Case No. 11-17180

IN THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RHONDA WHITEROCK FRED

Plaintiff – Appellee,

v.

WASHOE TRIBE OF NEVADA & CALIFORNIA

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
Hon. John A. Mendez, District Judge

BRIEF OF APPELLEE

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JURISDICTION

(1) Plaintiff-Appellee Rhonda Whiterock Fred ("Ms. Fred") asserted the jurisdiction of the District Court for the Eastern District of California, Sacramento ("District Court") pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343(a), and 28 U.S.C. §1360.

(2) On August 12, 2011, the District Court, "having carefully reviewed the entire file, [determined that] the findings and recommendations [of the magistrate judge] to be supported by the record and by proper analysis." DS[1] 28; Order Adopting Findings and Recommendations in Full. The District Court agreed with the magistrate that Ms. Fred should be given an opportunity to amend her complaint because a properly pled complaint could give rise to one or more claims over which the District Court would have subject matter jurisdiction; that exhaustion of tribal remedies for the purpose of determining tribal court jurisdiction would serve no purpose other than delay; and, deferral of any ruling on the Tribe's claim of sovereign immunity was premature pending a review of Ms. Fred's amended complaint provided it lists as defendants those entities/persons appropriate to each claim.

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[1] "DS" refers to the District Court's Docket Sheet.

(3) The Tribe's Interlocutory appeal is not properly before the United States Court of Appeals for the Ninth Circuit and should be dismissed for lack of finality because the District Court's order is merely a step toward final disposition of the merits of the case, *Eisen v. Carlisle & Jacquelin et al.,* 417 U.S. 156, 171, (1974). Moreover, the Tribe has failed to establish that the District Court's order would have an irreparable effect on its rights and be effectively unreviewable on appeal from a final judgment. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949); *Tyson Johnson v. Houston Jones*, 515 U.S. 304, 310 (1995).

ISSUES PRESENTED

(1) Whether the District Court's order conclusively determined disputed questions and whether failure of the United States Court of Appeals for the Ninth Circuit to immediately review the District Court's order will cause significant and irreparable harm to the Tribe?

(2) Whether the District Court properly granted Ms. Fred the right to amend her original complaint and, in so doing, retained jurisdiction over possible or uncertain claims pursuant to 28 U.S.C. §1331?

(3) Whether the District Court properly determined that requiring Ms. Fred to return to tribal court to exhaust her tribal remedies would do

nothing more than cause delays where the only question to be resolved by the tribal court is a determination of its own jurisdiction?

(4) Whether deferring a ruling on the Tribe's claim of sovereign immunity was correct in light of the court's order granting Ms. Fred leave to file an amended complaint where she is required to list as defendants those entities/persons appropriate to each claim?

STATEMENT OF THE CASE

This case, quite simply, is about the right of an indigent non-enrolled California Pomo Indian grandparent to file an amended complaint with the District Court where her original complaint, as written, is a conglomeration of possible or uncertain claims. Ms. Fred has proceeded *pro se* through tribal court proceedings and all the way to the District Court in an effort to gain custody of her two minor grandchildren who were removed from her home by the Tribe's Department of Social Services and made wards of the Washoe Tribal Court. The Tribe, in an effort to derail Ms. Fred's legal rights, has "jumped the gun" and improperly filed an Interlocutory Appeal the United States Court of Appeals for the Ninth Circuit before Ms. Fred had her District Court request for court appointed legal counsel granted, and before she was

able to file an amended complaint consistent with the Order of the District Court.

SUMMARY OF ARGUMENT

The Tribe seeks to have this Court of Appeals cut off Ms. Fred's ability to have her claim proceed on the merits prior to a complete and properly pleaded record is ever established with the District Court and, instead, asks the Court of Appeals to extinguish her claims by deciding matters collateral to her case in chief.

The Tribe first advances the novel theory that the District Court's refusal to dismiss Ms. Fred's claims for failure to exhaust tribal remedies implicates a public interest of such importance that it cannot be reviewed upon final judgment. ER[2]"H", Appellant's Response to Order to Show Cause at p. 10. The Supreme Court of the United States views the tribal exhaustion rule differently. (T)he exhaustion requirement is not a jurisdictional bar. Federal Courts may merely stay proceedings and retain jurisdiction pending exhaustion of tribal court remedies." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857, (1985).

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[2] "ER" refers to Excerpt of Record.

The Tribe then asks this Court of Appeals to adopt its view that the District Court's deferral on ruling on the Tribe's sovereign immunity claim is equivalent to a denial or rejection of that immunity. ER "H", Appellant's Response to Order to Show Cause at p. 11. The Tribe offers no authority in support of its proposition and, instead, admits that it may have another opportunity to raise its immunity should Ms. Fred amend her complaint. ER "H" Appellant's Response to Order to Show Cause at p. 12, lines 4-5. By its own admission, the Tribe's claim fails to satisfy the requirement of finality for appellate review. 28 U.S.C. §§1291-1292.

The Tribe's final collateral claim is that the District Court erred by reaching the issue of federal question jurisdiction. It is well established that District Courts are empowered to determine whether a tribal court has exceeded the lawful limits of its jurisdiction pursuant to 28 U.S.C. §1331. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-53 (1985). "A plaintiff properly invokes §1331 jurisdiction when she pleads a colorable claim 'arising under' the Constitution or laws of the United States." *Jennifer Arbaugh v. Y&H Corporation*, 546 U.S. 500, 513 (2006). The District Court also has the power to dismiss a claim for lack of jurisdiction at any time but not before a plaintiff has had an opportunity to be heard. *Harmon v. Superior Court*, 307 F.2d 796, 797 (9th

Cir.Cal.1962). The District Court has done that which this Court of Appeals mandated in *Harmon*; to wit, grant Ms. Fred an opportunity to amend her Complaint to properly state a colorable claim arising under the Constitution or laws of the United States rather than dismiss for lack of subject matter jurisdiction.

ARGUMENT

I. THE TRIBE'S INTERLOCUTORY APPEAL SHOULD BE DISMISSED DUE TO LACK OF FINALITY IN THE DISTRICT COURT

28 U.S.C. §1291 grants appellate courts jurisdiction to hear appeals only from final decisions of the district courts. Interlocutory appeals, appeals before the end of district court proceedings, are the exception, not the rule. . . . " An interlocutory appeal can make it more difficult for trial judges to do their basic job – supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary." *Tyson Johnson v. Houston Jones*, 515 U.S. 304, 309 (1995) citing *Richardson-Merrel Inc. v. Koller*, 472 U.S. 424, 430, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985); *Flanagan v. United States*, 465 U.S.

259, 263-264, 79 L. Ed. 2d 288, 104 S. Ct. 1051 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981).

It does not, however, bar review of all prejudgment orders. There exists "a 'small class' of district court decisions that, though short of final judgment, are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *John W. Behrnes v. Robert J. Pelletier*, 516 U.S. 299, 305, (1996) quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949). The *Tyson Johnson* court explained the *Cohen* criteria to mean that the order "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Tyson Johnson v. Houston Jones, supra,* 515 U.S. 304, 311 (1995). In other words, an interlocutory appeal is proper only if failure to review immediately will cause significant harm, appellate review is needed to avoid that harm, and the matter is separate from the merits and review now is less likely to

force the appellate court to consider the same matter more than once. *Id.* at 311. As already noted above, however, interlocutory appellate review is not available where, as here, the District Court's actions is merely a step toward final disposition of the merits of the case, *Eisen v. Carlisle & Jacquelin et al.,* 417 U.S. 156, 171 (1974).

A. Sovereign Immunity

The Tribe set forth an exaggerated argument that it will suffer irreparable harm as a result of the District Court's deferral on the issue of sovereign immunity. The Tribe's assertion that the "lower Court's order deferring ruling on the Washoe Tribe's sovereign immunity is the equivalent of a denial or rejection of that immunity", ER "H", Appellant's Response to Order to Show Cause, p.11 lines 17-18, is without authority and contradicts the District Court's own language. In fact, the District Court acknowledged that the Tribe's claim of sovereign immunity "may be the case, and that the Tribal Court may be the appropriate defendant." ER "C", Magistrate's Findings & Recommendations, p.10, lines 21-22.

The court logically abstained from finally deciding the question of sovereign immunity prior to the filing of an amended complaint "where [the court] will know what claims are being brought." ER "C", Magistrate's Findings & Recommendations, p.10, lines 23-24. The significance of this

is that, contrary to what the Tribe wants this Court of Appeals to believe, the District Court did not reject or deny the Tribe's claim of sovereign immunity; instead, it held in abeyance a final decision on the issue pending the filing of an amended complaint to see if the Tribe even remains as a defendant. The District Court's understanding and appreciation of the doctrine of tribal sovereign immunity is evident by its own words and the conditions that it has placed on Ms. Fred when filing her amended complaint; to wit, that her "amended complaint list as defendants those entities/persons appropriate to each claim." ER "C", Magistrate's Findings & Recommendations, p.11, line 1.

The order of the District Court on the issue of sovereign immunity is logical and supported by the record. Paradoxically, the Tribe admits it may have another opportunity to raise its immunity should Ms. Fred amend her Complaint *and should the Tribe be named therein*. ER "H", Appellant's Response to Order to Show Cause, p.12, line 5. Emphasis added. In making its admission, the Tribe undermines its own argument in favor of immediate appellate review due to irreparable and unreviewable harm. The Tribe actually underscores the uncertain and speculative effect of the District Court's Order. In fact, it is the Tribe's acknowledgment of the uncertain effect of the District Court's order and its ability to raise

sovereign immunity again (should the amended Complaint include the Tribe as a defendant) that supports the conclusion that the Tribe has failed to satisfy the *Cohen* test for interlocutory appellate review and that the District Court's Order is merely a step toward final disposition of the merits of the case.

B. Subject Matter Jurisdiction

Federal district courts are courts of limited jurisdiction. United States Constitution Article III, §1. Congress has broadly authorized the federal courts to exercise subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. Non-Indians may bring a federal common law cause of action under 28 U.S.C. §1331 to challenge tribal court jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-53 (1985). This Court of Appeals has previously noted that "[b]ecause 'federal law defines the outer boundaries of an Indian tribe's power over non-Indians,' [Nat'l Farmers Union] at 851, 105 S.Ct. 2447, the 'question whether an Indian tribe retains the power to compel a non-Indian ... to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under §1331.'" *Boozer v. Wilder*, 381 F.3d 931, 934 (9th Cir. 2004).

The District Court always has power to dismiss for lack of jurisdiction. "But it cannot dismiss for lack of jurisdiction, without giving the plaintiff an opportunity to be heard, unless such lack appears on the face of the complaint and is obviously not curable. *Harmon v. Superior Court*, 307 F.2d, 796, 797 (9th Cir. Cal. 1962.) "The court cannot know, without hearing the parties, whether it may be possible for [plaintiff] to state a claim entitling her to relief, however strong it may incline to the belief that [she] cannot." *Harmon*, *supra,* 307 F.2d, 796, 798 (9th Cir. Cal. 1962.)

The District Court correctly acknowledged Ms. Fred's status as a non-Indian[3] for the purpose of its analysis on the question of subject matter jurisdiction. ER "C", Magistrate's Findings & Recommendations, p.5, line 7-13. The District Court then conducted a two-part analysis; (1) §1331 jurisdiction; and, (2) failure to state a claim in response to the Tribe's motion to dismiss.

As noted in the magistrate's analysis, "*pro se* pleadings are held to a less stringent standard than those drafted by lawyers." ER "C", Magistrate's Findings & Recommendations, p.7, line 10-11; citing *Haines*

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[3] "[G]iven the status of plaintiff as not even an enrolled member of any tribe, the undersigned considers her "non-Indian" for the purpose of this case." [ER "C" Magistrates Findings & Recommendations, p.5, lines 11-13"]

v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594 (1972).] The magistrate's Findings & Recommendations then rely on ample judicial authority that "when considering a motion to dismiss, the court must accept as true the allegations of the complaint in question. . . construe the pleading in the light most favorable to the party opposing the motion and resolve all doubts in the pleader's favor. . . [and] 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" ER "C" Magistrate's Findings & Recommendations, p.5, line 7-13, citations omitted.

The District Court then reasoned that just because the claims are not clearly defined and it is not entirely clear what the remedy would be if the court ultimately ruled in Ms. Fred's favor, "this uncertainty does not mean the case should be dismissed at this stage." ER "C", Magistrate's Findings & Recommendations, p.7, lines 2-11, citations omitted. And, "subject matter jurisdiction exists for some type of claim." ER "C", Magistrate's Findings & Recommendations, p.6, lines 13-14.

Nothing in this analysis supports the Tribe's spurious claim that Interlocutory appellate review is necessary to avoid irreparable and unreviewable harm. "[B]ecause the complaint as written is a conglomeration of possible or uncertain claims, . . . plaintiff should be

required to amend the complaint to delineate by separate headings the precise claims she desires to bring herein." ." ER "C", Magistrate's Findings & Recommendations, p. 8, lines 22 – 24 and p. 9 line 1. Also, "plaintiff shall in filing her amended complaint list as defendants those entities/persons appropriate to each claim." ER "C", Magistrate's Findings & Recommendations, p. 10, line 25 and p. 11 line 1. Thus, even if Ms. Fred amends her complaint, it is highly speculative whether the Tribe will remain as a named party. Furthermore, even if, the Tribe is named as a party in the amended complaint, objection that a federal court lacks subject matter jurisdiction may be raised by a party at any stage in the litigation, even after trial and entry of judgment. *Jennifer Arbaugh v. Y&H Corporation,* 546 U.S. 500, 506 (2006), 126 S.Ct. 1235. Mere inconvenience is insufficient to support interlocutory appellate review. *Cohen* requires a showing of irreparable harm and a lack of reviewability before a Court of Appeals can exercise interlocutory jurisdiction over a District Court's order. Such a showing cannot and has not been made by the Tribe. The District Court's order of subject matter jurisdiction lacks the requisite effect of finality without review to support interlocutory appellate review.

C. Exhaustion of Tribal Remedies

The well established jurisprudence with regards to the doctrine of tribal remedy exhaustion cited by the District Court provides authoritative grounds, and correctly applies case precedent, upon which to base dismissal of the Tribe's Interlocutory Appeal.

It is settled law that a federal court must afford the tribal court a full opportunity to determine its own jurisdiction. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17, 107 S.Ct. 971 (1987). Yet the exhaustion doctrine is not absolute. For instance, in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, supra, 471 U.S. 845, at 856 n. 21, the court recognized an exception to the exhaustion doctrine when exhaustion would be futile. Further, an exception to the exhaustion doctrine exists where exhaustion would serve no purpose other than delay. *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304 (2001). Moreover, exhaustion is prudential: it is required as a matter of comity, not as a jurisdictional prerequisite. *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004). Finally, a district court may exercise its discretion and stay the action while a tribal court handles the matter. *National Farmers, supra*, 471 U.S. 845, 857.

The record below shows that Ms. Fred filed two petitions for habeas corpus with the tribal court seeking custody; she appealed to the

Inter-Tribal Court of Appeals of Nevada (ITCAN), which upheld the tribal court's order. She filed for reconsideration, which was denied. With this record as the backdrop, the District Court properly applied the *Hicks* exception and concluded that "for [Ms. Fred] to return to tribal court to exhaust her tribal remedies with respect to the jurisdiction question would serve no other purpose than delay." ER "C", Magistrate's Findings & Recommendations, p. 9, lines 9-12 and p. 10 lines15-17.

As with the issues of sovereign immunity and subject matter jurisdiction, the decision of the District Court on the issue of tribal remedy exhaustion fails to rise to the level of urgency required by *Cohen* to warrant interlocutory appellate review. The Tribe has failed to articulate how the District Court's order will result in irreparable and unreviewable harm. Even if, arguendo, the District Court erred in its application of *Hicks* as the Tribe suggests, the remedy is a stay of the proceedings until the tribal court has handled the matter.

II. CONCLUSION

As noted above, the Tribe has failed to satisfy the three-prong test of *Cohen* required for interlocutory appellate review of the District Court's Order. The District Court's Order is merely a step toward final disposition

of the merits of the case. For these reasons, the Tribe's Interlocutory Appeal should be dismissed due to lack of finality in the District Court.

Alternatively, even if the District Court erred as it relates to tribal exhaustion, dismissal is not required as the Tribe urges. The District Court may stay the proceedings while the tribal court handles the matter. In either event, the Tribe's Interlocutory Appeal for dismissal of the District Court's Order must be denied and Ms. Fred respectfully requests that the District Court's Order be affirmed in whole, or in part, with direction to stay the matter in the District Court while the tribal court handles the issue of jurisdiction.

STATEMENT OF RELATED CASES

There are no known related cases pending with this court.

RESPECTFULLY SUBMITTED this 15th day of June, 2012.

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