No. 10-408

In the
Supreme Court of the United States

GLACIER ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

THE ESTATE OF SCOTT SHERBURNE, RON BIRD AND HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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I.

REVIEW OF THE NINTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

At issue is a *sua sponte* ruling that issue preclusion bars consideration of injunctive relief where a tribal court has ordered enforcement of a money judgment against non-Indian assets, even where the trial lacked due process. *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001).

In *Bird,* a comity proceeding, GEC did not appeal tribal court subject matter jurisdiction under the two exceptions in *Montana v. United States,* 450 U.S. 544, 564-66 (1981), concentrating instead on the lack of due process. A consideration of the tribal court's *jurisdiction to enforce the judgment on its own* was not necessary to the decision not to extend comity. That is self-evident from the decision: "we do [not] address whether there may be further proceedings in the tribal court." *Id.* at 1139 n.2. The Ninth Circuit held that the lack of due process *alone* prevented federal recognition and enforcement of the tribal judgment. *Id.* at 1152. Now, GEC's failure to appeal the issue of tribal subject matter jurisdiction in that proceeding has been given preclusive effect in GEC's action for injunctive and declaratory relief from tribal court orders allowing enforcement of the money judgment, notwithstanding the lack of due process.

Due process is "perhaps the most majestic concept in our whole constitutional system." *Joint Anti-Facist Refugee Comm. v. McGrath,* 341 U.S. 123, 174 (1951). "[W]here no judicial resources have been spent on resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte,* thereby eroding the principle of [due process] so basic to our system of adjudication." *Arizona v. California,* 530 U.S. 392, 412-13 (2000). The *sua sponte* ruling in district court gave GEC no chance to brief this issue or respond meaningfully at the summary judgment hearing, where in any event, the district court did not apply the correct preclusion doctrine. In the Ninth Circuit and other circuits, issue preclusion is a matter of law reviewed de novo; careful analysis is necessary to determine whether it has been properly applied. *See, e.g., McQuillon v. Schwarzennegger,* 369 F.3d 1091, 1096 (9th Cir. 2004); *United States v. Weiss,* 467 F.3d 1300, 1308 (11th Cir. 2006).

This *sua sponte* decision, and the Ninth Circuit's affirmance, has precluded consideration of the relief GEC sought in federal court: to enjoin Respondents from continuing their tribal court enforcement efforts against non-Indian assets within the exterior boundaries of the Blackfeet reservation. Pet. 6-7; Pet. App. 16a. In its Question Presented and Opposition, Respondents would have this Court believe the only issue is whether GEC may challenge for a second time the tribal court's subject matter jurisdiction: "[w]hether labeled '*res judicata*' or 'issue preclusion', the petitioner is not entitled to revisit subject matter jurisdiction or collaterally attack the decision . . .on subject matter jurisdiction." Opp. 6. The Opposition does not meaningfully refute any of GEC's cogent arguments why issue preclusion is not appropriate.

So far as GEC is aware, where a federal court has declined to recognize and enforce a tribal judgment for lack of due process, no federal court has decided that the losing party is nonetheless entitled to pursue enforcement against non-Indian assets *in the tribal court*, the very court whose proceedings lacked due process. Whether such an issue is barred by issue preclusion is squarely before this Court.

GEC contends that the tribal court's subject matter jurisdiction to order enforcement of the defective judgment has not only not been decided, but is nonwaivable and may be brought at any time. "Because tribal court jurisdiction is an issue of subject matter jurisdiction, it may not be waived, and Town Pump may raise the issue at any time during the suit." *Town Pump v. LaPlante,* 2010 WL 3469578, *1 (9th Cir. Sept. 3, 2010); *accord, Nevada v. Hicks,* 533 U.S. 353, 373 (2001)(challenges to tribal court jurisdiction "would presumably be nonwaivable"); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221, 1228 (9th Cir. 1989)("a party cannot waive by consent or contract a [tribal] court's lack of subject matter jurisdiction"). While Respondents argue GEC "abandoned" the jurisdictional issue, Opp. 2, waiver is defined as "[t]he voluntary relinquishment or *abandonment* . . . of a legal right[.]" *BLACK'S LAW DICTIONARY* 1574 (7th Deluxe ed. 1999)(emphasis added). Thus GEC's right to question the tribal court's subject matter jurisdiction to order enforcement is not waived by allegations of "abandonment." Again, no determination of this issue was necessary – or made – in *Bird;* the only issue was whether *the federal court* should recognize and enforce the judgment. The subject matter jurisdiction of the tribal court to order

enforcement of its defective judgment has never been litigated to a final decision. It cannot be precluded.

In the Indian Civil Rights Act of 1968 (ICRA), Congress directs: "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8). Section 1302(8) incorporates this language from the Fifth Amendment. Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective,* 76 N. DAK. L. REV. 311, 363 n.18 (2000). The Blackfeet tribal courts adopted Anglo-Saxon law and procedures. *Bird,* 255 F.3d at 1143-44 & n.13; SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS–THE COSTS OF SEPARATE JUSTICE* 17 (1978). Consequently, there is no concept or notion of Blackfeet due process that differs from this Court's concept of due process. Blackfeet decisions extol due process for litigants in their courts. *See, e.g., Brown v. Schlact,* No. 95-CA-40 ("the Court is . . . compelled to consider the fairness to all parties . . . under long-standing principles of justice embraced by the Blackfeet Code and Constitution"). Pet. App. 248a. "[T]he avowed aspiration of the [Blackfeet] chief judge is that the court be 'just like the regular [white] courts.'" BRAKEL, *AMERICAN INDIAN TRIBAL COURTS–THE COSTS OF SEPARATE JUSTICE* 70. There is no reason to defer to any Blackfeet due process notion, because there is none. The closing argument here was in contravention of all parties' notions of due process.

Because there is no separation of Blackfeet/Anglo-Saxon due process, and given Congress's mandate that non-Indians must be afforded due process in tribal courts, this Court's decision in *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 69-72 (1978) – that the sole remedy for a due process violation in tribal court is habeas review of the legality of detention – might be revisited. GEC was precluded from making such an argument because of the *sua sponte* ruling and the Ninth Circuit's affirmance. Pet. App. 1a-3a.

Given the Congressional mandate of due process and the acknowledged Blackfeet adoption of Anglo-Saxon law, a federal court may declare GEC's due process rights in tribal court and consider whether Respondents should be enjoined from enforcing the judgment against the assets of a non-Indian corporation on non-Indian fee land and/or Congressionally granted utility rights-of-way, *including collecting payments due* for electricity that is administrated, generated, and transmitted on non-Indian land. This is a question of federal law, just as are federal determinations of tribal jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 857 (1985)("§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction"). This Court recognizes "Congress's desire to extend the [IRCA's] guarantees to non-Indians if and where they come under a tribe's . . . *civil jurisdiction.*" *Oliphant v. The Suquamish Indian Tribe,* 435 U.S. 191, 196 n.6 (1978)(emphasis added). If that is true, and Blackfeet due process is identical to this Court's due process, why should habeas relief be the only remedy for a violation of 25 U.S.C. § 1302(8)?

This Court should settle this law by granting the Petition to enable consideration of the real issues this case presents, either by considering them in this Court

as a matter of law, or by remanding for a lower federal court to decide in the first instance.

II.

REVIEW OF THE NINTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL LAW THAT THE CIRCUIT HAS DECIDED IN CONFLICT WITH OTHER CIRCUITS AND RELEVANT DECISIONS OF THIS COURT

This Court holds that issue preclusion must be analyzed in light of past and current facts, as well as recent precedent and Constitutional concerns, to determine if it is applicable and – even if it is – whether there are special circumstances *not* to apply it. *See* Pet. 10-29. The district court and Ninth Circuit did not do so. Instead, both courts treated preclusion as self-evident because GEC did not appeal the tribal jurisdiction, when an appeal based on due process clearly was sufficient for purposes of comity. *Ipso facto*, these courts concluded the tribal court may enforce its judgment because all other issues are precluded. When federal appellate courts issue dispositions on issue preclusion, usually the analysis is thorough. *See, e.g., Irvin v. United States,* 335 Fed. Appx. 821 (11th Cir. 2009).

In contrast, this Court holds that jurisdiction is a *separate* question from what relief, if any, is available. *Davis v. Passman,* 442 U.S. 228, 239 n.18 (1979); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers,* 390 U.S. 557, 561 (1968). This precedent should be especially true where the Congressionally-mandated due process was lacking,

and where the district court's *sua sponte* order gave GEC no chance to be heard on the question of issue preclusion, further violating GEC's due process rights. *California Diversified Promotions, Inc. v. Musick,* 505 F.2d 278, 180-81 (9th Cir. 1974).

In the usual case, even if there is jurisdiction, a judgment rendered without due process may not be enforced; it is void. *Espinoza v. United Student Aid Funds,* 553 F.3d 1193, 1202 (9th Cir. 2008). Jurisdiction and due process are the *sine qua non* of federal court recognition and enforcement of tribal judgments in comity proceedings. *Wilson v. Marchington,* 127 F.3d 805, 810 (9th Cir. 1997). If this Court holds that a tribal judgment may be declared null and void for lack of jurisdiction, *Plains,* 128 S. Ct. at 2717, this Court should also be able to decide whether a tribal judgment may be declared null and void for lack of due process, especially where no deference is indicated. Short of requesting a declaration that such a judgment is null and void, GEC should still have the *opportunity* to argue that a federal court may enjoin Respondents from pursuing their enforcement efforts in tribal court. *Cf. Burrell v. Armijo,* 456 F.3d 1159, 1166, 1170-73 (10th Cir. 2006)(Tenth Circuit concludes, unlike the Ninth Circuit here, that issue preclusion does not bar consideration of the merits where there is a fundamental lack of due process).

What is more, even if GEC had appealed tribal subject matter jurisdiction to try the case under the *Montana* exceptions in *Bird* and lost, that would have no effect on the determination that the tribal court trial lacked due process. The same questions posed here would remain. And, since Respondents are

seeking non-Indian assets on non-Indian land and Congressionally-mandated rights-of-way within the exterior boundaries of the reservation, and seeking to seize payments due for electricity transmitted on those rights-of-way, there is a conflict with this Court's decision in *Plains*. *Plains* holds that the *Montana* exceptions do not grant tribes automatic regulatory or adjudicatory authority over a non-member, and especially not on non-tribal land where, even now, this tribal enforcement is taking place. 128 S. Ct. at 2722.

III.

MISSTATEMENTS OF FACT AND LAW

Respondents claim no argument was made post-judgment to the Blackfeet appeals court regarding lack of due process *in closing argument.* Opp. 1. This implies there was no fair opportunity for the appellate court to consider GEC's due process concerns. But, Paragraph 25 of the Notice of Appeal to the Blackfeet Appellate Court states: *"The entire proceedings* were conducted in such a fashion as to violate the Co-op's rights to procedural and substantive due process." Reply App. 7a. This encompasses the closing argument. And, the Notice of Appeal states that the damages appear "to have been given under the influence of passion or prejudice," Reply App. 6a, para. 18, and challenges the "all-Indian jury in violation of the Co-op's rights to due process and equal protection of the law." Reply App. 4a, para. 11. GEC's Opening Brief in that appeal discusses not only the all-Indian jury, but the due process requirements of section 1302(8) as well. Reply App. 10a-12a. The Brief points out that Respondents' attorney elicited improper opinions "that GEC and its manager Bill Chapman are

racists," Reply App. 12a, which came through loud and clear in the closing argument quoted at length in *Bird*, 255 F.3d at 1149-50. Five pages of the Opening Brief (Reply App. 14a-18a) are devoted to the damages awarded and the fact they could only have resulted from passion and prejudice, concluding:

> [T]here can be little doubt that the highly inflammatory manner in which the plaintiffs' attorney tried the case was designed to achieve exactly this result. The plaintiffs were aided in no small part in achieving this result by the trial court's failure to sustain GEC's repeated objections to the immaterial, incompetent, speculative and highly prejudicial evidence plaintiffs relied upon to prove that RACISM was the motivation behind all of GEC's actions.

Reply App. 16a-17a. Finally, the Conclusion to the Opening Brief leaves no doubt that the Blackfeet appellate court had notice of GEC's due process argument concerning the entire trial, including closing argument:

> From start to finish, the trial court proceedings in this case were handled in such a manner as to deprive GEC of the fundamental right to a fair trial. . . . Judge Sellars consistently failed to apply the law in an evenhanded fashion, so that the result would be one which both sides in this action would consider to be fair and just.

Reply App. 18a-19a.

Respondents argue GEC raised no "special circumstances" arguments before the district court.

Opp. 2-3. But, *Respondents* made no arguments there regarding issue preclusion, and this ball was in their court. That is why the district court made its *sua sponte* "res judicata" ruling, albeit with the wrong preclusion doctrine. *See Migra v. Warren City School Dist. Bd. of Education,* 465 U.S. 75 (1984)(explaining the difference between preclusion doctrines). This Court has applied the "special circumstances" exception specifically to issue preclusion. *Montana v. United States,* 440 U.S. 147, 162-63 (1979). Thus, because Respondents did not argue issue preclusion at all, there was no occasion for GEC to bring up the special circumstances exceptions – including border security – until it challenged the district court's *sua sponte* ruling on appeal. What is more, the affidavit of GEC's manager quoted in GEC's Petition at 27-28 explaining this danger was attached to GEC's Complaint for Injunctive and Declaratory Relief. Pet. App. 151a-152a. Respondents' statement that this was "not raised before the district court" is false. Opp. 7.

Respondents claim the Complaint for Injunctive and Declaratory Relief did not raise any due process grounds. Opp. 2-3. This assertion is also false. Not only did GEC argue the lack of due process given the decision in *Bird,* Pet. App. 144a-145a, paras. 15 & 16, but it also requested relief on those due process grounds. Pet. App. 150a, para. 2. This correction also applies to Respondents' argument that Paragraph 28 of the Complaint makes it clear that only subject matter jurisdiction is challenged. Opp. 3.

Finally, Respondents claim that they sought "and obtained a declaration that the policy of insurance would apply to the judgment entered against petitioner." Opp. 7. However, that action for a

declaratory judgment was filed in tribal court. GEC and the insurer, Federated Rural Electric Insurance Cooperative ("Federated"), moved to dismiss for lack of jurisdiction, among other things. That motion to dismiss was never decided. Instead, the tribal court granted summary judgment in favor of coverage. In 1994, Federated timely filed a notice of appeal, but the appeal has never been acted upon. All of this information was before the district court in GEC's Brief in Support of Plaintiff's Motion for Summary Judgment, filed August 4, 2008, including citations to the relevant records in the tribal court. Reply App. 21a-22a. Thus, the matter of insurance coverage – while completely irrelevant to the issues here – is not as simple as Respondents would have this Court believe.

CONCLUSION

"A federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *National Farmers Union,* 471 U.S. at 853. This determination is abrogated when it is erroneously assumed that issue preclusion bars review of: (1) whether a tribal court has jurisdiction to enforce a judgment despite the lack of due process; (2) whether that court has jurisdiction to order seizure of non-Indian assets on non-Indian land and payments due from the administration, transmission, production, and provision of electricity over non-Indian land; and (3) whether, in the exercise of that jurisdiction, the tribal court threatens the security of the U.S./ Canada border by ordering seizure of payments for electrical service where Respondents admit that "[a] majority of the individual customers of Glacier Electric Cooperative are members of the Blackfeet Tribe and

reside within the exterior boundaries of the Blackfeet Reservation" and that "[a]pproximately eighty percent (80%) of [GEC's] members are individuals and businesses that reside on the Blackfeet Reservation." Opp. 1. It is surely obvious that seizure of payments will severely hamper GEC's ability to provide electricity to the border stations, if not prevent it outright.

This Court should grant the Petition so that it may be determined whether Blackfeet tribal enforcement of a judgment rendered without due process is an unlawful exercise of tribal court judicial power. GEC has a right to be protected against such an unlawful exercise of tribal authority.

Respectfully submitted,

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