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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

MAY 18 2004

PATRICK FISHER
Clerk

WYANDOTTE NATION, a Federally Recognized Indian Tribe,
Plaintiff-Appellant,

v.

NATIONAL INDIAN GAMING COMMISSION; ERIC F. MELGREN, in his official capacity as United States Attorney for Kansas; UNITED STATES DEPARTMENT OF JUSTICE; JOHN ASHCROFT, in his official capacity as Attorney General, Department of Justice; KATHLEEN SEBELIUS, in her official capacity as Governor of Kansas; WILLIAM R. SECK, in his official capacity as the Superintendent of the Kansas State Highway Patrol; RONALD MILLER, in his official capacity as Chief of Police, City of Kansas City, Kansas; LARRY WELCH, in his official capacity as Director of the Kansas Bureau of Investigation; CAROL MARINOVICH, in her official capacity as Mayor, City of Kansas City, Kansas; PHILL KLINE, in his official capacity as Attorney General for the State of Kansas; PHILLIP L. SIEVE, in his official capacity as District Court Judge for the State of Kansas, County of Wyandotte; NICK A. TOMASIC, in his official capacity as District Attorney, Wyandotte County, Kansas,

Defendants-Appellees.

No. 04-3135

(D.C. No. 04-CV-2140-JAR-DJW)

(D. Kan.)

ORDER AND JUDGMENT^(*)

Before **O'BRIEN** and **PORFILIO**, Circuit Judges, and **BROBRY**, Senior Circuit Judge.

The Wyandotte Nation appeals from the district court's denial of its motion for a temporary restraining order (TRO) and has requested an injunction pending appeal. Because we lack jurisdiction, we dismiss the appeal and deny the motion for injunction.⁽¹⁾

"Ordinarily, denial of a temporary restraining order is not appealable." Populist Party v. Herschler, 746 F.2d 656, 661 n.2 (10th Cir. 1984). There are, however, two exceptions to this general jurisdictional prohibition: when the order is appealable as a final order under 28 U.S.C. § 1291, and when the order has the practical effect of denying a preliminary injunction. Id. The first exception is not implicated in this case: the district court's denial of the TRO was not a final appealable order under § 1291. That

leaves us to determine whether the order may be appealed because it was a *de facto* denial of a preliminary injunction. See *Office of Pers. Mgmt. v. Am. Fed'n of Gov't Employees, AFL-CIO*, 473 U.S. 1301, 1305 (1985). To come within this exception, in addition to having the "practical effect" of denying an injunction, the consequences of the order must be irreparable and the only effective means of challenging the order must be by immediate appeal. *United States v. Colorado*, 937 F.2d 505, 507 (10th Cir. 1991).

In this case, appellant's rights will not be irretrievably lost absent immediate review, and immediate appeal is not the only effective means of challenging the order. In fact, the matter of appellant's rights is still squarely before the district court in the question of preliminary injunctive relief. And there is every indication that the district court "contemplate[s] a prompt hearing on a preliminary injunction." See *Office of Pers. Mgmt.*, 473 U.S. at 1305. Further, we cannot say that "further interlocutory relief is unavailable" here, nor is it clear that the hearing held by the district court within two days of the case being transferred was a "full adversary hearing." See *Populist Party*, 746 F.2d at 661 n.2 (quotation omitted).

This court has no jurisdiction to review the denial of the TRO in this case; the order does not have the "practical effect" of the denial of a preliminary injunction, the consequences of the denial are not irreparable, and immediate review is not the only effective means of challenging the order. The appeal is DISMISSED. The motion for injunction pending appeal is DENIED as moot. The mandate shall issue forthwith.

ENTERED FOR THE COURT

PER CURIAM

FOOTNOTES

Click footnote number to return to corresponding location in the text.

^{*} This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

¹ After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

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