

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-002756-15T2

ON APPEAL FROM ORDER OF MARCH 9, 2016, IN
DOCKET NO. MER-L-2343-15, SUPERIOR COURT, LAW
DIVISION, MERCER COUNTY

SAT BELOW:
THE HONORABLE WILLIAM ANKLOWITZ, J.S.C.

NANTICOKE LENNI-LENAPE TRIBAL NATION,
Plaintiff-Appellant,

v.

JOHN JAY HOFFMAN, ACTING ATTORNEY
GENERAL OF NEW JERSEY, IN HIS
INDIVIDUAL AND OFFICIAL CAPACITIES,
Defendant-Appellee.

[PROPOSED] BRIEF OF AMICI CURIAE
IN SUPPORT OF PLAINTIFF

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25 U.S.C. § 305e(a)(3)(B)

I. AMICUS PARTIES

The Indian Law Resource Center is a non-profit law and advocacy organization established in 1978 to provide legal assistance to Indian nations and indigenous peoples in the U.S. and throughout the Americas to combat racism and oppression, to protect their lands and environment, to protect their cultures and ways of life, to achieve sustainable economic development and genuine self-government, and to realize their other human rights. The Center also works internationally, including with the United Nations and the Organization of American States, played a key role in the establishment of the UN Working Group on Indigenous Populations, and drafted the original UN Declaration on the Rights of Indigenous Peoples. The Center works with Native governments in the United States, Canada, and throughout the Americas, to assist them in securing the right of self-determination. The Center works within existing political frameworks to advocate for increased legal safeguards and assists indigenous governments when their rights are threatened.

The Alliance of Colonial Era Tribes (ACET) is an intertribal league of sovereign American Indian Nations continuing from the colonial era, which advocates for the promotion and preservation of inherent tribal sovereignty, the protection of treaty rights, the assertion of tribal identity, and the acknowledgement of

that identity by the United States government. ACET is a watchdog for discriminatory government actions against American Indian tribes' inherent status, which often overlook the historical, political, and legal relationship with tribal governments.

The Salem Quarterly Meeting of the Society of Friends is a subset of the Philadelphia Yearly Meeting and the regional chapter of Quaker communities in southern New Jersey, whose Indian Affairs Committee works with local tribes to achieve their full potential as Native Americans and to obtain opportunities from both state and federal governments that are due. The Society of Friends has a long history working within the Native American community: the Philadelphia Yearly Meeting's Indian Affairs Committee dates back to the eighteenth century, and its relationship with regional tribes has included teaching Indians and their children, monitoring legislation affecting Native Americans, and helping Indian communities to combat frauds and abuses. Salem's Indian Affairs Committee continues this tradition and has over the years come to intimately understand the struggles of the region's American Indian tribes.

II. PRELIMINARY STATEMENT

The long history of the mistreatment of American Indians by state and federal governments in the United States is well-documented. For many generations, since Europeans began

immigrating to the New World, tribes and their members have been robbed of their lands, taken from their families, given false promises, and murdered *en masse*.

While full amends for hundreds of years of abuse is impossible, in more recent times, governments have begun to make some effort to make up for these atrocities. The undersigned amici are deeply concerned that after New Jersey properly initiated steps to help its remaining tribal communities through state recognition, it now seeks to pull even that modest rug out from beneath them without process or procedure.

With respect to Plaintiff, New Jersey recognized it as a state tribe in 1982 and continued to treat it as state-recognized for many decades thereafter, including passing two state laws granting the Tribe (and two other state tribes) special privileges based on their status as tribes. This status enabled Plaintiff to receive certain federal benefits reserved for state tribes. Without this state status, Plaintiff would have been unable to access those benefits, threatening its very existence. The state itself has also benefitted from its repeated assertions to federal agencies that it has state recognized tribes.

Defendant's attempt to turn back the clock and reverse its prior actions - which attempted, in some small part, to

compensate the Tribe for centuries of mistreatment - must be rejected.

First, state recognition can be critically important to tribes around the country. It opens up federal benefits to tribes that cannot meet the very high standards for federal recognition.¹

Second, the federal government places no strictures on state methods of tribal recognition, and has long accepted concurrent resolutions as proper forms of state recognition.² New Jersey Senate Concurrent Resolution 73, the two subsequent state statutes, state communications to the federal government, and other state actions predicated on the Tribe's recognition status, taken separately or together, constitute state recognition sufficient to make Plaintiff eligible for federal benefits.

Third, if this Court affirms the trial court's decision, the consequences may be dire for state tribes across the nation, which rely on a wide variety of state recognition methods to obtain federal benefits. Should entities that oppose the

¹ According to various sources, the United States currently has 567 federally recognized tribes and about 60 state-recognized tribes.

² Only the Indian Arts and Crafts Act requires that a tribe be "formally recognized." 25 U.S.C. § 305e(a)(3)(B) ("The term 'Indian tribe' includes, for purposes of this section only, an Indian group that has been formally recognized..."). This recent addition to the agency's regulations does not define formal. No other agencies have such language.

availability of federal benefits to American Indians take action, those tribes' status may newly be in jeopardy.

Finally, an affirmation by this Court would make New Jersey the first and only state, to the best of the *amici's* knowledge, to withdraw recognition of a state tribe retroactively and without due process. This Court should ensure that New Jersey not earn this highly dubious distinction.

III. ARGUMENT

A. The Importance of State Recognition.

State recognition of American Indian tribes can be confusing for those unfamiliar with its origins and purpose. Consequently, judges in both state and federal courts - who rarely deal with recognition issues and when they do, deal with federal recognition issues - sometimes ignore the concept of state recognition and its importance.

Historically, the hallmark of state recognition was merely a state's unique treatment of an American Indian community due to its ethnic distinction; any tribe was recognized as a state tribe when it was the subject of state action, such as funding for tribal schools or a special tax status. Formal recognition-specific language is a relatively new development. Even when it was first introduced in the 1990s, the federal government left it up to states to determine whether historic treatment or some other action would designate a tribe as eligible for federal

benefits. The federal government purposefully implemented this approach to state recognition in order to respect state practices and make it easier for tribes to access federal benefits critical to their survival.

Also, state recognition provides value to the tribes (and the states) beyond enabling access to federal benefits. Tribes benefit enormously from an official, formal relationship with the states to communicate about common concerns and resolve a variety of issues.

The importance of the less stringent standard for state tribal recognition is evident in the prevalence of state recognition in the eastern United States, where colonists had the earliest and most devastating impact on American Indian populations. With drastically reduced membership, land holdings, and historic records - as compared with western tribes - it is significantly more difficult to establish the required elements of federal recognition. Thus, the unique system of state recognition is fundamentally important. State recognition allows state governments the opportunity to reconcile with tribes by providing access to limited, yet critical, services, without imposing the significant burden of requiring federal recognition.

B. The Federal Government Accepts A Variety Of State Procedures As Establishing State Tribal Recognition.

State recognition takes a wide variety of forms. See Plaintiff's Appellate Brief ("Pb") at 17. The long-settled approach taken by the federal government is to leave questions surrounding state tribal recognition - who gets it, when they get it, how should the state confer it - to the states to answer. As a result, the landscape of state recognition policies and procedures varies widely.

Methods utilized have ranged from formal enactments of statutes, to executive orders, to legislative resolutions. While not exhaustive, Plaintiff sets forth some examples of each of these approaches in its Complaint. Pa15-16.

The trial court's assumption that New Jersey required, as of 1982, that tribal recognition be accomplished only by statute directly contradicts the *amici's* experience and understanding of state recognition procedures, as well as Plaintiff's Complaint. The undersigned *amici* have always understood that states can (and do) recognize tribes in a variety of manners, and that the federal government accepts those methods as rendering state tribes eligible for certain federal benefits.

In the instant case, the question is not whether a concurrent resolution is the equivalent of a statute in terms of force of law, but whether New Jersey understood at the time that a

concurrent resolution was adequate for federal standards. Plaintiff pleads, and the evidence suggests, that New Jersey did so understand and caused the tribes to rely on that understanding for decades thereafter without controversy.

In addition, the trial court gives no rationale for its legal conclusion that tribal recognition by New Jersey could only be achieved via statute at the time the concurrent resolutions passed. The court assumed, without explanation, that the statute requirement existed in 1982.

That baseless assumption is plainly belied by the state legislature's decision to amend the Commission law in 2002 to require statutory recognition. If a statute had always been required for state recognition, the amendment would have served no purpose. Courts should avoid statutory construction which renders any word in the statute "inoperative, superfluous or meaningless" or "to mean something other than its ordinary meaning." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 204 (1999). Accordingly, the trial court's decision must be overturned.

C. An Affirmance Of The Trial Court May Be Disastrous For Other State Tribes.

As a result of the long history of the federal government accepting legislative resolutions and many other methods for state recognition, allowing Defendant to withdraw its

recognition of the Plaintiff Tribe may have serious repercussions for other tribes that have obtained recognition from a state, but not Congress or the Bureau of Indian Affairs.

Consequently, this Court must reject Defendant's request that it affirm the trial court's ruling that Plaintiff has no claim because it was not recognized via a state statute. Such an outcome may have implications far beyond those that would inevitably be suffered by Plaintiff. *Amici* anticipate that the status of state tribes all over the country may be questioned, either by in-state interests opposed to American Indian tribes receiving exclusive federal benefits, or by federal agencies now confused about state recognition.

Should the trial court's untenable viewpoint be affirmed, the status of state tribes nationwide, whose states have changed the methods utilized for recognition, will be placed in jeopardy. The *amici* urge this Court to refuse to support such a manifestly unjust outcome.

D. New Jersey Would Be The First State To Retroactively Withdraw State Recognition Of A Tribe Based Upon A New Law.

Finally, should the trial court decision stand, New Jersey will earn the dubious honor of being the first and only state in America to withdraw state recognition from a tribe retroactively and without due process, based upon a newly enacted law.

As Plaintiff details in its principal brief, in ruling that Plaintiff failed to state a claim for relief, the trial court relied heavily upon a requirement adopted by the state legislature in 2002 that tribes must be recognized by statute (Pb2-3, 10). This requirement did not exist in 1982 (when the concurrent resolution passed), in 1992 (when the birth certificate statute passed), or in 1995 (when the Commission on Indian Affairs was created). Pb4-5. Nor did the requirement of statutory recognition exist before 2002, when New Jersey amended the Commission statute. Pa16. Nevertheless, the trial court inexplicably held it proper to apply the heightened standard of a statute to Plaintiff.

Several states have changed their methods of tribal recognition; none have determined that as a result of those changes, state tribes lost their previously granted status. Pa16. For example, South Carolina used statutes for tribal recognition until 2003, when the state legislature granted recognition authority to the Commission on Minority Affairs. Pa15. Likewise, Connecticut originally recognized state tribes by executive order, and now does so by statute. Pa15.

This Court should not allow New Jersey to stand out as the first and only state in America to withdraw state recognition from a tribe retroactively, based upon a newly enacted law.

IV. CONCLUSION

The *amicus* parties urge this Court to reverse the trial court's decision to grant Defendant's motion to dismiss, and reinstate Plaintiff's claims to be heard on the merits.

Dated: August 18, 2016

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