

TRIBAL COURT
NOTTAWASEPPI HURON BAND OF POTAWATOMI

CES ENTERPRISES, LLC,
CHAD E. STUCK,

Petitioner,

Case No.

09-009-CV

v.

FIREKEEPERS DEVELOPMENT
AUTHORITY, an agency of the
Nottawaseppi Huron Band of Potawatomi,
Respondent.

Decision on
Respondent's
Motion to Dissolve Temporary
Restraining Order of
May 1, 2009
and to
Dismiss Underlying Action

**DECISION ON RESPONDENT'S MOTION TO DISSOLVE
TEMPORARY RESTRAINING ORDER
AND
TO DISMISS UNDERLYING ACTION**

I. Introduction:

This matter came to this Court on a petition for a Temporary Restraining Order (TRO) filed on May 1, 2009 by a limited liability corporation owned by a Tribal member (hereinafter referred to as "Petitioner"). The petition sought to enjoin the FireKeepers Development Authority (hereinafter referred to as "Respondent") from executing a contract for certain casino operation related services because it alleged that the Request For Proposals was flawed and because the Respondent did not follow the Native American preference requirement embodied in tribal law. This Court issued the TRO

after due deliberation of all the relevant considerations. Shortly after the TRO was entered by this Court, Respondent filed a motion to dissolve the TRO on the following grounds: (1) the Respondent is immune from suit under the protections of tribal sovereign immunity; (2) the need for a TRO (to maintain the status *quo*) is moot because the contract had been executed a couple of hours prior to the Court entering the TRO; and (3) the Petitioner will not prevail on his underlying claims. The hearing on the Respondent's motion was held on May 4, 2009. Accordingly, this written decision is issued.

II. Jurisdiction: The jurisdiction of this Court is considered below as the Respondent argues that Respondent is immune from suit.

III. Ruling and Rationale:

Respondent's Motion is **GRANTED**, in part, and **DENIED**, in part.

It is **denied** in its request that this Court dismiss the underlying action for the reason that no underlying action has been filed. Thus, logically there is nothing to dismiss.

It is **granted** in its request to dissolve the TRO for all of the following reasons:

(1) First and foremost, the matter is moot. The contract has been signed by both parties. The agreement has been executed. In fact, the transaction was completed about two hours before this Court issued the TRO.

(2) Secondly, Petitioner will not prevail in any action against the Respondent for the following reasons:

(a) There is no legal basis for a remedy on the claim the RFP was flawed. Petitioner seeks to avoid the defense of tribal sovereign immunity by seeking an order from this Court to reopen the RFP

process for a period of ten (10) days so that he can submit another bid, rather than seeking money damages. This Court is convinced that the Petitioner will fail in his attempt to persuade this Court that the RFP was flawed.

(b) It is clear from the exhibits presented to this Court that the Native American preference, to which Petitioner refers, applies to the Director hired by the Respondent to manage the gaming operations rather than to the Respondent itself as it fulfills its responsibilities.

Thus, this claim for relief will fail, as well.

(3) Respondent is immune from suit. The Tribal Constitution provides that “[T]he NHBP ...shall be immune from suit.” See Constitution of the Nottawaseppi Huron Band of Potawatomi, Art. X, Sec. 3(d). Interestingly, all the concerns this Court expressed during the hearing about the use of tribal sovereign immunity to deny access to justice do not apply to Respondent. Respondent is a tribal business entity. Tribal businesses should be allowed to operate without undue intrusions or interference from courts. The concerns apply to tribal government. Some of the concern may be addressed by amendments to the Tribal Constitution. To its credit, Tribal Council has already tried to address one of the areas of concern by proposing a change to the current *Constitution* which would allow suits by members for prospective protection and declaration of rights and duties. In addition, this Court would respectfully suggest a delegation, from the people, of judicial review power regarding the constitutionality of laws, as well as the power to rule on the constitutionality of governmental action/inaction. Any final concerns can be addressed by the appropriate

use of case-by-case waivers of immunity to provide access to justice.

The hearing provided an active exchange of thoughts regarding the need for the protections of sovereign immunity when it is used as a shield and the need to eliminate the potential of it being used as a sword to cut people off at the knees as they try to gain access to their court. With the Tribe in its infancy and its institutions in their formative stages, it was a meaningful opportunity to consider the Court's concerns as we collectively think about the appropriate design of tribal government for this particular tribal community. It is noteworthy that all of the members of the current Tribal Council were present.

FOR ALL OF THE FOREGOING, THIS COURT **GRANTS** THE PART OF RESPONDENT'S MOTION SEEKING TO DISSOLVE THE TEMPORARY RESTRAINING ORDER AND **DENIES** THE PART SEEKING DISMISSAL OF THE UNDERLYING ACTION.

THE TEMPORARY RESTRAINING ORDER ENTERED BY THIS COURT ON MAY 1, 2009 IS HEREBY DISSOLVED.

DATED

MICHAEL PETOSKEY
CHIEF JUDGE