

In the Supreme Court of the State of Washington

CHRISTOPHER WRIGHT, an individual,)	
)	
Respondent,)	
)	No. 77558-3
v.)	
)	En Banc
COLVILLE TRIBAL ENTERPRISE)	
CORPORATION, a foreign corporation;)	Filed December 7, 2006
COLVILLE TRIBAL SERVICES)	
CORPORATION, a foreign corporation;)	
and DON BRAMAN, an individual,)	
)	
Petitioners.)	
)	

SANDERS, J.—The Court of Appeals, Division One concluded Colville Tribal Enterprise Corporation (CTEC), Colville Tribal Services Corporation (CTSC), and their agent Don Braman cannot claim tribal sovereign immunity from suit. We reverse, holding tribal sovereign immunity protects CTEC, CTSC, and Don Braman in his official capacity.

facts and procedural history

The Confederated Tribes of the Colville Reservation (the Tribe) is a sovereign American Indian tribe recognized by the United States, governed by the Colville Business Council (the Council). The Tribe owns land in Washington held in trust by the United States. The Colville Tribal Code (CTC) authorizes the formation of three kinds of tribal corporations: governmental (Chapter 7-1 CTC), nonprofit (Chapter 7-2 CTC), and business (Chapter 7-3 CTC).

Chapter 7-1 CTC authorizes the Council to create tribal governmental corporations by resolution. The Tribe characterizes tribal governmental corporations as “agencies and instrumentalities of the Colville Tribal Government,” CTC 7-1-1 (*see also* 7-1-3), intended to enable “the management of the economic development of tribal resources to be separated from other governmental functions of the Tribe[.]” CTC 7-1-2(e). Accordingly, it claims they enjoy “all of the privileges and immunities” of the Tribe, including the protection of tribal sovereign immunity. CTC 7-1-3.

The Tribe directly or indirectly owns and controls all tribal governmental corporations created by the Council under chapter 7-1 CTC. The Council must appoint all “initial, incorporating directors” of a tribal government corporation, and subsequent directors must be elected according to the corporation’s charter. CTC 7-1-8. Either the Tribe or a tribal governmental corporation must own at least 60 percent of the voting stock of every tribal governmental corporation, CTC 7-1-6, and

a tribal governmental corporation may not alienate any voting stock it owns in a tribal government corporation. CTC 7-1-7.

CTEC and its wholly-owned subsidiary CTSC are tribal governmental corporations created by the Council under chapter 7-1 CTC. CTEC is wholly-owned by the Council, as the representative of the Tribe. CTEC owns and manages 14 business enterprises on behalf of the Tribe, including CTSC.¹ CTEC distributes 80 percent of the net income of its casino enterprises and 25 percent of the net income of its noncasino enterprises directly to the Tribe, and it uses the remaining net income to cover capital costs and business development. Clerk's Papers at 312. However, the Tribe may instruct CTEC to change this distribution. *Id.*

In July 2002, CTSC hired Christopher Wright, a non-Indian, as a pipe-layer and equipment operator. Wright worked off-reservation on a project to construct a waterline for a United States Navy housing development in Oak Harbor, Washington. Wright alleges racial harassment prompted his resignation in February 2003.

In November 2003, Wright sued CTEC, CTSC, and his former supervisor Don Braman as their agent in Island County Superior Court, alleging race discrimination,

¹ Mill Bay Casino, Okanogan Bingo Casino, Coulee Dam Casino, Colville Indian Precision Pine, Colville Indian Power and Veneer, Colville Timber Resource Company, Colville Tribal Logging, CTSC, Roosevelt Recreational Enterprises, Rainbow Beach Resort, Trading Post, Inchelium Community Store, Keller Community Store, and Colville Tribal Credit. Clerk's Papers at 312.

racial harassment, hostile work environment, negligent supervision, and negligent infliction of emotional distress. The trial court dismissed for lack of subject matter jurisdiction under CR 82.5(a).

The Court of Appeals reversed, finding CR 82.5(a) does not apply and tribal sovereign immunity does not protect CTEC or CTSC. *Wright v. Colville Tribal Enter. Corp.*, 127 Wn. App. 644, 111 P.3d 1244 (2005). CTEC and CTSC petitioned for review under RAP 13.4(1) and (4), raising only tribal sovereign immunity. We granted review at 156 Wn.2d 1020 (2006).

standard of review

The existence of personal jurisdiction over a party asserting tribal sovereign immunity is a question of law reviewed de novo. *See Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 876, 929 P.2d 379 (1996).

analysis

Tribal sovereign immunity protects a tribal corporation owned by a tribe and created under its own laws, absent express waiver of immunity by the tribe or Congressional abrogation.² *See Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). CTEC and CTSC are tribal government corporations owned by the Tribe and created under its own law. The Tribe has not waived and Congress has not abrogated their immunity. Accordingly,

tribal sovereign immunity protects CTEC and CTSC. Tribal sovereign immunity also protects Braman in his official, but not individual, capacity.

I. Tribal Sovereign Immunity Protects Tribes and Tribal Enterprises

Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and “unequivocal” waiver or abrogation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). As “domestic dependent nations,” Indian tribes “exercise inherent sovereign authority over their members and territories,” including sovereign immunity from suit “absent a clear waiver by the tribe or congressional abrogation.” *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991). Tribal sovereign immunity protects tribes from suits involving both “governmental and commercial activities,” whether conducted “on or off a reservation.” *Kiowa Tribe*, 523 U.S. at 754-55, 760.

See also Md. Cas. Co. v. Citizens Nat'l Bank, 361 F.2d 517, 521 (5th Cir. 1966) (“The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material.”).

² The dissent argues summary judgment is inappropriate because the parties dispute material questions of fact. But it fails to identify any disputed facts. While the parties dispute the "significance" of the facts, dissent at 3, they do not dispute the facts themselves. Indeed, the parties dispute whether CTEC and CTSC are tribal entities protected by tribal sovereign immunity. But in the absence of an actual factual dispute, this is a question of law. The dissent simply advances an 11-factor test we reject as incompatible with *Kiowa* and without foundation in Washington law.

The protection of tribal sovereign immunity also protects tribal agencies and instrumentalities as extensions of tribal government. *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2d Cir. 2000); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583-84 (8th Cir. 1998); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-71 (8th Cir. 1986). Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (holding state agency immune from suit under Eleventh Amendment). And tribal sovereign immunity also protects certain tribal business enterprises because “an action against a tribal enterprise is, in essence, an action against the tribe itself.” *Local IV-302 Int’l Woodworkers Union v. Menominee Tribal Enters.*, 595 F. Supp. 859, 862 (E.D. Wis. 1984).

Whether or not tribal sovereign immunity protects a particular tribal business enterprise depends on the nature of the enterprise and its relation to the tribe. *See, e.g., Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 305 (N.D.N.Y. 2003) (holding casino tribal entity protected by tribal sovereign immunity); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 274-76 (N.D.N.Y. 2000) (holding casino protected by tribal sovereign immunity which “extends to tribal enterprises”); *Doe v. Oneida Indian Nation of N.Y.*, 278 A.D.2d 564, 565, 717 N.Y.S.2d 417 (2000) (holding tribal sovereign immunity protects casino); *Dixon v.*

Picopa Constr. Co., 160 Ariz. 251, 258, 772 P.2d 1104 (1989) (holding tribal sovereign immunity protects “Indian tribes and their subordinate economic organizations”). “When a tribal corporation and government are not completely distinct, the immunity of the latter extends to the business operations of the former.” Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 Am. Indian L. Rev. 41, 49 (2001).

Essentially, tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws. “Tribal law corporations are assumed to be a subdivision of the tribal government.” Bernardi-Boyle, *supra*, at 57. A tribal corporation must explicitly “hold itself out as a separate and distinct entity” in order to waive immunity. *White Mountain Apache Indian Tribe v. Shelley*, 104 Ariz. 4, 480 P.2d 654, 656 (1971). Because the Council must create, own, and control every tribal governmental corporation governed by chapter 7-1 CTC, they enjoy the protection of tribal sovereign immunity.³

II. CTEC and CTSC Are Tribal Agencies and Instrumentalities Protected by Tribal Sovereign Immunity

³ The dissent correctly suggests tribal sovereign immunity may deter non-Indians from entering business transactions with tribal corporations. Dissent at 5 n.4. Unfortunately, the 11-factor test it proposes makes it impossible for non-Indians contemplating a business transaction with a tribal corporation—or tribes themselves—to know whether tribal sovereign immunity protects a particular tribal corporation without a judicial determination. Uncertainty is the enemy of contract. Accordingly, we adopt a bright-line rule enabling tribes to clearly demarcate which tribal corporations are protected by tribal sovereign immunity and which are not.

Under Washington law, tribal sovereign immunity protects tribal governmental corporations and their subsidiaries. *See N. Sea Prods., Ltd. v. Clipper Seafoods Co.*, 92 Wn.2d 236, 240, 595 P.2d 938 (1979). In *North Sea Products*, we held a tribal governmental corporation and its subsidiary, both conducting a commercial enterprise outside the reservation, were “subordinate divisions” of the tribe protected by tribal sovereign immunity. *Id.* at 237-38. *See also White Mountain Apache Indian Tribe*, 480 P.2d at 656 (holding tribal governmental corporation engaged in commercial activity is “subordinate economic organization” protected by tribal sovereign immunity). As tribal governmental corporations conducting commercial enterprises outside the reservation, CTEC and CTSC are functionally identical to the tribal corporations at issue in *North Sea Products*. Accordingly, tribal sovereign immunity must protect CTEC and CTSC.

In sum, tribal sovereign immunity protects a tribal governmental corporation unless the tribe waives or Congress abrogates immunity. A tribe may waive the immunity of a tribal governmental corporation by charter. *See Bernardi-Boyle, supra*, at 50 (suggesting inclusion of “sue and be sued” clause in charter waives tribal sovereign immunity). *But see* William V. Vetter, *Doing Business With Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 173 (1994) (questioning effectiveness of such provisions). And a tribal governmental corporation authorized to waive immunity

may do so by contract. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993) (finding no immunity because charter of tribal corporation validly provided “sovereign immunity ‘is hereby expressly waived with respect to any written contract entered into by the Corporation’” (quoting tribal entity’s charter); *Weeks*, 797 F.2d at 671. Alternatively, a tribe may waive the immunity of a tribal enterprise by incorporating the enterprise under state law, rather than tribal law. *See Vetter, supra*, at 173. For example, tribal sovereign immunity did not protect “a nonprofit Alaska corporation consisting of fifty-six Alaska Native villages in the Bethel area.” *Runyon v. Ass’n of Vill. Council Presidents*, 84 P.3d 437, 438 (Alaska 2004). In other words, the Alaska tribes waived immunity by incorporating the tribal enterprise in question under Alaska law, rather than their own tribal law.

However, the immunity of CTEC and CTSC is neither waived nor abrogated. “It is well settled that waiver of [tribal] sovereign immunity will not be implied, but must be unequivocally expressed.” *Anderson & Middleton Lumber Co.*, 130 Wn.2d at 876. Chapter 7-1 CTC neither waives the immunity of tribal government corporations nor permits tribal government corporations to waive their own immunity. And the Tribe explicitly asserts the immunity of CTEC and CTSC. Furthermore, Congress has not abrogated tribal sovereign immunity to suit for employment discrimination. *See, e.g., Tenney v. Iowa Tribe of Kan. & Neb. Gaming Comm’n*, 243 F. Supp. 2d 1196, 1198 (D. Kan. 2003) (holding 42 U.S.C. § 2000e(b)

explicitly exempts Indian tribes from liability for employment discrimination).

Accordingly, tribal sovereign immunity protects CTEC and CTSC.

III. Tribal Sovereign Immunity Protects Employees of Tribal Governmental Corporations Acting in Official Capacity

Tribal sovereign immunity also protects Braman because Wright names him solely in his official capacity. *See Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (holding tribal sovereign immunity “extends to individual tribal officials acting in their representative capacity and within the scope of their authority”). *See also Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996). Of course, tribal sovereign immunity would not protect Braman from an action against him in his individual capacity. *See Mashantucket Pequot Tribe*, 204 F.3d at 360; *White Mountain Apache Indian Tribe*, 480 P.2d at 658 (holding tribal sovereign immunity protects officers from suit in official but not individual capacity).

CONCLUSION

Tribal sovereign immunity protects CTEC and CTSC, as well as Braman, acting in his official capacity. We reverse the Court of Appeals.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Susan Owens

Justice Bobbe J. Bridge
