

**Case No:** 10-35455

**Court Name:** United States Court of Appeals for the Ninth Circuit

**Case Title:** K2 America Corporation (Plaintiff-Appellant) v. Roland Oil & Gas, LLC (Defendant-Appellee)

**Nature of Proceeding:** Appeal

**Name of Court Below:** U.S. District Court, District of Montana, Great Falls Division

**Document Title:** Appellant's Opening Brief

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

K2 AMERICA CORPORATION,

Plaintiff – Appellant,

v.

ROLAND OIL & GAS, LLC

Defendant – Appellee.

NO. 10-35455

D.C. No. 4:09-cv-00076-RKS  
U.S. District Court for Montana,  
Great Falls

APPELLANT'S OPENING BRIEF

CORPORATE DISCLOSURE STATEMENT

COMES NOW K2 America Corporation and, pursuant to FED. R. APP. P. 26.1, hereby states that it is a wholly owned subsidiary of Guardian Exploration Inc. ("Guardian"). Guardian is a publicly held company which is traded on the Toronto Stock Exchange.

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JURISDICTIONAL STATEMENT

I. *Basis of District Court's Subject Matter Jurisdiction:*

The District Court's subject matter jurisdiction is the sole issue raised in this appeal. The District Court has subject matter jurisdiction based on the preemptive effect of federal law governing transfers of interests held in trust by the United States on behalf of Indians. *See* 28 U.S.C.A. 1360(b) (West 2010).

II. *Basis for the Court of Appeals' Subject Matter Jurisdiction:*

The Ninth Circuit Court of Appeals has jurisdiction pursuant to 28 U.S.C.A. § 1291. The Order from which Appellant appeals is the Order Dismissing for Lack of Jurisdiction entered on April 15, 2010 by the Hon. Keith Strong, United States Magistrate Judge for the United States District Court, District of Montana, Great Falls Division ("Dismissal Order").

III. *Filing Dates Establishing the Timeliness of the Appeal:*

The Dismissal Order was entered on April 15, 2010. On May 14, 2010, Appellant filed in the District Court action a Notice of Appeal in accordance with the Federal Rules of Appellate Procedure.

IV. *Assertion of Final Order or Judgment:*

The Dismissal Order is a final order which disposes of all of the parties' claims for lack of jurisdiction. *In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001).

## I. STATEMENT OF THE ISSUE

I. Whether the district court erred when it dismissed Appellant's action based on lack of subject matter jurisdiction.

## II. STATEMENT OF THE CASE

On August 21, 2009, the Plaintiff-Appellant, K2 America Corp. ("K2"), filed suit against the Defendant-Appellee Roland Oil & Gas (sometimes, "Roland") in the United States District Court for the District of Montana. K2 brought claims for tortious interference with prospective economic advantage, misappropriation of trade secrets, conversion, civil conspiracy, and implied contract/unjust enrichment. K2 also brought claims for constructive trust and declaratory judgment, contending that it is the rightful owner of a certain oil and gas lease purchased by Roland. The lands covered by that lease are owned by the United States in trust for the benefit of numerous owners. The Defendant answered and counterclaimed, raising a tortious interference with contract claim. The parties consented to pretrial procedures and trial before a magistrate judge. The Defendant moved to dismiss in January, 2010 arguing lack of subject matter jurisdiction for failure to exhaust tribal remedies (among other unrelated arguments). K2 responded to the Defendant's various arguments, and contended that the action was within the court's subject matter jurisdiction because of the preemptive effect of federal law

governing interests in lands held in trust by the United States on behalf of Indians. After the motion was fully briefed, the district court dismissed the case for lack of subject matter jurisdiction on April 15, 2010.

### III. STATEMENT OF FACTS

The following facts are set forth in K2's Complaint, which are to be taken as true for purposes of this Court's appellate review of the Dismissal Order. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

K2 is a Montana corporation whose primary business is exploration and production of oil and gas resources. (Compl. ¶ 1.) Defendant is a Montana limited liability company whose primary business is exploration and production of oil and gas resources. (*Id.* ¶ 2.)

From about 2004 to 2008, K2 retained a man named John Harper ("Harper") as its contract operator to assist K2 in its oil and gas development on the Blackfeet Indian Reservation. (*Id.* ¶ 6.) K2 hired Harper to perform (among other duties) well siting and site preparation, drilling and completion operations, production operations, and operations relating to abandonment and reclamation. (*Id.*) Harper assumed a position of trust and confidence in the performance of his contract operator duties, and acquired confidential and proprietary information including protected trade secrets. (*Id.* ¶ 7.) Among the information acquired by Harper were

K2's strategic business plans and prospective oil and gas lease acquisitions. (*Id.*) Specifically relevant to the case at bar, Harper learned that K2 was going to pursue oil and gas leases in an area designated by K2 as the "Kye Trout" area. (*Id.* ¶ 8.) The specific area in which K2 had a prospective interest was 600 acres located in Sections 5 and 6, Township 31 North, Range 5 West, Montana Principal Meridian. (*Id.*) The portion located in Section 6, Township 31 North, Range 5 West is allotted land, wherein title is held by the United States in trust for the benefit of Indian allottees. (*Id.*)

K2's planned acquisitions were based on geologic, engineering and other data and analyses obtained or developed by K2. (*Id.* ¶ 10.) K2 furnished information to Harper with the intent that he use it to further K2's business interests. (*Id.*) Rather than using the information furnished to him to further K2's interests, however, Harper formed the Defendant for the very purpose of acquiring oil and gas leases in the Kye Trout area. (*Id.* ¶ 11.) Harper solicited capital and other assistance from Robert E. Miller ("Miller") in the formation of Defendant and thereafter acquired leases covering K2's prospective area. (*Id.* ¶ 12.) Miller and/or various entities in which Miller owns an interest are competitors of K2, and Harper was aware of the competitive relationship when he sought Miller's assistance. (*Id.*) K2's action seeks title to and possession of only that lease covering the allotted lands in Section 6. (*Id.* ¶¶ 8-9, 39-47.) K2's action does not

seek title or possession to the lease covering Section 5. (*Id.*) K2 seeks only money damages as to that lease. (*Id.* ¶¶ 14-38.)

#### IV. SUMMARY OF ARGUMENT

The district court committed reversible error by dismissing K2's Complaint for lack of subject matter jurisdiction. K2's claims fall within an area which is preempted by federal law and within the exclusive jurisdiction of the federal courts. The complete preemption exception to the well-pleaded complaint rule applies to K2's cause of action and, as such, K2's complaint was facially sufficient to invoke the district court's subject matter jurisdiction.

#### V. ARGUMENT

##### **A. The District Court Erred by Failing to Recognize that K2's Claims Are Preempted by Federal Law and Therefore within the Exclusive Jurisdiction of the Federal Courts.**

In its Complaint, K2 asserted jurisdiction under 28 U.S.C.A. § 1360(b). This statute is part of Public Law 280, enacted by Congress in 1953. Subsection (a) relates to the grant of civil jurisdiction to certain states over disputes arising in Indian country to which at least one party is an Indian. 28 U.S.C.A. §1360(a). Subsection (b) is an express limitation on the grant of jurisdiction under subsection (a). It states,

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.*

28 U.S.C.A. § 1360(b) (emphasis added).

K2 demonstrated to the district court that numerous other courts interpret § 1360(b) as an acknowledgment of exclusive federal court jurisdiction over actions concerning ownership or possession of any interest in lands held in trust by the United States for the benefit of Indians. (*See* Pl.'s Resp. to Def.'s Mot. to Dismiss 8-14.) Specifically, in its response brief, K2: (1) noted the exclusive federal jurisdiction over lands held in trust or restricted status and the preemptive effect of federal law in this realm (*id.* 8-9), (2) identified the specific federal statutory and regulatory scheme governing the lease in question (the Allotted Lands Leasing Act, 25 U.S.C.A. § 396 (West 2010)) and regulations thereunder (25 C.F.R. pt. 212 (1996)) (Pl.'s Resp. to Def.'s Mot. to Dismiss 10), and (3) discussed how the Supreme Courts of California, Alaska, and Montana all interpret § 1360(b) as a mandate that all disputes falling within the last clause of § 1360(b) be channeled into federal court (*id.* 10-13.)

The district court nonetheless dismissed the action. (*See* Order Dismissing for Lack of Jurisdiction). The district court held that no basis for jurisdiction existed within the four corners of the complaint. (*Id.*, p. 2). The court rejected the argument that § 1360(b) confers federal court jurisdiction (*id.*, pp. 2-4) and stated that K2 must plead a claim under a distinct federal law in order for the court to have federal question jurisdiction (*id.* at 4-5).

The determinative issue for purposes of this appeal is whether § 1360(b) delineates the scope of preemptive federal jurisdiction over lands held in trust for the benefit of Indians. If the answer is in the affirmative, then the district court had jurisdiction. Moreover, if the answer is in the affirmative, then K2 had no obligation to plead any other federal law as the basis for subject matter jurisdiction. This Court must review the district court's actions *de novo*. *In re Ford Motor Co.*, 264 F.3d at 957. The question is whether the allegations in K2's Complaint, taken as true, invoked the subject matter jurisdiction of the district court. *Doe*, 557 F.3d at 1073.

*1. The Last Clause in 28 U.S.C.A. § 1360(b) Codifies the Scope of Federal Preemption and Therefore Identifies the Classes of Cases that Must Be Brought in Federal Court.*

The California Supreme Court has provided the most detailed analysis of the intent behind and effect of § 1360(b). In *Boisclair v. Superior Court*, Imperial Granite Company brought a suit asserting easement rights over certain Indian trust

land. 801 P.2d 305, 307-08 (Cal. 1990) (*en banc*). At issue on appeal was whether the state court had jurisdiction to adjudicate the dispute in light of 28 U.S.C.A. § 1360(b). *Id.* at 307. Finding that the lower court did not have jurisdiction, the California Supreme Court held that § 1360(b) codifies the scope of federal preemption over Indian property disputes and, as a consequence, identifies the scope of actions that must be filed in federal court. *See id.* 310-15.

The *Boisclair* court first discussed the historic origins of federal preemption and exclusive federal jurisdiction over Indian property. *Id.* at 309-10. Next, the court analyzed the legislative history behind 1360(b) and concluded that it embodies “the principle that the exclusive federal-Indian trust relationship is best maintained by channeling all disputes about such land into federal court.” *Id.* at 311. Finally, in light of these principles, it analyzed Imperial Granite Company’s easement claims. Relying primarily on the plain language of § 1360(b), the court held that the state did not have jurisdiction to adjudicate the dispute. *Id.* at 313. The court indicated that actions like K2’s – where the property is admittedly trust land and the dispute concerns an “interest therein” – fall squarely within the area of exclusive federal jurisdiction. *Id.* at 312-13, 315. Actions where the trust status of the land is disputed, however, are more on the fringe because a state court may have jurisdiction depending upon further factual development. Nevertheless, even

these cases should be initially “shunted into federal court” until it is shown that the land is not in fact trust land. *Id.* at 313.

The Supreme Courts of both Alaska and Montana adhere to the reasoning in *Boisclair*. In *Heffle v. Alaska*, the Alaska Supreme Court considered whether a state court had jurisdiction to enter an injunction restraining an allottee from blocking an easement. 633 P.2d 264, 266-67 (Alaska 1981). After discussing congressional policy regarding Indians and the legislative history behind § 1360(b), the *Heffle* court concluded that the state courts did not have subject matter jurisdiction because the propriety of an injunction depended upon an adjudication of interests in an easement crossing an allotment. *Id.* at 268-69. The court said: “Since we conclude that state courts cannot accept this case without improperly deciding questions reserved exclusively to the federal courts, it appears that filing the case in federal court . . . is the state’s proper course if it wishes to pursue the matter further.” *Id.* at 269.

In *Krause v. Neuman*, the Montana Supreme Court similarly concluded that the state courts could not adjudicate a dispute concerning the sale of lands from an Indian allottee to non-Indians. 943 P.2d 1328 (Mont. 1997). Given that the defendant was allottee whose land was held in trust by the United States, and that the suit involved issues of title, the Montana Supreme Court found that the action

was preempted by federal law under three distinct federal statutes – one of which was § 1360(b) – and that the case had to be adjudicated in federal court. *Id.* at 1331-33. The court held that removal of the equitable claim for specific performance did not change the result, since the money damages claims also hinge on the issue of title. *Id.* at 1333; *see also Unalachtigo Band of the Nanticoke Lenni Lanape Nation v. New Jersey*, 867 A.2d 1222,1228-29 (N.J. Super. Ct. App. Div. 2005); *Foster v. Alaska*, 34 P.3d 1288, 1290 (Alaska 2001) (“But § 1360(b) reserves for the federal courts jurisdiction over questions involving the ownership or right to possession of property held in trust by the United States or subject to a restriction against alienation imposed by the United States.); *Crow Tribe of Indians v. Deernose*, 487 P.2d 1133, 1134 (Mont. 1971) (“Unless jurisdiction had been granted state courts by Act of Congress, the federal courts have exclusive jurisdiction over foreclosure actions involving Indian trust lands.”).

Other statutes confirm that the last clause in § 1360(b) delineates the scope of federal preemption and federal court jurisdiction over trust lands. For example, 25 U.S.C.A. § 1322 allows for other states to assume civil jurisdiction over actions involving one or more Indian parties where the pertinent tribe consents to such assumption. 25 U.S.C.A. § 1322(a). Subsection (b) of § 1322 reiterates § 1360(b), with the exact same language concerning federal preemption over Indian property law. *Id.* § 1360(b); *see also* 25 U.S.C.A. § 416i. (West 2010). At the state level,

Montana (like other states), has a statute that mirrors § 1360(b). MONT. CODE ANN. § 2-1-304(3) (West 2010). These statutes are all a recognition of the United States government's plenary authority over Indians and their lands, and the preemptive effect of federal law in this area. They confirm that there is no need for a federal statute to confer jurisdiction on federal courts over Indian property disputes. Federal courts have always had jurisdiction over such disputes, and this jurisdiction has been guardedly reserved when Congress has chosen to allow for state civil jurisdiction over actions involving Indians and arising in Indian country.

*2. K2's Complaint Was Facially Sufficient to Invoke the District Court's Jurisdiction.*

The district court erred when it found that K2's Complaint did not invoke its subject matter jurisdiction. Although it did not use the term, it appears that the District Court relied on the "well-pleaded complaint rule" to find that K2 did not adequately plead subject matter jurisdiction. (*See Order Dismissing for Lack of Subject Matter Jurisdiction 2.*) This rule says that subject matter jurisdiction must be determined from the face of the well-pleaded complaint. *Boisclair*, 801 P.2d at 314-15.

The Federal Rules of Civil Procedure require K2 to merely provide "a short and plain statement of the grounds for the court's jurisdiction . . . ." FED. R. CIV. P. 8(a)(1). The specific jurisdictional statute need not be pleaded, provided the

plaintiff has pled adequate facts to otherwise support federal court jurisdiction. *Williams v. U.S.*, 405 F.2d 951, 954 (9th Cir. 1969). Jurisdiction should be sustained when it is apparent on a fair reading of the complaint.

Regardless, the district court's decision failed to recognize the "complete preemption" exception to the well-pleaded complaint rule. This rule says that, "Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar v. Williams*, 482 U.S. 386, 393 (1987); *see also Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457-58 (9th Cir. 1986) (discussing when federal courts apply state law in federal cases). The United States Supreme Court affirmed the application of the complete preemption doctrine to disputes involving trust lands when it said that a "state-law complaint that alleges a present right to possession of Indian tribal lands necessarily asserts a present right to possession under federal law,' and is thus completely preempted and arises under federal law." *Id.* at 393 n. 8; *see also Boisclair*, 801 P.2d at 315. The Ninth Circuit has similarly recognized that the complete preemption doctrine is applicable to actions involving possession of or title to Indian lands. *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 n.3 (9th Cir. 1993).

Thus, K2's claims are federal claims which arise under federal law by virtue of the complete preemption doctrine. The result is that the district court has subject matter jurisdiction under 28 U.S.C.A. § 1331 regardless of whether K2 characterized that jurisdiction as arising under 28 U.S.C.A. § 1360(b). The district court erred when it suggested that K2 has to more specifically plead federal question jurisdiction under a federal statute other than § 1360(b). (Order Dismissing for Lack of Jurisdiction 4.) Had K2 pled the exact same case in Montana state court, the Defendant could have either moved to dismiss under § 1360(b) or removed the action to federal court.

*Heffle* reinforces K2's position in this regard. There, the defendant sought to remove the case to federal court. *Heffle*, 633 P.2d at 269. The federal district court denied removal because the complaint facially was simply an action for obstruction of a highway under state law. *Id.* There were no allegations that the lands traversed by the highway were a native allotment or that the action raised issues of title or possession to trust lands. *Id.* Had there been such allegations, the federal court would have sustained the defendant's removal: "[a]ny adjudication of title, claim, right or interests in an Alaska Native Allotment held in trust by the United States . . . is within the exclusive jurisdiction of the federal courts and must be determined in a separate action in this court." *Id.* Here, in contrast, K2 has alleged that certain disputed lands are allotted and held in trust by the United States

(Compl. ¶ 9), and K2 has sought title to and possession of an interest in those lands (*i.e.*, an oil and gas lease) (*id.* ¶¶ 39-47). K2's reference to § 1360(b) in the Complaint, taken together with the other allegations and the legal argument in its briefing, clearly demonstrate that K2 properly invoked the lower court's subject matter jurisdiction. (*See* Pl.'s Resp. to Def.'s Mot. to Dismiss 12 n.2) ("*Heffle* indicates that actions under §1360(b) also present federal questions so as to give rise to jurisdiction under § 1331."). To require K2 to specifically allege "federal common law" and jurisdiction under 28 U.S.C.A. § 1331 would ignore the complete preemption doctrine and elevate form over substance.

## VI. CONCLUSION

For the reasons stated above, K2 respectfully requests that this Court reverse the district court's dismissal for lack of subject matter jurisdiction and remand the case back to that court for further proceedings, as it is the only forum that may adjudicate K2's claims.

Dated this 23rd day of August, 2010.

K2 America Corporation,  
Plaintiff-Appellant



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