminishes the sovereignty of all Indian tribes.

II. APPLYING THE DOCTRINE OF APPARENT AGENCY WAIVERS OF IMMUNITY REPRESENTS AN UNACCEPTABLE DOUBLE STANDARD.

The doctrine of apparent agency results in a disparate treatment of Indian tribes as sovereigns when compared to courts' treatment of other sovereign entities that assert sovereign immunity. *See Arakaki v. United States*, 71 Fed. Cl. 509, 515 (Fed. Cl. 2006) ("The apparent authority of a government agent is not sufficient to bind the government, even where the agent in question believed he held such authority."); *Dale v. Colagiovanni*, 443 F.3d 425, 428 (5th Cir. 2006) (("If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no activity of the foreign state.") (citing *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 307-08 (9th Cir. 1997))); *Doran v. Condon*, 983 F.Supp. 886, 888 (D. Neb. 1997) ("[A] state will be held to have waived its immunity only where stated by the most express language or by such overwhelming implication form the text as will leave no room for any other reasonable construction."); *Department of Public Safety and Correctional Services v. ARA Health Services, Inc.*, 668 A.2d 960, 969 (Md. Ct. Spec. App. 1995) ("In the absence of actual authority, the State may avoid the contract, regardless of the reasonableness of the beliefs of the other party."); *Gontrum v. City of Baltimore*, 35 A.2d 128 (1943) ("A municipal corporation is not bound by a contract made in its name by one of its officers or by a person in its employ, although within the

scope of its corporate powers, if the officer or employee had no authority to enter into such a contract on behalf of the corporation.").

In essence, the Court has not treated Indian tribes as sovereign nations, rather, in applying apparent agency, treats them as private entities. Such treatment is disrespectful to Amici Curiae and to Indian tribes in general; the court would not do this to the United States government, a foreign government, the State of Nebraska, or even a municipality. Indian tribes must be afforded the same respect as other sovereigns. The Omaha Tribe has a government-to-government relationship with the State and with the United States government. This Court's decision in this matter diminishes tribal sovereign immunity by effectively empowering a non-tribal entity to decide who has the authority to sign away a Tribe's most fundamental sovereign rights.

Other courts have held that tribal sovereign immunity should be treated no differently from federal sovereign immunity. *See Native American Distributing v. Seneca-Cayuga Tobacco Company*, 546 F.3d 1288, 1295 (10th Cir. 2008) (noting that the court previously recognized that officers of the United States possessed no power through their actions to waive immunity or to confer jurisdiction on a court in the absence of an express waiver of immunity, so there was "no reason to treat tribal immunity any differently than federal sovereign immunity in this context.") Indian sovereignty, like that of other sovereigns, is not a discretionary principle

subject to the vagaries of the commercial bargaining process or the equities of a given situation. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989). Further, courts have held that unauthorized acts of tribal officials are insufficient to waiver tribal sovereign-immunity. *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) (declined to extend *Rush Creek*). *See also Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1288 (10th Cir. 2001) (rejecting argument that tribal Chief had actual or apparent authority to waive immunity because "[s]uch a finding would be directly contract to the explicit provisions of the Tribal Constitution"); *Wold Touch Gaming, Inc. v. Massena Mgmt, LLC*, 117 F.Supp.2d 271, 276 (N.D.N.Y. 2000) (holding that a senior vice president's signature to an agreement with an express waiver of sovereign immunity provision did not waive sovereign immunity because that right was reserved exclusively to the tribal council); *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 841-42, 844 (N.J. Super. Ct. Law Div. 1999) (holding that a controller's signature on a contract containing a forum selection clause was insufficient to waive sovereign immunity, in part, because the right to waive immunity was reserved to the tribal council).

There is no logical reason why this Court should apply apparent authority to a tribal sovereign when all other sovereigns are seemingly safe from this doctrine. Indeed, federal courts have expressly declined to apply the doctrine of apparent

authority to the State of Nebraska—in a suit brought by an Indian tribe. *Santee Sioux Tribe of Nebraska v. State of Nebraska*, 121 F.3d 427, 431-32 (8th Cir. 1997) (actions of Governor and attorneys general do not constitute a waiver of Eleventh Amendment immunity absent specific legislative authorization to do so). There is no reason that this same rule should not apply to sovereign Indian tribes.

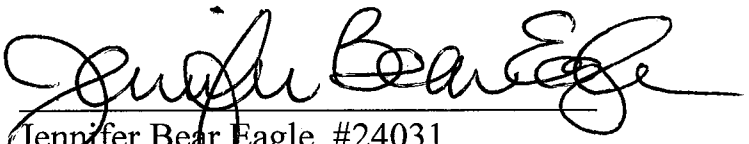
Not only does applying the apparent agency doctrine set forth in *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo.App. 2004), represent an unacceptable double-standard, but it also presents a danger to the continuing vitality all Indian tribes, for it allows a rogue tribal council member to waive a tribe's sovereign immunity where no authority exists, chips away Indian tribes' inherent powers of self-government, and further weakens fragile tribal economies.

CONCLUSION

For all the reasons set forth herein, Amici Curiae respectfully request that this grant Appellant's Motion for Rehearing.

Dated: April 25, 2011.

Respectfully Submitted,



Jennifer Bear Eagle, #24031
Fredericks Peebles & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
Telephone: (402) 333-4053
Facsimile: (402) 333-4761

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2011, a true and correct copy of the within and foregoing was mailed via U.S. Mail, postage prepaid thereon, to the following:

Michael J. Whaley
Elizabeth M. Skinner
Gross & Welch, P.C., L.L.O.
1500 Omaha Tower
2120 South 75nd Street
Omaha, NE 68124
Attorneys for Plaintiff

Ben Thompson
Thompson Law Office, PC, LLO
1306 Gold Circle, Suite 201
Omaha, NE 68144
Attorney for Defendant