Jimmy B. Fenison
AIS 335 American Indian Law
Professor Harmon
November 25, 2008

Agua Caliente Band of Cahuilla Indians v.
Fair Political Practices Commission of California State

The *Los Angeles Times* reported (July 17, 2008) that on June 29th, the Agua Caliente Band dropped its appeal to the U.S. Supreme Court against California State and the Fair Political Practices Commission (FPPC) after the FPPC sued them and won in California Supreme court[1]. The tribe agreed to waive its sovereign immunity in area of disclosing tribal campaign contributions under California's Political Reform Act (PRA) of 1974. The tribe owns two casinos and much of the resort town of Palm Springs, CA. It is one of the wealthiest tribes in the U.S. according to Sharon O'Brien (221)[2], and they spent $20 million on political campaigns between '02 and July '07 according to Nancy Vogel of *L.A. Times.* According to Howard Dickstein, attorney who represents California tribes, when tribes across the U.S. heard about this case going to the U.S. Supreme Court they feared a "wholesale attack of tribal sovereignty" (qtd. in "Tribe drops fight"). The question posed in this paper is how would the U.S. Supreme Court rule if this appeal was carried out?

Cases of jurisdiction over tribal campaign contributions are unprecedented in the U.S. Supreme Court and like the *White Mountain Apache Tribe v. Bracker* (1980) case, this case deserves a "particularized inquiry into the nature of state, federal, and tribal interests at stake" (Wilkinson 169)[3]. The format of this paper will be in a mock court opinion. In predicting the outcome of this case there are at least two major questions to be addressed: I. Can the state enforce PRA on the tribe? II. Does the tribe still retain sovereign immunity from PRA? I'm inclined to think that the tribe retains all powers not taken away by federal government or given up by tribe. Therefore, the state has no jurisdiction in this matter. Still, the case is provocative because the tribe is wealthy and may have unfair advantage in

[1] Vogel, Nancy "Tribe drops fight against donation disclosure effort; Agua Caliente will halt its appeal of the case to the U.S. high court. Other Indians had feared sovereignty might ultimately be eroded" [HOME EDITION]. *Los Angeles Times* July 14, 2007.

[2] O'Brien, Shannon *American Indian Tribal Governments* Norman: U of Oklahoma P, 1989.

[3] Wilkinson, Charles *Indian Tribes as Sovereign Governments* 2nd ed. Oakland: AILTP, 2004.

realm of political influence. On other hand, their decision to waive immunity would have effect on over 500 tribes in U.S., most of which are not wealthy. Furthermore, tribes are not like corporations. They are not meant for profit of individuals but rather the Indian community. Who wouldn't want to see American Indian communities thrive after all they have suffered and still suffer as minority? But ignorance of American Indian history may tempt many to marginalize Indian problems and assume gaming money resolves all that.

I.

According to California State, the intention of the PRA was to enforce regulations against lobbyists and organizations who may "gain disproportionate influence over governmental decisions" (4)[4]. The FPPC said the tribe failed to disclose their campaign contributions before the 1998 elections, "thereby depriving voters of information necessary to make informed decisions" (7). They also argued that tribal campaign contributions are off-reservation activities and tribes only have authority over on-reservation activities (37). In light of all this, the state may be justified in saying it has a "significant interest" (7) or compelling and rational basis in regulating tribal campaign contributions.

The *New Mexico v. Mescalero Apache Tribe* (1983) ruling said that "State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention" (Wilkinson 177). This is called *concurrent jurisdiction* unless state already precluded tribal jurisdiction. Example would be the *Washington v. Confederated Tribes of the Colville Reservation* ruling which allowed Washington State to tax cigarette sales to non-members on reservations and gave the state minimal power to enforce. Some states already share jurisdiction on reservations through Public Law 280 (1953) where state laws apply to criminal cases on reservations.

The Montana v. U.S. (1980) ruling would also seem to support the state's argument because it states that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation" (564). This ruling represented a new trend by courts to deny tribal power based on diminished status as sovereigns and started with the 1978 *Oliphant* decision which ruled that tribes may not exercise criminal jurisdiction over non-Indians on the

[4] California Supreme Court *Real Party in Interest's Opposition Brief on the Merits* Dec. 2004. Retrieved Nov. 24, 2008, http://www.courtinfo.ca.gov/courts/supreme/documents/agua2.pdf.

reservation. This trend draws from only the past court cases or parts of those rulings that support their position of taking away powers from tribes they still retain and the U.S. has not explicitly taken away. A recent example is the *Nevada v. Hicks* (2001) ruling which said:

> "Our cases [referring to *Montana* and *Oliphant*] make clear that the Indian's right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as *sovereign* entities, it was long ago that the Court departed from Chief Justice Marshall's view [*Worcester* decision in 1832 that tried to prevent Georgia from removing Cherokee Indians in *Trail of Tears*] that 'the laws of (a state) can have no force' within reservation boundaries" (202).

Montana, Oliphant and other court cases that followed all take advantage of the ambiguous reference to tribes' so-called diminished status found in *Johnson v. McIntosh* (1832) and *U.S. v. Kagama* (1886). Although the state may argue that they have a compelling interest in regulating tribal campaign contributions because of interference with state government, they still lack proof that the diminished status of tribes allows form them to enforce the PRA on the tribe. Is the state actually interfering with tribal government? Does the tribe still retain power to privately make campaign contributions through sovereign immunity? The previous court decisions may lead us to think *no*, but attention should also be given to precedent that may say *yes*.

II.

Interestingly, California State also argued that they may enforce the PRA on the tribe based upon the *Guarantee Clause* and the 10th Amendment to the U.S. Constitution (*Real Party in Interest's* 2). The clause, Art. IV § 4, states that "The *United States* [emphasis added] shall guarantee to every State in this Union a Republican Form of Government." The state assumed it, not the U.S., may enforce this on the tribe. This ambiguous clause along with the 10th amendment, which says all powers not delegated to U.S. nor prohibited to states are reserved to states, were loosely interpreted by the state to justify enforcing PRA on the tribe.

The tribe argued that they retain sovereign immunity except under two circumstances: "unequivocal congressional abrogation or express tribal consent" (21)[5]. The *U.S. v. Wheeler* (1978) ruling supports this statement and also said that tribes did not derive powers from U.S. nor U.S. Constitution (Wilkinson 329) but rather they are "separate sovereigns" (330). Furthermore, the *Indian Commerce Clause* (U.S. Constitution, Art. I, § 8) and the *Nonintercourse Act* of 1790 established early on that the U.S. alone has power to deal with tribes. *Morton v. Mancari* (1974) said tribes' trust status with the U.S. is a government-to-government relationship (54). Therefore the U.S. Constitution does not give to states jurisdiction over tribes. So the state's only recourse is to use cases that take advantage of the tribes' diminished status.

Oliphant and *Montana*, and subsequent federal court cases that follow trend, are inconsistent. They strictly interpret tribal powers when in conflict with state powers but loosely interpret state powers when in conflict with tribal powers. They provide a loophole for the states to compromise tribal powers. However, *Williams v. Lee* (1959) ruling rejected loose interpretations of state powers over tribes such as Arizona's: "The Supreme Court of Arizona affirmed . . . since no Act of Congress expressly forbids their doing so Arizona courts are free to exercise jurisdiction" (218). Instead, the *Williams* ruling gave a strict interpretation of state powers over tribes saying, "absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (220).

U.S. paternalism aside, the original intent of the U.S. government according to Chief Justice Marshall in *Cherokee Nation v. Georgia* (1831) and *Worcester* rulings was to protect tribes as "weaker powers" resembling "wards" of the U.S. (146). This backdrop to U.S. Indian law led the court in *Winters v. U.S.* (1908) to say that any ambiguous clauses having to do with Indians should be interpreted in favor of the tribe (154). Therefore the court should read the diminished status of tribes not as a loophole in favor of state subversion but as a condition of the tribes which demands protection under legislative branch of U.S.

[5] California Supreme Court *Agua Caliente Band of Cahuilla Indians' Opening Brief on the Merits* Sep. 2004. Retrieved on Nov. 21, 2008, http://www.courtinfo.ca/gov/courts/supreme/documents/agua1.pdf.

Court Ruling

The U.S. Supreme Court would probably rule in favor of state in keeping with recent trend to take advantage of tribes' diminished status. However, they should rule in favor of tribe because diminished status does not mean the tribe has lost their sovereign immunity from the PRA. Instead of a loose interpretation of state powers over tribes, the court should seek to preserve both state and tribal sovereignty as they presently exist. Questions of line between state and tribal governments should ideally be left to legislative or in some cases executive and not judicial branch of federal government. As *Lone Wolf* (1903) decision said, "the power [U.S. plenary power] has always been deemed a political one, not subject to be controlled by the judicial department" (51). The court should also take into consideration that many tribal communities suffer socioeconomically and any further diminishing of their status is deleterious.