



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #MKE-17-056

TITLE: Opposing Any Attempt to Limit the Sovereign Immunity of Indian Tribes in Any Forum, Including the Patent Trial and Appeal Board

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, Indian tribal governments have a unique status in our federal system under the Constitution and numerous treaties and federal laws. As governments, Tribal Nations operate and fund courts of law, police forces, and fire departments and provide a broad range of governmental services to their citizens, including health care, education, transportation, public safety, and domestic and social programs; and

WHEREAS, sovereign immunity from suit is the right of all governments in the United States, including federal, state and tribal governments. The purpose is to provide protection against loss of assets held in common for many people for the performance of vital government functions. The federal government has a longstanding obligation under the Constitution, treaties, and hundreds of court cases to protect tribal self-government. Any federal abrogation of tribal immunity runs sharply counter to this obligation, and would substantially interfere with tribal self-governance, and place tribal assets and funds at risk; and

WHEREAS, federal patent law was overhauled in 2011 with the America Invents Act (AIA). The AIA brought in the Inter Partes Review (IPR) process, now codified at 31 USC Secs 311-319. IPR is a quasi-litigation process before the Patent Trial & Appeals Board rather than federal district court. The IPR process is intended to be a faster and more cost effective way to challenge and defend patents. However, the new law has created considerable controversy; and

WHEREAS, there is legislation pending in the Congress to address the current law's deficiencies and amend the IPR. That legislation incorporated findings that, "unintended consequences of the comprehensive 2011 reform of patent laws are continuing to become evident, including the strategic filing of post-grant review proceedings to depress stock prices and extort settlements, the filing of repetitive petitions for inter partes and post-grant reviews that have the effect of harassing patent owners, and the unnecessary duplication of work by the district courts of the United States and the Patent Trial and Appeal Board;" and

WHEREAS, the Supreme Court is considering the constitutionality of the IPR process. In *Oil States Energy Services v. Greene's Energy Group*, the Court has agreed to consider whether the IPR process violates the Constitution by extinguishing private property rights without the benefit of a federal court hearing and a jury; and

WHEREAS, the Saint Regis Mohawk Tribe ("SRMT" or the "Tribe"), recently entered into a transaction with Allergan Corporation ("Allergan") in which the Tribe has gained ownership of the patents for RESTASIS® (Cyclosporine Ophthalmic Emulsion) 0.05%, a medication to treat chronic dry eyes, and then licensed the use of patents back to Allergan in exchange for a lump sum payment and annual royalties that will be used for essential governmental purposes; and

WHEREAS, Tribal governments possess the same sovereign authority often exercised by public universities and state governments to partner with companies to bring products to the market while retaining title of intellectual property developed; such state entities have been held to be immune from IPR proceedings brought against them before the Patent Trial and Appeal Board; and

WHEREAS, Indian tribes also have and support tribal colleges and universities where research and innovation in such fields as health care (including significant diabetes research), energy and gaming technology makes it necessary and appropriate for the title of such intellectual property to be protected by sovereign immunity on par with public universities and state governments; and

WHEREAS, at least two federal courts have held that tribal immunity from suit applies in federal district court patent litigation. *Specialty House of Creation v. Quapaw Tribe* 2011 WL 308903; *Microlog Corp. v. Continental Airlines*, 2011 WL 13141413; and *Home Bingo Network v. Multimedia Games, Inc.*, No. 1:05-CV-0608, 2005 WL 2098056 (N.D.N.Y. Aug. 30, 2005); and

WHEREAS, the Tribe has asserted its sovereign immunity from suit in a pending action regarding the validity of the RESTASIS patent in IPR proceedings before the Patent Trial and Appeal Board; and

WHEREAS, unlike recent successful assertions of sovereign immunity by state entities to the IPR proceedings, there has been considerable press coverage and reaction by Members of Congress to the Tribe's transaction and use of sovereign immunity as a defense to IPR proceedings; and

WHEREAS, this recent attention has led to Congressional actions including investigatory and oversight measures to determine the validity of the transaction between the St. Regis Tribe and Allergan; and

WHEREAS, legislation has been introduced in the U.S. Senate with the specific purpose “To abrogate the sovereign immunity of Indian tribes as a defense in inter partes review of patents.”

NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians (NCAI) strongly opposes any legislative attempt to abrogate tribal sovereign immunity in any proceeding or forum; and

BE IT FURTHER RESOLVED, that the NCAI urges Congress to preserve tribal sovereign immunity in parity with state sovereign immunity in any future amendments of America Invents Act; and

BE IT FURTHER RESOLVED, that the NCAI urges Congress to refrain from consideration of any legislation impacting or affecting tribal sovereign immunity in the America Invents Act in order to consider any guidance the Court provides in *Oil States Energy Services v. Greene’s Energy Group*; and

BE IT FURTHER RESOLVED, NCAI strongly opposes S. 440 in the 116th Congress because it abrogates tribal sovereign immunity while preserving state sovereign immunity. The United States should honor its treaties and the federal trust responsibility and S. 440 should be soundly defeated; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was amended by the General Assembly at the 2019 Mid Year Session of the National Congress of American Indians, held at the Nugget Casino Resort, June 24-27, 2019, with a quorum present.



Jefferson Keel, President

ATTEST:



Juana Majel Dixon, Recording Secretary