

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Case No. DA 10-0099

IN THE MATTER OF THE ESTATE OF:

WILLIAM F. BIG SPRING, JR.,

Deceased.

JULIE BIG SPRING AND WILLIAM
BIG SPRING III,

Appellants.

v.

ANGELA CONWAY. DOUG ECKERSON.
And GEORGIA ECKERSON,

Appellees.

AMICUS CURIAE BRIEF OF THE BLACKFEET TRIBE

ON APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT
The HONORABLE LAURIE McKINNON presiding

APPEARANCES:

Joe J. McKay
P. O. Box 1803
Browning, MT 59417
Ph: 406-338-7262
Fx: 406-338-7262
E-mail: powerbuffalo
@Yahoo.com
Appellant's Attorney

Linda Hewitt Conners
P. O. Box 7310
Kalispell, MT 59904
Ph: 406-755-2255
Fx: 406-755-5155 Ph:
E-mail: linda conners
@attorneysmontana.com
Attorney for Appellee
Doug Eckerson

Ron A. Nelson
Burt N. Hurwitz
P. O. Box 1645
Great Falls, MT 59403
406-761-3000
Fx: 406-455-2313
Attorneys for Appellee
Angela Conway

Sandra K. Watts
P.O. Box 849
Browning, MT
59417
Ph: 406-338-7777
Fx: 406-338-5363
Attorney for
Amicus Curiae
Blackfeet Tribe

TABLE OF CONTENTS

| | | |
|----|--|----|
| 1. | Table of Authorities | ii |
| 2. | Statement of the Issue | 1 |
| 3. | Statement of the Case | 1 |
| 4. | Statement of Facts | 2 |
| 5. | Law and Argument | 3 |
| A. | Blackfeet Tribal Law | 3 |
| 1. | The Constitution of the Blackfeet Tribe | |
| 2. | The Blackfeet Tribal Law and Order Code of 1967, as amended. | |
| B. | The Blackfeet Tribal Court | 11 |
| C. | Distinguishing <i>Plains Commerce Bank v. Long Family & Cattle Co.</i> | 12 |
| D. | Appellants' Argument | 13 |
| 6. | Conclusion | 13 |
| 7. | Certificate of Service | 15 |
| 8. | Exhibits | 16 |
| 9. | Certificate of Compliance | 17 |

TABLE OF AUTHORITIES

Cases

| | |
|---|-------|
| Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408 (1989) | 13 |
| County of Yakima v. Confederated Tribes of Yakima Indian Nation, 502 U.S. 251 (1992)..... | 13 |
| Fisher V. District Court, 424 U.S. 382 (1976)..... | 5, |
| In re estate of Dan Boggs, 2008 P 21 (Blackfeet Tribal Court)..... | 11 |
| McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973)..... | 10 |
| Montana v. united States, 450 U.S. 564 (1983)..... | 10,12 |
| Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., et al., 554 U.S. _____, 128 S.Ct. 2709 (2008)..... | 12,13 |
| Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)..... | 10 |
| Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8L.Ed. 483..... | 3 |

Other

| | |
|--|-------|
| American Indian Probate Reform Act, 25 USCA §2201..... | 9 |
| Constitution of the Blackfeet Tribe, Article VI, Section 1(l) (n)..... | 5,6 |
| Blackfeet Law and Order Code of 1967, as amended, Chapter 3, § 4..... | 6,7,8 |
| Blackfeet Ordinance 44..... | 7 |
| Blackfeet Resolution 25-67..... | 6,7 |
| Indian Reorganization Act, 25 U.S.C. Sections 461 et seq..... | 4 |

STATEMENT OF THE ISSUE

Whether the Blackfeet Tribe has the exclusive jurisdiction to probate the estates of resident enrolled members of the Blackfeet Tribe when such estate consists of Indian-owned fee land within the exterior boundaries of the Blackfeet Reservation.

STATEMENT OF THE CASE

This case comes before this Court on the appeal of the Appellants from the decision of the Ninth Judicial District of Glacier County which ruled against a Motion to Dismiss by the Appellants based on the lack of subject matter jurisdiction over the estate of William Big Spring, II, an enrolled member of the Blackfeet Tribe, who, at the time of his death was a resident of the Blackfeet Reservation and whose estate consisted of both trust and fee land solely within the exterior boundaries of the Blackfeet Reservation. The District Court stated that there was concurrent jurisdiction over this property and that the District Court was therefore the proper forum for the probate of this Indian-owned fee land.

Appellants argue that the State District Court is without jurisdiction over the probates of resident enrolled members of the Blackfeet Tribe. Appellants further state that the probate of the trust land of such persons is vested in the

Administrative Courts of the United States and that the probate of the fee land is vested, exclusively in the Blackfeet Tribal Court. That is also the view of the Blackfeet Tribe as seen in this Amicus Brief.

Appellee Doug Eckerson argues that William and Julie consented to the jurisdiction of the District Court and consented to the contractual settlement of all claims of the estate, including his claim against the estate. He further argues that there has been no federal preemption of probate for fee owned land within reservation boundaries, that the Blackfeet Tribe has the same law as the State of Montana governing the inheritance of fee land, and that the transfer of Indian fee owned property to him, through the State District Court does not interfere with the self governance of the Blackfeet Tribe.

Appellee Angela Conway is the natural child of the decedent. She argues that the State District Court has concurrent jurisdiction with the Blackfeet Tribal Court over the estates of enrolled members of the Blackfeet Tribe who die possessed of fee land within the boundaries of the Blackfeet Reservation. She also argues at the same time that the fee character of the land in question takes this matter out from under the jurisdiction of the Blackfeet Tribe.

STATEMENT OF FACTS

The Blackfeet Tribe hereby adopts the Statement of Facts as set forth in the Appellants' Brief and Appellants' Reply Brief.

LAW AND ARGUMENT

First and foremost, the Blackfeet Tribe states with absolutely no equivocation that it has exclusive jurisdiction to probate in the Blackfeet Tribal Court, Indian-owned fee estates of enrolled, resident members of the Blackfeet Tribe, when that land is situated within the exterior boundaries of the Blackfeet Reservation. Any assumption of State jurisdiction over such probates infringes on the self-government of the Blackfeet Tribe, and flies in the face of well-established principles of the law established from the early Supreme Court cases going back to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483.

In the instant case, the attempted assumption of jurisdiction by the State District Court of Glacier County, Montana has no basis in legal precedent or in the legal principles which established Indian Tribes as sovereign governments within the territory of the United States. This decision of the District Court must be reversed and a clear statement made by this Court that the probate of Indian-owned fee land is a central tenant of the self government of the Blackfeet Tribe and that the exclusive forum for such exercise is in the functioning Blackfeet Tribal Court.

A. BLACKFEET TRIBAL LAW.

1. The Constitution of the Blackfeet Tribe.

Except for the argument in the Briefs of Julie and William, little attention is paid by both Doug and Angela to the organic documents of the

Blackfeet Tribe. The present Blackfeet Tribal government was organized pursuant to the authority of the Act of June 18, 1934 (48 Statutes at large, page 986) and the amendments thereto and which is more commonly known as the “Indian Reorganization Act”, 25 U.S.C. Sections 461 et seq. The Blackfeet Tribal members voted in favor of a Constitution and Bylaws on November 13, 1935, and these documents were approved by the Secretary of the Interior on December 13, 1935.

The Territorial jurisdiction of the Blackfeet Tribe is set forth in Article I of its Constitution, as follows: “The jurisdiction of the Blackfeet Tribe shall extend to the territory within the confines of the Blackfeet Reservation boundaries as defined in the agreement of September 26, 1895 . . .” Those boundaries were formed after the sale by the Blackfeet of certain mountain front land, some of which is now known as Glacier National Park. Those boundaries have remained the same to the present day. The Constitution of the Blackfeet Tribe set up provisions for the selection of a governing body denominated the “Blackfeet Tribal Business Council”.

Among the enumerated powers of the Blackfeet Tribal Business Council is one which deals with the inheritance of real and personal property. Article VI, Section 1(l) of the Constitution of the Blackfeet Tribe reads as follows:

Section 1. Enumerated Powers. The council of the Blackfeet

Reservation shall exercise the following powers, subject to any limitations embodied in the statutes or the Constitution of the United States, and subject further to all express restrictions upon Such powers contained in this constitution and the attached by-laws.

...

(l) To regulate the inheritance of real and personal property other than allotted lands within the Blackfeet Reservation, subject to review by the Secretary of the Interior.

The Blackfeet Tribe has, therefore, preempted any other jurisdiction from having jurisdiction over the probate of real and personal property, excluding trust lands, within the boundaries of the Blackfeet Reservation.

This reading of the Tribe's own organic document as to its exclusive jurisdiction and authority has been upheld by the Supreme Court of the United States in another essential tenant of tribal self government – the adoption of members of the Tribe. See *Fisher v. District Court*, 424 U.S. 382 (1976). The Constitution of the Blackfeet Tribe, Article VI, Section 1(n), states the Blackfeet Tribal Business Council has the power, "To enact ordinances not inconsistent with Article II (Section governing membership in the Tribe) of this constitution, governing adoption and abandonment of membership . . ." As has been made very clear in *Fisher* the Court held, "Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, **the jurisdiction of the Tribal Court is exclusive.**" (emphasis supplied) *Fisher v. District Court*, 424 U.S. 382, 386-390. See also the Reply Brief of the Appellant, pgs 17-19 for a more thorough review of *Fisher* and its applicability to the instant case.

The question must be asked – If the Blackfeet Tribe has no jurisdiction over the inheritance of Indian-owned fee land within the boundaries of the Blackfeet Reservation, than why is this Section of the Blackfeet Constitution included among the powers of the Blackfeet Tribal Business Council? The answer is clear. The Blackfeet Tribe has no jurisdiction over the probate of trust land, which is exclusive to the federal government, but its jurisdiction is exclusive over all other forms of property, both personal and fee, within the Blackfeet Reservation. To read the section of the Blackfeet Constitution set out above on the power to regulate the inheritance of real property within the Blackfeet Reservation (Article VI, Section (l) with Article VI, Section (n) governing the regulation of adoption of members of the Tribe, the reader must come to the conclusion that the regulation of inheritance is as **exclusive** to the Tribe as is the adoption of members of the Tribe. The constitutional powers both involve enrolled members of the Tribe and the subject matters are the “regulation of inheritance” of Blackfeet member-owned land within the Blackfeet Reservation and the “adoption of members” of the Blackfeet Tribe – both integral to the self government of the Blackfeet Tribe.

2. The Blackfeet Tribal Law and Order Code of 1967, as amended.

Pursuant to the Constitution of the Blackfeet Tribe, the Blackfeet Tribal Order Code of 1967, as amended, (BTLOC) in a duly noticed and convened special session on the 20th. day of November, 1967 by Resolution No. 25-67. See attached

as Exhibit “A”. It should be noted that this Resolution specifically mentioned Sections l(k) and 1(n) of Article VI of the Blackfeet Constitution as being in accordance with the “Federal Statutes as applicable in CFR-25”. (See Exhibit A)

Initially, the Code, as set out in Angela’s Brief, stated in Chapter 2, Section l, BTLOC , denominated “Civil Actions” that the Tribal Court and the State had concurrent and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe which is brought before the Courts. However, this Section and any other section referring to State jurisdiction was amended and essentially repealed by Ordinance 44, adopted by the Blackfeet Tribal Business Council on the 13th. day of December, 1974. See attached as Exhibit “B”. This Ordinance states emphatically that the State of Montana has no jurisdiction over The Blackfeet Tribal Law and Order Code of 1967, as amended, “. . . and further that any portion now in the Blackfeet Tribal Law and Order Code of 1967, as amended relating to concurrent jurisdiction with said State of Montana or giving any jurisdiction to the said State of Montana, be hereby deleted and such language shall be of no further force or effect.” (Exhibit B) This ordinance is now found as the preface to the Blackfeet Law and Order Code of 1967, as amended. This ordinance clearly shows that the Blackfeet Tribe was well aware of the language in its Code stating that the State of Montana had concurrent jurisdiction over some types of actions in the Tribal Court and that the Tribal Council went to great lengths to delete and

repeal any such language. The import of this action speaks volumes to the instant issue. In no way has the Blackfeet Tribe consented to any type of concurrent jurisdiction over the inheritance proceedings of Indian-owned fee land on the Blackfeet Reservation.

The Blackfeet Tribal Law and Order Code of 1967, as amended in Chapter 3, Section 4, states as follows:

“Section 4. DETERMINATION OF HEIRS.

When any member of the Tribe dies leaving property other than trust real estate or other trust property subject to the jurisdiction of the United States, any member claiming to be an heir of the decedent may bring suit in the Tribal Court to have the court determine the heirs of the decedent. No determination of the heirs shall be made unless all the possible heirs known to the Court, to the Superintendent, and to the claimant have been notified to the suit and given full opportunity to come before the Court and defend their interests. Possible heirs who are not residents of the Reservation under the jurisdiction of the Court must be notified by Registered Mail and a copy of the notices must be preserved in the record of the case.

In the determination of heirs the Court shall apply the custom of the Tribe as to inheritance if such custom is proved. Otherwise, the Court shall apply State law in deciding that relatives of the decedent are entitled to be his heirs. Where the estate of the decedent includes any interest in restricted allotted lands or other property held in trust by the United States, over which the Examiner of Inheritance would have jurisdiction, the Court may distribute only such property as does not come under the jurisdiction of the Examiner of Inheritance, and determination of heirs by the Court may be reviewed, on appeal, and the judgment of the Court modified or set aside by the Examiner of Inheritance, with the approval of the Secretary of the Interior, if the law and justice is required.

The Tribal Court may, in its discretion, turn over the question of determining heirs and distributing a decedent’s property to a state court.”

This section makes it very apparent that the Tribal Court takes exclusive jurisdiction over the probate of Indian-owned fee land within the Blackfeet Reservation. If, the Tribal Court desires, it may then pass such case over to a state court, but only in its discretion. This in no way negates the original exclusive jurisdiction of the Tribal Court in the instant case, but rather enhances and supports the Court's exclusivity.

Despite the arguments of Angela and Doug, the Tribal Court procedure on inheritance of Indian-owned fee land does not just mirror the laws of the State of Montana. The Section cited above states that the Tribe will first refer to the custom of the Tribe and then use the law of Montana, not the jurisdiction of Montana, as a guide in determining heirship. As stated in Julie and William's Briefs, this discretion of the Tribal Court on its use of both custom law and state inheritance principles is bolstered by the adoption of American Indian Probate Reform Act, 25 U.S.C.A. §2201 et.seq. (AIPRA) which was enacted to preempt any further encroachment by non-members in the inheritance of Indian land.

Despite the fact that William Big Springs, II died prior to the enactment of AIPRA, the issue of this preemption is still germane to this case. The utilization of both custom law of the Blackfeet Tribe and the guiding principles of AIPRA as applied to the probate of Indian-owned fee land within the Reservation preempts any use of the State of Montana's probate code.

It should be noted here, that little mention is made of custom law, but it is a valuable tool that can be used by the Tribal Court in the determination of heirs of an estate and to maintain the continuum of Indian ownership of the land. The laws of the Blackfeet Tribe are different from those of the State of Montana, both in use of custom law and in the use of determination of heirs. For instance, the Blackfeet Tribe does not recognize common law marriages, although the same have been recognized in the State of Montana. One of the reasons for this Blackfeet law is the fact that through intermarriage to non-Indians and Indians of other Tribes, the land disappears from Blackfeet ownership. This tribal law is used by the Administrative Law Judge in the probate of allotted Indian land as well as by Tribal Judges in the probate of Indian-owned fee land. The uniqueness of Blackfeet law and the need for that law to assist in staunching the loss of Indian ownership of land is why the Blackfeet Tribal Court has exclusive jurisdiction of the probate of resident Indian-owned fee land within the Blackfeet Reservation. This is an essential function of tribal government - to regulate the inheritance of Indian land, other than allotted land, which has been preempted by the Federal government. See *Montana v. United States*, 450 U.S. 544 (1983); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and the whole panoply of Indian law cases which

emanates from the discussion of the jurisdiction of Indian Tribes and their place as sovereign nations within the United States of America.

The statutory scheme found in the Blackfeet Tribal Law and Order Code of 1967, as amended supports the exclusive jurisdiction of the Blackfeet Tribal Court over probate cases of Tribal resident member-owned fee land within the Blackfeet Reservation.

B. THE BLACKFEET TRIBAL COURT.

The Blackfeet Tribal Court is a working court of general jurisdiction. It handles both criminal and civil cases, including probate cases and adoption cases. The probate cases are filed using forms developed by the Court and the laws of the Blackfeet Tribe are used in the determination of heirs and the distribution of the affected property, be it fee land owned by Blackfeet Tribal members residing on the Blackfeet Reservation or personalty. See *In re the Estate of Dan Boggs*, 2008 P 21, Blackfeet Tribal Court. In this case the Tribal Court probated the fee land of a deceased member of the Tribe, determined his heirs and distributed the estate.

The forum is set and the laws are enacted for the civil probate jurisdiction of the Blackfeet Tribal Court. The probate of an enrolled members non-trust estate, the adoption of members of the Blackfeet Tribe, the appointment of guardians for minors and incompetent persons are all exclusive to the jurisdiction of the Blackfeet Tribal Court and are some of the most basic tenants of sovereignty and

self-government. To contravene any of these processes is an incursion into the sovereignty of the Blackfeet Tribe and a negative effect to the welfare of the Tribe.

C. DISTINGUISHING *PLAINS COMMERCE BANK v LONG FAMILY & CATTLE CO.*

The decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 544 U.S. ___, 128 S.Ct. 2709 (2008) has no application to the present case. *Plains Commerce* dealt with the issue of tribal jurisdiction over *non-member fee land*, and application of the “Montana test” , *Montana v. U.S.*, *supra*, or purposes of determining jurisdiction in those circumstances, 128 S.Ct. @ 2720, (“[t]his case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals.”) *See* 544 U.S. at ___ (“[t]he Longs’ discrimination claim challenges a non-Indian’s sale of non-Indian fee land.”) The present case involves tribal jurisdiction over the probate of property of a Blackfeet tribal member located on the reservation. As such, tribal jurisdiction is exclusive.

The District Court acknowledged that *Plains Commerce* is distinguishable on its facts. Slip Op. at 6. Nevertheless, the District Court relied on general statements in the decision to the effect that Indian tribes have no authority over fee lands. Slip Op. at 5-6. Such statements are not dispositive of tribal jurisdiction over *Indian fee lands*, however, and no decision of the Supreme Court has

definitively addressed this issue. Indeed, the cases on which the Supreme Court relies for the general statements relating to fee land, *County of Yakima v.*

Confederated Tribes of Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) and *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), both involve non-Indian fee lands and do not address any issues relating to Indian fee lands.

Moreover, the Court's analysis in *Plains Commerce* is directed to application of the "Montana test," a test that has no application to Indian activities. It is clear that *Plains Commerce* did not address any issues relating to Indian fee land and cannot be relied on to determine jurisdiction in this case.

D. APPELLANTS' ARGUMENT.

The Blackfeet Tribe has, in this Brief, centered on the law of the Blackfeet Tribe and its application to the instant case. The Blackfeet Tribe does very much approve of and agree with, the Appellants' arguments both in their Brief and in their Reply Brief. Therefore, the Blackfeet Tribe adopts the reasoning in Julie and William's Brief as its own.

CONCLUSION

The Blackfeet Tribe asserts most strenuously its exclusive jurisdiction in this case. The Tribe's organic documents and its laws, coupled with the myriad decisions of the United States Supreme Court and some of the decisions of the

Montana Supreme Court, all point to the fact that the Blackfeet Tribe has the exclusive right to regulate the inheritance of fee land belonging to tribal members living on the Blackfeet Reservation. As quoted in the Brief of Julie and William, "Inheritance is perhaps the most traditional and customary aspect of tribal law, and state jurisdiction would probably represent the greatest intrusion imaginable on the right of Indians to manage their internal affairs." *Canby, American Indian Law* NS, 2nd. ed. (1994), pg. 165. The opinion of District Judge McKinnon is wrong, does not follow the established law and must be reversed.

DATED this 27th day of August, 2010.

BLACKFEET LEGAL DEPARTMENT

BY:


SANDRA K. WATTS

Tribal Attorney

Blackfeet Legal Department

P. O. Box 849

Browning, MT 59417

Attorney for Blackfeet Tribe

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing Amicus Curiae Brief of the Blackfeet Tribe, and that I served a true and accurate copy of the foregoing Amicus Curiae Brief with the Clerk of the Montana Supreme Court on August 28, 2010; and that I have served true and accurate copies of the foregoing Amicus Curiae Brief of the Blackfeet Tribe upon each attorney of record, and each party not represented by an attorney in the above-referenced action, by U.S. Mail, postage prepaid thereon, at their addresses as listed in the court records as follows:

Joe J. McKay
P. O. Box 1803
Browning, MT 59417
Appellant's Attorney

Linda Hewitt Conners
Attorney at Law
P. O. Box 7310
Kalispell, MT 59904
Attorney for Appellee Doug Eckerson

Ron A. Nelson
Burt N. Hurwitz
Church, Harris, Johnson & Williams, P.C.
P. O. Box 1645
Great Falls, MT 59403-1645
Attorney for Appellee Angela Conway

Georgia Eckerson, aka Georgia Melton
133 3rd Avenue NW
Cut Bank, MT 59427
Appellee

DATED this 27th. Day of August, 2010.



SANDRA K. WATTS