No. 06-361

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2006

DON WALTON,

Petitioner,

v.

TESUQUE PUEBLO et al.,

Respondents

On Petition for a Writ of Certiorari
To the Court of Appeals for the 10th Circuit

REPLY TO BRIEF IN OPPOSITION

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1. *Stare Decisis* is Not Dispositive

Defendants urge *stare decisis* as to the preclusive effect of *Santa Clara v. Martinez*, 469 US 49 (1978) on this Court's jurisdiction. They cite a list of authorities led by *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 US 751 for the proposition that *Santa Clara* foreclosed federal jurisdiction over claims of tribal violations of civil rights of non-Indians.

Kiowa, hardly a ringing endorsement of sovereignty doctrine, is a contract case. *Kiowa* and its progeny are distinguishable insofar as they do not concern civil rights claims. The opinions of the Ninth Circuit in *Evans v. McKay,* 869 F.2d 1341, of Chief Justice Rehnquist in *National Farmer's Union Ins. v. Crow Tribe,* 468 US 1315, of Judge Seth in *Dry Creek Lodge, Inc. v. US,* 623 F.2d 682 and others belie the claim of case closed. So, for that matter, does the Defendants' treatment of Petitioner's *Evans*-type claim under 42 USC 1981, 1985, 1988 as barred not by substantive precedent but by practitioner error. As in *Oliphant v. Suquamish Tribe,* 435 US 191, there are distinctions between tribal powers over Indians and others.

On considerations similar to concerns raised in *Kiowa*, the NLRB recently declined to apply *stare decisis* in *San Manuel Indian*

Bingo and Casino and Hotel Employees & Restaurant Employees International Union, et al, 341 NLRB No. 138 (2004).

Santa Clara examined a tribe's power to determine its membership, the essence of sovereignty as this Court noted. If it is as broad and absolute as Defendants urge, it indeed bears re-examination. The nation should not contain an archipelago where the most basic rights of notice and opportunity to be heard are not features of the justice system.

3. A Petitioner for Writ of Habeas Corpus Deserves an Evidentiary Hearing Prior to Dismissal of Petition on a 12(b)(1) Challenge Relying on Hotly Contested Facts.

Defendants concede Petitioner was and remains excluded from the venue where he earned his livelihood but say he failed to demonstrate detention sufficient to trigger examination of his petition for writ of *habeas corpus* because he "presented no evidence that he had been excluded from the Pueblo after December, 2003."

The first reported decision construing ICRA, *Dodge v. Nakai*, 298 F Supp 17 (DC Ariz, 1968), involved a legal aid director excluded from his place of employment. Exclusion is detention sufficient to warrant *habeas corpus* relief per *Poodry v. Tonowanda Band of Seneca Indians*, 85 F.3d 874, *cert den* 519 US 1041 (1996), at 893-

897. In any case, Petitioner's affidavit and his declaration responsive to the Pomeranz letter clearly assert that he is and remains banished from the Pueblo to this day; the market rules provide for precisely such exclusion, to be lifted only at the discretion of the market manager; under Pueblo law neither Ms. Pomeranz nor the ceremonial governor can waive banishment imposed by the market manager; and Petitioner's request for a declaration of the tribal court that he was not banished was denied subsequent to December, 2003.

If he "presented no evidence" it is only because he was denied an evidentiary hearing.

The District Court ruled, App. 15, that no evidentiary hearing was required "*since the Court will deny Tesuque's motion to dismiss*." Emphasis supplied. The Tenth Circuit then reversed the District Court's denial of the Defendants' motion to dismiss, but without granting an evidentiary hearing.

3. Congress Clearly Intended Federal Jurisdiction to Enforce Contractual Guarantees of Administrative Due Process for Third Party Beneficiaries of ISDEAA Contracts.

Subsequent to *Santa Clara*, Congress mandated a Model Contract for all ISDEAA federal contract agencies. Model Contract

clause (b)(13)) guarantees recipients of program services administrative due process. Model Contract clause (c)(5) guarantees them access to a judicial body. How is the Congressional declaration that nothing in ISDEAA truncates sovereign immunity harmonized with the ISDEAA contract clauses explicitly guaranteeing third party beneficiaries of ISDEAA agencies a forum and administrative due process? Defendant and the lower courts accomplish harmonization by refusing to read the troublesome contract clauses.

A less Procrustean harmonization is achieved by interpreting ISDEAA as Congress intended it. In 1975 when it declared that nothing in the ISDEAA truncates sovereign immunity, Congress had a solicitor's opinion that federal review of civil rights violations *appeared settled*. Even so, Congress provided that insurance would be procured insuring claims against ISDEAA programs up to $1 million and waiving sovereignty defenses against such claims.

Respectfully submitted,

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