Tribal Immunity Can't Be Skirted In Land Fight, Justices Told

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Law360, New York (January 30, 2018, 4:31 PM EST) -- A tribal coalition and the federal government told the U.S. Supreme Court on Monday that they supported the Upper Skagit Indian Tribe in its bid to overturn a Washington high court decision in a property dispute, saying it carved out an improper exception to tribal sovereign immunity.

The Cayuga Nation, the Cherokee Nation and three other tribes said in an amicus brief that the Washington Supreme Court should not have found that a property dispute between the Upper Skagit tribe and Sharline and Ray Lundgren could survive despite the tribe's sovereign immunity. Congress did not specifically carve out an exception to that immunity to fit the particular facts in the case, and the courts should not do so themselves, the five tribes said.

In December, the high court agreed to take a look at the Washington Supreme Court's 5-4 **decision** holding that the tribe could not invoke its sovereign immunity to dismiss the land ownership suit brought by the Lundgrens, who believe a strip of land in Skagit County belongs to them. The court reasoned there was an exception to immunity because the trial court overseeing the matter was exercising jurisdiction over the property itself, rather than the tribe. This is referred to as in rem jurisdiction.

For the five tribes, the state Supreme Court violated principles of sovereign immunity. The brief cited the Supreme Court case **Michigan v. Bay Mills Indian Community**, which concerned a potential sovereign immunity exemption for "off-reservation commercial activity."

"The court rejected that request 'for the single, simple reason: because it is fundamentally Congress' job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty that tribes retain — both its nature and its extent — rests in the hands of Congress," the coalition of tribes said, adding that no special exemption applied in the present case.

Carving out an exception to tribal immunity for in rem jurisdiction would be wrong, the coalition said, as in rem suits still pull in the tribe.

"While in rem suits are formally suits against things, they are really suits against the people who claim interests in those things," the tribes said. "In this court's words, the 'phrase judicial jurisdiction over a thing is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.'"

So, when a tribe sees that there is an in rem suit against some property it has an interest in, it must get involved, the brief said. "This basic point forecloses the Washington Supreme Court's attempt to circumvent immunity via in rem jurisdiction," the coalition said.

In the present quiet title action, immunity **should stand** no matter what "Washington-specific legal fictions" the state's high court tried to impose, the brief said. According to the tribes, the Washington Supreme Court used a twisted sequence: It determined the Lundgrens had a winning claim and then decided the "tribe 'does not have an interest in the disputed property.'"

"That dodge cannot work," the tribes said. By looking at the merits, the Upper Skagit tribe had its immunity violated with the threshold question. "Such immunity is empty if, to establish it, sovereigns must first litigate and win on the merits — losing their property if they do not."

The tribes also said that the present case was a poor vehicle for the court to carve out a generic exception to immunity for in rem matters, saying that there were a variety of different scenarios that made the issue complicated.

And the federal government agreed with the tribal coalition, saying the Washington Supreme Court's decision should be overturned.

"Tribal sovereign immunity precedents have made clear that a suit against the sovereign's property is a suit against the sovereign itself," the federal government said.

Both the Lundgrens and the Upper Skagit tribe had asked the state trial court for summary judgment, with the Lundgrens arguing that they had acquired the disputed land years before the tribe purchased its property, by adverse possession or by mutual recognition and acquiescence. Meanwhile, the tribe argued that the court didn't have jurisdiction to rule on the matter due to the tribe's sovereign immunity.

The lower court rejected the tribe's bid and found that the Lundgrens had established their ownership over the land. That ruling was affirmed by the state's high court, prompting the Upper Skagit tribe's high court petition in September.

Along with the coalition of tribes and the federal government, another coalition of tribes that included the Fond du Lac Band of Lake Superior Chippewa asked the high court to overturn the Washington Supreme Court on Monday. The National Congress of American Indianssubmitted a brief with the same request. In addition, a coalition of states, including Illinois and Indiana, said that whatever the outcome of the case, the Supreme Court should keep its finding that an in rem action doesn't prevent a party from asserting immunity.

The land at issue lies between a barbed wire fence along the southern portion of the tribe's property, but north of the deed line for the Lungrens' adjacent property. Although the Lundgrens bought their property in 1981, the couple claims it has been in their extended family since 1947 and the fence — which has stood

for at least 70 years — has always been treated as the boundary between their property and the tribe's property to the north, according to the state high court's decision.

But in an attempt to gain control over the land, the tribe argued that it did not know about the fence until after it acquired the property in 2013, as the tribe surveyed the parcel, according to court documents. Since, the tribe has maintained that the fence does not represent the boundary of the Lundgrens' property.

Chrissi Ross Nimmo, deputy attorney general with the Cherokee Nation who was on the brief of the coalition of five tribes, said it was vital the lower court's decision is overturned.

"As to Cherokee Nation, we simply believe it is extremely important that the basic tenets of tribal sovereignty are upheld and that the Supreme Court not allow states to carve out exceptions to tribes' immunity from suit," she told Law360 on Tuesday.

A representative for the Lundgrens did not respond to a request for comment.

The coalition of five tribes consists of the Cayuga Nation, the Seneca Nation of Indians, the Saint Regis Mohawk Tribe, the Cherokee Nation and the Pueblo of Pojoaque.

The coalition is represented by Martin E. Seneca Jr., Michele F. Mitchell and Karla E. General of the Seneca Nation of Indians; Ian Heath Gershengorn, David W. DeBruin, Sam Hirsch and Zachary C. Schauf of Jenner & Block LLP; Todd Hembree and Chrissi Ross Nimmo of the Cherokee Nation; Marsha K. Schmidt; Carrie Frias of the Pueblo of Pojoaque Legal Department; and Daniel I.S.J. Rey-Bear of Rey-Bear McLaughlin LLP.

The U.S. is represented by Noel J. Francisco, Edwin S. Kneedler, Ann O'Connell, Jeffrey H. Wood, William B. Lazarus and Mary Gabrielle Sprague of the Department of Justice.

The Upper Skagit Indian Tribe is represented by Arthur W. Harrigan Jr., Tyler L. Farmer, Kristin E. Ballinger and John C. Burzynski of Harrigan Leyh Farmer & Thomsen LLP, and in-house by David S. Hawkins.

The Lundgrens are represented by Scott M. Ellerby of Mullavey Prout Grenley & Foe.

The case is Upper Skagit Indian Tribe v. Sharline Lundgren et al., case number 17-387, in the Supreme Court of the United States.

--Additional reporting by Andrew Westney, Christine Powell and Dorothy Atkins. Editing by Aaron Pelc.