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Legal Sidebar

Supreme Court Directs State Court to Decide Whether Indian Tribe Can Invoke Sovereign Immunity in Property Dispute

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July 16, 2018

Indian tribes possess "inherent sovereign authority," which means, among other things, that they cannot be subject to lawsuits unless the tribe waives or Congress expressly abrogates such immunity. Recently, the Supreme Court in *Upper Skagit Indian Tribe v. Lundgren* ruled that a Washington state court erroneously rejected an Indian tribe's claim that sovereign immunity foreclosed a lawsuit involving a property dispute between two landowners and the tribe. Citing the Supreme Court's 1992 decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, the state court had reasoned that an Indian tribe's claim of sovereign immunity did not bar courts from exercising jurisdiction to settle disputes over real property. In reversing the state court's decision, the Supreme Court held that the state court's reliance on *Yakima* was misplaced because that case did not address the scope of tribal sovereign immunity, but only concerned the question of whether a particular federal law permitted state taxation of certain land within an Indian reservation. The Supreme Court directed the lower court to address the plaintiffs' new contention that an Indian tribe cannot assert sovereign immunity in an action relating to immovable property located in in the territory of another sovereign, namely, in another state. While the Supreme Court's decision clarifies its ruling in *Yakima*, the Court's decision leaves unresolved the underlying issue of whether an Indian tribe may invoke sovereign immunity in cases involving disputes over real property.

Legal Background: *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*

In *Yakima*, the Supreme Court considered whether the Indian General Allotment Act of 1887 (GAA) permitted a state to impose property and sales taxes on "fee patented" land within an Indian reservation.

Congressional Research Service
7-5700
www.crs.gov
LSB10169

The GAA, which reflected Congress's intent "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large," authorized the United States government to allot parcels of reservation land to Indians individually, and to hold the allotted land "in trust for the sole use and benefit of the Indian" for at least 25 years, after which a patent-in-fee would issue to the Indian. The GAA, as amended, provided that, upon issuance of a patent-in-fee, an Indian would be subject to the civil and criminal laws of the state where he resided, and "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." Ultimately, in 1934, Congress passed the Indian Reorganization Act (IRA), which intended "to encourage Indian tribes to revitalize their self-government." Among other provisions, the IRA ended the allotment of land to Indians, indefinitely extended the existing periods of trust applicable to already-allotted lands not alienated, and authorized the U.S. government to restore unallotted surplus Indian lands to tribal ownership. The IRA's discontinuation of the allotment policy and subsequent legislation concerning the reach of state law within reservation lands have been interpreted to mean that the GAA no longer authorized *plenary* state jurisdiction over Indians living on fee-patented lands.

That said, the Supreme Court ruled in *Yakima* that the GAA, as amended, authorized states to tax fee-patented lands on an Indian reservation. The Court determined that the IRA did not preclude state taxation of fee-patented lands, reasoning that, although Congress's policy of tribal self-government effectively barred the exercise of state *in personam* jurisdiction over members of an Indian tribe based on their activities or transactions on that land, "the mere power to assess and collect a tax on certain real estate" is not "significantly disruptive" of tribal self-government. The Court thus concluded that the GAA permitted Yakima County to impose a property tax on fee-patented reservation land, but did not allow the county to enforce a sales tax on such land because the GAA limited a state's jurisdiction to taxation of the *land* itself, not to the sale of such land.

Facts and Procedural History in *Upper Skagit*

The Upper Skagit Tribe (Tribe), located in the State of Washington, sought to expand its Indian reservation by purchasing forty acres of land that had been originally included in a tract of land that was ceded under an 1855 treaty. Following a survey of the newly purchased land, the Tribe discovered that an acre of the land extended beyond a barbed wire fence into land owned by its neighbors (the Lundgrens). The Tribe informed the Lundgrens of its plan to remove the fence and establish a new boundary line between their respective properties in light of the survey. In response, the Lundgrens filed a quiet title action in state court, arguing that they had obtained title to the property claimed by the Tribe through adverse possession or mutual recognition and acquiescence long before the Tribe bought the land. The Tribe moved to dismiss the lawsuit based, in part, on its right to "the common-law immunity from suit traditionally enjoyed by sovereign powers." A trial court denied the Tribe's motion to dismiss and, following an appeal of that decision, an appellate court ruled that the Lundgrens had established title to the disputed property.

On appeal to the Washington Supreme Court, the Tribe maintained that it had sovereign immunity from the Lundgren's lawsuit, and that neither the Tribe nor Congress had waived such immunity to determine ownership of real property. The Tribe argued that the fact that a claim involves real property "does not affect or somehow avoid threshold jurisdictional questions such as sovereign immunity." The Lundgrens acknowledged that the Tribe had sovereign immunity, but argued that, because the trial court had *in rem* jurisdiction over the real property itself, the court did not need to have personal jurisdiction over the Tribe, and, therefore, sovereign immunity was irrelevant.

The Washington Supreme Court affirmed the denial of the Tribe's motion to dismiss, ruling that "[a] court exercising in rem jurisdiction [to determine title to real property] is not necessarily deprived of its jurisdiction by a tribe's assertion of sovereign immunity." Significantly, the court cited the Supreme Court's decision in *Yakima* for the proposition that sovereign immunity applies only when a state seeks to

exercise *in personam* jurisdiction over an Indian tribe itself, but not when the state seeks to exercise *in rem* jurisdiction over the real property within an Indian reservation.

The Supreme Court's Decision in *Upper Skagit*

In its petition for Supreme Court review, the Tribe argued that the Washington Supreme Court erred by carving out an *in rem* exception to immunity when a court exercises jurisdiction to determine ownership of real property. The Tribe argued that the Supreme Court never recognized such an exception in *Yakima*, which "merely clarifie[d] the jurisdiction to tax afforded to states pursuant to Section 6 of the GAA." In response, the Lundgrens did not dispute the Tribe's contention, but urged the Supreme Court to recognize an exception to tribal sovereign immunity based on the common law concept that sovereigns have no immunity from suits involving "immovable property" located in the territory of another sovereign. Based on this doctrine, the Lundgrens argued, the Tribe could not invoke sovereign immunity because their lawsuit related to immovable property located in the State of Washington that the Tribe had purchased in "the character of a private individual."

In a 7-2 decision, the Supreme Court reversed the Washington Supreme Court's decision. In the majority opinion written by Justice Gorsuch (joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan), the Court held that the state court erroneously relied on *Yakima* in concluding that sovereign immunity does not prevent courts from exercising *in rem* jurisdiction to settle disputes over real property within an Indian reservation. The Court explained that *Yakima* did not address the scope of tribal sovereign immunity, and only involved the "much more prosaic question" of whether the GAA permitted states to collect property taxes on fee-patented land within Indian reservations.

The Court noted that, instead of disputing the fact that *Yakima* "resolved nothing about the law of sovereign immunity," the Lundgrens raised an "entirely distinct" argument based on the immovable property exception to sovereign immunity. The Court, however, declined to address the Lundgrens' newly advanced claim, reasoning that "[d]etermining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before [the Court]; and the alternative argument for affirmance did not emerge until late in this case." Therefore, the Court remanded the case to the Washington Supreme Court to address the Lundgrens' arguments in the first instance.

In a concurring opinion, Chief Justice Roberts (joined by Justice Kennedy) agreed with the Court's decision, but questioned how a person should resolve a property dispute with an Indian tribe, noting that "a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right." Chief Justice Roberts suggested that the solution may be to recognize an exception for legal actions to determine ownership rights in immovable property located in another sovereign, but acknowledged that it was unclear "whether different principles afford Indian tribes a broader immunity from actions involving off-reservation land." Chief Justice Roberts argued that, if such an exception did not apply to Indian tribes, the scope of tribal sovereign immunity would "need to be addressed in a future case."

In a dissenting opinion, Justice Thomas (joined by Justice Alito) argued that the Court should have considered whether the immovable property exception applied to the Tribe's sovereign immunity claim, even if the Lundgrens had not previously raised that issue, because it was a "well established" exception to sovereign immunity. Justice Thomas further argued that Indian tribes do not enjoy more expansive immunity than other sovereign powers, and were thus subject to "longstanding limits on sovereign immunity, such as the immovable property exception." Otherwise, Justice Thomas argued, Indian tribes would possess "a sweeping and absolute immunity that no other sovereign has ever enjoyed—not a State, not a foreign nation, and not even the United States." Justice Thomas concluded that the Court's decision left state and federal courts "with little more guidance than they had before" regarding the scope of tribal

sovereign immunity, and "needlessly delay[ed] relief for the Lundgrens, who must continue to litigate the threshold question whether they can litigate their indisputable right to their land."

Implications of the Court's decision

Courts have previously been divided over the extent to which tribal sovereign immunity bars courts from exercising jurisdiction in legal actions concerning the property rights of Indian tribes, and, in particular, whether the Supreme Court's decision in *Yakima* created an exception to tribal sovereign immunity for *in rem* proceedings over real property. In *Upper Skagit*, the Supreme Court has now clarified that its decision in *Yakima* did not concern the scope of tribal sovereign immunity, but only addressed the narrower statutory question of whether the GAA permitted the taxation of certain land within an Indian reservation. Consequently, reviewing courts seemingly may no longer rely on *Yakima* in addressing the applicability of tribal sovereign immunity.

Yet despite the Supreme Court's clarification of *Yakima*, there remains an unresolved question concerning the extent to which an Indian tribe may invoke sovereign immunity in cases involving real property rights—an issue that had arguably prompted the Court to agree to review the Washington Supreme Court's decision in *Upper Skagit*. Nevertheless, in an exercise of restraint, the Court expressly declined to address that "grave question" and, instead, directed the state court to consider whether the immovable property exception grounded in common law applies to tribal sovereign immunity. Given the Court's narrow ruling, the conflicting rulings of state and federal courts concerning the applicability of tribal sovereign immunity in real property disputes "will persist" for the time being, and it is not certain whether this threshold jurisdictional question will return to the Court anytime soon.

In view of this uncertainty, Congress may consider legislative options to resolve the disagreement over the applicability of tribal sovereign immunity in cases involving real property. As the Supreme Court has observed, tribal sovereign immunity is a "broad principle" subject to the plenary power of Congress, and "it is fundamentally Congress's job, not [the Court's], to determine whether or how to limit tribal immunity." In particular, Congress may consider whether there should be any distinction between *in rem* and *in personam* proceedings for purposes of applying tribal sovereign immunity, as some courts have concluded; whether the immovable property exception should apply to tribal sovereign immunity, as Justice Thomas argues; or whether there should be other circumstances in which tribal sovereign immunity may be restricted, as Congress has provided in past legislation. Further, the Supreme Court's decision in *Upper Skagit* raises other considerations. In his concurring opinion, Chief Justice Roberts questioned how an individual can resolve a dispute over real property with an Indian tribe in the face of sovereign immunity, and warned of the "intolerable" consequences that could result in the absence of any redress. Congress could consider other legislative options that address these concerns and establish some "means of resolving property disputes of this sort."