

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 REPLY
	)	BRIEF
	)	
JEFF GRUBBE et al,	)	
	)	
Defendants-Appellees	)	
	)	

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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  
REPLY BRIEF

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## **1. SUMMARY OF THE OPPOSITION**

Opposition by The Tribe is in three parts: defenses, points regarding Indian Sovereignty, and the scope of 28 U.S.C. § 1360. Defenses to the allegations will be briefly discussed. Indian Sovereignty has been discussed and ruled on in both lower court rulings, Doc 23, page 2, lines 6 - 14 and Doc 51, page 2, lines 7 - 12. ABBA does not challenge these findings on immunity of tribal officials.

The basic issue to be resolved is identified on pages 15 - 16 of the opposition where it is stated that Public Law 280 (28 U.S.C. § 1360) does not require that the Tribe obey the process of the state court as to an assignment order against a Tribal member, and that no court has jurisdiction to review such disobedience.

## **2. ISSUES STATED BY THE TRIBE**

A. Does jurisdiction exist .... “when the funds are unquestionably property of the tribe, not the individuals?” Opposition page 7.

This is a statement of a defense, a factual dispute about the target funds.

B. Can ABBA circumvent ... sovereign immunity by naming the tribe’s elected officials as individual defendants?

This has been ruled on by the lower court in its Order, Doc 51, page 2, lines 7 - 12.

ABBA believes that the Tribe gets closer to identifying the issue at pages 15 -

16, where it asserts that PL 280 does not require that the Tribe obey the process of the state court as to an assignment order following judgment against a Tribal member.

### **ADDENDUM 28 U.S.C. § 1360, (PL 280)**

The text of 28 U.S.C. § 1360 appears as an addendum to this brief.

#### **3. DISTINGUISHING IMMUNITY AND DEFENSES**

Immunity is fundamentally different from a defense. Immunity protects an entity from suit, it defeats jurisdiction. The merits of the case and defenses to the allegations made are not at issue when jurisdiction is before the court. Therefore, assertions of defenses are premature.

The Tribe asserts, seemingly as defenses, that:

1. As to the Assignment Order, that its target is not assignable because the identified funds are funds that the Tribe “might” otherwise pay to Judgment Debtor Mathews, if the Assignment Order did not exist. Opposition page 13.
2. That as custodian of income due to ABBA’s judgment debtors Mathews the Tribe, may not be bound by the Assignment Order. Opposition fn 15 at page 42.

ABBA would argue that each of these defenses will fail, but the issue before this Court is immunity rather than defenses.

#### **4. DISTINGUISHING OFFICIAL AND INDIVIDUAL CONDUCT**

In the context of the doctrine of *Ex Parte Young* 209 US 123, (1908) a state

official may act in accordance with the laws and policies of his employer and therefore his actions are official. And, if his actions are official, in the sense that they are actions by the state, immunity will attach to his actions. In the seminal case *Ex Parte Young, supra* a Minnesota State Attorney General acted to enforce a state law mandating fines and imprisonment for violations of railroad rate ceilings. A legal distinction was created to separate the acts of the Attorney General from an act by the state of Minnesota. It was held that an injunction to prevent the Attorney General from doing that which he has no legal right to do by federal law is not an interference with the discretion of an officer because the state has no power to impart to the Attorney General any immunity from responsibility to the supreme authority of the United States. *Ex Parte Young, supra*, 159, 160.

The Tribe's lengthy argument about whether or not the sued tribal officials acted as "individuals" or as "officials" is of no consequence. The tribal officials named as defendants in the complaint were acting with tribal authority, as was the Minnesota Attorney General, but ABBA argues that they were acting in violation of federal law, as was the Minnesota Attorney General. From the perspective of the entity, the official was acting officially; from the perspective of the federal court, he was acting as an individual.

**5. THE TRIBE'S STATEMENT OF THE CASE.**

The Tribe's characterization of the case is misleading and wrong. The Tribe incorrectly characterizes this case as a claim for money damages against the Tribe. Opposition page 35. It is not. The relief requested is Injunctive and Declaratory against named individuals. See Amended Complaint, Doc 45. Claims are for prospective non-monetary relief.

Claims for money damages have been fully litigated in state court against the Judgment Debtor, tribal members Clifford Mathews and Nancy Tewawina. See Judgment and Assignment Order, Docs 45-2 and 45-3.

The Tribe would like to show that this case falls within the types of cases which are subject to tribal sovereign immunity. This includes claims against tribes for:

money damages, discussed in *Maxwell v. County of San Diego*, 697 F.3d 941, 1088 (9th Cir., 2012);

money damages against tribes as the real party in interest based upon a finding that the actors were negligent employees of a tribe's commercial interests, *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 726-727 (9th Cir., 2008);

claims grounded on vicarious liability for negligent acts, *M.J. ex rel. Beebe v. U.S.*, 721 F.3d 1079, 1084 (9th Cir., 2013);

claims against a tribe through a tribal corporation, *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998);

The Tribe gets to the real issue at pages 15 - 16 of its Opposition; this case is about whether the Tribe must obey the state court assignment order against its Tribal members.

## 6. ARGUMENT PRESENTED BY THE TRIBE

In support of its claim to sovereign immunity the Tribe argues first that Tribal Officials are protected by Tribal Immunity.

The lower court ruled on this issue in its order, Doc 51 page 2, lines 7 - 12. In that ruling the court correctly found that immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute, citing *Ex Parte Young, supra*. The court opined that the relevant inquiry is whether prospective relief is requested and whether violation of federal law is alleged.

Second, the Tribe argues that the doctrine of *Ex Parte Young, supra*, is not applicable because monetary relief is requested.

Even though the complaint states no cause of action for monetary relief against any party, the Tribe argues that since the target of the assignment order is income due to tribal member Mathews, and since the money comes from the Tribal treasury, that makes the Tribe the real party in interest. This theory was rejected in *Maxwell v.*

*County of San Diego*, 697 F.3d 941, 1088 (9th Cir., 2012). In that case the Maxwell's sued tribal Fire Paramedics in their individual capacities for money damages and the target of the claim was their income. The court found that the tribe is not the real party in interest. Damages will come from the pockets of the individual defendants, not the tribal treasury. The tribal income payable to ABBA's judgment debtor is similar to the income payable to the paramedics. Indeed, the Tribe did pay ABBA directly from ABBA's judgment debtor's income until the judgment debtor cancelled his authorization. Complaint, Doc 45, page 2, lines 4 - 9.

Third, the Tribe argues that there is no substantial issue of federal law.

The Tribe argues that there is no violation of federal law because 28 U.S.C. §1360 on its face only creates jurisdiction for civil disputes between Indian and non Indian parties in the state superior courts. The Tribe acknowledges that the statute provides that the state superior courts "shall have the same force and effect within Indian country as they have elsewhere within the state". See Tribes Opposing Brief, page 20.

ABBA argues that refusal of the Tribe to comply with the orders of the superior court nullifies the mandate that superior court orders shall have the same force and effect within Indian country as they have elsewhere within the state. 28 U.S.C. § 1360(c) states that any tribal ordinance or custom shall, if not inconsistent with any

applicable civil law of the State, be given full force and effect. The Tribe's refusal to comply with the California Superior Court Judgment and Assignment Order is inconsistent with the law of the State of California. Therefore, a question of federal law is at issue.

The issue is substantial because ABBA's right to a forum for its civil dispute is to be abrogated by the very entity addressed in 28 U.S.C. § 1360, Indian tribes. The whole purpose of the statute is to provide a forum for disputes involving Indians and non Indians, but this purpose shall be defeated by claims of sovereign immunity which will defeat the jurisdiction imparted by the statute to the state.

The Tribe cites three cases in support of its argument that 28 U.S.C § 1360 cannot provide federal jurisdiction. The first is *K2 America Corp. v. Roland Oil & Gas Co.*, 653 F.3d 1024 (9th Cir., 2011). Plaintiff K2 sued in federal court alleging claims arising from an oil and gas lease located on lands held by the United States in trust for various Indian allottees. K2 contended that federal jurisdiction is proper for actions concerning ownership of an interest in land held in trust as an exception to the scope of 28 U.S.C § 1360 . The court disagreed, finding that the K2 claims were state law claims subject to 1360, and therefore must be heard in superior or tribal court. In contrast, ABBA has litigated its state law claims in superior court to final judgment and enforcement.

The Tribe also cites *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 726-727 (9th Cir., 2008). Plaintiff Cook claimed money damages resulting from a motor vehicle accident where the offending driver, Christensen, was found to be drunk and an employee of defendant Avi Casino Enterprises, Inc. a tribal corporation, as were Avi employees, Dodd and Purbaugh, who served her drinks. Cook sued the tribal corporation and employees Christensen, Dodd, and Purbaugh, alleging negligence and dram shop liability. Jurisdiction was grounded on diversity, not federal law. Christensen pled guilty to aggravated assault and driving under the influence and was sentenced to four years in Arizona prison. She did not move to dismiss, and was not a party to the appeal. The court made no finding as to claims against driver Christensen. The court found that negligent servers Dodd and Purbaugh were protected by sovereign immunity as employees of the tribe's commercial activities. Their negligent acts were not in violation of federal law, and the doctrine of *Ex Parte Young* cannot disturb their claims to immunity.

In cited case *M.J. ex rel. Beebe v. U.S.*, 721 F.3d 1079,(9th Cir., 2013) a Tribal Police Officer Johnson negligently caused injury to minor M.J. When Johnson was deemed to be a federal employee for purposes of this lawsuit, the United States substituted itself for Johnson and removed the case to federal court. The United States settled all claims against Johnson. M.J. sought additional damages against City

employer of Johnson, on theories of vicarious liability; negligent hiring, supervision, and training; and negligent entrustment. These are not federal claims and there was no issue of violation of federal law. The only issue before the court was M.J.'s vicarious liability claim against City, employer of Johnson. Johnson was acting in his official capacity and within the scope of his authority, even if negligently. He was not alleged to be violating any federal law. Since his acts were official, and not in violation of federal law, his sovereign immunity will not be defeated by the doctrine of *Ex Parte Young*. Therefore Johnson was immune from tort liability by tribal sovereign immunity. *M.J. ex rel. Beebe v. supra*, 1084. In contrast, ABBA alleges that the individual defendants were in violation of federal law when they denied ABBA the remedy ordered by the superior court. Therefore the individual Tribal defendants may not claim sovereign immunity.

## **7. CONCLUSION**

The Tribe urges the Court to read 28 U.S.C. § 1360 narrowly such that sovereign immunity challenges based on tribal policy and custom by a tribal custodian of accounts may defeat judgments and enforcement of judgments by a state court. This reading ignores the contents of paragraph 1360 (c) which states that tribal ordinances or customs inconsistent with state law shall not be given force and effect.

The parties have been unable to find precedent. ABBA urges the Court to

consider the purpose and effect of 28 U.S.C. § 1360 (a) and (c) such that civil disputes between Indian and non Indian parties may be brought to final resolution.

The Tribe argues that requiring the Tribe to comply with a state court assignment order encroaches on the sovereignty of the tribe. The Tribe argues that sheltering a judgment debtor from judgments taken against him will protect the customs, traditions, and self-government of the Tribe. The Tribe argues that its sovereignty is more important than the sovereignty of the state. The State of California followed its federal mandate and exercised jurisdiction to judgment and enforcement against tribal members Mathews and Tewawina. The Tribe, by refusing to comply with the assignment order, will thwart the authority of the State of California and halt its sovereign right to enforce its judgments. In this clash of sovereign states, a balancing of harms and benefits must favor the State of California. “State sovereignty does not end at a reservation's border”, *Nevada v. Hicks* 533 US 353, 361 (2001).

## **8. CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure, Rule 32(a)(7)(A)because this brief contains 2,299 words and

10 pages, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, Rule 32(a)(7)(B)(iii).

DATE April 19, 2014

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**ADDENDUM 28 U.S.C. § 1360**

State civil jurisdiction in actions to which Indians are parties.

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

<u>State</u>	<u>Indian country affected</u>
Alaska	All Indian country within the State.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) 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.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.