Justices Wary Of Weakening Tribal Immunity In Property Row

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Law360, Washington (March 21, 2018, 4:52 PM EDT) -- Various members of the U.S. Supreme Court on Wednesday conceded that a Washington couple made an "extremely strong argument" that Native American tribes shouldn't be immune from lawsuits over contested real estate, yet a procedural quirk in the case gave them pause.

The issue of tribal sovereign immunity took center stage during oral arguments in **a land dispute** between the Upper Skagit Indian tribe of Washington state and a married couple.

The couple, Sharline and Ray Lundgren, sued the tribe to obtain title over a one-acre parcel of land located on property recently purchased by the tribe. The Lundgrens argued that their family had occupied the land for decades and thus had "adverse possession" of the parcel under Washington state law.

The tribe asserted its sovereign immunity and tried to get the case dismissed, but the trial court refused and granted judgment in favor of the Lundgrens — a decision that was upheld by the Washington Supreme Court.

On appeal to the U.S. Supreme Court, the tribe has argued that sovereign immunity can only be waived by the tribe itself or blocked by Congress. But during Wednesday's arguments, several justices appeared sympathetic to the Lundgrens. They suggested that under common law traditions dating back to the 18th century, there is an exception to sovereign immunity for "immovable property."

"I think since about 1750, there's been an exception for a sovereign nation for immovable property," Justice Stephen Breyer said. "And therefore, if the nation of Canada comes and has a piece of land in North Dakota and the person who lives there says, 'I'm sorry, this belongs to me, not to Canada,' and Canada says no, my understanding was there has been a long-standing exception to sovereign immunity."

Justice Elena Kagan echoed that point, saying the immovable property exception to sovereign immunity is "part of the doctrine from long, long ago."

"It doesn't have much to do with the states all agreeing about something at the Constitutional Convention," she said.

Chief Justice John Roberts Jr. repeatedly demanded to know how land disputes involving tribes should be resolved, if not by courts.

"You say," Chief Justice Roberts began, questioning a lawyer for the federal government appearing in support of the tribe, "the Lundgrens could, for example, log trees on the disputed strip, commence building a structure or take other similar actions that would induce petitioner to file suit.

"Is that really what you want them to do?" he asked Assistant Solicitor General Ann O'Connell, incredulously. "There's a dispute about this piece of property and you say, well, go pick a fight. Go cut down some trees. That's a surprising position for the government to take."

When O'Connell reiterated that approach, Chief Justice Roberts tried to underscore the absurdity of the position. "The tribe, I gather, said they're going to build their own fence right on the line," he said. "And you're saying the Lundgrens should jump over the fence with a chainsaw and start cutting down trees, and when the tribe comes up to them, they're supposed to say, 'Oh, Ms. O'Connell said I should do this.'"

"I think the — well, they probably shouldn't say that," O'Connell replied.

Still, despite their frosty reception to the tribe's sovereign immunity bid, it is far from clear that the Lundgrens will receive the high court victory they're hoping for. That's because, according to several members of the court, the Washington Supreme Court did not base its ruling on the immovable property exception; the lower court instead denied immunity on the grounds that the trial court was exercising so-called in rem jurisdiction over the property, rather than the tribe itself.

"This is an argument that you have pressed vigorously here but it has nothing to do with the decision of the Washington Supreme Court," Justice Ruth Bader Ginsburg told Perkins Coie LLP's Eric Miller, an attorney for the Lundgrens. "There was nothing about [the] immovable property exception."

Justice Kagan expressed similar concerns. "Now you're coming in and you have an extremely strong argument about this immovable property rule, but it's not the same argument that the court in Washington made ... It's a completely new way to win this case."

Justice Neil Gorsuch made a similar point. "This court doesn't normally resolve questions like that in the first instance," he said. "Normally it is a question of review, not first view. Why shouldn't we exercise discretion here and wait?"

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 its in-house counsel David S. Hawkins.

The Lundgrens are represented by Scott M. Ellerby of Mullavey Prout Grenley & Foe, and Eric D. Miller, Luke M. Rona, Jennifer A. MacLean, Charles G. Curtis Jr. and Lauren Pardee Ruben of Perkins Coie LLP.

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

--Editing by Stephen Berg.