

U.S.C.A. No. 14-56760

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

RICHARD S. HELD RETIREMENT	)	
TRUST	)	
	)	
Plaintiff-Appellant	)	
	)	
-vs-	)	APPELLANT'S OPENING
	)	BRIEF
JEFF L. 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. 5:14-cv-14-00257 TJH (DTBx)

APPELLANT RICHARD S. HELD RETIREMENT TRUST  
OPENING BRIEF

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## 1. JURISDICTION

### A DISTRICT COURT JURISDICTION

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

Plaintiff Richard S. Held Retirement Trust was denied benefits of a civil trial and related rights of enforcement, *Order, docket 30.*

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

Plaintiff Richard S. Held Retirement Trust sought relief in federal court for refusal by Clifford Wilson Mathews, (aka Clifford Wilson Matthews), and Jeff L. Grubbe et al (Native American Indian Tribal Council members) to comply with federal law. *Complaint docket 1.*

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

The Trust obtained a judgment and assignment order against Mathews in state court as mandated by 28 U.S.C. §1360, *Complaint, exhibits A and B, docket 1.* Execution of the judgment requires compliance by judgment debtor Mathews, or by the individuals who control the target of the assignment order, the Tribal Council members. Mathews and the Tribal Council members who control the target of the

assignment order refuse to comply with the assignment order. *Complaint, docket 1.*

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

The Trust litigated contract claims against Mathews, from judgment to enforcement of judgment by an assignment order against income received by Mathews, *Complaint, exhibits A and B, docket 1.* Refusal to comply with the assignment order by Mathews and Tribal Council members with discretion to act falls within the penumbra of federal law.

5. Federal common law provides subject matter jurisdiction in actions directly involving Indian affairs *Sycuan Band of Mission Indians v. Roache*, 38 F.3d 402, 405, (9<sup>th</sup> Cir. 1994), (gaming operations); *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 68, (1<sup>st</sup> Cir. 2005), (claim that State's conduct violated tribal rights).

Mathews failed to respond to the Superior Court action, *Complaint, exhibit A, docket 1*, and the District Court action, *Default by Clerk, docket 26*, and his Tribal Council members assert sovereign immunity as a bar to complying with state court judgments and orders, *Rule 12(b) Motion, docket 13*. They contend that the state court judgments and orders violate their Tribal rights, *id.*

## B COURT OF APPEAL JURISDICTION

The Court Of Appeal has jurisdiction over final orders and dismissals issued

by a District Court. 28 U.S.C. § 1291.

The District Court dismissed with prejudice and closed the case. *Order, docket 30.*

#### C TIMELINESS OF APPEAL

The Order was filed on October 17, 2014, *Order, docket 30*, and Notice of Appeal was filed on November 5, 2014, *Notice of Appeal, docket 31*.

#### D FINAL ORDER

The District Court granted a Rule 12 (b) motion to dismiss on October 17, 2014, *Order, docket 30*. This dismissal was grounded on a finding that the court lacks jurisdiction, *id.* The court finds that 28 U.S.C. § 1360 does not confer federal jurisdiction, that violation of federal law has not been sufficiently alleged, and further that no set of facts could cure the deficiency, *id.* Therefore, the doctrine of *Ex Parte Young*, 209 U.S. 123, (1908) does not apply and tribal officials retain immunity, *id.* The District Court also finds that The Trust fails to provide facts to support its allegations against Mathews, (the underlying judgment debtor). *id. page 2, lines 24 and 25.*

The final District Court motion was granted with prejudice and without leave to amend, and the case was terminated, *id.*

## **2. STATEMENT OF ISSUES**

This case is about the conflict between Native American Sovereign Immunity and federal law. Native American Sovereign Immunity may be limited by waiver or Congressional action. 28 U.S.C. §1360 (Public Law 280) confers jurisdiction on State Courts over civil matters to which Indians are parties, but it is silent about enforcement of judgments and orders issued by those courts. The District Court finds that it lacks jurisdiction to enforce 28 U.S.C. §1360, *Order, docket 30*.

The issues before the Court are:

- A. Does 28 U.S.C. §1360 provide state courts with full jurisdiction for litigation of claims, with implied federal court review to consider post judgment claims of sovereign immunity?
- B. Is a tribal custom and practice of not complying with California Superior Court assignment orders inconsistent with California civil law for enforcement of its judgments?
- C. Is federal judicial review available as to policy and actions by Tribal Council members acting as individuals when those policies and actions present colorable constitutional claims?
- D. Are actions by Tribal Council members acting as Judicial Officers or Legislators subject to judicial review?

### **3. STATEMENT OF THE CASE**

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

The Trust obtained a state court judgment and enforcement by assignment order against Mathews, a Native American, *Complaint, exhibits A and B, docket 1*. The assignment order is to reach Mathews' income provided by his Tribe, *id*. The Tribal Council members refuse to comply with the assignment order, *Motion to Dismiss, docket 13*.

#### Proceedings Below

Trust's Complaint states claims for declaratory relief and injunctive relief against Mathews (judgment debtor) and individual members of the Tribal Council of the Agua Caliente Band of Cahuilla Indians, *Complaint, docket 1, pages 5 - 9*.

The Tribal Council members filed a Rule 12(b) motion to dismiss The Trust's complaint, *docket 13*, based on sovereign immunity. The Trust filed its opposition to the Rule 12 (b) motion, *docket 16*. The Tribal Council members replied, *docket 18*. The District Court granted a Rule 12 (b) motion, *docket 13*, based on a finding of

lack of jurisdiction. The court found that plaintiff's original complaint failed to sufficiently allege that tribal officials violated federal law, citing *Burlington Northern and Santa Fe Railway Co. v. Vaughn*, 509 F.3d 1085, 1090 (9<sup>th</sup> Cir. 2007), *docket 30*.

The court dismissed and closed the case, *docket 30*. The Trust filed its notice of appeal, *docket 31*.

#### Disposition below

The District Court granted a Rule 12(b) motion to dismiss without oral argument, with prejudice, and closed the case, *Order, docket 30*. This dismissal was grounded on a finding that the court lacks jurisdiction because The Trust has not sufficiently pled violation of federal law, *id. page 2, lines 12 -15*. The District Court found that while 28 U.S.C. § 1360 confers jurisdiction on state courts, it cannot confer jurisdiction on federal courts. The District Court correctly opined that 28 U.S.C. § 1360 mandates state jurisdiction for disputes between Native American Indians and non-Indians, but the District Court provides no opinion about the key issue of federal jurisdiction to review post judgment claims of Sovereign Immunity, *id.*

The District Court fails to state that The Trust had exhausted state court jurisdiction before bringing its claims to federal court, *Complaint, docket 1, page 2, lines 4 - 8; page 4 line 26 to page 5 line 2; Opposition to Motion to Dismiss, docket*

16-1, page 1, lines 26 - 28; page 2 lines 9 - 12; page 3, lines 1 - 9, lines 11-15.

Further, the court found there are no facts that would allow a finding of federal jurisdiction over state judgments against the tribe, *id.*, therefore the doctrine of *Ex Parte Young*, 209 US 123, (1908) does not apply and tribal officials retain immunity, *id.* The court further finds that The Trust fails to provide any facts to support its allegations against Mathews, *id. page 2 lines 24 - 25.*

The District Court Order, *docket 30*, leaves for higher court review the central question before it: Does 28 U.S.C. §1360 imply or even require federal court review to consider post judgment claims of sovereign immunity which will defeat enforcement of state court judgments?

#### **4. STATEMENT OF FACTS**

On June 24, 2008 The Trust entered into an agreement with Mathews in which Mathews was guarantor for a note secured by a deed of trust in the total amount of \$60,000. Mathews is a Native American of the Agua Caliente Band of Cahuilla Indians, a Federally recognized Indian Tribe. The principal borrower mortgaged her property for the benefit of Mathews and the proceeds of the loan were used by Mathews to pay a bail bond premium. *Complaint, docket 1.*

The note was unpaid and uncollectible from the borrower, and demand was made upon Mathews as guarantor. Mathews failed to pay and a lawsuit was filed in

California Superior Court, County of Riverside, (Held Trust v. Mathews, RIC 1210864) against Mathews as guarantor of a promissory note. Attorney fees were demanded by the terms of the note sued upon. *Id.*

Mathews failed to respond to the California Superior Court lawsuit and default was taken and judgment was entered, *Complaint, exhibit A, docket 1.* Enforcement of the Superior Court judgment was obtained by an Assignment Order against the income due to judgment debtor Mathews from his tribe, the Agua Caliente Band of Cahuilla Indians, *Complaint, exhibit B, docket 1.*

Judgment creditor Held Trust served the judgment and assignment order on Mathews, the judgment debtor, and on Agua Caliente Band of Cahuilla Indians as custodian of the per capita account of judgment debtor Mathews. Judgment debtor Mathews failed to respond to the assignment order, *Complaint, docket 1.* Agua Caliente Band of Cahuilla Indians, by its Tribal Council, acknowledges authority and discretion to implement the orders of the Superior Court of California, but it refuses to comply with the assignment order, *id.* The Tribe, by its Tribal Council, asserts immunity from the orders of the California Superior Court, *id.*

## **5. SUMMARY OF ARGUMENT**

28 U.S.C. §1360 (Public Law 280) mandates that California Superior Courts shall have jurisdiction over civil matters to which Indians are parties, and which are

subject to private litigation in state court. 28 U.S.C. §1360 (c) states that tribal ordinances or customs shall be given full force and effect, if not inconsistent with any applicable civil law of the State. It is fair to conclude from the double negative that if tribal ordinances or customs are inconsistent with any applicable civil law of the State, they shall not be given full force and effect.

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

The refusal of judgment debtor Mathews, and the Agua Caliente Tribal Council refusal to submit to State Court jurisdiction, is inconsistent with the civil law of the State of California, and conflicts with the U.S. Constitution and federal law. 28

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

## **6. ARGUMENT**

### **6.1 STANDARD OF REVIEW**

#### Subject Matter Jurisdiction

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

#### Statutory Interpretation.

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

*Vega v. Holder*, 611 F.3d 1168, 1170 (9th Cir. 2010) review of BIA’s interpretation of a statute is purely legal, reviewed de novo.

## **6.2 28 U.S.C. SECTION 1360(c) ADDRESSES SUPREMACY OF LAW**

### **OVER TRIBAL SOVEREIGNTY, AND IMPLIES FEDERAL REVIEW OF THOSE CLAIMS.**

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

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

By its Order, the District Court holds that 28 U.S.C. § 1360 confers on the State of California jurisdiction for civil disputes between Indians and non Indians, *Order, docket 30*. The District Court further holds that federal review is unavailable as to sovereign immunity claims barring enforcement of state judgments, *id.* In support of

this holding, the District Court finds that 28 U.S.C. § 1360 “does not confer jurisdiction on federal courts”, citing *K2 America Corporation v. Roland Oil & Gas, LLC.* 653 F.3d 1024, 1028 (9<sup>th</sup> Cir. 2011), *Order page 2, lines 10 - 15, docket 30.*

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

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

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

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

*K2, supra*, 1029 citing *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949

(9<sup>th</sup> Cir. 2004).

In the case at bar, The Trust has litigated in Superior Court and obtained judgments and assignment orders on income received by the judgment debtor, *Complaint, exhibits A and B, docket 1.* The judgment debtor and the Tribal Council are all individuals with power and discretion to comply with the orders of the Superior Court. The Tribal Council of the Agua Caliente Band of Cahuilla Indians is empowered and obliged to administer the affairs and manage the business of the Band, and to protect the security and general welfare of the Band and its members; and to negotiate with State and local governments on matters relating to the jurisdiction of the particular government unit involved in the application of civil laws, *Constitution and Bylaws, Article V, addendum.* The Constitution and Bylaws of Agua Caliente describe no forum for resolution of civil claims in general, or for trial courts specifically, they have never advised, claimed or argued that the matter should be brought before a tribal court or a tribal court association.

Applying the first *Peabody Coal, supra* test, 28 U.S.C. § 1330 does not confer federal jurisdiction over state law causes of action, but it does create jurisdiction when its provisions are violated. The first prong of the *Peabody* test is satisfied. The Trust's claims are not contract claims, those have been litigated in state court, but rather enforcement of judgments and orders issued by the state court. The causes of

action The Trust presents in federal court are created by the right to a civil remedy awarded by a state court.

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

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

#### 6.2.2 Tribal Customs and Policies Inconsistent With State Law Shall Have No Force and Effect, 28 U.S.C. § 1360(c).

28 U.S.C. § 1360(c) clearly shows legislative intent that if a tribal ordinance

or custom is inconsistent with applicable civil law of the State, the tribal ordinance or custom shall not be given force and effect.

The holding and Order of the District Court leaves The Trust with no remedy. State Court jurisdiction has been exhausted pursuant to 28 U.S.C. § 1360. The Tribal Constitution and Bylaws provide no alternate forum for resolution of disputed claims between Indians and non Indians, *Constitution and Bylaws, addendum*.

Agua Caliente is one of the few Tribes which has no Tribal Court, and has chosen not to be a member of the Intertribal Court of Southern California, *Complaint, page 5, ¶25, docket 1*. The Constitution and By-laws of the Agua Caliente Band of Cahuilla Indians provide for no judicial means for resolution of civil claims, *addendum*. Therefore, The Trust had no opportunity or obligation to pursue its remedy in a tribal court because there is no functioning tribal court. See *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1036 (9th Cir.1999).

The benefits of Public Law 280 bring with them responsibilities to follow rules and procedures essential to the functioning of an effective and just judicial system. Among these responsibilities are accepting adverse rulings or orders, and accepting enforcement orders such as seizures or garnishments pursuant to a court order. The right to judicial adjudication includes the right to trial by a competent court, a court which incorporates accepted standards of due process and rules of court. Agua

Caliente has none of these.

While Tribal Sovereign Immunity must preserve the self governing functions of the tribe, and preserve its customs and traditions, *Nevada v. Hicks*, 533 US 353, 361(2001), the claims of The Trust are to enforce a judgment and collection of judgment obtained in Superior Court. The claims and the remedies sought are no threat to tribal self-government, in fact enforcement of contract obligations and court judgments should be in harmony with tribal self-government, and should have no adverse effect on internal tribal relations. There is no claim that the State of California should have broad powers to regulate the activities of tribal members, only that the State must maintain civil law in transactions between Indian and non Indian that are entered into on State lands. *Nevada, supra*

The claims made by The Trust against the Tribal Council members are private rather than regulatory, have no bearing on the Tribes' right to self-governance in its intramural matters, and do not abrogate rights guaranteed by Indian treaties. Congress clearly intended by 28 U.S.C. § 1360(c) that Indians and Indian Tribes should comply with state law.

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

#### **6.3.1 State Laws May Be Applied to Indian Tribes**

It is well settled that State laws may be applied to Indian Tribes after balancing the interests of the State and the Tribe. Regulatory authority of the State may extend to tribal lands. Tribal power to make laws and exercise self government does not exclude all state regulatory authority on the reservation. See *Nevada, supra*, 361 (2001). State interests outside the reservation may require regulation of activities of tribal members on the reservation, *Id.* Tribal sovereign interests must be balanced against the interests and sovereign powers of the state, and such balancing may advise that States may regulate the activities even of tribe members on tribal land, since an Indian reservation is considered part of the territory of the State, *Id.* 362. Tribal rights to self government are protected by sovereign immunity by a balancing of Tribal interests against State and Federal government interests. *Id.* 362

The relevant facts in Nevada are a search warrant was to be served for records located on Tribal land. This exercise of State power was challenged by the Tribe based on Tribal Immunity, and the Tribe refused to comply with the search warrant. In the case at bar, the State Court assignment order is an exercise of state power challenged by the Tribal Defendants. The *Nevada* Court held that Tribal authority does not extend to regulation of the service of a search warrant against a tribal member suspected of having violated state law outside the reservation. The Court held that when acts by State officers and agents are thwarted by Tribal acts or

omissions, “the operation of the state may be arrested at the will of the Tribe”. *Id.* 365. It was held that the State's interest in execution of process outweighs Tribal Immunity, noting that Tribal Immunity is limited to preservation of essential tribal self-government functions and internal relations. *Id.* 362.

The Trust has been granted an Assignment Order issued by the California Superior Court. The Assignment Order directs individual members of the Aqua Caliente Tribal Council to exercise their powers to assign income from a judgment debtor to The Trust, and they refuse to do so. By these acts and omissions, the Tribal Council members thwart the judicial power of the State, and the State's power to enforce its judgments is arrested at the will and discretion of the Tribal Council Members.

#### 6.3.2 Tribal Officials Acting As Individuals Are Subject to Federal Jurisdiction

Immunity provided by The Eleventh Amendment to the United States is limited by well established case law, *Ex Parte Young, supra*. The doctrine of *Ex Parte Young* states that an injunction may issue to prevent violation of the Constitution or federal law by a state official, even if the act is under authority of state law. *Id.* 159. Eleventh Amendment immunity of state officials is circumvented by what is described as a legal fiction. A State Officer is not the State and he may be enjoined by a federal court from exercising his authority as a state officer when he acts in

violation of federal law. *Id.* 155, 156. Enjoining acts in violation of federal law is not an interference with the discretion of an officer, *id.* 159. Suits for prospective declaratory relief against state officers to enjoin ongoing violation of federal law are within the doctrine of *Ex Parte Young, supra*, and are not barred by sovereign immunity, *Agua Caliente v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000).

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

In the context of Tribal Law, it is well settled that the *Young* exception to Eleventh Amendment Immunity applies to conflicts between tribal laws and federal law, subject to well defined limitations for the benefit of tribal interests. *Maxwell, supra*, 1089. When tribal officials act pursuant to tribal law or tribal policy, and the officials' acts or omissions violate federal law, the tribal officials may be enjoined as individuals unless self governing rights of tribes, and customs and traditions of tribes are violated. *Nevada, supra*.

It is well settled that state taxing power against Indian Tribes is clearly barred by Tribal Immunity, see *Bryan, supra, California v. Cabazon Band of Mission*

*Indians*, 480 U.S. 202, FN 17, (1987), *Agua Caliente v. Hardin*, *supra*.

Encroachment on Tribal self government will be barred by Eleventh Amendment Immunity, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). State regulation of gambling is likewise barred by Tribal Immunity, see *Cabazon*, *supra*. 222.

The scope of immunity available to individual tribal members acting in their official or individual capacity is analogous to that of state or federal officials. Tribal members enjoy no greater immunity than state or federal officers as to civil claims. In *Maxwell*, *supra* the Maxwells sued defendant members of the Viejas Band of Kumeyaay Indians in their individual capacity as fire paramedics, claiming money damages. Claims were made against the individual fire paramedics, not The Viejas Band. Vicarious liability was not claimed, therefore the Viejas Band was not the real party in interest, even though any payment by the individual defendants may be traceable to the tribal treasury. Even though it was found that the Tribe could provide indemnification in the form of direct payment from the tribal treasury, rather than from the paychecks of the individuals, the Tribe was not the real party in interest. *Maxwell, supra, 1089*. In the case at bar, The Trust claims its remedy from the judgment debtor Mathews who happens to be a tribal member, and while his income may be traceable to the tribe, the claims and assignments of income are against the

income of the tribal member and not the tribe. The *Maxwell* court held that when a remedy is to come from an individual rather than the tribe, the sovereign is not the real party in interest and immunity will not be available to the individual. *Id. at 1088.*

Suits over plainly unlawful acts are actionable as individual capacity suits; they are not barred by sovereign immunity, *Maxwell, supra* 1089, citing *Santa Clara Pueblo, supra* 58. This is in harmony with sovereign immunity exceptions provided to plaintiff's by the doctrine of *Ex Parte Young, supra*. State or federal officers who act in violation of federal law are not acting in their official capacity, the state cannot impart immunity to an official action in violation of federal law, see *Ex Parte Young, supra*.

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

The sovereignty claimed by the Tribal Defendants leads to the inevitable result that a state judgment holder is to have no recourse to any court to enforce its judgment. All courts will lack jurisdiction. This is particularly troubling because

Agua Caliente has no tribal court, and has chosen to not be a part of the Intertribal Courts of Southern California, *Complaint, docket 1, page 3, para 6*. Agua Caliente would deprive any person, Indian or non Indian, of his Constitutional right to access to the Judiciary Branch of government, and any litigant would be forced to abandon his claim or submit to the absolute discretion of the Tribal government. This erodes the rule of law, is contrary to the interests of Indian and non Indian alike, and cannot be reconciled with the Constitutional right of all persons to access to a Judicial Branch.

### 6.3.3 Tribal Officials Acting As Executive Officers or Legislators Are Subject to Judicial Review

*Marbury v. Madison*, 5 U.S. 138, (1803) creates the authority for federal review of executive actions and legislative acts. This authority was grounded on the finding that every individual has the right to claim protection of the laws, and that it is the duty of government to afford that protection. The Trust has perfected its claims against judgment debtor Mathews, and has been granted an Order from the Superior Court of California enforcing relief by an assignment order targeting income from an Indian Tribe. Jurisdiction of the Superior Court of California is mandated by federal law. The relief afforded by the Superior Court of California is denied by a group of Tribal officials, The Tribal Council, acting as tribal executive officers or tribal

legislators, or both. The Trust has the right to claim protection of the laws, and it is the duty of government to afford that protection. The federal government, by its judicial branch, is the only entity with power and authority over the Tribal officials.

## **7. REQUEST FOR ATTORNEY FEES**

The Judgments and Assignments issued by the California Superior Court *Complaint, exhibits A and B, docket 1*, include award of attorney fees based upon the terms of the contracts sued upon. It is requested that fees for this appeal be considered and added to prior fee awards.

## **8. CONCLUSION**

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

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

8.3 The Agua Caliente Tribal Council members should be ordered to comply with the California State Court judgment and assignment order against Tribal Members Mathews, named in the California State Court Assignment Orders.

8.4 Tribal member and judgment debtor Mathews should be ordered to comply with the California State Court judgment and assignment order.

8.5 The Court should find that plaintiff and appellant should recover fees and costs.

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

A matter of concern to this litigant is that the District Court failed to notice, or was indifferent to, the effective nullification of 28 U.S.C. § 1360 by its findings and holdings in the Rule 12(b) motion before it, dockets numbers 30. The District Court displays a great reluctance to find federal jurisdiction, appears anxious to dismiss with prejudice leaving no forum for The Trust's claims, and declines to take oral argument to allow litigants to address concerns of the court. The District Court's analysis and procedures in the instant case is identical to that of related case ABBA Bail Bonds v. Jeff Grubbe, U.S.C.A. No. 13-56701, 2:12-cv-06593-TJH-DTB. The Trust urges this Court to remand the matter to the District Court by a random assignment.

## **9. CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure, Rule 32(a)(7)(B)because this brief contains 6,186 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, Rule 32(a)(7)(B)(iii).

## **10. CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on March 25, 2015.

I certify that all participants in the case are registered CM/ECF user and that service will be accomplished by the appellate CM/ECF system.

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//s//

## **11. STATEMENT OF RELATED CASES**

The issues are identical to issues raised in ABBA Bail Bonds v. Jeff Grubbe, U.S.C.A. No. 13-56701, 2:12-cv-06593-TJH-DTB. This case has been fully briefed

and has been submitted for oral argument. The difference in this case is a different plaintiff.

DATE March 25, 2015

//s//

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Emile M. Mullick  
Attorney for Appellant  
RICHARD S. HELD RETIREMENT TRUST

## **ADDENDUM**

28 U.S.C. § 1360

Constitution and Bylaws of the Agua Caliente Band of Mission Indians,  
(Cahuilla)

28 U.S.C. section 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 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:

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 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.

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF INDIAN AFFAIRS

\*

CONSTITUTION AND BY-LAWS  
OF THE  
AGUA CALIENTE BAND OF MISSION  
INDIANS  
CALIFORNIA

\*

ADOPTED JUNE 28, 1955  
AMENDED FEBRUARY 26, 1957



UNITED STATES  
GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1957

## **CONSTITUTION AND BY-LAWS OF THE AGUA CALIENTE BAND OF MISSION INDIANS, CALIFORNIA**

### **ARTICLE I—NAME**

The name of this organization shall be the Agua Caliente Band of Mission Indians since that name has prevailed as the name of said Band from time immemorial.

### **ARTICLE II—TERRITORY**

The jurisdiction of the Agua Caliente Band of Mission Indians shall extend to the territory within the boundaries of the Agua Caliente Indian Reservation as heretofore designated and to any other lands which may hereafter be added.

### **ARTICLE III—MEMBERSHIP**

- (a) The membership of the Agua Caliente Band of Mission Indians shall consist of all persons whose names appear on the last official per capita payroll of June 1954, and children born to such members as issue of a legal marriage, provided such children shall possess at least  $\frac{1}{8}$  degree of Indian blood.
- (b) No new members may be adopted.

### **ARTICLE IV—GOVERNING BODY**

- (a) The governing body of the Agua Caliente Band of Mission Indians shall be known as the Tribal Council (formerly designated as the Tribal Committee) and shall be comprised of five members consisting of three officers, namely; the Chairman, Vice-Chairman, Secretary and two additional members.
- (b) Effective beginning with the next election after the adoption of this constitution, the members of the Tribal Council shall be elected in the following manner:
  1. Officers shall be elected for a term of two years; the Chairman to be elected during the even year, the Vice-Chairman and Secretary to be elected during the following odd year.
  2. The other members shall be elected for a term of one year.
  3. Elections shall take place on March 15, at which time the Secretary shall call the election. Elections shall be by secret ballot and absentee ballots shall be used by members who cannot be present to cast their ballots at the place on the Reservation where, and at the time when the election is held.

4. All enrolled members of the Agua Caliente Band of Mission Indians who are 21 years of age and over are qualified voters at all elections even after their allotted lands have been sold or fee patented.
5. The Council shall select election officers and tellers who shall have the duty of reporting certified election results to the Tribal Secretary for recording of the same and announcement to all the members of the Band.
6. Members of the Council shall continue to serve in their official capacity until their successors are duly elected, qualified and installed.

(c) The Tribal Council shall hold regular meetings on the first and third Tuesday of each month between the months of October and May, and the first Tuesday of each month between the months of June and September. Special meetings may be called by the Chairman or Vice-Chairman upon five days notice.

(d) A quorum shall consist of three-fifths of the membership of the Tribal Council.

(e) Meetings of the Tribal Council shall be conducted in an orderly manner pursuant to Robert's Rules of Order when the procedure is not specifically designated in these by-laws. The order of business shall be as follows:

1. Call to order
2. Reading of minutes of the last meeting
3. Unfinished business
4. Tribal reports, accounts
5. Indian Bureau reports, statements and accounts
6. Applications, petitions and claims
7. Other new business
8. Announcements
9. Adjournment

(f) The duties of the officers of the Tribal Council shall be as follows:

1. The Chairman of the Tribal Council shall preside over all meetings of the Council and of the Band. He shall exercise in addition thereto any other authority vested in him by the Council to advance the interests of the Band.
2. The Vice-Chairman shall assist the Chairman, and, in the absence of the Chairman, he shall assume the duties of the office of Chairman.
3. The Secretary shall keep all records of the Council, including a permanent file of the minutes of all meetings. The Secretary shall make the same available at all times for the inspec-

tion of the other members of the Council and of the Agua Caliente Band. The Secretary shall also make regular reports to the Band at the annual and special meetings, of business transacted by the Council, and shall perform all the other customary duties of a Secretary concerning the affairs, property and correspondence of the Band. All correspondence prepared on behalf of and approved by the Tribal Council may be signed by the Secretary.

4. Committees may be appointed by the Tribal Council for specific purposes and their duties shall be clearly designated by resolution at the time of their creation. Such committees shall report as required to the Tribal Council at its regular meetings.
- (g) At the next regular meeting after the annual election, the Council shall appoint two enrolled adult members of the Agua Caliente Band of Mission Indians to serve as proxies for a period of one year. Upon the request of a member who is unable to be present at a meeting of the Tribal Council, a proxy may act as his substitute to attend any regular or special meeting of the Council.
- (h) Meetings of the Tribal Council shall be open to enrolled members of the Agua Caliente Band of Mission Indians unless an executive session of the Council has been called by the Chairman. Otherwise only members of the Council, representatives of the Bureau of Indian Affairs, and guests invited by the Council may be present at such meetings.
- (i) Members of the Council who miss three consecutive meetings without an excuse deemed sufficient by a majority of the Council, shall be considered to have voluntarily resigned from the Council. The vacancy created thereby shall be filled at the next regular meeting of the Council by the election of a new member agreed upon by at least three-fourths of the remaining members of the Tribal Council. The term of the newly elected member shall run for the balance of the term of the member who resigned.
- (j) Members of the Tribal Council may be suspended or dismissed if they are guilty of misconduct or a violation of the provisions herein specified. Before a vote to expel a member is taken, he shall be given a written statement of the charges against him at least five days before the meeting before which he is to appear, and an opportunity to answer any and all charges shall be given to him at a regular meeting of the Council. Such suspension or dismissal must be voted on at a meeting where at least four-fifths of the membership of the Council are pres-

ent and suspension or dismissal shall require a four-fifths vote in order to be effective. This procedure need not be followed in connection with voluntary resignations pursuant to Article IV (i) hereunder.

- (k) Upon receipt of a petition signed by one-half of the eligible voters calling for the recall of any member of the Council, it shall be the duty of the chairman to call an election upon said petition. At least  $\frac{1}{2}$  of the eligible voters must vote in the election. To carry a recall into effect a  $\frac{3}{5}$  majority is required.
- (l) One room in the Tribal office shall be set aside for the purposes of the Tribal Council.

## ARTICLE V—POWERS OF THE TRIBAL COUNCIL

Subject to all applicable statutes and regulations, the Tribal Council shall exercise the following powers:

- (a) To administer the affairs and manage the business of the Band; to regulate the uses and disposition of tribal property; to protect and preserve the Tribal property, including wildlife and natural resources, and the rights of its members; to cultivate Indian arts, crafts and culture; to administer charity; and to protect the security and general welfare of the Band and its members.
- (b) To regulate the procedures of the Tribal Council and of other tribal agencies; to enact ordinances and resolutions pertaining to tribal affairs and to take all proper means to enforce the same.
- (c) To employ legal counsel, the choice of counsel and the fixing of fees to be subject to the approval of the Secretary of the Interior or his authorized representatives; and to obtain legal services from the Federal Government in connection with its trust responsibility over tribal affairs, including litigation, legislation and any other matters concerning tribal property or the members of the Band.
- (d) To recommend by appropriate resolution the expenditure of any tribal funds held in the Treasury of the United States, and to expend any tribal funds within the exclusive control of the Band. Monthly per capita payments shall be maintained or increased to the extent consistent with the maintenance of a sound tribal budget.
- (e) To obtain financial reports, statements and audits of all tribal funds under the supervision and custody of the Federal Government.
- (f) To manage, repair, rebuild, remodel or reconstruct all tribal property, including tribal office buildings, mineral springs, bath

house, Palm Canyon buildings and tollgate house, and to manage, lease, or otherwise operate tribal properties; to set aside, reserve and designate tribal property for use as parks, schools, public buildings, tribal monuments, churches and hospitals.

- (g) To plan, construct, repair, and otherwise manage streets, highways, flood control and other utilities on tribal property.
- (h) To confer with and advise the Secretary of the Interior with regard to all appropriation items on behalf of Indian welfare, health, education, loans to Indians for home construction, highways, flood control and the development of resources and cultural advancement.
- (i) To promulgate and enforce assessments or permit fees upon non-members doing business and obtaining special privileges on the Agua Caliente Reservation, including the privilege of fishing, amusements, games, explorations, camps, and mining, including the preparation of a schedule of rents for the use of tribal property.
- (j) To confer and consult with the Secretary of the Interior or his authorized representative concerning the employment, including the fixing of salaries, of all persons paid from tribal funds, and to give preference in employment to members of the Agua Caliente Band and their relatives, and in accordance with 25 U. S. C. 48, to take over complete responsibility for this function.
- (k) By ordinance to exclude from the Tribal land non-Indian persons not legally entitled to be thereon and who are deemed to be objectionable, such ordinance to be subject to the approval of the Secretary of the Interior or his authorized representative.
- (l) To negotiate with the Federal, State and local governments on behalf of the Band and obtain advice and opinions from representatives of any such governmental units on matters relating to the jurisdiction of the particular governmental unit involved and which concern the status of the Band and its property, such as matters of taxation, the application of State, civil and criminal laws, and annexation of tribal lands to the City of Palm Springs.

#### ARTICLE VI—INHERENT POWERS

Any rights and powers heretofore vested in the Agua Caliente Band of Mission Indians not expressly referred to in this Constitution and By-laws shall not be abridged and may be exercised by the general membership in meetings called for that purpose either by the Chairman of the Tribal Council or by petition signed by at least 15 voters of the Band. At such meetings a quorum shall consist of three-fifths of the adult members of the Band.

## ARTICLE VII—TRIBAL MEETINGS

There shall be one regular annual tribal meeting held on March 15. Special meetings may be called by the Chairman with notice thereof sent to the members of the Band at least five days prior to the meeting specifying the purpose for which the meeting is being called.

## ARTICLE VIII—ADOPTION AND AMENDMENTS

This Constitution and By-laws shall be in full force and effect when adopted by a majority vote of the duly qualified members of the Agua Caliente Band of Mission Indians at the annual election or at any special election called for that purpose. Written notice specifying the purpose of the election shall be mailed to each member of the Band at least five days prior to said election. Amendments to the Constitution and By-laws may be made in the same manner.

## ARTICLE IX—REPEAL

If adopted, this Constitution and By-laws repeals all former laws and ordinances in conflict with this Constitution and By-laws.

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On June 28, 1955, the attached Constitution and By-laws was duly adopted by vote of 11 for and 9 against in an election held by the members of the Agua Caliente Band of Mission Indians and was duly amended in the same manner in an election held on February 26, 1957.

APPROVED: GLENN L. EMMONS, DATE: April 18, 1957.  
*Commissioner of Indian Affairs*

