

Appleby Law PLLC
333 North Fairfax Street
Suite 302
Alexandria, VA 22314

office: 703-837-0001
mobile: 202-577-5655

www.applebylawpllc.com

INDIAN LAW ALERT
MAY 27, 2014

***THE SUPREME COURT SPEAKS ON TRIBAL SOVEREIGN IMMUNITY: MICHIGAN
V. BAY MILLS INDIAN COMMUNITY***

In a 5-4 decision, the Supreme Court today announced that the State of Michigan's suit against the *Bay Mills Indian Community* to enjoin the tribe from operating a casino in violation of its compact with the State is **barred by the tribe's immunity from suit**. The decision, which has been the subject of much speculation and anticipation, is major "win" for Indian country.

The case arose from a dispute between the Bay Mills Indian Community, a federally recognized tribe located in northern Michigan, and the State of Michigan over the tribe's off-reservation casino in Vanderbilt, Michigan, approximately 125 miles south of its reservation. The land had been recently purchased by the tribe. However, Bay Mills did not follow the normal procedure for putting off-reservation land in trust before using it for gaming, both the State of Michigan and the Little Traverse Bay Band of Odawa Indians – the owner of a casino only 35 miles from Bay Mills' new facility – argued that the casino was operating illegally. The National Indian Gaming Commission – the federal agency tasked with regulating Indian gaming -- declined to resolve the dispute, finding that it did not have jurisdiction because the Bay Mills casino technically is not located on "Indian lands."

The case ultimately made its way to the Supreme Court to decide whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from engaging in off-reservation commercial activity on land owned by the tribe, even where that activity arguably violates state law. The Supreme Court's decision today affirmed principles previously developed by the court, namely:

First, as domestic dependent nations, tribes have inherent sovereign authority that is subject to control by Congress. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991).

Second, unless and until Congress acts, tribes retain their sovereign authority. *United States v. Wheeler*, 435 U.S. 313 (1978).

Third, among the core aspects of sovereignty that tribes possess – subject to congressional action – is the common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Appleby Law PLLC
333 North Fairfax Street
Suite 302
Alexandria, VA 22314

office: 703-837-0001
mobile: 202-577-5655

www.applebylawpllc.com

Fourth, tribes' immunity from suit applies to a suit brought by a state, *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977), or arises from a tribe's commercial activities off Indian lands. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 535 U.S. 751 (1998).

Fifth, unless Congress has unequivocally authorized suit, in the absence of an express waiver by a tribe, the suit must be dismissed. *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Tribe of Okla.*, 532 U.S. 411 (2001).

During the run-up to *State of Michigan v. Bay Mills*, there was a great deal of speculation and concern about whether the Court would depart from its holding in *Kiowa Tribe of Okla.* and hold that tribes' immunity from suit does not extend to off-reservation commercial activity. The Court made it very clear today that it will not stray from *Kiowa* and that "it is fundamentally Congress's job to determine whether or how to limit tribal immunity." Given the number of states that supported Michigan's position, it will not be surprising if legislation limiting tribal immunity is introduced in Congress. However, whether such legislation will survive the current Congress is another matter entirely.

A full copy of the Court's opinion can be found at http://www.supremecourt.gov/opinions/13pdf/12-515_jq2i.pdf.

