No. 13-56701

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABBA BAIL BONDS, INC., a California corporation,

Plaintiff-Appellant,

vs.

JEFF L. GRUBBE; VINCENT GONZALES, III; ANTHONY ANDREAS, III; SAVANA R. SAUBEL; and JESICA NORTE, each in his or her official capacity as an officer or member of the Tribal Council of the Agua Caliente Band of Cahuilla Indians,

Defendants-Appellees.

On appeal from the United States District Court,
Central District of California,
Honorable Terry J. Hatter, Jr., Senior District Judge

BRIEF OF APPELLEES JEFF L. GRUBBE; VINCENT GONZALES, III; ANTHORY ANDREAS, III; SAVANA R. SAUBEL; AND JESSICA NORTE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

JURISDICTIONAL STATEMENT

District Court

In its First Amended Complaint ["FAC"], plaintiff-appellant ABBA Bail Bonds, Inc. ["ABBA"] alleged federal jurisdiction under 28 U.S.C. §§1331 and 1360 (Doc. 45, p. 3, line 14). For the reasons noted below, federal subject matter jurisdiction was lacking under either of these sources.

Court of Appeals, Finality, Timeliness

ABBA appeals from the final Order filed on September 4, 2013 (Doc.51) dismissing its FAC with prejudice, thus disposing of all ABBA's claims and terminating the litigation in the District Court. No separate judgment was entered. ABBA's Notice of Appeal from this Order was filed on September 29, 2013, which was 25 days later, within the 30 days allowed by FRAP 4(a)(1)(A). The appeal is thus timely, and this Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does federal question jurisdiction exist for a claim that P.L. 280 requires individual tribal officials to obey a state court order to pay money, in litigation to which neither they nor their tribe was a party, when the funds sought are unquestionably property of the tribe, not the individuals?

2. Does Public Law 280 allow a plaintiff to circumvent an Indian tribe's sovereign immunity by naming the tribe's elected officers as individual defendants?

ADDENDUM: 28 U.S.C. §1360

As required by Ninth Circuit Rule 28-2.7, the text of 28 U.S.C. §1360 (the civil part of P.L. 280) appears as an Addendum to this brief, at p. 52.

STATEMENT OF THE CASE

Despite ABBA's claim that "This case is about the conflict between Native American Sovereign Immunity and federal law" (Opening Brief, p. 3), there is no such conflict. Tribal sovereign immunity from unconsented suit originates in federal law, and federal law defines and limits it. There is no conflict between the doctrine and federal law, only a question as to the application of this doctrine to an unusual set of facts.

Rather, this case is about money. ABBA is trying to extract money from the Agua Caliente Band of Cahuilla Indians (the "Tribe"). ABBA seeks to avoid the Tribe's immunity by asserting claims against not the Tribe itself, but against the five individual members of the Tribe's elected Tribal Council on an *Ex Parte Young* theory. In support of this effort, ABBA makes a novel but specious claim.

ABBA has obtained an order from a state court in litigation to which neither the Tribe nor any of its officers was a party. As between ABBA and Clifford Mathews, a defendant in that litigation and a member of he Tribe, the state court order purports to assign to ABBA payment of certain funds that the Tribe might otherwise pay to Mr. Mathews. ABBA in effect wishes to turn the Tribe into ABBA's collection agency. The Tribe, acting through its five-member elected Tribal Council, has declined to obey this order from the state court, in litigation to which it and they are strangers. Yet ABBA persists.

ABBA relies on a federal statute[1] that allows individual reservation Indians to be named as defendants in ordinary private civil litigation in state

[1] Public Law 83-280, 67 Stat. 588, 18 U.S.C. §1162 (criminal) and 28 U.S.C. §1360 (civil), commonly known as "P.L. 280". California is one of the states named in and thus subject to this statute.

court. Despite two square holdings by the Supreme Court that P.L. 280 does not waive any tribe's sovereign immunity, and despite a great body of law of this Court that one may not circumvent a tribe's sovereign immunity by the transparent subterfuge of naming a tribe's officers as nominal defendants, ABBA seizes on P.L. 280's authorization to make individual reservation Indians defendants in state court as somehow overcoming the obstacles of controlling precedent from the U.S. Supreme Court and this Court.

Were this so, then tribal sovereign immunity would no longer exist in states subject to P.L. 280. Any plaintiff could circumvent the immunity by obtaining a state court order or judgment against any individual tribal member without any notice to or involvement of the tribe or its officials. If that member's tribe did not voluntarily honor that judgment or assignment order or other collection device, then the plaintiff could bring suit in federal court against the individual officers of the member's tribe under an *Ex Parte Young* theory, and obtain direct relief against them under ABBA's reading of P.L. 280, requiring them to drain the tribe's treasury to satisfy the judgment or assignment order against the member. Not only would tribal sovereign immunity and funds vanish in states subject to P.L. 280, but the federal courts would become small claims courts or collection agencies for every such collection action against individual Tribal members. The Tribal Defendants will show how this theory and result are foreclosed by the precedents of the Supreme Court and this Court.

ABBA highlights the weakness of its claim by how it states the issue: "The issue before this Court is: does 28 U.S.C. §1360 [the civil part of P.L. 280] provide state courts with full jurisdiction for litigation of claims, **with implied federal court review** to consider post judgment claims of sovereign immunity?" (Opening Brief, pp. 3-4, bold emphasis added). This is a fatal

flaw to ABBA's argument**.** P.L. 280 is purely a measure to confer on state courts full criminal and a limited degree of civil jurisdiction over individual reservation Indians, but no state court jurisdiction whatsoever over tribes. Nor does P.L. 280 confer any jurisdiction on the federal courts over anything or anyone at all.

The federal courts do not sit as courts of appeals from actions of state courts regarding claims of tribal sovereign immunity. As courts of limited jurisdiction, the federal courts have no jurisdiction except as Congress explicitly confers it. No federal jurisdiction derives from implication, only from statute. ABBA's claim of federal jurisdiction by implication not only finds absolutely no support in the language of P.L. 280, but this Court has already rejected it. The Tribal Defendants[2] now urge the Court to do so again.

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[2] The defendants named in both ABBA's original complaint and in ABBA's FAC are Jeff L. Grubbe, Vincent Gonzales, III, Anthony Andreas, III, Savana R. Saubel, and Jessica Norte. The captions identify all five as either officers or members of the elected Tribal Council of the Agua Caliente Band of Cahuilla Indians. Defendant Savana R. Saubel left office in April 2012. The defendants pointed this out and urged ABBA to dismiss the action as against her in their first motion to dismiss [Doc. 11, p. 6, lines 26-28]. Despite this invitation, ABBA continued to name her as a defendant in its FAC, and continues to do so now, even though the defendants pointed this out again in their second motion to dismiss [Doc. 47-1, p. 7, lines 24-28]. Because Savana R. Saubel is no longer a member of the Tribal Council, she could provide no relief to ABBA even if ordered to do so. For this reason, ABBA has asserted no case or controversy as against her, or any claim against her on which relief could be granted. Both the action and the appeal should be dismissed as to her. The same can now also be said concerning Councilmember Jessica Norte, who left office on April 1, 2014, although ABBA may not know this. The remaining three defendants are still in office, and will be referred to herein as the "Tribal Defendants".

STATEMENT OF FACTS

The Agua Caliente Band of Cahuilla Indians (hereinafter, the "Tribe") "is a federally recognized Indian tribe"[3], and ABBA has so stated. (Opening Brief, p. 7) One of its members is Clifford Mathews. As a member of the Tribe, Mr. Mathews has that relationship with the Tribe, just as he has a relationship with the State of California as one of its citizens, or with the United States as one of its citizens. But none of these governments, either federal, state, or tribal, is responsible for the debts of its citizen, Mr. Mathews, solely because of that citizenship.

In its Opening Brief, ABBA mentions that, prior to filing the present action in 2012, there was another entire round of litigation in 2010 in which ABBA sought to obtain the same funds directly from the same tribe as it now seeks indirectly. ABBA touts the judgment and assignment order that it obtained in this earlier case, but omits the details of the proceedings prior to them. Because knowledge of ABBA's first attempt to extract money from the Tribe is essential to an understanding of its current second attempt, the Tribal Defendants will provide a better description of that omitted earlier unsuccessful attempt.

Mr. Mathews incurred a large debt to ABBA in 2009. To try to collect it, ABBA filed an action in California Superior Court against him and two others on April 22, 2010, asserting claims for breach of contract and common counts.[4] Because federal interests and a federal official were

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[3] *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1043 (9th Cir., 2000).

[4] *ABBA Bail Bonds, Inc. v. Clifford Wilson Mathews, et al.*, Superior Court, Riverside County, civil no. RIC0007570. A copy of the Superior Court file is attached as exhibits to the Notice of Removal noted *infra*, doc. No. 1 therein. This 2010 state court litigation, later removed to and then remanded

implicated, the U.S. Attorney filed a Notice of Removal to the District Court on June 4, 2010.[5] Upon removal, ABBA filed a FAC, naming the same individuals as defendants, plus two new defendants: (1) Chris Larson, an official with the Office of Special Trustee, U.S. Bureau of Indian Affairs, and (2) the Agua Caliente Band of Cahuilla Indians. [2010 Litigation, Doc. 9] By stipulation, the federal official was dismissed. [2010 Litigation, Doc. 31, 37]. The District Court granted the Tribe's Rule 12 motion to dismiss based on tribal sovereign immunity [2010 Litigation, Doc. 55], leaving only the individual defendants. In granting the Tribe's motion to dismiss, the District Court held:

> Aqua Caliente Band of Cahuilla Indians is a federally recognized tribe with sovereign immunity. Abba has failed to demonstrate that Aqua Caliente or Congress has waived sovereign immunity in this case. Therefore, Aqua Caliente is immune from suit.
> [2010 Litigation, Doc. 55, p. 2, lines 11-14]

Because only state law claims were asserted against the individual defendants, the District Court remanded the removed case back to the Superior Court [*Id.*]. ABBA never appealed this holding as to the Tribe's sovereign immunity. Eventually, in the absence of, and without the involvement of or any notice to, the Tribe, the Superior Court entered its

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from the District Court, civil no. 5:10-cv-00823, will be referred to herein as the "2010 Litigation".

[5] 2010 Litigation, Doc. 1. In the present case, the Tribe requested that the District Court take judicial notice of the District Court's entire file in the 2010 Litigation [Doc. 10]. The Tribal Defendants now renew that request to this Court, since ABBA includes only the state court judgment and assignment order in its Excerpt of Record. This judgment and assignment order were both taken by default against the remaining individual defendants, after the federal official and the Tribe had been dismissed.

judgment [Doc. 45-2] against Mr. Mathews on his underlying debt, and its assignment order [Doc. 45-3], purporting to assign to ABBA certain funds that the Tribe might otherwise pay to Mr. Mathews. It is these funds that the Tribe refuses to pay to ABBA, and that ABBA now seeks this Court to direct the Tribe to pay to ABBA, as stated in the assignment order.

The proceedings in the District Court in this case are simple. Faced with the above square holding (and issue preclusive effect) that sovereign immunity stands in the way of ABBA's attempt to extract money from the Tribe directly, ABBA now seeks to do so indirectly. Instead of naming the Tribe as a defendant, as it did before, ABBA now names the Tribal Defendants, the individual officers and members of the Tribe's elected Tribal Council, and alleges violation of federal law to support an *Ex Parte Young* theory. The Tribal Defendants moved to dismiss under Rule 12, for lack of federal jurisdiction and for tribal sovereign immunity of the Tribal Defendants. The District Court granted the motion based both on sovereign immunity and on ABBA's failure to allege a sufficient violation of federal law (Doc. 23). ABBA moved for relief to amend, and the District Court allowed an amendment (Doc. 38). The Tribal Defendants renewed their arguments in another motion to dismiss, focusing on ABBA's *Ex Parte Young* theory and allegations of violation of federal law. The District Court agreed, and dismissed again, with prejudice. (Doc. 51) This appeal followed.

STANDARD OF REVIEW

There are no disputed issues of fact in this appeal. All issues are purely legal. The District Court dismissed the action with prejudice for lack of subject matter jurisdiction. See Order filed September 4, 2013 (Doc. 51). Therefore, the standard of review is abuse of discretion.

> We review a district court's decision to dismiss a complaint with prejudice for abuse of discretion. [cit.om.] A district court abuses its discretion if it applies the wrong legal rule or if its "application of the [correct] rule was illogical, implausible, or without support in the record." [cit.om.]
>
> *Salaner v. Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir., 2013)

As to the sovereign immunity question, *de novo* review applies. *Miller v. Wright*, 705 F.3d 919, 923 (9th Cir., 2013).

SUMMARY OF ARGUMENT

1. *The District Court lacked federal question jurisdiction.* In its effort to extract money from the Tribe, ABBA prays for declaratory and injunctive relief. ABBA never identifies the precise grounds for seeking this relief, beyond a generalized statement that P.L. 280 "does not confer jurisdiction on federal courts, but violation of that federal law does" as a federal question.[6] Perhaps this is so because ABBA's underlying claims in the state court judgment and order which it seeks to have the Tribe honor are breach of contract and unjust enrichment, both clearly state law claims, not federal claims. Even though federal law is certainly involved in determining whether P.L. 280 overcomes tribal sovereign immunity as to the Tribal Defendants, ABBA's right to relief does not depend on a substantial question of federal law. The immunity of the Tribal Defendants does present a substantial question of federal law, but only as a defense. Federal question jurisdiction must be based on a plaintiff's own affirmative claim,

[6] Opening Brief, p. 10.

not an anticipated defense. ABBA's right to relief depends instead on its state law causes of action, neither of which supports federal jurisdiction.

2. ***P.L. 280 does not overcome tribal sovereign immunity as to the Tribe itself or as to its elected officers in their official tribal capacities.*** The Supreme Court has twice held that, although P.L. 280 does confer full civil jurisdiction over individual reservation Indians for ordinary civil causes of action (tort, contract, divorce, etc.) against them in their private capacities, P.L. 280 does NOT confer any jurisdiction on the state courts over the Tribes themselves. Also, this Court has held that P.L. 280 confers no jurisdiction at all on the federal courts, and that a plaintiff may not circumvent a tribe's immunity by simply naming the tribe's officers as nominal defendants.

To avoid these obstacles, ABBA asserts claims against the Tribe's elected officials under P.L. 280 on an *Ex Parte Young* theory. The subterfuge is obvious. ABBA is still trying to get the same funds from the Tribe as when it sued the same Tribe directly in the 2010 Litigation, in which the Tribe's immunity was upheld. ABBA still seeks money from the Tribal treasury, not from the individual members of the elected Tribal Council. The *Ex Parte Young* allegation cannot subject the Tribe, acting through its officers, to any claim for money. The most that such an allegation can do is to support a claim for prospective non-monetary relief. But, as before, ABBA seeks money.

Even if ABBA sought non-monetary relief, the *Ex Parte Young* allegation still does not support ABBA's claim that the Tribal Defendants violate federal law by not honoring the state court judgment and assignment order in litigation to which neither the Tribe nor they were parties. P.L. 280 did not confer *any* jurisdiction over the Tribe on the state courts, whether to

make the Tribe a direct defendant in state court, or to obey the process of the state court in litigation to which the Tribe is a stranger. This is so whether ABBA proceeds directly against the Tribe, or indirectly against its elected officers. Therefore, there is no ongoing violation of federal law for ABBA's *Ex Parte Young* allegation to address.

For all these reasons, the District Court's dismissal of this action should be affirmed.

I.

THE DISTRICT COURT PROPERLY DISMISSED FOR LACK OF FEDERAL JURISDICTION.

A. 28 U.S.C. §1331 does not provide federal jurisdiction in this case.

ABBA cites 28 U.S.C. §1331 as a basis for federal jurisdiction over its claims (Doc. 45, p. 3, lines 13-14), on the theory that an interpretation of 28 U.S.C. §1360 supports such jurisdiction. However, even if a claim requires interpretation of federal law, that does not mean that the claim automatically "arises under" federal law. As this Court has recently held,

> For a case to 'arise under' federal law, a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on a substantial question of federal law.
>
> *K2 America Corp. v. Roland Oil & Gas Co.*, 653 F.3d 1024, 1029 (9th Cir., 2011)[7]

[7] ABBA seeks to distinguish *K2* by noting that, in *K2*, the "plaintiff had failed to take his case before the Superior Court, but in the case at bar the plaintiff has fully exhausted Superior Court jurisdiction." (Opening Brief, p. 13) Even if that is so, it does not matter. Federal jurisdiction does not automatically spring into existence upon exhaustion of state remedies. The District Court does not sit as a Court of Appeal from actions of the state courts.

A. 28 U.S.C. §1360 does not create ABBA's claims.

ABBA alleges that the state court judgment and assignment order that ABBA seeks this Court to enforce "are grounded on contract and fraud and as such are grounded on the civil laws of the state of California . . ." (Doc. 45, p. 7, lines 11-12). Thus, ABBA's claims are not created by federal law; rather, they are created by state law. In its leading case on the subject, this Court held that such ordinary state law claims cannot be transformed into ones arising under federal law simply because they may also involve the kinds of issues of federal law that frequently attend any tribal litigant:

> There is nothing in the present case that suggests that the action is anything other than a simple breach of contract case. . . . The Tribe . . . seeks recovery of damages for failure to perform a construction contract. . . . [¶] It is true that the "arising under" requirement of section 1331 may be met by "claims founded upon federal common law as well as those of a statutory origin." [cit.om.] However, we can discern no reason to extend the reach of the federal common law to cover all contracts entered into by Indian tribes. Otherwise the federal courts might become a small claims court for all such disputes.
>
> *Gila River Indian Community v. Henningston, Durham & Richardson* , 626 F.2d 708, 714-715 (9th Cir., 1980)

> The fact that the Court must review federal statutory and case law to determine whether Plaintiffs may pursue their state law claims against Defendants in federal court does not transform Plaintiffs' action from one arising under New York Law into one arising under federal law.
>
> *Frazier v. Turning Stone Casino,* 254 F.Supp.2d 295, 303 (N.D.N.Y., 2002)

Thus, even though a tribe is involved and issues of federal law must be considered, it is the essential nature and origin of ABBA's claims that determines whether those claims "arise under" federal law. By asserting that its claims "are grounded on contract and fraud and as such are grounded on the civil laws of the state of California . . .", ABBA confirms that its claims do not originate in federal law. They originate in state law for purposes of federal question jurisdiction.

B. ABBA's right to relief does not depend on a substantial question of federal law.

The nub of ABBA's argument is its claim that "23[8] 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." (Opening Brief, p. 14) The federal courts have rejected both aspects of ABBA's assertion.

1. P.L. 280 does not confer subject matter jurisdiction on the federal courts for any claim at all.

This Court has rejected ABBA's claim that P.L. 280, 28 U.S.C. §1360, confers *any* jurisdiction on the federal courts:

> Through what is commonly known as "Public Law 280" ("P.L. 280"), Congress provided to certain states [fn.om.] broad jurisdiction over criminal offenses committed in Indian country, 18 U.S.C. §1162(a), and limited jurisdiction over civil causes of action arising in Indian country, *id.* [28 U.S.C.] §1360(a). . . .
>
> The Supreme Court has explained that §1360(b) "simply" reaffirmed "the existing reservation Indian-Federal Government relationship in all respects save the conferral of state-court

[8] *23* U.S.C. in original; should be *28* U.S.C.

> jurisdiction to adjudicate private causes of action involving Indians [cit.om.]
>
> The district court correctly concluded that §1360(b) limits the exercise of state court jurisdiction; it does not confer jurisdiction on federal courts. Although P.L. 280 "necessarily preempts and reserves to the Federal government or the tribe jurisdiction not so granted [cit.om.], the law plainly did not confer subject matter jurisdiction upon federal courts.
>
> *K2 America Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1027-1028 (9th Cir., 2011)

2. The Supreme Court has twice held that P.L. 280 does not waive the sovereign immunity of tribes.

The Supreme Court first held in 1976 that P.L. 280 did no more than allow state courts to make individual reservation Indians defendants in ordinary private civil litigation (torts, contracts, divorces, etc.), while extending no state jurisdiction over the tribes themselves, as distinguished from their individual citizens, or waiving any tribe's sovereign immunity:

> Thus, provision for state criminal jurisdiction over offenses committed by or against Indians on reservations was the central focus of P.L. 280 . . .
>
> *Bryan v. Itasca County*, 426 U.S. 373, 380; 96 S.Ct. 2102, 2107; 48 L.Ed.2d 710 (1976)

> Piecing together as best we can the sparse legislative history of [28 U.S.C. §1360, it] seems to have been primarily intended to address the lack of adequate forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State "jurisdiction over civil causes of action between

> Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action." With this as the primary focus of [28 U.S.C. §1360], the wording that follows in [28 U.S.C. §1360]—"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 Indian country as they have elsewhere within the State"—authorizes application by the state courts of their rules of decision to decide such disputes. [fn. 10: such civil laws] "would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of 'private' laws."
>
> *Id.*, 426 U.S. at 383-384; 96 S.Ct. at 2108-9

> In short, the consistent and exclusive use of the terms "civil causes of action," "aris[ing] on," "civil laws . . . of general application to private persons or private property," and "adjudicat[ion]," in both the Act and its legislative history virtually compels our conclusion that the primary intent of [28 U.S.C. §1360] was to grant jurisdiction over private civil litigation involving reservation Indians in state court.
>
> *Id.*, 426 U.S. at 384-385, 96 S.Ct. at 2109

Based on this analysis of the purpose and scope of P.L. 280, the Supreme Court held that P.L. 280 extended no state jurisdiction at all over tribes, as distinguished from their individual tribal citizens:

> **The Act [28 U.S.C. §1360] itself refutes any such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves . . .**
>
> *Bryan, supra*, 426 U.S. at 388-389; 96 S.Ct. at 2111, bold emphasis added

The Supreme Court repeated this conclusion in 1986, specifically holding that P.L. 280 did not waive any tribe's sovereign immunity:

> We have never read Pub.L. 280 to constitute a waiver of Tribal sovereign immunity . . .
>
> *Three Affiliated Tribes of Ft. Berthhold Reservation v. Wold Engineering*, 476 U.S. 877, 892; 106 S.Ct. 2305, 2314; 90 L.Ed.2d 881 (1986)

Thus, ABBA is simply wrong in claiming that a supposed violation of P.L. 280 (i.e., the refusal of the Tribal Defendants to honor ABBA's state court judgment and assignment order) somehow creates subject matter jurisdiction to challenge that action in federal court as a federal question in which ABBA's right to relief depends on a substantial question of federal law. P.L. 280 did not confer any jurisdiction on the district court; nor did it waive tribal sovereign immunity. These questions of federal law are no longer open. To present a substantial question of federal law, the federal question must truly be substantial:

> It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.
>
> *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 313; 125 S.Ct. 2363, 2367; 162 L.Ed.2d 257 (2005)

This Court's holding in *Peabody Coal Co. v. Navajo* Nation, 373 F.3d 945 (9th Cir., 2004) supports this conclusion. There a coal company sought to enforce not a claim arising directly from a federally-approved mining lease,

but rather to enforce an arbitration settlement award growing out of a dispute involving such a federally-approved mining lease. While this Court held that, because of the intense federal involvement in and regulation of Indian mining leases, their enforcement might present a substantial federal question, the enforcement of the arbitration settlement award based on such a lease did not. "Whether the Navajo Nation is in breach of this award is an issue that can be resolved by the common law of contracts." *Id.*, at 951.

Similarly, the mere presence of a federal question, regarding whether 28 U.S.C. §1360 waives the Tribal Defendants' sovereign immunity as to the state court assignment order, does not transform ABBA's underlying contract and tort claims into federal law claims. If it did, then the result against which this Court warned in *Gila River, supra,* would prevail: the federal courts would become small claims courts or collection agencies for all state law claims against members of tribes. Creditors could routinely name tribal officials as defendants on an *Ex Parte Young* theory that they are violating federal law by not honoring the plaintiff's state court judgments or orders against those tribal members on ordinary state law causes of action (contract, tort, etc.)

As a long-settled points of federal law, whether 28 U.S.C. §1360 confers any jurisdiction on district courts, or waives a tribe's sovereign immunity, do not raise a substantial question of federal law for purposes of federal question jurisdiction. Under the second prong of the test of *K2, supra*, ABBA's right to relief does not depend on a *substantial* question of federal law. ABBA's right to relief depends instead on the merits of its contract, fraud, or other state law claims. The District Court correctly determined that federal question jurisdiction was not present in this case.

II.

IF ABBA HAS STATED ANY CLAIM AT ALL ON WHICH RELIEF CAN BE GRANTED, IT IS AGAINST THE FIVE TRIBAL DEFENDANTS IN THEIR OFFICIAL TRIBAL CAPACITIES ONLY.

It is not clear whether ABBA has sued the Tribal Defendants in their official tribal capacities, or in their non-tribal individual capacities, or both. On the one hand, in the caption to the FAC [Doc. 45, p. 1], ABBA names them as follows:

> ABBA BAIL BONDS, INC., a California Corporation,
>
> Plaintiff,
>
> v.
>
> JEFF L. GRUBBE, Acting Tribal Council Chairman, Agua Caliente Band of Cahuilla Indians; VINCENT GONZALES III, Tribal Council Member, Agua Caliente Band of Cahuilla Indians; ANTHONY ANDREAS III, Tribal Council Member, Agua Caliente Band of Cahuilla Indians; SAVANA R. SAUBEL, Tribal Council Member, Agua Caliente Band of Cahuilla Indians; JESSICA NORTE, Tribal Council Member, Agua Caliente Band of Cahuilla Indians; DOES 1-10 inclusive
>
> Defendants.

In the allegations of the FAC itself, ABBA repeatedly refers to either the Tribal Council or to the members of the Tribal Council, and never to the five Tribal Defendants as individuals or in any other capacity. Even when ABBA identifies the five Tribal Defendants, ABBA alleges that they

> are members of the Tribal Council of the Agua Caliente Band of Cahuilla Indians.
>
> Doc. 45, p. 3, lines 27-28

The Tribal Council of the Agua Caliente Band of Cahuilla Indians acknowledges authority and discretion to make payments from the per capita accounts of its tribal members but refuses to comply with the assignment orders . . .

Doc. 45, p. 6, lines 9-11

The Tribal Council of the Agua Caliente Band of Cahuilla Indians has authority and discretion to make payments from the per capita accounts of the judgment debtors, as described by the judgments and assignment order of the Superior Court, but have threatened to refuse, and have refused, and will refuse under the purported authority of the tribe, to comply with the assignment orders as required by and in violation of federal law, 28 U.S.C. §1360.

Doc. 45, p. 7, lines 17-22

The Tribal Council of the Agua Caliente Band of Cahuilla Indians asserts sovereign immunity as a bar to the jurisdiction of the California Superior Court . .

Doc. 45, p. 7, lines 23-24

Plaintiff ABBA seeks a determination and declaration of the rights and the legal relations between it and members of the Tribal Council of the Agua Caliente Band of Cahuilla Indians , , ,

Doc. 45, p. 8, lines 2-4

The Tribal Council of the Agua Caliente Band of Cahuilla Indians has been served the Judgment and Assignment Orders of the California Superior Court . . . Doc. 45, p. 8, lines 27-28

Plaintiff ABBA seeks an order directing the Tribal Council Members of the Agua Caliente Band of Cahuilla Indians to comply with the Assignment Order and Judgment of the California Superior Court . . . Doc. 45, p. 9, lines 9-11

ABBA's caption and all its textual allegations point to suit against the Tribal Defendants in their official tribal capacities as members of the Tribal Council. Nowhere does ABBA make any allegation at all that any Tribal Defendant took any action in any personal non-tribal individual capacity, as opposed to his or her official tribal capacity.

On the other hand, in an apparent attempt to fall within the scope of the jurisdiction that P.L. 280 extended to California state courts over individual reservation Indians, ABBA makes two fleeting and confusing references to the Tribal Defendants in their individual capacities, not in the text of any allegation, but instead in the headings to ABBA's two causes of action, and in its prayer for relief. ABBA's causes of action are entitled:

> DECLARATORY RELIEF AGAINST DEFENDANT MEMBERS OF THE TRIBAL COUNCIL IN THEIR OFFICIAL CAPACITY AND IN THEIR INVIDIVUAL CAPACITY ACTING IN VIOLATION OF FEDERAL LAW AND IN THE COURSE AND SCOPE OF TRIBAL LAW.
>
> Doc. 45, p. 6, lines 20-25

> INJUNCTIVE RELIEF AGAINST DEFENDANT MEMBERS OF THE TRIBAL COUNCIL OF THE AGUA CALIENTE BAND OF CAHUILLA INDIANS AND DOES 1 THROUGH 10 IN THEIR OFFICIAL CAPACITY AND IN THEIR INDIVIDUAL CAPACITY ACTING [sic] THE COURSE AND SCOPE OF TRIBAL LAW IN VIOLATION OF FEDERAL LAW.
>
> Doc. 45, p. 8, lines 7-12

In its prayer for relief, ABBA

> prays for judgment against Defendants and each of them as follows:

> AGAINST DEFENDANTS JEFF L. GRUBBE, VINCENT GONZALES III, ANTHONY ANDREAS III, SAVANA R. SAUBEL and JESSICA NORTE IN THEIR OFFICIAL CAPACITY AND IN THEIR INDIVIDUAL CAPACITY ACTING [sic] THE COURSE AND SCOPE OF TRIBAL LAW AS MEMBERS OF THE TRIBAL COUNCIL OF THE AGUA CALIENTE BAND OF CAHUILLA INDIANS . . .
>
> 2. An order directing the named defendants members of the Tribal Council of the Agua Caliente Band of Cahuilla India to make payments to plaintiff ABBA Bail Bonds . . .
>
> Doc. 45, p. 9, line 20 to p. 10, line 9

These references in the headings and prayer for relief do mention "in their individual capacity" but they also state "acting in the course and scope of tribal law" and "acting [in?] the course and scope of tribal law as members of the Tribal Council of the Agua Caliente Band of Cahuilla Indians".

From these confusing allegations and references in headings and in the prayer, the Tribal Defendants take it that ABBA sues them in their official tribal capacities. There are no allegations of individual actions, just claims for declaratory and injunctive relief for actions taken in their official tribal capacities. If ABBA sues the Tribal Defendants in their individual private non-tribal capacities, then ABBA has stated no claim for any relief against them because there are no allegations at all of any actions by the Tribal Defendants as private individuals in any non-tribal capacity. If ABBA has stated any claim for relief at all, it is against the Tribal Defendants in their official tribal capacities as elected members of the Tribe's Tribal Council.

III.

ABBA'S *EX PARTE YOUNG* ALLEGATION DOES NOT OVERCOME THE IMMUNITY OF THE TRIBAL DEFENDANTS IN THIS CASE.

A. The general rule: a plaintiff may not evade tribal sovereign immunity by naming tribal officials as nominal defendants.

In its 2010 Litigation, ABBA named the Tribe as a defendant in its name. In that previous action, the District Court granted the Tribe's Rule 12 motion to dismiss on grounds of sovereign immunity. In its current action, ABBA attempts to avoid tribal sovereign immunity by naming the Tribe's five elected Members of its Tribal Council as defendants, rather than the Tribe itself. This Court routinely rejects such subterfuges**:**

> This tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority.
>
> *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir., 1985)

> The final question is whether ACE's tribal immunity extends to two of its employees, defendants Dodd and Purbaugh. We conclude that it does. . . . In these cases the sovereign entity is the "real, substantial party in interest, and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.." [cit.om.] Applying this principle to tribal rather than state immunity, we have held that a plaintiff cannot circumvent tribal immunity "by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." [cit.om.]
>
> *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 726-727 (9th Cir., 2008)

> Johnson is also immune from tort liability by application of NVK's sovereign immunity as an Indian tribe. [cit.om.] This immunity "protects tribal employees acting in their official capacities and within the scope of their authority." [cit.om.] Here, NVK employed Johnson as a TPO as the time of the accident. Plaintiffs do not dispute that Johnson was acting in that capacity when he engaged in the conduct giving rise to Plaintiffs' claims. Accordingly, Johnson is also immune from tort liability under tribal sovereign immunity.
>
> *M.J. ex rel. Beebe v. U.S.*, 721 F.3d 1079, 1084 (9th Cir., 2013)

B. ABBA's *Ex Parte Young* allegation does not overcome the tribal sovereign immunity of the Tribal Defendants in this case.

To avoid the sovereign immunity of the Tribal Defendants, ABBA makes an allegation under *Ex Parte Young*, 209 U.S. 123; 28 S.Ct. 441; 52 L.Ed. 714 (1908). In its FAC ABBA alleges as follows:

> 34. The Tribal Council of the Agua Caliente Band of Cahuilla Indians has authority and discretion to make payments from the per capita accounts of the judgment debtors, as described by the judgments and assignment order of the Superior Court, but have threatened to refuse, and have refused, to comply with the assignment orders as required by and in violation of federal law, 28 U.S.C.§1360.
>
> Doc. 45, p. 7, lines 17-22; p. 9, lines 3-8

This Court has held that a proper allegation under *Ex Parte Young* can overcome tribal sovereign immunity as to an individual tribal official. Such a proper allegation must be that (1) the tribal official has acted outside the authority that the tribe is capable of bestowing on him or her, or not in his or her official tribal capacity; (2) the tribal official is acting in violation of federal law; and (3) the relief sought is non-monetary and prospective only.

For the following reasons, ABBA has not sufficiently alleged any of these three factors to support a claim under *Ex Parte Young* as against the Tribal Defendants. For that reason, the immunity remains intact.

1. ABBA has not alleged that any Tribal Defendant acted outside his or her official tribal capacity.

Nowhere in its FAC does ABBA does allege that the Tribal Defendants acted *outside* their official tribal capacities at all. On the contrary, if anything, ABBA alleges that they acted *within* their tribal authority. ABBA alleges that the 5 Tribal Defendants "are members of the Tribal Council of the Agua Caliente Band of Cahuilla Indians" and that:

> The Tribal Council of the Agua Caliente Band of Cahuilla Indians acknowledges authority and discretion to make payments from the per capita accounts of its tribal members, but refuses to comply with [ABBA's judgment and order].
>
> Doc. 45, p. 6, lines.10-12

By alleging that the Tribal Defendants are members of the Tribe's elected Tribal Council and have the authority and discretion to honor ABBA's state court judgment, or not, ABBA alleges that they are acting *within* their tribal capacity, not *outside* it, and that that tribal capacity includes the discretion to honor ABBA's state court judgment, or not.

Furthermore, in the following confusing language from the headings of its causes of action ABBA states that its causes of action are asserted

> AGAINST DEFENDANT MEMBERS OF THE TRIBAL COUNCIL OF THE AGUA CALIENTE BAND OF CAHUILLA INDIANS IN THEIR OFFICIAL CAPACITY AND IN THEIR INDIVIDUAL CAPACITY ACTING [sic] THE COURSE AND SCOPE OF TRIBAL LAW
>
> Complaint, p. 6, ll. 21-25; p. 8, ll. 2-6

Without an affirmative allegation (and appropriate proof) that the Tribal Defendants have acted *outside* their official tribal capacities as members of the elected Tribal Council, ABBA fails to make an essential allegation under *Ex Parte Young*:

> The defendants argue that Imperial has failed to allege any viable claim that the tribal officials acted outside their authority, so as to subject them to suit. We agree.
>
> The complaint alleges no individual actions by any of the tribal officials named as defendants. As far as we are informed in argument, the only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury.
>
> *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir., 1991)

> Claimants may not simply describe their claims as against a tribal official as in his "individual capacity" in order to eliminate tribal immunity. . . . Permitting such a description to affect tribal immunity would eviscerate its protections and ultimately subject Tribes to damage actions for every violation of state or federal law. The sounder approach is to examine the *actions* of the individual tribal defendants. Thus, the Court holds that a tribal official—even if sued in his "individual capacity"—is only "stripped" of tribal immunity when he acts "manifestly or palpably beyond his authority . . ." [cit.om.] . . .
>
> Rather, the Court finds that to state a claim for damages against Bell and Campisi, the plaintiffs would have to allege and prove that Bell and Campesi acted "without any colorable claim of

> authority," apart from whether they acted in violation of federal or state law. [fn.15] . . . Additionally, as the defendants point out, the plaintiffs' complaint does not allege that Bell and Campesi were acting on their own account or for their own personal benefit.
>
> *Basset v. Mashantucket Pequot Museum*, 221 F.Supp.2d 271, 280, 281 (D.Conn., 2002)

The above reference in a caption to individual capacities is not a sufficient allegation under *Ex Parte Young*. Even treating the reference as an allegation, that reference states "IN THEIR INDIVIDUAL CAPACITY ACTING [word missing?] THE COURSE AND SCOPE OF TRIBAL LAW" (Complaint, p. 6, ll. 23-25). Even if one reads "OUTSIDE" into the reference where a word is apparently missing, a bare conclusory allegation that a tribal official acted outside his official capacity is simply insufficient under *Ex Parte Young*. What is required is an allegation of "individual actions" (*Imperial*, *supra*, at 1271) or acting "without any colorable claim of authority" or "on their own account or for their own personal benefit" (*Basset*, *supra*, at 281). ABBA simply makes no such allegation at all.

In contrast to ABBA's fleeting reference in a caption to individual capacities, the Tribal Defendants have offered uncontroverted evidence to the effect that, in choosing not to comply with ABBA's judgment and assignment order from the Superior Court, they were acting *within* their official tribal capacities. The Tribal Defendants have provided the full text of their Tribe's Constitution[9], which was approved by the Commissioner of

[9] Doc. 47-3. The Commissioner of Indian Affairs approved the original Constitution on April 18, 1957, and Article V(n) on August 9, 1991 (p. 12).

Indian Affairs under 25 U.S.C. §2.[10] Article V of that Constitution authorizes the Tribe's elected Tribal Council to take the following actions, among others:

> (a) To administer the affairs and manage the business of the Band . . .; to protect and preserve the Tribal property . . .
>
> (d) To expend any tribal funds within the exclusive control of the Band . . .
>
> (n) To prescribe the conditions under which the custodian of any Tribal . . . property may honor any subpoena concerning the production . . . of any such . . . property in any litigation to which the Tribe or a Tribal entity is not a party.

The action of which ABBA complains is that the Tribe's elected Tribal Council decided not to comply with ABBA's request that it obey the judgment and assignment order of the Superior Court. This action was entirely within the power that the Constitution confers on the Tribal Council. It is certainly part of administering the affairs and managing the business of the Tribe, of protecting and preserving Tribal property[11]. By definition this action is part of expending Tribal funds. And it falls squarely within prescribing the conditions under which the custodian of Tribal property may

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[10] This Court has held that such an approval by a federal official itself preempts contrary state law. See *Stuart v. U.S.*, 109 F.3d 1380, 1388 (9th Cir., 1997).

[11] ABBA apparently assumes that the funds in question belong to Mr. Mathews, the judgment debtor named in the state court judgment and order, rather than to the Tribe. That is simply not the law. The funds belong to the Tribe until and unless the Tribal Council acts to distribute or spend them. "Furthermore, tribal members have no vested right to tribal funds until they have received payment. Felix S. Cohen, Handbook of Federal Indian Law 606 (1982 ed.)." *Quair v. Sisco*, 359 F.Supp.2d 948, 979, n. 4 (E.D.Cal., 2004).

honor process in litigation to which the Tribe is not a party. ABBA does not claim otherwise or allege that the Tribal Council's action was outside the scope of this above Constitutional authority. All that the Tribal Defendants did was to act within the scope of the authority conferred on them by the Tribal Constitution. This Court has held that actions taken as elected members of a Tribal Council are *per se* within the authority that a tribe may confer on its elected officers:

> The defendants argue that Imperial has failed to allege any viable claim that the tribal officials acted outside their authority, so as to subject them to suit. We agree.
>
> The complaint alleges no individual actions by any of the tribal officials named as defendants. As far as we are informed in argument, the only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury.
>
> *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir., 1991)

Therefore, without such an allegation, ABBA's claims against the Tribal Defendants in their individual non-tribal capacities (if they exist at all) do not satisfy the standard of *Ex Parte Young*.

Although ABBA has not alleged that any Tribal Defendant has acted outside his or her official tribal capacity, ABBA has alleged that they acted in violation of federal law, in that they refuse to honor ABBA's state court judgment and assignment order. Were it true, this substitute allegation is still not sufficient to show that the Tribal Defendants acted outside their

tribal authority. Even if the official's action turns out to be wrong, that alone does not mean that the defendant official acted outside his authority under *Ex Parte Young*. More is needed: that the official had no governmental authority at all to act, not just that his or her action was somehow wrong:

> An action is not *ultra vires* simply because it "is arguably a mistake of fact or law." *United States v. Yakima Tribal Court*, 806 F.2d 853, 859-60 (9th Cir., 1986), *cert. denied*, 481 U.S. 1069, 107 S.Ct. 2461, 95 L.Ed.2d 870 (1987). An action is *ultra vires*, and results in a divesture of sovereign immunity, only if "an employee of the United States acts *completely outside his governmental authority*." *Id.* (emphasis added). [fn.om.] We hold that the *ultra vires* exception does not divest the United States of sovereign immunity in this case.
>
> *Alaska v. Babbitt*, 67 F.3d 864, 867 (9th Cir., 1995)

In *Alaska, supra*, 67 F.3d at 867, n. 3, this Court gave an example of such an action "completely outside his governmental authority":

> For example, 'if a dispute occurs pertaining to the sale of an employee's personal house, his government employment provides him with no shield to liability.'

Because ABBA makes no allegation that the Tribal Defendants acted outside their tribal capacity (and instead alleges that they acted *within* that capacity), ABBA cannot invoke *Ex Parte Young*. Even if they violated federal law by choosing not to honor ABBA's state court judgment and assignment order, they still made that choice in their official tribal capacity as members of the Tribal Council. Their action, even were it wrong, is still shielded by their Tribe's sovereign immunity under *Ex Parte Young*.

2. ABBA seeks prohibited monetary relief under *Ex Parte Young*.

Even if a plaintiff makes the proper allegation that a tribal official has acted beyond his or her tribal authority, that plaintiff may seek *only* prospective injunctive relief under *Ex Parte Young*, and *not* any monetary relief. The Supreme Court and this Court have so held:

> In Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945) the [U.S. Supreme] Court stated
>
> > "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*, at 464, 65 S.Ct., at 350
>
> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." [cit.om.]
>
> > *Edelman v. Jordan*, 415 U.S. 651, 663; 94 S.Ct. 1347, 1355-1356; 39 L.Ed.2d 662 (1974)
>
> Moreover, to the extent the complaint seeks monetary relief, such claims are barred under *Ex Parte Young*.
>
> > *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir., 2013)
>
> [*Ex Parte Young*] permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe.
>
> > *Salt River Project Agricultural Improvement and Power District v. Lee*, 672 F.3d 1176, 1181 (9th Cir., 2012)

In this case, ABBA unabashedly seeks an order from this Court commanding the Tribal Defendants to pay money to ABBA. Such a payment would come from the funds of the Tribe, not the personal funds of the Tribal Defendants. The funds that ABBA wishes to divert to itself are funds "from Agua Caliente Band of Cahuilla Indians", NOT from the individual Tribal Defendants. This is confirmed by ABBA's current prayer for relief:

> WHEREFORE, Plaintiff ABBA prays for judgment against Defendants and each of them as follows: AGAINST [the 5 named Tribal Defendants] IN THEIR OFFICIAL CAPACITY AND IN THEIR INDIVIDUAL CAPACITY ACTING [word missing?] THE COURSE AND SCOPE OF TRIBAL LAW AS MEMBERS OF THE TRIBAL COUNCIL OF THE AGUA CALIENTE BAND OF CAHUILLA INDIANS, . . .
>
> 2. An order directing the named defendants members of the Tribal Council of the Agua Caliente Band of Cahuilla Indians to make payments to plaintiff ABBA Bail Bonds as described by the Assignment Order and Judgment of the California Superior Court and against the accounts of judgment debtors Mathews . . .
>
> Doc. 45, p. 9, line 28 to p. 10, line 8

ABBA's prayer thus seeks an order directing the Tribal Defendants to pay to ABBA funds "as described by the Assignment Order". The Superior Court's assignment order is an exhibit to the FAC and states:

> IT IS ORDERED:
>
> That the following rights to payment of Judgment Debtor CLIFFORD WILSON MATHEWS . . . be, and hereby are, assigned to the judgment creditor, ABBA Bail Bonds, Inc. . . .:

> A. Regular periodic monthly payments from Agua Caliente Band Of Cahuilla Indians in the amount of $22,500 per month each, received by CLIFFORD WILSON MATHEWS . . .
>
> Doc. 45-3, p. 1, lines 25-28 to p. 2 line 5

ABBA thus seeks an order from this Court directing the Tribal Defendants to pay money to ABBA in accordance with the Superior Court's above assignment order. That order purports to assign to ABBA "Regular periodic payments **from Agua Caliente Band Of Cahuilla Indians** in the amount of $22,500[12] per month each received by" Mr. Mathews (bold emphasis added). ABBA's own allegation demonstrates that the source of the funds ABBA seeks is "the account[] of judgment debtor[] Mathews" with the Tribe, and NOT the personal funds of the individual Tribal Defendants. ABBA's own prayer demonstrates that it seeks to have the Tribal Defendants pay money to ABBA *from funds of the Tribe*, and NOT from the personal non-Tribal funds of the individual Tribal Defendants.

ABBA's concession that it seeks money from the Tribe, rather than from the individual Tribal Defendants, is fatal to its *Ex Parte Young* claim. A monetary claim is necessarily against the sovereign, and therefore barred, under *Ex Parte Young*, if it seeks money from the sovereign:

> a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of, but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.
>
> *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 691, n. 11; 69 S.Ct. 1457, 1468; 93 L.Ed. 1628 (1949)

[12] This amount is vastly overstated.

> The general rule is that a suit is against the sovereign "if the judgment sought would expend itself on the public treasury . . ."
>
> *Dugan v. Rank*, 372 U.S. 609, 620; 83 S.Ct. 999, 1006; 10 L.Ed.2d 15 (1963)

Here, the Tribe, as any government, can act only through its officers. Those officers have determined, not on behalf of themselves personally, but rather on behalf of the Tribe whose members elected them to conduct its business and expend its funds under the Tribe's Constitution, NOT to pay ABBA in response to a state court judgment and order in litigation to which the Tribe is not even a party. Any order from this Court to the individual Tribal Defendants to pay money to ABBA as stated in ABBA's FAC and its assignment order, as demanded, would necessarily expend itself on the Tribal treasury, NOT on the personal wallets or purses of the individual Tribal Defendants. This action is therefore against the Tribe as sovereign, and barred under *Ex Parte Young*:

> Thus, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*, [*Ford Motor Co. v. Department of Treasury*, 323 U.S. 459] at 464, 65 S.Ct., at 350.
>
> *Regents of the University of California v. Doe*, 519 U.S. 425, 429; 117 S.Ct. 900, 903; 137 L.Ed.2d 55 (1997)

> Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. *Cf. Alden v. Maine*, 527 U.S. 706, 750, 119 S.Ct. 2440, 144 L.Ed.2d 636 (1999) (noting that sovereign immunity protects the financial

> integrity of States, many of which "could have been forced into insolvency but for their immunity from private suits for money damages").
>
> *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir., 2006)

See also *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir., 2008).

ABBA's reliance on *Maxwell v. County of San Diego*, 697 F.3d 941 (9th Cir., 2012) is misplaced. In *Maxwell*, this Court emphasized the "remedy sought" aspect of the doctrine of tribal sovereign immunity, rather than the "scope of authority" aspect. Doing so in this case yields the same result. As noted above, the remedy sought by ABBA is that the Tribal Defendants obey the Superior Court's assignment order. The language of that order is

> IT IS ORDERED:
>
> That the following rights to payment of Judgment Debtor CLIFFORD WILSON MATHEWS . . . be, and hereby are, assigned to the judgment creditor, ABBA Bail Bonds, Inc. . . .:
>
> B. Regular periodic monthly payments **from Agua Caliente Band Of Cahuilla Indians** in the amount of $22,500 per month each, received by CLIFFORD WILSON MATHEWS . . .
>
> Doc. 45-3, p. 1, lines 25-28 to p. 2 line 5, bold emphasis added

Thus, the remedy sought by ABBA is that the Tribal Defendants pay money from the Tribe's treasury to ABBA. Even under *Ex Parte Young* this remedy is unavailable. Any request for money is beyond the scope of *Ex Parte Young*, as noted in detail above. For this reason, *Maxwell* does not change the result that ABBA's *Ex Parte Young* allegation does still not

defeat the tribal sovereign immunity of the Tribal Defendants, whether the test employed is the "remedy sought" or the "scope of authority". Both tests yield the same result in this case.

For this additional reason, ABBA has not satisfied the requirements for an action under *Ex Parte Young*. Monetary relief is simply not available under *Ex Parte Young*, especially when, as here, it would operate directly against the Tribe's treasury.

IV.

ABBA OVERSTATES *NEVADA V. HICKS*.

Starting at Section 6.3.1., p. 17, of its Opening Brief, ABBA relies on *Nevada v. Hicks*, 533 U.S. 353, 361-362; 121 S.Ct. 2304, 2311; 150 L.Ed.2d 398 (2001). In *Hicks* state officials served a state court search warrant on a reservation *on an individual, not on a tribe*, in a search for evidence of an off-reservation crime. The Supreme Court framed the issue as follows:

> This case presents the question whether a tribal court may assert jurisdiction over civil claims against state officials who enter tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.
>
> *Id.*, 533 U.S. at 355, 121 S.Ct. at 2308

Hicks itself states that its holding is narrow and specific. "Our holding in this case is limited to the question of tribal court jurisdiction over state officers enforcing state law." *Id.*, 533 U.S. at 358, n. 2. Despite this disclaimer, ABBA cites *Hicks* for the broad proposition that "State laws may be applied to Indian Tribes after balancing the interests of the State and

the Tribe." (Opening Brief, p. 17) While such balancing does occur in some cases[13] as to the applicability of a state statute to an on-reservation activity, the mere applicability of a state statute does not imply a waiver of tribal sovereign immunity for enforcement by the state.[14]

Citing the Supreme Court's footnote that its decision in *Hicks* is confined to the question of tribal court jurisdiction, this Court also views *Hicks* narrowly:

> Hicks expressly limited its holding to "the question of tribal-court jurisdiction over state officers enforcing state law" . . . *Id.*, at 358, n.2 . . .To summarize, Supreme Court and Ninth Circuit precedent, as well as the principle that only Congress may limit a tribe's sovereign authority, suggest that *Hicks* is best understood as the narrow decision it explicitly claims to be. *See Hicks*, 533 U.S. at 358. n.2, 121 S.Ct. 2304. Its application of *Montana* to a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in that case exist.
>
> *Water Wheel Camp Recreational Area v. Larance*, 642 F.3d 802, 813 (9th Cir., 2011)

See also *McDonald v. Means*, 309 F.3d 530, 540 (9th Cir., 2002) in which this Court limited the holding of *Hicks* to its facts (i.e., state court process against an individual Indian for an off-reservation crime, question of tribal court jurisdiction over state officials): "The limited nature of *Hicks's* holding renders it inapplicable to the present case."

Unlike *Hicks*, the state court process that ABBA seeks to enforce is directed at the Tribe itself and the Tribe's treasury through its elected Tribal

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[13] E.g., taxation of cigarette sales, see *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134; 100 S.Ct. 2069; 65 L.Ed.2d 10 (1980)

[14] See discussion, *infra*, especially regarding *Kiowa Tribe*, 523 U.S. at 755.

Council members,[15] *not* to any individual reservation Indian. That alone distinguishes *Hicks*, as this Court has noted above. Further, the focus of *Hicks* was the scope of the jurisdiction of a Tribal Court to require state officials to seek relief in tribal court before executing their warrant. Here, there is no claim that ABBA must exhaust any tribal court remedies. Here, there is no question of tribal court jurisdiction. Since *Hicks* itself states that its holding does not extend beyond its specific facts, and with this Court so interpreting it, *Hicks* does not stand for the broad proposition advanced by ABBA.

With *Hicks* thus distinguished, the controlling law is still that California state court process does not extend to a *tribe*, as distinguished from its individual members. This Court has held that "Absent a waiver of sovereign immunity, tribes are immune from processes of the [California

[15] The assignment order that ABBA seeks to enforce purports to assign to ABBA "Regular periodic monthly payments from the Agua Caliente Band of Cahuilla Indians . . .", Doc. 43-1, p. 2, lines 3-4. ABBA obtained its assignment order under California Code of Civil Procedure §708.510. (See Doc. 43-1, Exhibit 3, p. 3, lines 14-26.) This statute authorizes the Superior Court to "order the judgment debtor to assign to the judgment creditor" certain forms of payment. In this case, the assignment order (Doc. 43-1, Exhibit 3) does not order the individual judgment debtor to do anything. Instead, it makes a free-standing direct assignment itself without the involvement of the judgment debtor: "IT IS ORDERED: That the following rights to payment of Judgment Debtor [names] be, and hereby are, assigned to [ABBA]." (*Id.*, p. 1, lines 24-28, and p. 2, line 1). The Tribal Defendants doubt the validity of the assignment order, since it is authorized only by a statute that allows an order directed to the judgment debtor himself to make the assignment himself, not to have the Superior Court make the assignment itself directly, without the judgment debtor doing anything. However, neither the Tribe nor any Tribal Defendant was not a party to the litigation in Superior Court that produced this order, so neither had any notice and could not object to it.

state] court." *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 557 (9th Cir., 2002), *reversed on other grounds sub nom. Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 123 S.Ct. 1887, 155 L.Ed.2d 933 (2003). This Court further extends this tribal immunity even to a subpoena from a federal court on behalf of a criminal defendant. *U.S. v. James*, 980 F.2d 1314, 1319 (9th Cir., 1992).[16]

This result also flows from the important role that tribal sovereign immunity plays in overall tribal sovereignty, the fostering of which is at the heart of modern federal Indian policy:

> The common law sovereign immunity possessed by a Tribe is a necessary corollary to Indian sovereignty and self-governance.
>
> *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890; 106 S.Ct. 2305, 2313; 90 L.Ed.2d 881 (1986)

Hicks preserves the essential role of tribal sovereignty. The issue in *Hicks* was whether a tribal court had jurisdiction over non-Indians seeking to enforce a state court subpoena against an individual Indian on a reservation. The test for that inquiry was whether such jurisdiction was "necessary to protect tribal self-government or to control internal relations" (*Id.*, 533 U.S. at 359) or to preserve "the right [of reservation Indians] to make their own

[16] The Tenth Circuit has very recently held that a civil subpoena to a non-party tribe is barred by tribal sovereign immunity. See *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155 (10th Cir., 2014). See also *Alltel Communications, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir., 2102) in which the Eighth Circuit reached the same result regarding a subpoena directed at a non-party tribe and a non-party tribal official.

laws and be ruled by them" (*Id.*, 533 U.S. at 361, quoting *Williams v. Lee*, 358 U.S. 217, 220; 79 S.Ct. 269; 3 L.Ed.2d 251 (1959).

In the present case, applying the same test yields the opposite result. Here, the reservation Indians (the Tribe) have established their own law, their Constitution, with the provisions quoted above,[17] and wish to be ruled by them. While there was no significant intrusion into tribal sovereignty and the right of reservation Indians to make their own laws and be ruled by them in *Hicks*, there certainly is such an intrusion here. There is a direct conflict with the Constitution that empowers only the Tribal Council to expend Tribal funds and to determine whether to honor state court process in litigation to which the Tribe is not a party. ABBA seeks to have the Court usurp the Tribe's federally-approved Constitution, and thereby to deprive the Tribe of the right to make its own laws and be ruled by them.

For these reasons, *Hicks* is distinguished and does not control this case. If anything, *Hicks* supports the role of tribal sovereign immunity in this case. *Hicks* recognizes the ability of the Tribe to make its own laws and be ruled by them as to the unwanted effort of ABBA to extract money from the Tribe and thereby to defeat its federally-approved Tribal Constitution.

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[17] The Tribal Council is authorized to "administer the affairs and manage the business of the Band"; "to expend any tribal funds"; and "to prescribe the conditions under which the custodian of any Tribal . . . property may honor any subpoena concerning the production . . . of any such . . . property in any litigation to which the Tribe or a Tribal entity is not a party." Constitution, Articles V(a), (d) and (n), Doc. 47-3, pp. 11 and 14. The original Constitution was approved by the Commissioner of Indian Affairs under 25 U.S.C. §2 in 1957, and the amendment in Article V(n) in 1991.

V.

THE SUPREME COURT AND THIS COURT HAVE ALREADY REJECTED MANY OF ABBA'S ARGUMENTS.

ABBA's claims that Congress must have intended "full jurisdiction" for litigation of claims in state court under P.L. 280, including a waiver of tribal sovereign immunity for federal court review of such immunity. Then, without providing any basis for it, ABBA makes an even broader claim: federal courts should be able to review *all* claims that a tribe's actions violate either the U.S. Constitution or unspecified federal law:

> The Court should find that 28 U.S.C. §1360 provides state courts will 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. . . .
>
> The Court should also find that federal judicial review of tribal policy and actions implemented by a Tribal Council should be available when those policies and actions are in conflict with the United States Constitution or federal law.
>
> Opening Brief, p. 24

ABBA makes these claims because, without such a federal remedy and a waiver of tribal sovereign immunity, it may not be able to litigate its claims:

> A reasonable interpretation of any statute conferring jurisdiction [here, P.L. 280] 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.
>
> Opening Brief, pp. 14-15

The Supreme Court has already rejected such a "right-without-a-remedy" argument in the context of tribal sovereign immunity:

> Our cases allowing states to apply their substantive laws to tribal activities are not to the contrary. . . .To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. [cit.om.] **There is a difference between the right to demand compliance with state laws and the means available to enforce them.**
>
> *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755; 118 S.Ct. 1700, 1703; 140 L.Ed.2d 981 (1998) (bold emphasis added)

The Supreme Court has also rejected ABBA's assertion that tribal sovereign immunity cannot operate to deprive it of a forum in which to present its claim:

> The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.
>
> *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 893; 106 S.Ct. 2305, 2314; 90 L.Ed.2d 881 (1986)

The result that ABBA seeks ("implied federal court review to consider post judgment claims of sovereign immunity") is the kind of result that the Supreme Court rejected in narrowly construing the Indian Civil Rights Act, 25 U.S.C. §§1301-1303. The Supreme Court refused to imply a federal remedy beyond habeas corpus review, despite the superficial desirability of federal court review to effectuate the statute, much as ABBA now claims:

> As we have repeatedly emphasized, Congress' authority over Indian matter is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. [cit.om.] Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of §1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intent to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that §1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.
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> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72; 96 S.Ct. 1670, 1684; 56 L.Ed.2d 106 (1978)

ABBA's final broad argument is equally unavailing. At p. 24 of its Opening Brief, ABBA urges the Court "to 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." This argument fails for three reasons.

First, federal courts are courts of limited jurisdiction, whose jurisdiction is strictly defined by statute. Not only does the language of P.L.

280 not even mention conferring any jurisdiction at all on federal courts, but this Court has held that it does not do so. *K2, supra,* 653 F.3d at 1029.

Second, a tribe's actions are not directly constrained by the U.S. Constitution.[18] There is no need to provide federal review of tribal actions under the U.S. Constitution, which does not apply to or limit those actions.

Third, there is no basis for federal review of tribal actions alleged to violate federal law, presumably the provisions of the Indian Civil Right Act, 25 U.S.C. §§1301-1303, which does apply to and limit tribal actions. The Supreme Court has already held that, except for habeas corpus relief, federal courts have no jurisdiction to hear claims under this statute.[19] As for claims other than under the Indian Civil Rights Act, this Court has already held that P.L. 280 confers no jurisdiction at all on the federal courts. *K2, supra.*

CONCLUSION

ABBA foolishly provided a large bond to a member of the Tribe without adequate security that the member, or anyone else, would make good on the bond in case of forfeiture. ABBA apparently feared it could not recover against the member directly. So ABBA brought a claim in Superior Court against the member's Tribe in 2010, even though the Tribe did not guarantee or have anything to do with the underlying bond obligation. On

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[18] "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56; 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978); *Talton v. Mays*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896)

[19] *Santa Clara*, *supra.*

removal, the District Court dismissed that claim against the Tribe, based on the Tribe's sovereign immunity. ABBA did not appeal that dismissal.

Instead, ABBA pursued its claims on remand to the Superior Court to judgment against the individual member, obtaining an order purporting to assign to ABBA funds of the Tribe that the Tribe might pay to the member. When ABBA presented this Assignment Order to the Tribe's 5-member elected Tribal Council, that Tribal Council refused to obey it. As a matter of policy, the Tribal Council does not obey any order from a state court in litigation to which the Tribe is not a party. The Tribal Defendants took this action solely in their official capacities as members of the elected Tribal Council, which controls the expenditure of Tribal funds under the Tribal Constitution. In their individual non-tribal capacities, the Tribal Defendants have no authority to direct the expenditure of Tribal funds. ABBA does not allege otherwise.

Knowing that it would be bound by issue preclusion by the unappealed dismissal of the Tribe in its own name from the 2010 litigation, ABBA now instead asserts a claim against the five elected members of the Tribal Council. That claim is that P.L. 280 and *Ex Parte Young* somehow combine to provide federal jurisdiction over the Tribal Defendants, and thereby the Tribe, that would otherwise not exist. ABBA never specifies exactly how it overcomes holdings that P.L. 280 did not waive any tribe's sovereign immunity,[20] that P.L. 280 conferred no jurisdiction of any kind on the federal courts,[21] that a claim under *Ex Parte Young* requires an allegation of individual action beyond what the tribe is capable of

[20] *Bryan, supra*, 426 U.S. at 488-489; *Three Affiliated Tribes, supra*, 476 U.S. at 892.

[21] *K2 supra*, 653 F.3d at 1029

authorizing,[22] and that monetary relief is not available under *Ex Parte Young*.[23] Rather, ABBA asserts that Congress must somehow have intended the result that ABBA seeks when it passed P.L. 280, including federal court review, even if it did not say so:

> The issue before the Court is: does 28 U.S.C. §1360 [P.L. 280] provide state courts with full jurisdiction for litigation of claims, with implied federal court review to consider post judgment claims of sovereign immunity?
>
> Opening Brief, pp. 3-4

Because the Supreme Court and this Court have already rejected many of ABBA's broad policy arguments, those arguments are simply unavailing.

For the above reasons, the Tribal Defendants urge the Court to affirm the dismissal of ABBA's action by the District Court.

Dated: April 9, 2014

Respectfully submitted,

/s/_____

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[22] *Imperial Granite, supra*, 940 F.2d at 1271; *Bassett, supra*, 221 F.Supp.2d at 281

[23] *Miller, supra*, 705 F.3d at 928; *Salt River, supra*, 672 F.3d at 1181.

CERTIFICATE OF COMPLIANCE
WITH RULE 32(a), F.R. App.P.;
STATEMENT OF RELATED CASES;
STATEMENT UNDER NINTH CIRCUIT RULE 28-2.7

1. This brief complies with the type-volume limitation of F.R.App.P. 32(a) because this brief contains 12,111 words, excluding parts fof the brief exempted by F.R.App.P. 32(a)(7)(B)(ii).
2. This brief complies with the typeface requirements of F.R.App.P. 32(a)(5) and the type style requirements of F.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using WORD 2010 in 14-point type.
3. No related cases are pending in this Court, within the meaning of Ninth Circuit Rule 28-2.6.
4. Except for the following, as used in Ninth Circuit Rule 28-2.7, all applicable statutes are contained in the brief, in full or in relevant part: none.

Dated: April 9, 2014

__/s/_____
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ADDENDUM: 28 U.S.C. §1360

(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 as 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:

State of	*Indian country affected*
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 shall authorize the 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 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.