Iowa Tribe of Kansas and Nebraska v. Salazar: Sovereign Immunity as an Ongoing Inquiry

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I. FACTUAL BACKGROUND

In 1996, the United States Congress passed Public Law 98-602,[1] which appropriated $100,000 to the purchase of real property on behalf of the Wyandotte Tribe ("the Tribe").[2] The Tribe intended to use these funds to acquire a parcel of land in downtown Kansas City, Kansas, (the "Shriner Tract" or "the Tract") with the purpose of building and operating a gaming facility.[3] After the United States Secretary of the Interior published notice of intent to take the land into trust on behalf of the Tribe, the Sac and Fox Nation of Missouri, the Iowa Tribe of Kansas and Nebraska, and the Prairie Band of Potawatomi Indians, along with the Governor of Kansas (collectively, "the Plaintiffs"), sued under the Administrative Procedures Act (APA),[4] alleging that the funds used to purchase the Tract were not exclusively taken from the Public Law 98-602 funds allocated for this purpose.[5] According to the Plaintiffs, if the Tribe had used funds other than those which Congress had allocated, the Secretary's acquisition of the Tract would have been improper under the APA.[6]

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[1] 98 Stat. 3149 (1984), entitled "An Act to provide for the use and distribution of certain funds awarded the Wyandotte Tribe of Oklahoma and to restore certain mineral rights to the Three Affiliated Tribes of the Fort Berthold Reservation."

[2] Iowa Tribe of Kansas and Nebraska v. Salazar, 607 F.3d 1225, 1228 (10th Cir. 2010).

[3] Governor of Kansas v. Kempthorne, 516 F.3d 833, 835 (10th Cir. 2008).

[4] 5 U.S.C. § 551 *et seq*. (1994).

[5] *Iowa Tribe*, 607 F.3d at 1228.

[6] *Id.*

While this litigation was pending, the Tribe purchased the Shriner Tract, and the Secretary of the Interior took it into trust.[7] Although the district court had issued a temporary restraining order prohibiting the Secretary from doing so, the order was dissolved on appeal and the Secretary went forward with the plan.[8] Eventually the trial court entered partial summary judgment for the defendants and remanded the case to the Secretary, who determined that the Tribe had used only Public Law 98-602 funds in the purchase and closed the case.[9]

The interested parties filed a second suit challenging these actions under the Quiet Title Act (QTA),[10] which provides the only means by which a claimant can challenge the federal government's title to real property.[11] The Tenth Circuit, however, barred the Plaintiffs from bringing this action, reasoning that Congress had not waived the United States' sovereign immunity under the QTA.[12] The Supreme Court had previously held sovereign immunity under the QTA to apply to any challenge to the United States' title in Indian trust land regardless of whether a given plaintiff had characterized his action as seeking to quiet title,[13] so long as the relief sought involved either removal of land that the government currently holds in trust, or otherwise encumbering that land.[14]

The Plaintiffs then successfully moved to reopen the original action pursuant to Federal Rule of Civil Procedure 60(b)(6).[15] Here, the Plaintiffs argued that the court should only have addressed the sovereign immunity issue at the inception of the action, when the Secretary had not yet taken the Tract into trust.[16] The district court, however, rejected this argument and found for the defendants, holding that the sovereign immunity issue must be reassessed with new factual developments in the case, and can be implicated at any stage of the litigation.[17] Accordingly, the court dismissed this suit as well, again basing its decision on the lack of waiver of sovereign immunity under the QTA.[18]

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[7] *Id.*

[8] *Id.*

[9] *Id.* at 1229 (citing *Kempthorne*, 516 F.3d at 838).

[10] 28 U.S.C. § 2409a.

[11] *Iowa Tribe*, 607 F.3d at 1230 (citing Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 286 (1983)).

[12] *Iowa Tribe*, 607 F.3d at 1229 (citing *Kempthorne*, 516 F.3d at 841–46).

[13] *Id.* (citing Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956, 961 (10th Cir. 2004)).

[14] *Id.* (citing *Kempthorne*, 516 F.3d at 842; *Neighbors*, 379 F.3d at 961–962)).

[15] Fed. R. Civ. Proc. 60(b)(6).

[16] *Iowa Tribe*, 607 F.3d at 1230.

[17] *Id.*

[18] *Id.* at 1229.

II. ISSUE

When the Plaintiffs appealed the district court's ruling, the Tenth Circuit confronted the question of whether the court should assess waiver of sovereign immunity only once at the time a plaintiff files his complaint, or whether it may also revisit the question after filing.[19] If sovereign immunity were only a bar to the initial filing of a complaint, then this case could proceed.[20] However, because the United States now held the land in trust, if the sovereign immunity inquiry were ongoing during the entire pendency of a lawsuit, it would be barred under the QTA.[21]

III. CIRCUIT SPLIT

The Tenth Circuit noted a split among the circuits on this particular issue. On the one hand, the Fifth and Ninth Circuits applied a "time-of-filing" rule, which dictated "the presence of a waiver of sovereign immunity [under the QTA] should be determined as of the date the complaint was filed."[22] On the other side was the First Circuit, which took the position that sovereign immunity could be established during the pendency of a suit even though the doctrine was inapplicable at its inception.[23]

IV. THE TENTH CIRCUIT'S ANALYSIS IN IOWA TRIBE OF KANSAS AND NEBRASKA V. SALAZAR

The court began its analysis by stating that the time-of-filing rule finds strong support in the diversity jurisdiction context.[24] In such situations, courts have no power to enjoin litigants from moving freely between states for the sole purpose of maintaining the requisite diversity of citizenship between the parties to sustain the courts' jurisdiction.[25] Therefore, a time-of-filing rule makes sense with regard to maintaining diversity jurisdiction during the course of an action and preventing jurisdictional manipulation by the parties. In contrast, courts had only very infrequently applied a time-of-filing rule to federal question cases

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[19] *Id.* at 1232.
[20] *Id.*
[21] *Id.*
[22] *Iowa Tribe*, 607 F.3d at 1236 (citing Bank of Hemet v. United States, 643 F.2d 661, 665 (9th Cir. 1981); Delta Savings & Loan Ass'n v. IRS, 847 F.2d 248, 249 n.1 (5th Cir. 1988)).
[23] *Id.*
[24] *Id.* at 1233 (citing Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 583 (2004) (Ginsburg, J., dissenting)).
[25] *Id.*

with the sole exception of removal cases, which involve high potential for manipulation.[26] Based upon this analysis, the court rejected the Plaintiffs' argument that prior applications of a time-of-filing rule controlled.[27]

The Tenth Circuit then discussed an early Supreme Court case addressing the precise question of whether courts must address sovereign immunity at the time of filing.[28] In *Beers v. Arkansas*,[29] Beers sued Arkansas for interest on state bonds that he held.[30] While Beers's suit was pending, the Arkansas legislature passed an act requiring state bond claimants to show the disputed bonds to the court, or else their case would be dismissed.[31] Beers could not produce the bonds, so the court dismissed his action pursuant to the newly-enacted law.[32] When he appealed his case to the Supreme Court, it was held that the sovereign waives its immunity—which is, after all, "altogether voluntary"—according to its own terms and conditions, and may withdraw that immunity "whenever it may suppose that justice to the public requires it."[33] The fact that the legislature "might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so" further bolstered this conclusion.[34]

The Tenth Circuit pointed out that the purpose behind the QTA's nonwaiver of sovereign immunity in the Indian trust context was to preserve the integrity of the United States' obligations to American Indian tribes and prevent adverse claimants from intermeddling in this relationship.[35] In order to avoid subjecting these lands to such adverse claims without the consent of the tribes for whom they are being held in trust, Congress determined that the waiver under the QTA, which applies in other contexts, should not apply here.[36]

Moreover, the court noted that the United States did not intend its waiver of immunity under the APA, which applied at this suit's inception, to "swallow other statutory regimes."[37] In fact, to the

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[26] *Id.* (citing Kabakjian v. United States, 267 F.3d 208, 212 (3d Cir. 2001); Connectu, LLC v. Zuckerberg, 522 F.3d 82, 92 (1st Cir. 2008)).

[27] *Id.*

[28] *Iowa Tribe*, 607 F.3d at 1233.

[29] 61 U.S. (20 How.) 527 (1857).

[30] *Iowa Tribe*, 607 F.3d at 1233 (citing *Beers*, 61 U.S. at 528).

[31] *Id.* (citing *Beers*, 61 U.S. at 528).

[32] *Id.* (citing *Beers*, 61 U.S. at 528).

[33] *Id.* (citing *Beers*, 61 U.S. at 529).

[34] *Id.* (citing *Beers*, 61 U.S. at 530).

[35] *Id.* at 1237.

[36] *Iowa Tribe*, 607 F.3d at 1237.

[37] *Id.*

contrary, Congress had made clear that nothing in the APA "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[38] With these considerations in mind, the Tenth Circuit concluded that the sovereign immunity inquiry was ongoing rather than simply taking place at the time of filing.[39]

The court summarily rejected three of the Plaintiffs' other arguments. With regard to the Plaintiffs' argument that the sovereign immunity question need not be addressed because this was an officer suit against the Secretary of the Interior rather than the United States itself, the court held that to accept such argument view would render the QTA's Indian lands exception "nugatory," and therefore rejected this contention.[40] The court also rejected the argument that its 1996 stay of the temporary restraining order could serve to retain jurisdiction where a sovereign immunity bar now applied.[41] The court stated that it intended that stay to preserve only the question of whether gaming would be permitted on the Tract and was "simply irrelevant" to the sovereign immunity question.[42] Lastly, the court rejected the argument that equity should prohibit the application of sovereign immunity at this stage of the proceedings after the Secretary's representation to the court during the Tribe's appeal of the temporary restraining order that staying that order would not deprive the court of jurisdiction.[43] This representation, according to the court, established merely that the court would retain jurisdiction over the question of whether gaming could occur, not over whether the APA or QTA and their respective sovereign immunity waivers should apply.[44]

V. IMPACT

Sovereign immunity is a fundamental threshold question in any suit against a state or the federal government. Because it can stand as an absolute bar to a plaintiff's cause of action, it is vitally important that

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[38] *Id.* (quoting 5 U.S.C. § 702).

[39] *Id.*

[40] *Id.* at 1238.

[41] *Id.* (quoting *Kempthorne*, 516 F.3d at 845) ("'[T]he previous orders of this court . . . are simply irrelevant' to the question of sovereign immunity.").

[42] *Iowa Tribe*, 607 F.3d at 1238.

[43] *Id.*

[44] *Id.* (quoting *Kempthorne*, 516 F.3d at 845–46) ("Because waiver must be unequivocally expressed by Congress, officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court. The federal government's appearance in court through its officers and agents, therefore, does not waive the government's sovereign immunity . . . .").

courts establish the contours of this immunity in the many contexts in which it may arise. In the relationship between Indian tribes and the federal government, entailing "solemn obligations" and "specific commitments,"[45] this question deserves particular attention.

Moreover, the fact that sovereign immunity of the federal government is not uniform from one court to the next runs counter to the entire concept of sovereign immunity. The doctrine is not a court procedural rule, but an inherent attribute of the sovereign itself.[46] Furthermore, waiver of immunity as to a particular issue is accomplished on a nationwide level, and according to the specific direction of Congress.[47]

To remedy this unacceptable confusion between the First Circuit on the one hand and the Fifth, Ninth and Tenth Circuits on the other hand, the Supreme Court should accept certiorari and affirm that the time-of-filing rule fails to do justice to the nature and extent of the immunity enjoyed by the federal government. This should instead be an ongoing inquiry, adapting to changing circumstances or directions by Congress during a suit's pendency. As *Beers* instructs, Congress could repeal the law altogether and divest the courts of jurisdiction if it thought proper to do so.[48] It naturally follows from *Beers* and from the well-established sovereign immunity doctrine that the Plaintiffs here have no ability to sue the government under the QTA, and that the Tenth Circuit's dismissal of this action was proper.

VI. CONCLUSION

Ultimately, the Tenth Circuit rejected the Plaintiffs' appeal that sovereign immunity should not apply to this case, and that the district court's dismissal for lack of jurisdiction was proper.[49] This conclusion falls on the better-reasoned side of the line dividing the federal circuit courts on this particular issue, as it comports best with historical understanding of the sovereign immunity doctrine and is best in line with all the parties' expectations. At present, however, there remains a circuit split on a question that must necessarily have one uniform application throughout the federal system. The immunity of the United States from suit must not vary depending on the geographic location of the court applying the doctrine. Furthermore, the obligations the United States owes to American Indian tribes warrant particular attention to questions

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45 *Iowa Tribe*, 607 F.3d at 1237.
46 *Id.* at 1237.
47 *Id.* at 1237 n.9.
48 *Beers*, 61 U.S. at 530.
49 *Iowa Tribe*, 607 F.3d at 1239.

implicating their right to challenge how the government handles their lands. Accordingly, the Supreme Court should grant certiorari to affirm the Tenth Circuit's conclusion in this case and establish one immunity standard across the entire nation.