

U.S.C.A. No. 13-56701

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABBA BAIL BONDS,)	
)	
Plaintiff-Appellant)	
)	
-vs-)	APPELLANT'S OPENING
)	BRIEF
)	
JEFF GRUBBE et al,)	
)	
Defendants-Appellees)	
)	

ON APPEAL FROM A JUDGMENT IN THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA

No. CV-12-06593 TJH (DTBx)
APPELLANT ABBA BAIL BONDS
OPENING BRIEF

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TABLE OF CONTENTS

1. JURISDICTION	
A DISTRICT COURT	1
B COURT OF APPEAL	2
C TIMELINESS	3
D FINAL ORDER	3
2. STATEMENT OF ISSUES	3
3. STATEMENT OF THE CASE	4
Proceedings Below	5
Disposition Below	6
4. STATEMENT OF FACTS	7
5. SUMMARY OF ARGUMENT	10
6. ARGUMENT	11
6.1 STANDARD OF REVIEW	11
Subject Matter Jurisdiction	11
Statutory Interpretation Jurisdiction	11
6.2 28 U.S.C. SECTION 1360 IMPLIES FEDERAL REVIEW	12
OF SOVEREIGN IMMUNITY CLAIMS	
6.2.1 Lower Court Jurisdiction Is Mandated By Federal Law,	12
28 U.S.C. § 1360	
6.2.2 Federal Review Of Sovereign Immunity Claims Is Vital	15
To 28 U.S.C. § 1360	
6.3 FEDERAL REVIEW OF TRIBAL POLICY IS AVAILABLE	17
WHEN IN CONFLICT WITH FEDERAL LAW	
6.3.1 State Laws May Be Applied To Indian Tribes	17

6.3.2 Tribal Officials Acting As Individuals Are	19
Subject To Federal Jurisdiction	
7. CONCLUSION	24
8. CERTIFICATE OF COMPLIANCE	25
9. STATEMENT OF RELATED CASES	25
10. REQUEST FOR ATTORNEY FEES	25

TABLE OF AUTHORITIES

CASES

<i>Agua Caliente v. Hardin</i> 223 F.3d 1041, (9 th Cir. 2000)	19, 21
<i>Aroostook Band of Micmacs v. Ryan</i> , 404 F3d 48, (1 st Cir. 2005)	2
<i>Bryan v. Itasca County</i> , 426 U.S. 373, (1976)	12, 20
<i>Burlington Northern and Santa Fe Railway Co. v. Vaughn</i>	5
509 F.3d 1085, (9 th Cir. 2007)	
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202, (1987)	20, 21
<i>Ex Parte Young</i> 209 US 123, (1908)	3, 6, 7, 15, 19, 20, 23
<i>Evans v. McKay</i> , 869 F.2d 1341, (9th Cir. 1989)	23
<i>Hardin v. White Mountain Apache Tribe</i> , 779 F.2d 476 (1985)	22
<i>Johnson v. Gila River Indian Cnty.</i> , 174 F.3d 1032, (9th Cir.1999)	16
<i>K2 Am. Corp.. v. Roland Oil & Gas LLC</i> ,	11, 13
653 F.3d 1024, (9th Cir., 2011)	
<i>Maxwell v. County of San Diego</i> 708 F3d. 1075, (9 th Cir. 2013)	11, 20, 21, 22
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145, (1973)	12
<i>Peabody Coal Co. v. Navajo Nation</i> , 373 F.3d 945, (9 th Cir. 2004)	13, 14, 15
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49, (1978)	21, 22
<i>Schleining v. Thomas</i> , 642 F.3d 1242, (9th Cir. 2011)	11
<i>Sycuan Band of Mission Indians v. Roache</i> , 38 F3d 402, (9 th Cir. 1994)	2

<i>Nevada v. Hicks</i> , 533 US 353 (2001)	16, 17, 18, 20
<i>Vega v. Holder</i> , 611 F.3d 1168, (9th Cir. 2010)	11

CONSTITUTION

United States Constitution, Seventh Amendment	1
United States Constitution, Eleventh Amendment	19, 20, 21
United States Constitution, Article III, section 2	1
United States Constitution, Article VI, clause 2	19

STATUTES

28 U.S.C. § 1291	2
25 U.S.C. § 1302	21
28 U.S.C. § 1331	1, 10, 13, 14
28 U.S.C. § 1360	1, 2, 3, 4, 6, 7, 10, 11, 12, 14, 15, 24, 25
Public Law 280	3, 10, 12, 16

RULES

Federal Rules of Appellate Procedure, Rule 32	25
Federal Rules of Civil Procedure, Rule 12 b	2, 6, 9, 14
Federal Rules of Civil Procedure, Rule 60	5
California Code of Civil Procedure, Section 128(a)(4)	10

1. JURISDICTION

A DISTRICT COURT JURISDICTION

1. Seventh Amendment right to jury trial in civil matters.

Plaintiff ABBA Bail Bonds was denied benefits of a civil trial and related rights of enforcement, *Order, docket 23, 51.*

2. Article III, section 2 of the United States Constitution extends federal judicial power to cases arising under the Constitution and under federal law.

Plaintiff ABBA Bail Bonds sought relief in federal court for refusal by a Native American Indian Tribal Council to comply with federal law. *Amended Complaint docket 45.*

3. 28 U.S.C. § 1331 provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Plaintiff ABBA Bail Bonds obtained a judgment and assignment order against a Native American individual in state court as mandated by 28 U.S.C. §1360, *dockets 45-2, 45-3.* Execution of the judgment requires compliance by the judgment debtor, or by the organization which controls the target of the assignment order. The judgment debtor, and the organization which controls the target of the assignment order, both refuse to comply with the assignment order. *Amended Complaint, docket*

45.

4. 28 U.S.C. §1360 confers on California Courts jurisdiction over civil matters to which Indians are parties.

Plaintiff ABBA Bail Bonds litigated contract and fraud claims against Native American individuals, including enforcement of judgment by an assignment order against income received by the judgment debtor, *dockets 45-2, 45-3*. Refusal to comply with the assignment order by those Native American individuals with discretion to act falls within the penumbra of federal law.

5. Federal common law provides subject matter jurisdiction in actions directly involving Indian affairs *Sycuan Band of Mission Indians v. Roache*, 38 F3d 402, 405, (9th Cir. 1994, (gaming operations); *Aroostook Band of Micmacs v. Ryan*, 404 F3d 48, 68, (1st Cir. 2005), (claim that States conduct violated tribal rights).

Judgment debtor and his Native American Tribal officials assert sovereign immunity as a bar to complying with state court judgments and orders. They contend that the state court judgments and orders violate their Tribal rights, *Rule 12b Motion*, *docket 11*.

B COURT OF APPEAL JURISDICTION

The Court Of Appeal has jurisdiction over final orders and dismissals issued by a District Court. 28 U.S.C. § 1291.

The District Court dismissed with prejudice and closed the case. *Order, docket*

51

C TIMELINESS OF APPEAL

The Order appealed from was filed on September 4, 2013, *docket 51*, and Notice of Appeal was filed on September 29, 2013, *docket 52*.

D FINAL ORDER

The District Court granted a Rule 12 (b) motion to dismiss on September 4, 2013, *docket 51*. This dismissal was grounded on a finding that the court lacks jurisdiction, *id*. The court finds that 28 U.S.C. § 1360 alone does not confer federal jurisdiction, that violation of federal law has not been sufficiently alleged, and further that no set of facts could cure the deficiency, *id*. Therefore, the doctrine of *Ex Parte Young* 209 U.S. 123,(1908) does not apply and tribal officials retain immunity, *id*. The final District Court motion was granted with prejudice and without leave to amend, and the case was terminated, *id*.

2. STATEMENT OF ISSUES

This case is about the conflict between Native American Sovereign Immunity and federal law. Native American Sovereign Immunity may be limited by waiver or Congressional action. 28 U.S.C. §1360 (Public Law 280) confers jurisdiction on State Courts over civil matters to which Indians are parties, but it is silent about

enforcement of judgments and orders issued by those courts. The District Court finds that it lacks jurisdiction to enforce 28 U.S.C. §1360, *Order, dockets 51, 23.*

The issue before the Court is: does 28 U.S.C. §1360 provide state courts with full jurisdiction for litigation of claims, with implied federal court review to consider post judgment claims of sovereign immunity?

A broader issue is whether federal judicial review is available as to policy and actions by a Tribal Council when those policies present colorable constitutional claims.

3. STATEMENT OF THE CASE

This case tests the limits of Native American Sovereignty as a bar to federal jurisdiction. Native American Tribes vigorously protect their sovereignty immunity. They will refuse to submit to state or federal court jurisdiction unless immunity is expressly waived or jurisdiction is clearly imposed by federal law. 28 U.S.C. §1360 is silent about federal review.

ABBA Bail Bonds obtained a state court judgment and enforcement by assignment order against Native Americans, *dockets 45-2 and 45-3*, (attached to *Amended Complaint, docket 45*). The assignment order is to reach the judgment debtors' income provided by his Tribe, *id.* The Tribal Council refuses to comply with the assignment order, *docket 11.*

Proceedings Below

ABBA's First Amended Complaint states claims for declaratory relief and injunctive relief against individual members of the Tribal Council of the Agua Caliente Band of Cahuilla Indians, *Amended Complaint, docket 45, pages 1 - 10*, (excluding exhibits).

The District Court granted two Rule 12 (b) motions to dismiss, both based on a finding of lack of jurisdiction. The first was on September 21, 2012, *docket s 9 and 11*, against plaintiff's original complaint, *docket 1, pages 1 - 10*, (excluding exhibits). ABBA opposed, *docket 12* , and Tribal Defendants replied, *docket 17*. The court dismissed after a finding that plaintiff's original complaint failed to sufficiently allege that tribal officials violated federal law, citing *Burlington Northern and Santa Fe Railway Co. v. Vaughn* 509 F.3d 1085, 1090 (9th Cir. 2007), *docket 23*. The court dismissed and closed the case, *docket 23*. ABBA filed its Rule 60 Motion For Relief, *docket 24*, and Tribal Defendants opposed, *docket 32*. ABBA filed its *Notice of Appeal, docket 33*, and its amended notice of appeal giving notice of a Rule 60 Motion, *docket 36*.

The District Court granted ABBA's Motion For Relief, *docket 38*, and ordered ABBA to file an amended complaint.

ABBA filed its Amended Complaint, *docket 45*, containing specific allegations

as described in *Burlington, supra.*, *Amended Complaint* docket 45, ¶¶ 34, 35, 42, 43,

The Tribal Defendants responded to the Amended Complaint with its second Rule 12 b motion grounded on lack of subject matter and personal jurisdiction by the doctrine of Tribal Sovereign Immunity barring California Superior Court jurisdiction, and barring federal review, *Rule 12b Motion, docket 47, 47-1.*

ABBA opposed the motion to dismiss arguing that Tribal Council members may not assert Sovereign Immunity as a bar to California Superior Court Orders, invoking the doctrine of *Ex Parte Young, supra, Opposition to Rule 12b Motion, docket 48 and 48-1.* The Tribal Defendants replied, *docket 50.*

The District Court granted the motion to dismiss, without oral argument, *docket 51*, and ABBA filed its notice of appeal, *docket 52.*

Disposition below

The District Court granted a Rule 12(b) motion to dismiss without oral argument, with prejudice, and closed the case, *Order, docket 51.* This dismissal was grounded on a finding that the court lacks jurisdiction because ABBA has not alleged violation of federal law, *id.* The District Court found that while 28 U.S.C. § 1360 confers jurisdiction on state courts, it cannot confer jurisdiction on federal courts, even to review post judgment claims of Sovereign Immunity, *id.* Further, the court found there are no facts that would allow a finding of federal jurisdiction over state

judgments against the tribe, *id.* Therefore, the doctrine of *Ex Parte Young, supra*, does not apply and tribal officials retain immunity, *id.*

The District Court failed to note that ABBA had exhausted state court jurisdiction before bringing its claims to federal court, and failed to note that ABBA seeks not to re-litigate state court claims, but rather to enforce a post judgment assignment order.

The District Court found that it lacks jurisdiction to review post judgment claims of sovereign immunity after 28 U.S.C. § 1360 state court litigation. *Order, docket 51.*

4. STATEMENT OF FACTS

Plaintiff ABBA BAIL BONDS, INC. provided bail bonds for Clifford Wilson Mathews in the total amount of \$328,500. *Amended Complaint, docket 45.* Mathews was charged with attempted murder of a police officer, *id.* Payment on the bail bonds was guaranteed by guarantors Nancy Tewawina and Mathew Martin, *id.* Mathews and his guarantor Tewawina are Native Americans of the Agua Caliente Band of Cahuilla Indians, a Federally recognized Indian Tribe, *id.* As tribal members, Mathews and Tewawina receive a substantial monthly income from the Tribe's Casino Profit Sharing Program, and Mathews assigned his income from Agua Caliente Band of Cahuilla Indians for payment of bond premiums due to ABBA, *id.*

Mathews failed to appear as ordered by the criminal court and his bail bond was forfeited, *id.* ABBA hired a bounty hunter to find and return Mathews to custody, *id.* Mathews cancelled the assignment of his income to ABBA after he fled, leaving money due to ABBA for bond premiums and for costs of his capture, *id.*

ABBA filed a lawsuit in California Superior Court for the County of Riverside, Case Number RIC 10007570, grounded on contract against individual defendants Mathews, Tewawina and Martin, and for injunctive relief in the form of an encumbrance on the Individual Indian Money (IIM) accounts of the named individual defendants, *ibid.* Since IIM accounts are administered by the United States Department of the Interior in accordance with 25 CFR 115, Real Party In Interest United States Department of the Interior removed the case to Federal Court, EDCV 10-823 TJH(DTBx), *id.* After removal ABBA filed a First Amended Complaint and included a fraud claim against Mathews and claims against new defendants Agua Caliente Band of Cahuilla Indians and Mark Cantrell, counsel to Mathews, *id.*

Agua Caliente Band of Cahuilla Indians and the United States Department of the Interior were dismissed and the matter was remanded to California Superior Court, County of Riverside, Case Number RIC 10007570, in November, 2010, *ibid.*

Defendants in the Superior Court action Mathews, Tewawina, and Martin failed to appear and plaintiff ABBA obtained *default judgments, docket 45-2.*

Superior Court claims against Cantrell are pending. ABBA applied for an assignment order against the per capita accounts of judgment debtors Mathews, Tewawina, and Martin and orders were issued by the Superior Court, *docket 45-3*.

ABBA Bails Bonds served the judgments and assignment orders on the judgment debtors and on Agua Caliente Band of Cahuilla Indians as custodian of the per capita accounts of judgment debtors Mathews and Tewawina, *Amended Complaint docket 45*. Agua Caliente Band of Cahuilla Indians, by its Tribal Council, acknowledges authority and discretion to implement the orders of the Superior Court of California, but it refused to do so, *id*. Further, Agua Caliente Band of Cahuilla Indians, by its Tribal Council, asserts immunity from the orders of the California Superior Court, *Rule 12b Motion, docket 9, 11*.

The Tribal Council of the Agua Caliente Band of Cahuilla Indians is empowered and obliged to administer the affairs and manage the business of the Band, and to protect the security and general welfare of the Band and its members *Constitution and Bylaws, Article V, ¶ a, docket 47-3 p.9*; to negotiate with State and local governments on matters relating to the jurisdiction of the particular government unit involved in the application of civil laws, *Constitution and Bylaws, Article V, ¶ 1, docket 47-3 p.12*. The Constitution and Bylaws of Agua Caliente describe no forum for resolution of civil claims in general, or for trial courts specifically,

Constitution and Bylaws, docket 47-3, they have never advised or argued that the matter should be brought before a tribal court or a tribal court association.

5. SUMMARY OF ARGUMENT

28 U.S.C. §1360 (Public Law 280) mandates that California Superior Courts shall have jurisdiction over civil matters to which Indians are parties, and which are subject to private litigation in state court. California Code of Civil Procedure §128(a)(4) provides that every court shall have the power to compel obedience to its judgments and orders. Taken together, 28 U.S.C. §1360 and California Code of Civil Procedure §128(a)(4) require that California Superior Courts exercise jurisdiction that extends to enforcement of its judgments and orders against parties who are Indians. When a California court has exercised jurisdiction to judgment and enforcement, and an Indian party or third party Indian officials block enforcement of those judgments and orders, jurisdiction for judicial review lies with federal courts. 28 U.S. C. §1360 does not confer jurisdiction on federal courts, but violation of that federal law is a federal matter. 28 U.S.C. §1331 provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

The Agua Caliente Tribal Council policy of refusal to submit to State Court jurisdiction conflicts with the U.S. Constitution and federal law. 28 U.S.C. §1360 is

rendered ineffective by the refusal of Tribal Council members to comply with Superior Court orders. The enforcement of a judgment and assignment order against a Tribal member is necessary for 28 U.S.C. §1360, and for the fulfilment of its purpose to provide a forum for civil disputes between Indian and non Indian parties.

6. ARGUMENT

6.1 STANDARD OF REVIEW

Subject Matter Jurisdiction

The District Court determined that it lacked subject matter jurisdiction. Such a determination may be reviewed de novo. *Maxwell v. County of San Diego* 708 F3d. 1075, 1081-82, (9th Cir. 2013), *K2 Am. Corp.. v. Roland Oil & Gas LLC*, 653 F.3d 1024, 1027 (9th Cir., 2011).

Statutory Interpretation.

The District Court relied upon an interpretation of a 28 U.S.C. §1360, this may be reviewed de novo. Congress has not directly addressed the exact issue in question, that is whether 28 U.S.C. §1360 provides for federal court review to consider post judgment claims of sovereign immunity. The standard of review is reasonableness of the District Court's interpretation of the statute. *Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011) review of questions of statutory construction de novo; *Vega v. Holder*, 611 F.3d 1168, 1170 (9th Cir. 2010) review of BIA's interpretation

of a statute is purely legal, reviewed de novo.

6.2 28 U.S.C. SECTION 1360 IMPLIES FEDERAL REVIEW OF SOVEREIGN IMMUNITY CLAIMS

6.2.1 Lower Court Jurisdiction Is Mandated by Federal Law, 28 U.S.C. §1360

28 U.S.C. §1360(a) grants certain states limited jurisdiction “over civil causes of action. . . to which Indians are parties.” The Statute names all Indian country within the State of California. By enactment of 28 U.S.C. § 1360 Congress expressly granted to the State of California jurisdiction over civil causes of action between Indians and non Indian parties. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, (1973), state laws may be applied on reservations unless they interfere with Tribal self-government, and *Bryan v. Itasca County*, 426 U.S. 373, 385, 388-390, (1976), Public Law 280 confers jurisdiction over private civil litigation in which an Indian is a party.

By its Order, the District Court holds that 28 U.S.C. § 1360 confers on the State of California jurisdiction for civil disputes between Indians and non Indians, but Tribal Officials retain sovereign immunity as to enforcement, *Order, docket 51*. The District Court holds that federal review is unavailable as to sovereign immunity claims barring enforcement of state judgments, *id.* In support of this holding, the District Court finds that 28 U.S.C. § 1360 “does not confer jurisdiction on federal

courts", citing *K2 America Corporation v. Roland Oil & Gas, LLC.* 653 F.3d 1024, 1028 (9th Cir. 2011), *Order page 2, lines 16 - 20, docket 51.*

The District Court failed to note that in its cited case, *K2, supra*, plaintiff had failed to take his case before the Superior Court, but in the case at bar plaintiff has fully exhausted Superior Court jurisdiction.

Plaintiff K2 America Corporation sued Roland Oil and Gas on state law claims and based federal jurisdiction on facts showing the dispute flowed from an oil and gas lease located on land held by the United States in trust for various Indian allottees. The *K2, supra* court held that the fact that the disputed leases were on land held by the United States does not confer federal jurisdiction because the underlying causes of action were state law based.

In *K2, supra*, the court opined that to satisfy the requirement of 28 U.S.C. § 1331 that a case to arise under federal law, the complaint must establish either:

- (1) that federal law creates the cause of action rather than conferring jurisdiction or
- (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law.

K2, supra, 1029 citing *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004).

In the case at bar, plaintiff has litigated in Superior Court and obtained judgments and assignment orders on income received by the judgment debtors, dockets 45-2, 45-3. The judgment debtors and the Tribal Council are all individuals with power and discretion to comply with the orders of the Superior Court, but they challenge the jurisdiction of the federal court, *Rule 12 b Motion docket 9, 47, 47-1*. The assertion of sovereign immunity by Tribal Officials blocks any effort by the Superior Court to provide a remedy.

Applying the first *Peabody Coal*, *supra* test, 23 U.S.C. § 1360 does not confer federal jurisdiction over state law causes of action, but it does create jurisdiction when its provisions are violated. ABBA's claims are not contract and tort claims litigated in state court, but enforcement of judgments and orders issued by the state court. The causes of action ABBA presents in federal court are created by the right to a civil remedy by a state court.

28 U.S.C. § 1331 states that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. ABBA's civil action against Native Americans brought in State Court arises by authority of 23 U.S.C. § 1360. A reasonable interpretation of any statute conferring jurisdiction is that enforcement of judgments is necessary and included in the scope of jurisdiction conferred. When enforcement of judgments is frustrated by

a claim of immunity, the purpose of the federal law conferring jurisdiction is frustrated, and the law itself is effectively violated by the immunity claim.

Applying the second *Peabody Coal, supra* test, ABBA's right to relief rests solely on resolution of a question of federal law. Does 28 U.S.C. § 1360 provide for federal court review of post judgment claims of sovereign immunity? Since sovereign immunity is a bar to jurisdiction, rather than a defense, it blocks access to the court and nullifies the law which provides jurisdiction. Federal Court review must be available because there is no other forum for review. *Ex Parte Young, supra*.

6.2.2 Federal Review of Sovereign Immunity Claims Is Vital to 28 U.S.C. §1360

It was held more than one hundred years ago that "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should....". *Ex Parte Young, supra, 143*.

The holding and Order of the District Court leaves ABBA with no remedy. State Court jurisdiction has been exhausted pursuant to 28 U.S.C. § 1360, The Tribe offers no alternate forum for resolution of disputed claims between Indians and non Indians, *Constitution and Bylaws, docket 47-3*.

Agua Caliente is one of the few Tribes which has no Tribal Court, and has chosen not to be a member of the Intertribal Court of Southern California, *First*

Amended Complaint, ¶3, docket 45. The Constitution and By-laws of the Agua Caliente Band of Cahuilla Indians provide for no judicial means for resolution of civil claims, *docket 47-3*. Therefore, ABBA had no opportunity or obligation to pursue its remedy in a tribal court because there is no functioning tribal court. See *Johnson v. Gila River Indian Cmt.,* 174 F.3d 1032, 1036 (9th Cir.1999).

The benefits of Public Law 280 bring with them responsibilities to follow rules and procedures essential to the functioning of an effective and just judicial system. Among these responsibilities are accepting adverse rulings or orders, and accepting enforcement orders such as seizures or garnishments pursuant to a court order. The right to judicial adjudication includes the right to trial by a competent court, a court which incorporates accepted standards of due process and rules of court. Agua Caliente has none of these.

While Tribal Sovereign Immunity must preserve the self governing functions of the tribe, and preserve its customs and traditions, *Nevada v. Hicks*, 533 US 353, 361(2001), the claims of ABBA are to enforce a judgment and collection of judgment obtained in Superior Court. The claims and the remedies sought are no threat to tribal self-government, in fact enforcement of contract obligations and court judgments should be in harmony with tribal self-government, and should have no adverse effect on internal tribal relations. There is no claim that the State of California should have

broad powers to regulate the activities of tribal members, only that the State must maintain civil law in transactions between Indian and non Indian that are entered into on State lands. *Nevada, supra*

The claims made by ABBA against Agua Caliente are private rather than regulatory, have no bearing on the Tribes' right to self-governance in its intramural matters, do not abrogate rights guaranteed by Indian treaties, and there is no evidence to support a finding that Congress intended that Indians and Indian Tribes should not comply with traditional common law tort and contract law.

6.3 FEDERAL REVIEW OF TRIBAL POLICY IS AVAILABLE WHEN IN CONFLICT WITH FEDERAL LAW.

6.3.1 State Laws May Be Applied to Indian Tribes

State laws may be applied to Indian Tribes after balancing the interests of the State and the Tribe. Regulatory authority of the State may extend to tribal lands. Tribal power to make laws and exercise self government does not exclude all state regulatory authority on the reservation. See *Nevada, supra*, 361 (2001). State interests outside the reservation may require regulation of activities of tribal members on the reservation, *Id.* Tribal sovereign interests must be balanced against the interests and sovereign powers of the state, and such balancing may advise that States may regulate the activities even of tribe members on tribal land, since an Indian

reservation is considered part of the territory of the State, *Id.* 362. Tribal rights to self government are protected by sovereign immunity by a balancing of Tribal interests against State and Federal government interests. *Id.* 362

The relevant facts in Nevada are a search warrant was to be served for records located on Tribal land. This exercise of State power was challenged by the Tribe based on Tribal Immunity, and the Tribe refused to comply with the search warrant. In the case at bar, the State Court assignment order is an exercise of state power challenged by the Tribal Defendants. The *Nevada* Court held that Tribal authority does not extend to regulation of the service of a search warrant against a tribal member suspected of having violated state law outside the reservation. The Court held that when acts by State officers and agents are thwarted by Tribal acts or omissions, “the operation of the state may be arrested at the will of the Tribe”. *Id.* 365. It was held that the State's interest in execution of process outweighs Tribal Immunity, noting that Tribal Immunity is limited to preservation of essential tribal self-government functions and internal relations. *Id.* 362.

ABBA Bail Bonds has been granted an Assignment Order issued by a State judge. The Assignment Order directs individual members of the Aqua Caliente Tribal Council to exercise their powers to assign income from a judgment debtor to ABBA Bail Bonds, and they refuse to do so. By these acts and omissions, the Tribal Council

members thwart the judicial power of the State, and the State's power to enforce its judgments is arrested at the will and discretion of the Tribal Council Members.

6.3.2 Tribal Officials Acting As Individuals Are Subject to Federal Jurisdiction

Immunity provided by The Eleventh Amendment to the United States is limited by well established case law, *Ex Parte Young, supra*. The doctrine of *Ex Parte Young* states that an injunction may issue to prevent violation of the Constitution or federal law by a state official, even if the act is under authority of state law. *Id. 159*. Eleventh Amendment immunity of state officials is circumvented by what is described as a legal fiction. A State Officer is not the State and he may be enjoined by a federal court from exercising his authority as a state officer when he acts in violation federal law. *Id. 155, 156*. Enjoining acts in violation of federal law is not an interference with the discretion of an officer, *Id. 159*. Suits for prospective declaratory relief against state officers to enjoin ongoing violation of federal law are within the doctrine of *Ex Parte Young, supra*, and are not barred by sovereign immunity, *Agua Caliente v. Hardin* 223 F.3d 1041, 1045 (9th Cir. 2000).

The Supremacy Clause, United States Constitution, Article VI, clause 2, establishes the supremacy of federal law over state law, and strips all states of the power to create an immunity to the supreme authority of the United States. *Ex Parte Young, supra, p. 160*. A state official cannot claim immunity imparted to him by his

state because the state is subject to supreme authority of the United States. *Id.*

In the context of Tribal Law, it is well settled that the *Young* exception to Eleventh Amendment Immunity applies to conflicts between tribal laws and federal law, subject to well defined limitations for the benefit of tribal interests. *Maxwell, supra, 1089.* When tribal officials act pursuant to tribal law or tribal policy, and if the officials' acts or omissions violate federal law, the tribal officials may be enjoined unless exceptions come to bear. *Nevada, supra.* The exceptions are the result of careful balancing of the interests of the tribe and the state. These exceptions will enable Eleventh Amendment protections to preserve the self governing rights of tribes, and the customs and traditions of tribes. *Nevada, supra.* The balancing process is subjective, interests will be judged differently by competing interests. Definitive and comprehensive rules are difficult to establish, and passionately held positions and beliefs of sovereignty by Native American Tribes will fuel challenges to any perceived loss of sovereignty.

It is well settled that state taxing power against Indian Tribes is clearly barred by Tribal Immunity, see *Bryan, supra* where it was held that a state may not levy a tax on a mobile home situated on reservation land, and see *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, FN 17, (1987), where court notes that it has consistently held that Indians' exemption from state taxes is intact and will be "lifted

only when Congress has made its intention to do so unmistakably clear.”; see also *Agua Caliente, supra* holding that a Tribe may challenge the taxing authority of a State by seeking injunctive relief against the taxing official.

Encroachment on Tribal self government may be difficult to define, but when found, it will be barred by Eleventh Amendment Immunity, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), where it was held that an Indian tribe's ordinance denying tribal membership to the children of certain female tribal members is within the scope of Tribal Sovereign Immunity, and that enforcement of the Indian Civil Rights Act, 25 U.S.C. Section 1302 is barred. State regulation of gambling is likewise barred by Tribal Immunity, see *Cabazon supra*. 222, finding that state may not regulate bingo and prohibit playing of draw poker and other card games inside reservations.

The scope of immunity available to individual tribal members acting in their official or individual capacity is analogous to that of state or federal officials. Tribal members enjoy no greater immunity than state or federal officers as to civil claims. In *Maxwell, supra* the Maxwells sued defendant members of the Viejas Band of Kumeyaay Indians in their individual capacity as fire paramedics, claiming money damages. Claims were made against the individual fire paramedics, not The Viejas Band. Vicarious liability was not claimed, therefore the Viejas Band was not the real

party in interest, even though any payment by the individual defendants may be traceable to the tribal treasury. Even though it was found that the Tribe might provided indemnification in the form of direct payment from the tribal treasury, rather from the paychecks of the individuals, the Tribe was not the real party in interest. *Maxwell, supra, 1090.* In the case at bar, ABBA claims its remedy from the judgment debtors who happen to be tribal members, and while their income may be traceable to the tribe, the claims and assignments of income are against the incomes of the tribal members and not the tribe.

The *Maxwell* court held that when a remedy is to come from an individual rather than the tribe, the sovereign is not the real party in interest and immunity will not be available to the individual. *Id. at 1088.* The *Maxwell* court cited *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (1985), as an example of official acts which are protected by immunity. In *Hardin, supra*, a tribal council ordered tribal police to eject the plaintiff from tribal land, *Id. at 478.* *Maxwell, supra* 1088. The *Maxwell* court observed that the act of the tribal council was within the scope of its powers, and to find otherwise would violated tribal sovereignty. *Id. at 1088.*

In contrast, suits over plainly unlawful acts are actionable as individual capacity suits; they are not barred by sovereign immunity, *Maxwell, supra* 1089, citing *Santa Clara Pueblo, supra* 58. This is in harmony with sovereign immunity

exceptions provided to plaintiff's by the doctrine of *Ex Parte Young, supra*. State or federal officers who act in violation of federal law are not acting in their official capacity, the state cannot impart immunity to an official action in violation of federal law, see *Ex Parte Young, supra*.

Tribal members, acting in their capacity of police officers, may be sued individually if their actions are in violation of federal law, see *Evans v. McKay*, 869 F.2d 1341, 1348 (9th Cir. 1989). The determining fact is that the tribal members, who may have been acting in conformance with tribal law, were allegedly acting in violation of federal law, and the doctrine of *Ex Parte Young, supra* will defeat sovereign immunity claims.

The sovereignty claimed by the Tribal Defendants leads to the inevitable result that a state judgment holder is to have no recourse to any court to enforce its judgment. All courts will lack jurisdiction. This is particularly troubling because Agua Caliente has no tribal court, and has chosen to not be a part of the Intertribal Court of Southern California, *First Amended Complaint, docket 45 and Constitution and By Laws docket 47-3*. Agua Caliente would deprive any person, Indian or non Indian, of his Constitutional right to access to the Judiciary Branch of government, and any litigant would be forced to abandon his claim or submit to the absolute discretion of the Tribal government. This erodes the rule of law, is contrary to the

interests of Indian and non Indian alike, and cannot be reconciled with the Constitutional right of all persons to access to a Judicial Branch

7 CONCLUSION

The Court should find that 28 U.S.C. § 1360 provides state courts with full jurisdiction for litigation of claims in which Indians are parties, and for federal court review to enforce state court judgments and orders challenged by claims of Native American Sovereign Immunity.

There is a widespread belief by the lay public, members of the bar, and even bench officers, that Tribal Sovereign Immunity will defeat civil claims and judgments. Uncertainty about Tribal Sovereign Immunity and civil claims should be addressed by a published opinion clarifying the limits of Tribal Sovereign Immunity as to civil claims litigated by authority of 28 U.S.C. § 1360.

The Court should also find that federal judicial review of tribal policy and actions implemented by a Tribal Council shall be available when those policies and actions are in conflict with the United States Constitution or federal law.

The Agua Caliente Tribal Council members should be ordered to comply with California State Court orders as to enforcement of its judgments against Tribal Members named in the California State Court Assignment Orders.

A matter of concern to this litigant is that the District Court failed to notice, or

was indifferent to, the effective nullification of 28 U.S.C. § 1360 by its findings and holdings in two Rule 12(b) motions, dockets numbers 51 and 23. The District Court displays a great reluctance to find federal jurisdiction, appears anxious to dismiss with prejudice leaving no forum for ABBA's claims, and declines to take oral argument to allow litigants to address concerns of the court. ABBA Bail Bonds urges this Court to remand the matter to the District Court by a random assignment.

8. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure, Rule 32(a)(7)(B)because this brief contains 6,215 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, Rule 32(a)(7)(B)(iii).

9. STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

10. REQUEST FOR ATTORNEY FEES

The Judgments and Assignments issued by the California Superior Court

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(docket 45-2, 45-3), include award of attorney fees based upon the terms of the contracts sued upon. It is requested that fees for this appeal be considered and added to prior fee awards.

DATE March 2, 2014

//s//

Emile M. Mullick
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ABBA BAIL BONDS