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Couer D'Alene Tribe v. Johnson Appellant's Brief Dckt. 44478

IN THE SUPREME COURT OF THE STATE OF IDAHO

COUER D'ALENE TRIBE, a federally recognized Indian Tribe, Plaintiff/Respondent, vs. KENNETH and DONNA JOHNSON, Defendants/Appellants.	Supreme Court No. 44478-2016

APPELLANTS' BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho in and for the County of Benewah

Honorable Scott Wayman presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is a case relating to the domestication and enforcement of a tribal judgment entered by default in the Coeur d'Alene Tribal Court (the "Tribal Court"). The Appellants Kenneth and Donna Johnson (the "Johnsons") challenge the propriety of the district court's judgment recognizing such tribal judgment in light of the Tribal Court's lack of subject matter jurisdiction, its failure to meet the requirements of comity, and the penal judgment rule.

B. Course of Proceedings.

On October 8, 2014, the Tribe filed suit against the Johnsons in the Coeur d'Alene Tribal Court. R Vol. I, pp. 24-27. The suit sought the imposition of a civil penalty and eviction and abatement of an alleged encroachment in or above submerged lands under the St. Joe River within the Coeur d'Alene Tribal Reservation (the "Reservation"). *Id.* After default for the Johnsons' failure to appear, a judgment was entered in the amount of $17,400.00, and entitling the Tribe to remove the encroachments (the "Tribal Judgment"). R Vol. I, pp. 32-40.

On January 22, 2016, the Tribe filed a petition for the recognition of the Tribal Judgment by the state court of Idaho pursuant to Idaho Code Section 10-1303. R Vol. I, pp. 5-7. On March 7, 2016, the Tribe filed a motion seeking an order for recognition of the Tribal Judgment. R Vol. I, p. 41. The Johnsons opposed the motion. R. Vol. I, pp. 56-83. Although no discovery or evidentiary hearing was afforded them, the Johnsons sought to enter evidence relating to the Tribe's jurisdiction by filing the Affidavit of Kenneth Johnson. R Vol. I, pp. 105-12. The Tribe moved to strike such evidence. R Vol. I, pp. 113-22.

On June 10, 2016, the district court heard oral argument relating to the Tribe's motion seeking an order for recognition of the Tribal Judgment. *See* Tr Vol. II. On July 15, 2016, the district court entered a Memorandum Opinion and Judgment recognizing the Tribal Judgment as valid and enforceable under the laws of Idaho. R Vol. I, pp. 134-55. The Johnsons timely appealed the district court's judgment on August 26, 2016. R Vol. I, p. 160.

C. Statement of Facts.

The Johnsons are a retired couple with riverfront property in St. Maries, Idaho, on the St. Joe River. R Vol. I, p. 44. They have a dock and pilings that extend into the St. Joe River. *Id.* It is the dock and pilings that are the alleged encroachment constituting the subject of this dispute.

Critically, the current ordinary high water mark of the St. Joe River is 2,128 feet and has been at that level since 1907. *See Erickson v. State*, 132 Idaho 208, 211, 970 P.2d 1, 4 (1998) . In 1907, the Post Falls Dam was constructed, and has been recognized as having raised the elevation of the waters of the Lake Coeur d'Alene and the St. Joe River that feeds into the lake by at least 6 1/2 feet, and perhaps as much as 8 feet. *See, e.g., In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (2006); *Deffenbaugh v. Washington Water Power Co.*, 24 Idaho 514, 135 P. 247 (1913) . In short, additional lands became submerged after the construction of the Post Falls Dam in 1907.

The Tribe takes the position that it has exclusive jurisdiction over all submerged lands within the Reservation, even those lands that became submerged after Statehood as a result of the construction of the Post Falls Dam. To support its position, the Tribe relies upon the

decision of the U.S. Supreme Court in *Idaho v. United States*, 533 U.S. 262 (2001), which case clarified the federal government's pre-Statehood reservation of certain submerged lands, to be held in trust for the benefit of the Tribe by the United States. The Tribe's broad interpretation of its jurisdiction over all submerged lands is codified in the Coeur d'Alene Tribal Code at § 44-1.01. *See* Appendix A.

The Tribe asserts that its broad jurisdiction enables it to charge a permit fee to those nonmember property owners who wish to have a dock, without regard for whether or not the dock is over land submerged only as a result of the dam's construction. R Vol. I, p. 44. Therefore, it has never established whether the Johnsons' dock and pilings are within the Tribe's pre-Statehood submerged land or land submerged as a result of the dam's construction.

In this case, the Johnsons failed to pay the Tribe's permit fee. R Vol. I, p. 44. The Tribe filed suit in the Tribal Court to evict the Johnsons' dock and pilings and for a civil penalty in the amount of $100 per day. *Id.* The Johnsons did not appear in defense of the Tribe's suit, and the Tribal Court entered an order of default and a default judgment against the Johnsons, ordering removal of the dock and payment of $17,400. *Id.*

The Tribe thereafter sought, and was granted, recognition of the Tribal Judgment in the state courts of Idaho. R Vol. I, pp. 134-55. The Johnsons timely appealed the district court's judgment on August 26, 2016. R Vol. I, p. 160.

II. ISSUES ON APPEAL

1. Whether the district court erred by finding the Tribal Court had jurisdiction to enter the Tribal Judgment.

2. Whether the district court erred by finding that the Johnsons were required to exhaust tribal remedies.

3. Whether the district court erred by finding that the Tribal Judgment is entitled to full faith and credit.

4. Whether the district court erred by giving effect to the Tribal Judgment enforcing the penal and revenue laws of the Tribe, including fines and penalties.

III. ARGUMENT

A. The District Court Erred When It Found the Tribal Court Had Jurisdiction to Enter the Tribal Judgment.

The district court determined that the Tribe had regulatory or legislative authority over the bed and banks of the St. Joe River, as presently situated, therefore granting the Tribal Court jurisdiction to enter the Tribal Judgment against the Johnsons by default. R Vol. I, pp. 143-45. The district court also held that the Johnsons waived any challenge to the Tribal Court's subject matter jurisdiction by failing to appear in Tribal Court and exhaust tribal remedies. R Vol. I, pp. 145-48. Each of the foregoing determinations constitutes error and should be reversed.

1. The Tribal Court's jurisdiction is limited.

"Indian tribes have long been recognized as sovereign entities, 'possessing attributes of sovereignty over both their members and their territory.'" *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006) (citations omitted); *see also Coeur d'Alene Tribe v. AT&T Corp.*, 23 ILR 6060, 6061 (Coeur d'Alene Tribal Ct. 1996) (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)) Generally, however, "the inherent sovereign powers of an

Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)). A tribe's jurisdiction over nonmembers is limited to situations where the nonmember has entered into a consensual relationship with the tribe or where the political integrity, economic security, or health and welfare of the tribe is at stake. *Montana*, 450 U.S. at 565-67. A tribal court is therefore not a court of general jurisdiction because a tribe's "inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." *Nevada v. Hicks*, 533 U.S. 353, 367 (2001) ; *see also Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802, 809 (9th Cir. 2011) ("[A] tribe's adjudicative authority may not exceed its regulatory authority.") (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)). "To exercise its inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction—and personal jurisdiction." *Water Wheel*, 642 F.3d at 809.

2. The Tribal Court did not have jurisdiction over the subject matter in controversy.

To that end, "*Montana*'s main rule is that, absent the contrary intervention of treaty or federal law, a tribe has no civil regulatory authority over non-tribal members for activities on reservation land alienated to non-Indians." *Burlington N. R.R. v. Red Wolf*, 196 F.3d 1059, 1062 (9th Cir. 1999) (citing *Montana*, 450 U.S. at 563-65). "The ownership status of land" is only one factor to consider in determining whether regulation is integral to tribal sovereignty, but "[i]t may sometimes be a dispositive factor." *Hicks*, 533 U.S. at 360. As *Hicks*

recognizes, "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction." *Id.*

In this case, the Tribe's purported regulatory and adjudicative jurisdiction is based upon *Idaho v. United States*, 533 U.S. 262 (2001). The Tribe asserts that the land underlying the portion of the St. Joe River over which the Johnsons' dock extends "is held in trust by the federal government for the Coeur d'Alene Tribe." R Vol. I, p. 46. The Tribe claims "exclusive sovereignty and dominion over the submerged lands and waters within the area now known as the Coeur d'Alene Reservation." *Id.* (quoting COEUR D'ALENE TRIBAL CODE 44-1.01). It is clear from these statements, and the enforcement actions taken, that the Tribal government asserts broad authority over ***all*** submerged lands and the waters overlying them within the entirety of the current exterior boundaries of the Reservation.

The United States Supreme Court and the Ninth Circuit Court of Appeals, however, specifically recognized that the United States reserved, or set aside, the submerged lands that existed ***prior to Statehood in 1890***. *See generally Idaho v. United States*, 533 U.S. 262 (2001), and *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) (upholding finding that the United States reserved 1873 submerged lands for the Tribe). It is ***these*** submerged lands within the reservation—and only these submerged lands—that are owned by the United States. It is well known that ***additional lands*** within the reservation boundary became submerged only after the construction of Post Falls Dam in 1907. *See, e.g., In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (2006); *Erickson v. State*, 132 Idaho 208, 970 P.2d 1 (1998); *Deffenbaugh v. Washington Water Power Co.*, 24 Idaho 514, 135 P. 247 (1913); *Petajaniemi v. Washington*

Water Power Co., 22 Idaho 20, 124 P. 783 (1912); *Washington Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911).

While the ordinary high water mark is currently 2,128 feet and has been at that level since 1907 (*Erickson*, 132 Idaho at 211, 970 P.2d at 4), this higher level is the result of "the dam [that] raised the water level . . . in both the lake and in the Coeur d'Alene and St. Joe rivers that feed into the lake." *In re Sanders Beach*, 143 Idaho 443, 450, 147 P.3d 75, 82. The dam has been recognized as "raising the elevation of the water . . . approximately 6 1/2 feet . . . . This increased height in the dam naturally ***resulted in submerging the lands*** adjacent to Coeur d'Alene Lake and the streams flowing into the lake to an elevation of at least 2,126.5 feet." *Id.* (citation omitted) (emphasis added); *see also Deffenbaugh*, 24 Idaho at 520-21, 135 P.2d at 253-54 ("the elevation is raised six or eight feet above the ordinary elevation of the water in the summer and fall").

It is these ***additional*** submerged lands—at least 6 1/2 feet and perhaps as much as 8 feet—beyond those recognized in *Idaho v. United States* that the Tribe asserts ownership over in the Tribal Code. This is the basis for the Tribe's asserted jurisdiction over the Johnsons, whose land is immediately adjacent to the artificially elevated portion of the St. Joe River. There is no basis for this ownership or the asserted jurisdiction over the Johnsons. The United States only reserved those submerged lands that existed prior to Statehood. They did not—could not—reserve lands that would not become submerged until after the dam was built in 1907.

As the facts illustrate, the jurisdictional basis of the Tribal Judgment is the regulation of nonmember conduct on nontribal land. Therefore, under *Montana*'s main rule—

which provides that the Tribe has no civil regulatory authority over nontribal members for activities on Reservation land alienated to non-Indians—the Tribal Court is without jurisdiction. Critically, neither of the *Montana* exceptions apply. The district court correctly determined that the Tribe has not alleged, and cannot prove, that the Johnsons entered into a consensual relationship with the Tribe as it relates to the dock. *See Montana*, 450 U.S. at 564-65 ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, though commercial dealing, contracts, leases, or other arrangements.").

The district court erred, however, in finding that the second *Montana* exception applies. The Tribe did not credibly claim or allege that the political integrity, economic security, or health and welfare of the Tribe is at stake by virtue of the Johnsons' maintenance of a dock above the submerged lands of the St. Joe River immediately adjacent to their private property. *See id.* ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."). The Supreme Court has made clear, in evaluating the second *Montana* exception, that the alleged conduct "must do more than injure the tribe, it must imperil the subsistence of the tribal community." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008) . "One commentator has noted that 'the elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.'" *Id.* (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005) § 4.03[3] at

248). Because the Tribal Court did not have jurisdiction over the subject matter at issue—an alleged encroachment into non-tribal submerged lands—its judgment is not entitled to full faith and credit or comity under the laws of Idaho.

In finding that the second *Montana* exception applied, the district court erred by over-simplifying the issue. The Johnsons do not argue that any nonmember may simply "thumb their nose at the tribal enforcement efforts without any risk of consequence," as the district court suggested. *See* R Vol. I, p. 144. The argument is much narrower than that. The Tribe may not engage in enforcement efforts on land that is not held in trust for its benefit, including land submerged as a result of the construction of the Post Falls Dam.

3. The doctrine of exhaustion of tribal remedies is not applicable.

While the district court dismisses 9th Circuit federal authority relating to the application of full faith and credit to the enforceability of tribal judgments in relying upon *Sheppard v. Sheppard*, 104 Idaho 1, 655 P.2d 895 (1992) (R Vol. I, pp. 139-41), when evaluating the Johnsons' right to challenge the Tribal Court's subject matter jurisdiction in Idaho courts, it relies exclusively upon federal authority relating to the exhaustion of tribal remedies. R Vol. I, pp. 145-48. The Court erred by applying that doctrine.

The Tribe sought domestication of the Tribal Judgment pursuant to Idaho Code Sections 10-1301 *et seq.* and in accordance with *Sheppard*'s ruling that Idaho courts afford tribal judgments full faith and credit, and not pursuant to Idaho Code Sections 10-1401 *et seq.* and the doctrine of comity reflected in *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997). In Idaho, a foreign judgment that is the subject of domestication under Idaho Code Sections 10-

1301 *et seq.* "has the same effect ***and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a district court of this state*** and may be enforced or satisfied in like manner." IDAHO CODE § 10-1302 (emphasis added).

"Subject matter jurisdiction is the power to determine cases over a general type or class of dispute." *Bach v. Miller*, 144 Idaho 142, 145, 158 P.3d 305, 308 (2007). In Idaho, "[s]ubject matter jurisdiction can never be waived or consented to, and a court has a sua sponte duty to ensure that it has subject matter jurisdiction over a case." *State v. Urrabazo*, 150 Idaho 158, 162-63, 244 P.3d 1244, 1248-49 (2010). Because Idaho courts have a duty to evaluate subject matter jurisdiction, and a foreign judgment is subject to the same defenses as a judgment entered by an Idaho court, the subject matter jurisdiction underlying the Tribal Judgment cannot be waived and ***must*** be evaluated by the district court, and this Court, without regard for the exhaustion of tribal remedies. In short, the federal exhaustion doctrine is not recognized in Idaho courts, at least for purposes of domestication under Idaho Code Sections 10-1301 *et seq.* The district court erred in applying such doctrine to this case.

4. An exception to the requirement for exhaustion of tribal remedies exists.

Even if the doctrine of exhaustion of tribal remedies did generally apply to the domestication of foreign judgments under Idaho Code Section 10-1301 *et seq.*, an exception to the exhaustion requirement exists in this case. When it is plain that tribal court jurisdiction is lacking, the exhaustion requirement "would serve no purpose other than delay." *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). To determine whether a tribal court's jurisdiction is plainly

lacking, a court examines whether its "jurisdiction is colorable or plausible." *See Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009). "The plausibility of tribal court jurisdiction depends on the scope of the Tribes' regulatory authority, as a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1302 (9th Cir. 2013) (internal quotation omitted).

As set forth in Section A.2 *supra*, the Tribe seeks to regulate nonmembers on nontribal land, and neither of the two *Montana* exceptions apply. The Tribe's regulatory authority on the St. Joe River is limited to the lands submerged as of 1873, and not to the additional submerged lands resulting from the construction of the Post Falls Dam. The Tribal Court's jurisdiction was plainly lacking and the exhaustion of tribal remedies was therefore not required. The district court erred by relying upon the failure to exhaust tribal remedies as a basis to avoid a complete evaluation of the Tribal Court's subject matter jurisdiction.

B. Principles of Comity Preclude Recognition of the Tribal Court Judgment.

The district court relies upon *Sheppard v. Sheppard*, 104 Idaho 1, 655 P.2d 895 (1992), in holding that Tribal Court judgments are entitled to full faith and credit and recognition in state court. The court's determination that the Tribal Judgment should be given full faith and credit was based upon federal court interpretations of 28 U.S.C. § 1738, which have since been supplanted. That statute, passed by the U.S. Congress, states in pertinent part: "Such . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State,

Territory or Possession from which they are taken." *Sheppard*, 104 Idaho at 7, 655 P.2d at 901. The question is whether Indian tribes are covered by this provision.

In *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997), the Ninth Circuit explained that the full faith and credit clause "applies only to the states." *Wilson*, 127 F.3d at 808. The Ninth Circuit explained that the Constitution does not afford full faith and credit to Indian tribal court judgments. *Wilson*, 127 F.3d at 808. The Ninth Circuit also held that Congress did not extend full faith and credit to tribal court judgments in the implementing statute found at 28 U.S.C. § 1738. The Ninth Circuit's decision is contrary to the earlier conclusion by the Idaho Supreme Court in *Sheppard*. However, interpretation of the federal statute is, of course, a matter of federal law.

In its decision, the Ninth Circuit further explained that in the absence of a Congressional extension of full faith and credit, the recognition and enforcement of tribal judgments must inevitably rest on principles of comity. *Wilson*, 127 F.3d at 809. The Ninth Circuit then relied on two authorities for its comity analysis: (1) Section 482 of the Restatement (Third) of Foreign Relations Law of the United States; and (2) *Hilton v. Guyot*, 159 U.S. 113 (1895).

The Ninth Circuit stated that "[w]hile *Hilton* and the Restatement (Third) provide sound guidance for assessing legal judgments of other nations, special considerations arising out of existing Indian law merit ***some modification*** in the application of comity to tribal judgments." *Wilson*, 127 F.3d at 810 (emphasis added). The Ninth Circuit then laid out the following legal criteria:

> In synthesizing the traditional elements of comity with the special requirements of Indian law, we conclude that, as a general principle, federal courts should recognize and enforce tribal judgments. However, federal courts must neither recognize nor enforce tribal judgments if:
>
> (1) the tribal court did not have both personal and subject matter jurisdiction; or
>
> (2) the defendant was not afforded due process of law.
>
> In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances:
>
> (1) the judgment was obtained by fraud;
>
> (2) the judgment conflicts with another final judgment that is entitled to recognition;
>
> (3) the judgment is inconsistent with the parties' contractual choice of forum; or
>
> (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.

Wilson, 127 F.3d at 810. The Ninth Circuit revised the factors in Section 482 of the Restatement (Third) so subject matter jurisdiction was a mandatory, rather than discretionary, factor for the review of tribal court judgments. *Wilson*, 127 F.3d at 811.

1. The Tribal Court lacks the required jurisdiction for recognition of its judgment in state court.

Both *Sheppard* and *Wilson* prohibit the recognition of a tribal judgment when the tribal court does not have jurisdiction, both over the person and the subject matter. A primary

problem for the Tribal Court judgment in this matter is the Tribal Court's general lack of jurisdiction over nontribal members, such as the Johnsons.

In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), the United States Supreme Court explained why it has been reluctant to subject nontribal members to tribal jurisdiction:

> Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." ***The Bill of Rights does not apply to Indian tribes***. Indian courts ***"differ from traditional American courts in a number of significant respects."*** And ***non-members have no part in tribal government***—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. ***Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations***.

Plains Commerce, 554 U.S. at 337 (citations omitted) (emphasis added).

This statement in the majority opinion in *Plains Commerce* was taken from the concurring opinion of Justice Souter in *Nevada v. Hicks*:

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian] tribunals," *Duro v. Reina*, 495 U.S. 676, 693 (1990), which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century ***that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.*** *See Talton v. Mayes*, 163 U.S. 376, 382-385 (1896); F. Cohen, Handbook of Federal Indian Law 664-665 (1982 ed.) (hereinafter Cohen) ("Indian tribes are not states of the union

> within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes").

Nevada v. Hicks, 533 U.S. 353, 383-84 (2001) (emphasis added). Justice Souter also explained:

> Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 25 U.S.C. § 1302, "the guarantees are not identical," *Oliphant*, 435 U.S., at 194, and there is a "definite trend by tribal courts" toward the view that they "ha[ve] leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U.S. Supreme Court precedents 'jot-for-jot,'" Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L. Rev. 285, 344, n. 238 (1998). In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, ***an overriding concern that citizens who are not tribal members be "protected . . . from unwarranted intrusions on their personal liberty,"*** 435 U.S., at 210.

Hicks, 533 U.S. at 384 (emphasis added). Justice Souter also listed other concerns with nontribal members being subjected to tribal courts:

> Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in ***the independence of their judges***. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still ***frequently unwritten***, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." . . . . The resulting law applicable in tribal courts is ***a complex "mix of tribal codes and federal, state, and traditional law," . . . which would be unusually difficult for an outsider to sort out***.

Hicks, 533 U.S. at 384-85 (emphasis added). Finally, Justice Souter expressed concern that tribal courts are often subordinate to the political branch:

> The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that ***"[t]ribal courts are often 'subordinate to the political branches of tribal governments,'"*** *Duro*, *supra*, at 693 (*quoting* Cohen 334-335).

Hicks, 533 U.S. at 385 (emphasis added).

While *Plains Commerce* relied on the concurring opinion of Justice Souter in *Hicks* for this language regarding the limits of tribal courts, Justice Souter in *Hicks* relied on *Duro v. Reina*, 495 U.S. 676 (1990), which is discussed more fully below. In turn, the majority opinion in *Duro* relied on the dissenting opinion of Justice Stevens in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-73 (1982), where Justice Stevens wrote:

> The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with ***the fundamental principle that [i]n this Nation each sovereign governs only with the consent of the governed."*** *Nevada v. Hall*, 440 U.S. 410, 426. Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited.

Merrion, 455 U.S. at 172-73 (emphasis added).

Tribal courts are not courts of general jurisdiction, because a tribe's adjudicative jurisdiction is only as broad as its legislative jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 367 (2001). And this tribal jurisdiction is limited to what is necessary to protect tribal self-government or to control internal relations. *Hicks*, 533 U.S. at 359. Any "[t]ribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Hicks*, 533 U.S. at 361.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court established that Indian tribes do not have inherent criminal jurisdiction to try and to punish non-Indians. This was explained further in *Duro v. Reina*, 495 U.S. 676 (1990), which held that Indian tribes may not assert criminal jurisdiction over a nonmember Indian. *See also United States v. Lara*, 541 U.S. 193 (2004) (there was no constitutional impediment to Congress providing tribes inherent authority to prosecute criminal misdemeanors). The Supreme Court explained why criminal punishment is not granted to Indian tribes:

> Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States.

Duro, 495 U.S. at 693. The Supreme Court explained the limitations of the tribal courts:

> ***The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate.*** While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. ***Tribal courts are often "subordinate to the political branches of tribal governments,"*** and their legal methods may depend on "unspoken practices and norms." It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.

Duro, 495 U.S. at 693 (citations omitted) (emphasis added). Because of these limitations, the Supreme Court questioned whether Congress could subject American citizens to tribunals that do not provide constitutional protections as a matter of right:

> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings

> before a tribunal that does not provide constitutional protections as a matter of right.

Duro, 495 U.S. at 693. The lack of constitutional protection from tribal power was a reason the Supreme Court declined to allow tribes to exercise criminal jurisdiction over nonmembers of their tribe:

> This is all the more reason to reject an extension of tribal authority over those who have not given ***the consent of the governed that provides a fundamental basis for power within our constitutional system.***

Duro, 495 U.S. at 694 (emphasis added).

The same reasons that the Supreme Court has declined to extend criminal jurisdiction over nonmembers of a tribe should also compel this Court to decline to extend penal jurisdiction over nonmembers of a tribe by enforcing a judgment that arises from civil penalties.

2. The defendants were not afforded due process.

Both *Sheppard* and *Wilson* require that due process be afforded to the defendants. Otherwise, the tribal judgment cannot be recognized by the court.

The Ninth Circuit emphasized that due process is a fundamental requirement for the enforcement of tribal court judgments:

> The guarantees of due process are vital to our system of democracy. We demand that foreign nations afford United States citizens ***due process of law*** before recognizing foreign judgments; ***we must ask no less of Native American tribes***.

Wilson, 127 F.3d at 811 (emphasis added). The Ninth Circuit also explained its concept of due process, writing:

> Due process, as that term is employed in comity, encompasses most of the *Hilton* factors, namely that there has been opportunity for ***a full and fair trial before an impartial tribunal*** that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is ***no showing of prejudice in the tribal court*** or in the system of governing laws. Further, as the Restatement (Third) noted, ***evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant***, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition." Restatement (Third) Section 482 cmt. b.

Wilson, 127 F.3d at 811 (emphasis added).

In addition to these criteria, the Ninth Circuit also explained that the enforcement of tribal court judgments should be based on federal law rather than on state laws:

> We apply federal common law when a federal rule of decision is "necessary to protect uniquely federal interests." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an "intricate web of judicially made Indian law." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). State law, especially the compacts between a state and a tribe, may be of substantial significance in a particular case. However, the quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that ***the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law***.

Wilson, 127 F.3d at 813 (emphasis added).

Of course, in this matter the Tribal Court is dominated by the Tribal government, which is the plaintiff seeking the judgment in the Tribal Court. The Tribal government is particularly biased on questions of ownership regarding submerged lands, as reflected in the

Tribal Code. In addition, it has not hesitated to impose a large civil penalty. Under these circumstances, it is very difficult to see how the Johnsons were afforded due process.

C. Recognition of the Tribal Court Judgment Is Prohibited by the Penal Law Rule.

The district court erred in its brief treatment of the penal law rule, essentially finding that the Tribal Judgment, which imposed civil penalties, was not a penal judgment because the Johnsons were not subject to criminal prosecution or incarceration. *See* R Vol. I, p. 152. The penal law rule is a "venerable and widely-recognized" rule that a state or country does not enforce the penal judgments of other states or countries unless required to do so by treaty. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1218 (9th Cir. 2006). A penal law is one where the wrong sought to be redressed is a wrong to the public, rather than to an individual. In other words, a penal law is where the law punishes an offense against the government rather than providing a private remedy to a person injured by the wrongful act. *Yahoo! Inc.*, 433 F.3d at 1219. In this case, the judgment against the Johnsons is issued in favor of the Tribal government.

The penal law rule is a part of the general principles of comity followed by the Ninth Circuit in *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997). While comity allows the enforcement of judgments compensating private individuals for injuries or harm, comity does not allow the enforcement of judgments in favor of a government for harms to the public.

The penal law rule was first established by the United States Supreme Court in *Antelope*, 23 U.S. (10 Wheat.) 66, 6 L. Ed. 268 (1825), when Chief Justice John Marshall

explained that "[t]he Courts of no country execute the penal laws of another." *Antelope*, 23 U.S. at 123; *United States v. Federative Republic of Brazil*, 748 F.3d 86, 91 (2d Cir. 2014).

Since Chief Justice Marshall's decision in *Antelope*, the Supreme Court has continued to treat the penal judgment rule as an "incontrovertible maxim" over many years. In *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 290 (1888), *overruled in part on other grounds by Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 278 (1935), the Supreme Court stated:

> ***By the law of England and of the United States, the penal laws of a country do not reach beyond its own territory***, except when extended by express treaty or statute to offences committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country.

127 U.S. at 289-90 (emphasis added).

In the case of *Huntington v. Attrill*, 146 U.S. 657 (1892), the Supreme Court ruled that Maryland was required to enforce a judgment from New York that imposed liability on a defendant to a plaintiff for money because of the defendant's false certificate misstating the capital stock of a company. The Supreme Court again referred to the words of Chief Justice Marshall that "[t]he courts of no country execute the penal laws of another." 146 U.S. at 666. However, the Supreme Court ruled that the penal law rule did not apply in that case because the judgment was to compensate a private individual for actual losses, rather than to punish the defendant for an offense against the state. 146 U.S. at 667.

In the case of *Oklahoma ex rel. West v. Gulf, Colorado & Santa Fe Railway Co.*, 220 U.S. 290, 299 (1911), the Supreme Court decided that it did not have the power to enforce the penal statutes of the State of Oklahoma. The Supreme Court relied on its 1888 decision in *Wisconsin v. Pelican Insurance Co.*, which stated: "The rule that the courts of no country execute the penal laws of another . . . ." *Wisconsin*, 127 U.S. at 290; *Oklahoma*, 220 U.S. at 299. The Supreme Court wrote:

> Those principles must, in our opinion, determine the present case adversely to the State. Although the State does not ask for judgment against the defendant railroad company for the penalties prescribed by the Oklahoma statutes for violations of its provisions, she yet seeks the aid of this court to enforce a statute one of whose controlling objects is to impose punishment in order to effectuate a public policy touching a particular subject relating to the public welfare. The statute viewed as a whole is to be deemed a penal statute. ***The present suit, although in form one of a civil nature, is, in its essential character, one to enforce by injunction regulations prescribed by a State for violations of one of its penal statutes and is, therefore, one of which this court cannot take original cognizance at the instance of the State.***

220 U.S. at 300 (emphasis added).

In the case of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413 (1964), the Supreme Court ruled that the act of state doctrine prevented a remedy for Cuba's expropriation of sugar. The Supreme Court again recognized "the principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries or sister states." 376 U.S. at 413-14.

In *Pasquantino v. United States*, 544 U.S. 349, 360-61 (2005), the Supreme Court held that a conspiracy to violate the United States' wire fraud statute as part of an attempt to

evade Canadian liquor import laws was not subject to the penal law rule because the statute at issue was a United States statute. In that case, the Supreme Court again quoted Chief Justice Marshall's statement that "[t]he Courts of no country execute the penal laws of another." 544 U.S. at 361. The Supreme Court explained that "[t]he rule against the enforcement of foreign penal statutes, in turn, tracked the common-law principle that crimes could only be prosecuted in the country in which they were committed." 544 U.S. at 361.

The Second Circuit recently reaffirmed and explained this history in *United States v. Federative Republic of Brazil*, 748 F.3d 86, 91 (2d Cir. 2014). In that case, the Second Circuit held that a judgment of a Brazilian court forfeiting proceeds of crime to the Brazilian government would not be enforced by the United States courts, because the judgment was a penal judgment for purposes of the penal law rule. Brazil could enforce its foreign judgment only through a statutory procedure established through the United States Attorney General. 28 U.S.C. § 2467. In *Federative Republic*, the Second Circuit wrote that Judge Learned Hand had explained the rationale for the penal law rule by pointing to the danger in requiring United States courts to "pass upon the provisions for the public order of another state," something that "is, or at any rate should be, beyond the powers of a court." *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring), *off on other grounds*, 281 U.S. 18 (1930). The Second Circuit explained that enforcement of foreign criminal laws would enmesh the courts in "the relations between the states themselves," a matter outside judicial competence and, in any event, "intrusted to other authorities" under the United States' system of separation of powers. *Moore*, 30 F.2d at 604; *Federative Republic*, 748 F.3d at 92; *Attorney Gen. of Can. v. R.J. Reynolds*

Tobacco Holdings, Inc., 268 F.3d 103, 109-20 (2d Cir. 2001) (expounding upon justifications for revenue rule, including "respect for sovereignty, concern for judicial role and competence, and separation of powers").

Section 483 of the Restatement (Third) of the Foreign Relations Law of the United States provides as follows:

> Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1987). The comment to the Restatement (Third) of Foreign Relations Law defines what constitutes a penal law as follows:

> A penal judgment, for purposes of this section, is a judgment in favor of a foreign state or one of its subdivisions, and primarily punitive rather than compensatory in character. ***A judgment for a fine or penalty is within this section; a judgment in favor of a foreign state arising out of a contract, a tort, a loan guaranty, or similar civil controversy is not penal for purposes of this section.*** Nor is a judgment for damages rendered in an action combining claims of civil and criminal responsibility, as is possible in some states, for example in respect of vehicle accidents or nonsupport of dependents. Actions may be penal in character, however, and therefore governed by this section, even if they do not result from judicial process, for example ***when a government agency is authorized to impose fines or penalties for violation of its regulations.***

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 cmt. b (1987) (emphasis added).

The Ninth Circuit relied on the penal law rule in Section 483 of the Restatement in its *en banc* decision in *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1219 (9th Cir. 2006):

> California courts follow the generally observed rule that, "'[u]nless required to do so by treaty, no state [i.e., country] enforces the penal judgments of other states [i.e., countries].'" *In re Manuel P.*, 215 Cal.App.3d 48, 81, 263 Cal.Rptr. 447 (1989) (Wiener, J., dissenting) (***quoting Restatement § 483 cmt. 3***); *see also In re Marriage of Gray*, 204 Cal.App.3d 1239, 1253, 251 Cal.Rptr. 846 (1988). ***This is consistent with the Restatement's declaration that "[c]ourts in the United States are not required . . . to enforce judgments [from foreign countries] for the collection of . . . fines or other penalties." Restatement § 483***; *see also* 30 Am.Jur.2d Execution and Enforcement of Judgments § 846 (2004) ("Courts in the United States will not recognize or enforce a penal judgment rendered in another nation."). A number of states have adopted an identical version of California's Uniform Act, *see* Enforcing Foreign Judgments in the United States and United States Judgments Abroad 28-32 (Ronald A. Brand ed., 1992), and ***the common law rule against the enforcement of penal judgments is venerable and widely-recognized***. *See Huntington v. Attrill*, 146 U.S. 657, 673-74, 13 S.Ct. 224, 36 L.Ed. 1123 (1892); *see also* 18 James Wm. Moore et al., Moore's Federal Practice § 130.05 (2002).

Yahoo! Inc., 433 F.3d 1199, 1219 (9th Cir. 2006) (emphasis added). The Ninth Circuit again quoted Section 483 later in its opinion:

> In short, the label "civil" does not strip a remedy of its penal nature. Thus, for example, an American court is not required to enforce an order of contempt or an award of punitive damages in a civil action. *Cf. Frank v. Reese*, 594 S.W.2d 119, 121 (Tex.Civ.App. 1979) ("Other jurisdictions are reluctant to give full faith and credit to an order for contempt due to its punitive nature[.]"); *Republic of Philippines v. Westinghouse Elec. Corp.*, 821 F.Supp. 292, 295 (D.N.J. 1993) (refusing to enforce Philippine law providing for punitive damages); ***see also Third Restatement***

> ***§ 483 cmt. b*** ("Some states consider judgments penal for purposes of nonrecognition if multiple, punitive, or exemplary damages are awarded, even when no governmental agency is a party.").

Yahoo! Inc., 433 F.3d at 1219-20 (emphasis added).

The 2005 Uniform Foreign Country Money Judgments Recognition Act revised the 1962 act of the same name. Nat'l Conference of Comm'rs on Unif. State Laws, Unif. Foreign-Country Money Judgments Recognition Act (July 21, 2005) ("Uniform Law"). These acts codify the most prevalent common law rules with respect to the recognition of money judgments rendered in other countries. Uniform Law at 1. This Uniform Law provides the means to enforce the judgments of a government, except for the United States or its possessions and except for any other government that is subject to the Full Faith and Credit clause of the U.S. Constitution. Uniform Law § 2; *see, e.g.,* IDAHO CODE §§ 10-1401 *et seq.*

However, this Uniform Law does not allow for the enforcement of penal judgments. Instead, the law states:

> (b) This [act] does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is:
>
> (1) a judgment for taxes;
>
> (2) ***a fine or other penalty*** . . . .

Uniform Law § 3 (emphasis added). The National Conference explained this rule as follows:

> ***Foreign-country judgments for*** taxes and ***judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts***. *See, e.g.*, Restatement Third of the Foreign Relations Law of the United States §483 (1986). Both the "revenue rule," under which the courts of one country will not enforce the revenue laws of another country, and

> the prohibition on enforcement of penal judgments seem to be grounded in the idea that ***one country does not enforce the public laws of another***. *See id.* Reporters' Note 2. The exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 11, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

Uniform Law at 7 (emphasis added). The National Conference also explained:

> Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice.

Uniform Law at 7.

The 2005 Uniform Foreign Country Money Judgments Recognition Act has been adopted by Idaho as Idaho Code Section 10-1401 *et seq.* Idaho Code Section 10-1403 provides as follows:

> (2) This chapter does not apply to a foreign country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is:
>
> (a) A judgment for taxes;
>
> (b) A fine or other penalty[.]

IDAHO CODE § 10-1403(2).

In *Nelson v. George*, 399 U.S. 224 (1970), the Supreme Court recognized that the Full Faith and Credit clause does not require sister states to enforce a foreign penal judgment:

> Since ***the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment***, *Huntington v. Attrill*, 146 U.S. 657 (1892); *cf. Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 279 (1935), California is free to consider what

> effect, if any, it will give to the North Carolina detainer in terms of George's present "custody."

Nelson, 399 U.S. at 229 (emphasis added).

In the case of *City of Oakland v. Desert Outdoor Advertising, Inc.*, 267 P.3d 48 (Nev. 2011), the Nevada Supreme Court considered whether it was required to enforce a California civil judgment against a sign company for violation of a section of the City of Oakland's municipal code dealing with signage. The Nevada Supreme Court determined that Nevada was not required to enforce a California judgment that was penal in nature:

> In addition, ***the United States Supreme Court has determined that the Full Faith and Credit Clause does not apply to penal judgments.*** *Huntington v. Attrill*, 146 U.S. 657, 666, 672-73 (1892); *Nelson v. George*, 399 U.S. 224, 229 (1970) (reiterating that "the full faith and credit clause does not require that sister states enforce a foreign penal judgment").

City of Oakland, 267 P.3d 48 (emphasis added). As a result, Nevada did not enforce California's judgment.

Other states follow this approach, holding that the Full Faith and Credit clause does not require the enforcement of a sister state's penal judgment. *Philadelphia v. Austin*, 429 A.2d 568, 572 (N.J. 1981) ("the United States Supreme Court has continued to recognize the vitality of the penal exception," but does require enforcement of the tax and revenue judgments of sister states); *Schaefer v. H. B. Green Transp. Line*, 232 F.2d 415, 418 (7th Cir. 1956) ("It is generally recognized that penalties fixed by state laws are not enforc[e]able in federal courts or even in other State courts."); *People v. Laino*, 32 Cal. 4th 878, 888, 87 P.3d 27 (Cal. 2004) ("[W]e have stated that the full faith and credit clause 'does not require that sister States enforce

a foreign penal judgment.'") ("If California need not give full faith and credit to penal judgments of another state, then it is free to determine under its own laws whether defendant's Arizona plea constitutes a conviction for purposes of the three strikes law[.]"); *Farmers & Merchants Trust Co. v. Madeira*, 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184, 188 (Ct. App. 1968) ("If the judgment is a penal judgment it is not enforceable in this state under either the full faith and credit clause of the United States Constitution or as a matter of comity.") ("It is the prevailing rule throughout this country that no action can be maintained in one state to recover money extracted as punishment for a civil wrong committed under the laws of another state."); *S.H. v. Adm'r of Golden Valley Health Ctr.*, 386 N.W.2d 805, 807 (Minn. Ct. App. 1986) (while not deciding the merits of the case, recognizing that the "full faith and credit clause . . . does not require a state to enforce the penal judgment of another state"); *MGM Desert Inn, Inc. v. Holz*, 411 S.E.2d 399, 402 (N.C. Ct. App. 1991) ("One exception to the full faith and credit rule is a penal judgment; a state need not enforce the penal judgment of another state."); *Russo v. Dear*, 105 S.W.3d 43, 46 (Tex. Ct. App. 2003) (recognizing that penal judgments are not entitled to full faith and credit as they are among the recognized exceptions to the full faith and credit requirements).

The scope of the penal law rule covers remedies that go to the public, rather than to private individuals. In *Wisconsin v. Pelican Insurance Co.*, the Supreme Court wrote that the penal law rule applied to all suits in favor of the state for the recovery of pecuniary penalties for any violation of municipal laws. 127 U.S. at 290. The Supreme Court explained:

> The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but ***to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties***. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.

Wisconsin, 127 U.S. at 290 (emphasis added). The Supreme Court held that a judgment of the state of Wisconsin for a penalty against a Louisiana insurance company for failure to properly register was not enforceable by the federal courts. The Supreme Court explained:

> The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The ***prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State***, and be paid, one half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures.

Wisconsin, 127 U.S. at 299 (emphasis added). The Supreme Court went on to explain:

> The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offence. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action; or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. In whatever form the State pursues her right to punish the offence against her sovereignty, ***every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offence***.

Wisconsin, 127 U.S. at 299 (emphasis added).

In *Huntington v. Attrill*, 146 U.S. 657 (1892), the Supreme Court explained the distinction between penal laws and laws that compensate individuals for damages. 146 U.S. at 668. The Supreme Court explained:

> ***Crimes and offences against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State***; and the authorities, legislative, executive or judicial, of other States take no action with regard to them, except by way of extradition to surrender offenders to the State whose laws they have violated, and whose peace they have broken.

Huntington, 146 U.S. at 669 (emphasis added). The Supreme Court also explained:

> The test whether a law is penal, in the strict and primary sense, is ***whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual***, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an ***infringement or privation of the private or civil rights belonging to individuals, considered as individuals***; and are thereupon frequently termed civil injuries: the latter ***are a breach and violation of public rights and duties, which affect the whole community, considered as a community***; and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Bl. Com. 2.

Huntington, 146 U.S. at 668-69 (emphasis added). The Supreme Court also gave the following distinction:

> The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question ***whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act***.

Huntington, 146 U.S. at 673-74 (emphasis added).

The Ninth Circuit explained that penal judgments are those intended to punish an offense against the public justice of the foreign state. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1219 (9th Cir. 2006) (*en banc*). The test to determine the penal nature of a judgment

> is not by what name the statute [on which the judgment is based] is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a ***punishment of an offense against the public, or a grant of a civil right to a private person***.

Yahoo! Inc., 433 F.3d at 1219 (emphasis added); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 413, n.15 (a penal law for purposes of the penal law rule "is one which seeks to redress a public rather than a private wrong").

The Ninth Circuit has ruled that the law for the enforcement of tribal judgments is the law of comity applied to judgments issued by foreign countries. *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997). The application of the penal law rule is consistent with the Supreme Court's limitation of tribal jurisdiction over nonmembers to "consensual relationships." *Montana*, 450 U.S. at 565. The majority opinion wrote that the term "'other arrangement' is clearly another private consensual relationship, from which the official actions at issue in this case are far removed." *Nevada v. Hicks*, 533 U.S. at 359, n.3. Justice O'Conner disagreed with the breadth of this statement, and the majority opinion responded as follows:

> The concurrence exaggerates and distorts the consequences of our conclusion, that the term "other arrangements" in a passage from *Montana* referred to other "private consensual" arrangements — so that it did not include the state officials' obtaining of tribal

> warrants in the present case. That conclusion is correct, as a fuller exposition of the passage from *Montana* makes clear:
>
> > "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter ***consensual*** relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."
>
> 450 U.S., at 565.
>
> The Court (this is an opinion, bear in mind, not a statute) obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who ***voluntarily submitted themselves to tribal regulatory jurisdiction*** by the arrangements that they (or their employers) entered into.

Nevada v. Hicks, 533 U.S. at 371-72 (citations omitted) (emphasis added).

This distinction between voluntary or consensual relationships is similar to the distinction between fines and penalties and contractual relationships for purposes of the penal law rule of Section 483:

> A judgment for a fine or penalty is within this section; a judgment in favor of a foreign state arising out of a contract, a tort, a loan guaranty, or similar civil controversy is not penal for purposes of this section.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 cmt. b (1987).

In this way, the penal law rule is consistent with *Montana*'s first exception, both of which preclude jurisdiction where the claim of jurisdiction is based on tribal government compulsion of nonmember conduct. Similarly, both allow jurisdiction if the person has voluntarily entered into a contractual relationship with the government.

Based on these rules, the judgment at issue in this case is based on a penal law, or a law that punishes an offense against the public or the Tribe as a whole. As a result, it should not be recognized by the courts of Idaho.

IV. CONCLUSION

For the foregoing reasons, the Johnsons respectfully request that the Court reverse the decision of the district court to recognize the Tribal Judgment in Idaho courts. In the alternative, the Johnsons respectfully request remand to the district court to evaluate the Tribal Court's subject matter jurisdiction to enter the Tribal Judgment at issue prior to recognition thereof.

DATED this 31st day of January, 2017.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Norman M. Semanko – Of the Firm
Matthew J. McGee – Of the Firm
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January, 2017, I caused a true and correct copy of the foregoing **APPELLANTS' BRIEF** to be served by the method indicated below, and addressed to the following:

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APPENDIX A

COEUR D'ALENE TRIBAL CODE

READOPTED EFFECTIVE OCTOBER 6, 2000

RESOLUTION 307(2000)

CHAPTER 44

ENCROACHMENTS

44-1.01 Jurisdiction and Intent

Jurisdiction. The Coeur d'Alene Tribe has exercised exclusive sovereignty and dominion over the submerged lands and waters within the area now known as the Coeur d'Alene Reservation since time immemorial. The submerged lands and waters within the Coeur d'Alene Reservation are owned by the Coeur d'Alene Tribe and the Tribe is legally entitled to the exclusive use and occupancy of them. These submerged lands and waters are essential to the Tribe's "dignity and ancient right." *Idaho v. The United States and Coeur d'Alene Tribe 533 U.S. 262 (2001).* The regulation of use of the submerged lands and waters are an essential governmental function of the Tribe. The Tribal and public health, safety and welfare requires that any allowed use of an encroachment upon these waters and submerged lands be regulated to protect water quality and quantity, navigation, fish and wildlife habitat, aquatic life, aesthetic beauty and Tribal values.

Tribal Intent. Although the Coeur d'Alene Tribe has the right of exclusive use and occupancy and to exclude non-Tribal member uses of the waters and submerged lands within the Reservation, the Coeur d'Alene Tribe may permit non-Tribal members the privilege to use these waters and submerged lands in certain specific, well-defined ways. This non-Tribal member use is by permission only and is to be narrowly construed. Except as specifically otherwise authorized in this Chapter, it is the intent of the Coeur d'Alene Tribe to reserve for enrolled members of the Coeur d'Alene Tribe the exclusive use and occupancy of all waters within the Coeur d'Alene Reservation and of all submerged lands underlying navigable waters within the Coeur d'Alene Reservation.

44-2.01 No Rights Conferred

No enforceable rights or privileges regarding use of the waters or submerged lands of the Coeur d'Alene Reservation are conferred on those who are not enrolled members of the Coeur d'Alene Tribe. All use of the waters or submerged lands by non-Tribal members are at the sole discretion of the Tribe. Permissive use by non-Tribal members is allowed only to the extent specifically authorized by this Chapter. Additional uses are neither inferred nor implied and are denied.