

3-28-2017

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

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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' REPLY 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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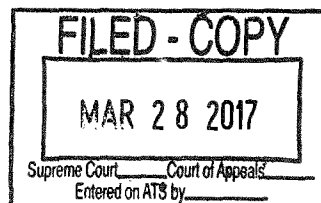


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I. ARGUMENT

A. The District Court Failed to Adequately Evaluate the Tribal Court's Subject Matter Jurisdiction.

As the Coeur d'Alene Tribe ("Tribe") notes, tribes generally does not have regulatory authority over non-tribal members on reservation land alienated to non-members, but do retain certain limited power and jurisdiction. *See* Resp. Br. at 4-5 (citing *Montana v. United States*, 450 U.S. 455, 565 (1981)). This limited authority is embodied in what is known as the *Montana* exceptions—the “consensual relationship” exception and the “direct effect” exception. In arguing that the district court correctly found that the “direct effect” exception applies, the Tribe recites several findings made by the federal court about the history, tradition and purpose of the Tribe's interest in the submerged lands in the matter of *Idaho v. United States*, 533 U.S. 262 (2001). *See* Resp. Br. at 5. Those findings do not alone, however, support the high threshold applicable for the Tribe to meet the “direct effect” exception. To meet that exception, the maintenance of a dock at a nonmember's fee property within the reservation would need to “imperil the subsistence of the tribal community” and regulation would be “necessary to avert catastrophic consequences.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008). The Tribe failed to make that demonstration, and the Court erred when it simply found that the importance of the bed and banks to the Tribe was sufficient to meet the exception.

The Tribe also argues that, independently, the Tribe has the power to exclude, and derivatively, the authority to regulate non-Indians on tribal land. Resp. Br. at 6. It argues that the pilings are maintained in the St. Joe River and, in accordance with *Idaho v. United States*,

533 U.S. 262, the pilings are on land held in trust by the United States for the Tribe. *Id.* at 6-7.

The Tribe dismisses Kenneth and Donna Johnson's (the "Johnsons") argument that the trust property under the St. Joe River that was withheld by the United States for the Tribe's benefit prior to statehood is not the same submerged land that exists today in light of the construction of a dam. *See Resp. Br.* at 11-14.

The Tribe suggests that a footnote explaining the courts' treatment of certain reservation lands conveyed to the State of Idaho post-statehood has no bearing upon land similarly conveyed to private individuals. *See United States v. Idaho*, 210 F.3d 1067, 1080 n.18 (2000). The footnote is not inconsequential. The pleadings to quiet title in *United States v. Idaho* were construed "in light of the physical situation as it existed prior to the construction of the dam." *Id.* The Tribe's title to the bed and banks as they existed after the construction of the dam at Heyburn Park was not determined by an action to quiet title. The Tribe's title to the bed and banks immediately adjacent to the Johnsons' non-tribal fee property, as they existed after the construction of the dam, was likewise not determined by an action to quiet title. It is not the Johnsons' burden to demonstrate that the Tribe does not hold title to the bed and banks over which the Johnsons' dock and pilings rest. The Tribe must succeed on the strength of its own title, *see Owen v. Boydstrum*, 102 Idaho 31, 34, 624 P.2d 413, 416 (1981), to meet that burden and assert its jurisdiction over the Johnsons. It has failed to do so.

B. All Tribal Judgments Are Not Entitled to Full Faith and Credit.

The tribal judgment at issue should not be entitled to full faith and credit. The Tribe argued, and the district court determined, that *Sheppard v. Sheppard*, 104 Idaho 1, 655

P.2d 895 (1982), demands the recognition of the tribal judgment at issue. The Johnsons urge this Court to distinguish this case from *Sheppard*, or to reconsider its holding, and to adopt the analysis more recently set forth by the Ninth Circuit in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). In that case, the federal district court below found that “an action prosecuted for the purpose of seeking recognition and enforcement of a judgment entered by an Indian tribal court presents a ‘federal question’ within the meaning of 28 U.S.C. § 1331.” 934 F. Supp. 1187, 1191-92 (1996) (relying on *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)). Whether to recognize a tribal judgment is a federal question. *See id.*

The determination by the Ninth Circuit in *Wilson* that the full faith and credit clause “applies only to the states,” and not to tribal court judgments, and that the comity analysis is the proper analysis for such judgments, strongly suggests that this Court should reevaluate its holding in *Sheppard*. As the Ninth Circuit noted in *Wilson*, several legislative acts governing the recognition of certain types of tribal judgments were passed subsequent to the enactment of 28 U.S.C. § 1738, which acts would not have been necessary if full faith and credit already extended to tribal judgments.

Tribal judgments should not be recognized under the full faith and credit clause, and *Shepherd* should be overruled or distinguished as it applies to underlying civil enforcement actions such as the instant action. As *Wilson v. Marchington* makes clear, the full faith and credit clause generally applies among the states, and the recognition of tribal judgments should be evaluated according to principles of comity. Importantly, the judgments entitled to full faith and credit are evaluated according to the Foreign Judgments Act, Idaho Code Sections 10-1301

et seq. See *id.* (defining a “foreign judgment” as a judgment of the United States or of any court or administrative body of “any state”). The principles of comity, on the other hand, are embodied in Idaho statutory law within the Uniform Foreign Country Money Judgments Recognition Act, Idaho Code Sections 10-1401 *et seq.* See IDAHO CODE § 10-1402 (Act applies to any government not entitled to full faith and credit). Recognition of the tribal judgment at issue should be subject to the requirements and procedures of the latter Act.

C. The Federal Exhaustion Doctrine Is Inconsistent with Idaho Law.

The Tribe contends that the Johnsons waived their jurisdictional challenge by failing to appear in tribal court to present that challenge. Resp. Br. at 10-11. To support its exhaustion argument, the Tribe cites *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), which held that “federal policy supporting tribal self-government directs a *federal court* to stay its hand.” *Id.* at 16 (emphasis added). That case does not direct that a state court stay its hand. 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.” *Bach v. Miller*, 144 Idaho 142, 145, 158 P.3d 305, 308 (2007). The tribal judgment is subject to the defense that it was entered without subject matter jurisdiction, just as an Idaho judgment would be. See IDAHO CODE § 10-1302.

The Johnsons respectfully request that this Court find that the federal exhaustion doctrine does not apply to the recognition of the tribal judgment at issue in Idaho courts. To the extent this Court finds the judgment subject to the foregoing adopted federal doctrine relating to

tribal law, the Johnsons reiterate *Sheppard's* inconsistency with federal law in the Ninth Circuit as it relates to the recognition of tribal judgments..

D. The District Court Erred When It Failed to Consider the Penal Law Rule.

The Tribe asserts that the penal law rule has not been recognized in this state and describes the rule only as a common law rule. While the Idaho judiciary has not expressly addressed the rule, the legislature has. Idaho Code Section 10-1403 expressly excludes any judgment for “a fine or other penalty” from the scope of the Uniform Foreign Country Money Judgments Act. *See* IDAHO CODE § 10-1403(2)(b). That exclusion recognizes the principle of the penal law rule—that a state is not required to enforce extra-jurisdictional penal judgments.

Furthermore, the United States Supreme Court has held that “the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment.” *Nelson v. George*, 399 U.S. 224, 229 (1970). Therefore, the Tribe is mistaken in asserting that the penal law rule need only be reached by this Court “if the Court determines that comity is the proper vehicle for recognition of tribal court judgments by the courts of this state.” Resp. Br. at 19.

Whether the tribal judgment at issue was recognized by virtue of full faith and credit and pursuant to Idaho Code Sections 10-1301 *et seq.*, or as a matter of comity and pursuant to Idaho Code Sections 10-1401 *et seq.*, the district court was not compelled, as it held, to recognize the pecuniary penalties of a foreign judgment payable to a foreign government for public harms, as opposed to a judgment for damages lying in contract or tort to a private citizen. The district court erred when it drew the line for the rule’s applicability at criminal prosecution or incarceration. *See* R Vol. I, at 152 (“The Johnsons are not subject to criminal prosecution or

incarceration pursuant to the tribal court judgment.”). The penal law rule has never applied so narrowly. *See, e.g., Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888) (“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.”). The Idaho statute reflecting the penal law rule, Idaho Code Section 10-1403, certainly does not restrict its application to purely criminal matters. *See* IDAHO CODE § 10-1403(2).


To the extent the tribal judgment at issue constitutes a penal judgment entered in tribal court to redress a public harm in another jurisdiction, the Johnsons respectfully request that this Court find that the Idaho district court was not required to recognize or enforce such judgment.

II. CONCLUSION

For the foregoing reasons, the Johnsons respectfully request that the Court reverse the decision of the district court to recognize the tribal judgment at issue in Idaho courts. In the alternative, the Johnsons request that the matter be remanded to address the tribal court’s subject matter jurisdiction and the applicability of the penal law rule.

DATED this 28th day of March, 2017.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 2017, I caused a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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