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Fletcher: Growing threat to land-in-trust statute

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by: Matthew L.M. Fletcher

The federal government's recent actions involving its authority to make decisions on acquiring land in trust for tribal gaming purposes may inadvertently threaten the authority and duty of the secretary of the Interior Department to take land into trust for Indian tribes.

On April 29, the D.C. Circuit decided an innocuous case involving the secretary of Interior's decision to take land into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (also known as the Gun Lake Band). It was the third such opinion in recent years involving Michigan Potawatomi Indian tribes, each brought by well-funded citizens groups opposing Indian gaming. The suits were mere harassment suits, intended to delay rather than prevent the opening of the Potawatomi gaming operations. Each of the suits brought similar claims.

Of import, one claim was that Section 5 of the Indian Reorganization Act, the statute that authorizes the secretary to take land into trust for Indian tribes, was an unconstitutional delegation of congressional authority. The first two D.C. Circuit panel decisions (2006 and 2007), involving the Pokagon Band of Potawatomi Indians and the Nottawaseppi Huron Band of Potawatomi Indians, rejected the constitutional challenge to Section 5 without much discussion or dissent. In fact, since 1995, at least three other federal appellate circuits have rejected the same kind of challenge to the statute, so this is unsurprising.

But the Gun Lake Band's panel included a dissenter, Circuit Judge Janice Rogers Brown, who argued that Section 5 was indeed an unconstitutional delegation of congressional authority.

What changed?

Well, one could say that Judge Brown, also the author of the San Manuel Indian Bingo and Casino v. NLRB decision that rocked Indian country, is simply unsympathetic to tribal interests, but I think there is more. Another event that may have pushed Judge Brown to dissent is the so-called "Artman guidance," issued in January 2008 that purported to set standards for gaming-related trust acquisitions. Judge Brown merely mentioned this "guidance," but she did so in a way that suggested it has great import in the context of a nondelegation challenge.

Consider the constitutional challenge to Section 5. First, the Nondelegation Doctrine states that Congress may not delegate unlimited or absolute authority to a federal agency. Typically, Congress will provide the agency with some limiting principles when it delegates authority. Section 5, drafted before the advent of modern administrative law, contains a very broad grant of authority to the Interior secretary. It merely states the secretary may take land into trust "in his discretion." On the face of it, that is virtually unlimited or absolute discretion. In 1995, the 8th Circuit held that Section 5's delegation was too broad in a case called South Dakota v. Department of Interior.

Interior's response to the decision was strategically sound. The secretary quickly promulgated new rules that provided for judicial review of Section 5 decisions, a key sticking point for the 8th Circuit. Moreover, Interior, which already had regulations on the books relating to non-gaming related trust acquisitions (25 CFR Part 151), began the arduous process of developing regulations for gaming-related trust acquisitions. As a result of these moves, the Supreme Court granted certiorari in the South Dakota case, vacated the lower court decision (over the objection of Justice Antonin Scalia), and remanded the case back to the 8th Circuit to reconsider Section 5 in light of these new regulations.

In 2000, at the end of the Clinton administration, the secretary actually reached the final stages of the process to promulgate gaming related trust acquisition regulations. But one of the first actions of the Bush administration under Secretary Gale Norton was to shelve it indefinitely. To this day, there is no regulation that specifically governs gaming-related trust acquisitions.

This is an act of administrative negligence that may soon devastate Indian country.

Instead, Interior's practice has been to nominally apply the antiquated Part 151 regulations on a case-by-case basis, building up long backlogs of trust acquisition requests and delaying many non-controversial trust applications for years. The January 2008 "guidance" that purported to set geographic limitations on gaming-related trust acquisitions appears to be a means to justify the denial of dozens of trust applications to quickly reduce the backlog.

It also appears to be a display of excessive, almost arrogant, administrative power.

Judge Brown is a very conservative judge, once discussed as a Supreme Court nominee because of her political views, and the federal judiciary includes many, many judges just like her. Her dissent is a warning to Indian country that Section 5 again is under attack.

Conservative judges tend not to be sympathetic to claims that the secretary acted arbitrarily and capriciously in denying trust applications, as the recent St. Croix Chippewa Tribe decision demonstrates. But they will be more and more sympathetic to state and local government claims that the secretary is abusing his authority when approving tribal trust applications. And they will use the secretary's assertion of authority contained in documents like the Artman guidance as evidence of the secretary's overly broad authority.

Hopefully, the new president will appoint a secretary of Interior that will complete the regulations for gaming-related trust acquisitions. This administration certainly won't. Until then, Section 5 is fair game.

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