

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-

JEFF L. GRUBBE, 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; LARRY N. OLINGER, Tribal Council Member, Agua Caliente Band of Cahuilla Indians; JESSICA NORTE, Tribal Council Member,) Agua Caliente Band of Cahuilla Indians; CLIFFORD WILSON MATHEWS,) AKA CLIFFORD WILSON MATTHEWS.

Defendants-Appellees

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)

REPLY BRIEF OF APPELLANT RICHARD S. HELD RETIREMENT TRUST

EMILE M. MULLICK
255 N. "D" St., Suit 301
San Bernardino, CA 92401
909 384 1975
Counsel for Plaintiff-Appellant
RICHARD S. HELD RETIREMENT TRUST

TABLE OF CONTENTS

1. STATEMENT OF ISSUES IDENTIFIED BY THE OPPOSITION ..	1
2. STATEMENT OF THE CASE BY THE OPPOSITION	1
3. STATEMENT OF FACTS BY THE OPPOSITION	2
4. ARGUMENT BY THE OPPOSITION	
A Federal Question	3
B Immunity of Government Officials	10
5. CONCLUSION	12
CERTIFICATE OF COMPLIANCE	14
ADDENDUM 28 U.S.C. § 1360	15
STATEMENT OF RELATED CASES	16
CERTIFICATE OF AUTHENTICITY	

TABLE OF AUTHORITIES

CASES

<i>Alaska v. Babbit</i> , 67 F.3d 864 (9 th Cir., 1995)	11
<i>Bay Mills Community v. Michigan</i> , ____ U.S. ____ , 134 S.Ct. 2014 (2014) ..	4, 5
<i>Bryan v. Itasca County</i> , 426 U.S. 373, S.Ct. 2102 (1976)	5
<i>Cook v. Avi Casino Enterprises, Inc.</i> , 548 F.3d 718, (9th Cir., 2008)	7
<i>Ex Parte Young</i> , 209 US 123, (1908)	2, 7, 8, 10, 11
<i>Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing</i> , 545 U.S. 308, 125 S.Ct. 2363 (2005)	6
<i>Imperial Granite Co. v. Pala Band of Mission Indians</i> ,	11
940 F2d. 1269 (9 th Cir., 1991)	
<i>K2 America Corp. v. Roland Oil & Gas Co.</i> , 653 F.3d 1024 (9th Cir., 2011) ..	6, 7
<i>Kiowa Tribe v. Manufacturing Technologies, Inc.</i> , 523 U.S. 751 (1998)	4, 5
<i>Maxwell v. County of San Diego</i> , 697 F.3d 941 (9th Cir., 2012)	3
<i>M.J. ex rel. Beebe v. U.S.</i> , 721 F.3d 1079, (9th Cir., 2013)	8
<i>Nevada v. Hicks</i> , 533 US 353 (2001)	13
<i>Peabody Coal Co v. Navajo Nation</i> , 373 F.3d 945 (9 th Cir. 2004)	6
<i>Three Affiliated Tribes of Ft. Berthold Reservation v. World Engineering</i> , 476 U.S. 877, 106 S.Ct. 2305 (1986)	8, 10

STATUTES

28 U.S.C. § 1360 (Pub.L. 280)	4, 9, 10, 12, 13
28 U.S.C. § 1331	2

CONSTITUTION

Seventh Amendment	2
Article III, Section 2	2

1. STATEMENT OF ISSUES IDENTIFIED BY THE OPPOSITION

The Tribe identifies two issues:

A. Does jurisdiction exist “when the funds are unquestionably property of the tribe, not the individuals?” (Opposition page 8)

This is a statement of a defense, and it is disputed by The Trust. The Trust alleges that the Superior Court Judgment and Assignment Order is against the money of the judgment debtor, Mathews, not the tribe. (Doc 1, page 4, lines 26 - 28; Exhibits A and B)

B. Does Pub.L. 280 allow plaintiff to circumvent sovereign immunity by naming the tribe’s elected officials as individual defendants?

This issue is argued on page 18 of Appellant’s Opening Brief and re-visited in section 4 of this brief.

2. STATEMENT OF THE CASE BY THE OPPOSITION

In its STATEMENT OF THE CASE the Defendant Tribal Council Members fault The Trust for not seeking to enforce its assignment order in the Superior Court, even after receiving clear notice that they would not recognize or comply with any Superior Court Orders. (Opposition page 9) The Trust is not required to expend court and client resources on a known fruitless endeavor after judgment and enforcement orders are issued.

The Tribal Council Members advance the theory that The Trust has not alleged a violation of federal law, thereby rendering the doctrine of *Ex Parte Young*, 209 US 123 (1908) not applicable. The Trust claims violation of:

1. its Seventh Amendment right to jury trial in civil matters,
2. Article III, section 2 of the United States Constitution, extending federal judicial power to cases arising under the Constitution and federal law, and Federal pre-emption,
3. 28 U.S.C. § 1331 mandating that district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
4. 28 U.S.C. § 1360 mandating that state courts shall have original jurisdiction of all civil actions involving Indians.

3. STATEMENT OF FACTS BY THE OPPOSITION

The Tribe correctly identifies Mathews as a United States citizen and a tribal member, and as the judgment debtor. The Tribal Council Members go on to argue why they refuse to comply with an assignment order issued by the Superior Court against Mathews' tribal income. The Tribal Council Members also argue why sovereign immunity will block the claims of The Trust. These arguments are expanded in Opposition argument sections.

4. ARGUMENT BY THE OPPOSITION

A Federal Question

The Tribal Council Members argue that federal jurisdiction is lacking because The Trust is attempting to “extract money from The Tribe”. The complaint, on its face, refutes that. Only claims for Declaratory and Injunctive Relief are pleaded. (Doc. 1, Page 1) The Trust seeks to enforce its judgment and assignment order issued by The Superior Court against income of the judgment debtor, Mathews, from his payor, The Agua Caliente Band of Cahuilla Indians. This theory was analyzed in *Maxwell v. County of San Diego*, 697 F.3d 941, 1088 (9th Cir., 2012). In that case the Maxwell’s sued tribal Fire Paramedics in their individual capacities for money damages and the target of the claim was the Paramedics’ income from the tribe. The court found that the tribe is not the real party in interest. Damages will come from the pockets of the individual defendants, not the tribal treasury. The tribal income payable to The Trust’s judgment debtor is similar to the income payable to the paramedics. Indeed, as alleged in related case before this Court, ABBA Bail Bonds v. Jeff Grubbe et al No. 13-56701, the Tribe did pay Plaintiff ABBA directly from judgment debtors Mathews’ income until the judgment debtor cancelled his authorization. (Related Case, Complaint, Doc 45, page 2, lines 4 - 9)

The Tribal Council Members argue that immunity may present a question of

federal law, but only a defense, confusing immunity with defense. Immunity from suit precludes any defenses; defenses are not before the court if the court lacks jurisdiction by immunity. (Opposition page 13) However, The Trust agrees that immunity is a question of federal law and is properly before the Court.

The Tribal Council Members argue correctly that Pub.L. 280, (28 U.S. C. § 1360) confers civil jurisdiction to state courts, but fail to acknowledge that The Trust has fully litigated its civil claims in state court, to final judgment and enforcement. (Doc 1, Exhibits A and B) This distinguishes the case at bar from all cases cited by The Tribal Council Members. One of the grounds for federal jurisdiction is the refusal of The Tribal Council Members to comply with the enforcement orders of the Superior Court, such orders flowing from jurisdiction mandated by federal law. 28 U.S.C. § 1360(c) states that any tribal ordinance or custom shall, if not inconsistent with any applicable civil law of the State, be given full force and effect. The Tribal Council Members' refusal to comply with the California Superior Court Judgment and Assignment Order is inconsistent with the law of the State of California. Therefore, a question of federal law is at issue. The Tribal Council Members cite several cases in support of their argument for tribal immunity. *Bay Mills Community v. Michigan*, ____ U.S. ____ , 134 S.Ct. 2014 (2014) and *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 118 S.Ct. 1800 (1998). Citations are

liberally made but context is lacking; the relevant facts of the cited cases are not stated. The Trust will briefly submit relevant facts for the cited cases.

Bay Mills, *supra*, is distinguished by its facts. Bay Mills exercised its monopoly power to engage in the lucrative business of casino gambling by opening a casino on land off the reservation it had purchased through a congressionally established land trust, claiming it could operate a casino there because the property qualified as Indian land. Based upon federal law granting monopoly power to Indian tribes to operate gambling casinos, and established tribal immunity for off-reservation commercial activity, the court held that the tribal immunity shielded the tribe's casino activity.

Kiowa Tribe, *supra*, is also distinguished by the facts. The subject of the suit was a contract signed and breached by the tribe. The Supreme Court reluctantly held that tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities, and whether they were made on or off a reservation, leaving it to Congress to change applicable law. In contrast, The Trust is not seeking enforcement of a contract, it has done that in state court, it is seeking enforcement of a State Court judgment.

In an older case, *Bryan v. Itasca County*, 426 U.S. 373, S.Ct. 2102 (1976) the Supreme Court held that states could not impose a tax on Indians on the reservation,

clarifying that granting of civil jurisdiction does not include a power to tax. Clearly, The Trust is not seeking a tax on a tribe.

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 125 S.Ct. 2363 (2005) analyses the “federal question” issue through a claim of title to land obtained at a federal tax sale. It was found that because the claim of title was dependent on the interpretation of the federal tax law, this implicated a substantial federal interest in construing federal tax law. The Court found that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law. In the case at bar, The Trust has litigated its claims under state law in state court, and is denied the benefit of the orders issued. This denial of satisfaction of judgment challenges federal law which mandates state jurisdiction.

Peabody Coal Co v. Navajo Nation, 373 F.3d 945 (9th Cir. 2004). Peabody sought to enforce an arbitration agreement. The Court held that this was not a cause of action created by federal law, that the real issue was whether the Navajo Nation was in breach of an award, and that is an issue to be resolved in state court by contract law.

K2 America Corp. v. Roland Oil & Gas Co., 653 F.3d 1024 (9th Cir., 2011) 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* 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. *K2 America* had failed to take his case before the Superior Court, but in the case at bar Plaintiff Trust has fully exhausted Superior Court jurisdiction and seeks not review, but enforcement.

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

Their negligent acts were not in violation of federal law, and the doctrine of *Ex Parte Young* cannot disturb their claims to immunity.

In cited case *M.J. ex rel. Beebe v. U.S.*, 721 F.3d 1079 (9th Cir., 2013) a Tribal Police Officer Johnson negligently caused injury to minor M.J. When Johnson was deemed to be a federal employee the United States substituted itself for Johnson and removed the case to federal court. The United States settled all claims against Johnson. M.J. sought additional damages against City employer of Johnson, on theories of vicarious liability; negligent hiring, supervision, and training; and negligent entrustment. These are not federal claims and there was no issue of violation of federal law. The only issue before the court was M.J.'s vicarious liability claim against City, employer of Johnson. Johnson was acting in his official capacity and within the scope of his authority, even if negligently. He was not alleged to be violating any federal law. Since his acts were not in violation of federal law, his sovereign immunity will not be defeated by the doctrine of *Ex Parte Young*. Therefore Johnson was immune from tort liability by tribal sovereign immunity. In contrast, The Trust alleges that the individual defendants were in violation of federal law when they denied The Trust the remedy ordered by the Superior Court. Therefore the individual Tribal defendants may not claim sovereign immunity.

Three Affiliated Tribes of Ft. Berthold Reservation v. World Engineering, 476

U.S. 877, 106 S.Ct. 2305 (1986) is important for the case at bar. Three Affiliated Tribes brought suit in North Dakota state court for negligence and breach of contract. Defendants cross complained. Three Affiliated Tribes claimed jurisdiction of North Dakota courts, and refused to waive its shield of immunity from cross complaint. The North Dakota court dismissed the complaint grounded on North Dakota law which required that Indian tribes must waive immunity as a condition to litigate in state court. The Supreme Court acknowledged the State's interest in leveling the playing field for all litigants, but it found in words to be quoted, that "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."

Infra p. 893. The Supreme Court held that the North Dakota law is pre-empted by federal law which mandates state court jurisdiction for civil matters between Indian and non Indian parties, opining that Pub.L. 280 is a "detailed federal regulatory scheme" which must pre-empt incompatible state action.

Applied to the case at bar, as the state law of North Dakota was pre-empted by federal law, the rules of The Tribal Council Members must be pre-empted by federal law when the "detailed federal regulatory scheme" of Pub.L. 280 is frustrated in its purpose of providing jurisdiction of civil claims.

It is important to note that the Court in *Three Affiliated Tribes* found that the issue before it was "retrocession", the transfer of civil matter jurisdiction from state court to federal court. In contrast, The Trust is seeking full implementation of Pub.L. 280, arguing that enforcement of judgments must be obtained for meaningful access to state courts, (*infra* p. 889). The Tribal Council Members refuse to accept any orders from the state court, therefore the forum must be federal court.

ADDENDUM 28 U.S.C. § 1360, (Pub.L. 280)

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

B Immunity of Government Officials

In the context of the doctrine of *Ex Parte Young*, 209 US 123 (1908) a state official acting in accordance with the laws and policies of his employer may not claim sovereign immunity if his actions are in violation of federal law. In the seminal case, *Ex Parte Young, supra*, a Minnesota State Attorney General acted to enforce a state law mandating fines and imprisonment for violations of railroad rate ceilings. A legal distinction was created to separate the acts of the Attorney General from an act by the state of Minnesota. It was held that an injunction to prevent the Attorney General from doing that which he has no legal right to do by federal law is not an interference with the discretion of an officer because the state has no power to impart to the Attorney General any immunity from responsibility to the supreme authority of the

United States. *Ex Parte Young, supra*, 159, 160.

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

In *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F2d. 1269 (9th Cir., 1991) the issue was continued use of a road as the only access to land after the Band denied further access. Imperial's complaint claimed no property right in the road at all, *infra* page 1272. Officials of the Band denied Imperial use of the road, and since no federal law or theory required the Band to provide access, it was found that the Band acted within its lawful authority with no conflict or violation of federal law.

Alaska v. Babbit, 67 F.3d 864 (9th Cir., 1995) is a quiet title case between Plaintiff State of Alaska and Secretary of the Interior Babbit. The district court dismissed the complaint finding a lack of subject-matter jurisdiction due to the United States' immunity from suit, and that immunity had not been waived. Importantly for

the case at bar, it was found that Babbit was not acting outside of his federal authority or in violation of federal law. Therefore, Alaska's suit was precluded by the United States' sovereign immunity.

5. CONCLUSION

The Trust argues that refusal of the Tribal Council Members to comply with the orders of the superior court nullifies the mandate that superior court orders shall have the same force and effect within Indian country as they have elsewhere within the state.

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

The Tribal Council Members urge the Court to read 28 U.S.C. § 1360 narrowly such that sovereign immunity challenges based on tribal policy and custom may defeat judgments and enforcement of judgments by a state court. This reading ignores the contents of paragraph 1360 (c) which states that tribal ordinances or customs inconsistent with state law shall not be given force and effect. The parties have been unable to find precedent.

The Trust urges the Court to consider the purpose and effect of 28 U.S.C. § 1360 (a) and (c) such that civil disputes between Indian and non Indian parties may be brought to final resolution. The Tribal Council Members argue that requiring the Tribal Council Members to comply with a state court assignment order encroaches on the sovereignty of the Tribe. The Tribal Council Members argue that sheltering a judgment debtor from judgments taken against him will protect the customs, traditions, and self-government of the Tribe. The Tribal Council Members argue that its tribal sovereignty is not pre-empted by federal law, and will pre-empt the sovereignty of the state. The State of California followed its federal mandate and exercised jurisdiction to judgment and enforcement against tribal member Mathews. The Tribal Council Members, by refusing to comply with the assignment order, will thwart the authority of the State of California and halt its sovereign right to enforce its judgments. In this clash of sovereign states, a balancing of harms and benefits must favor the State of California. “State sovereignty does not end at a reservation’s border”, *Nevada v. Hicks*, 533 US 353, 361 (2001).

DATE May 26, 2015

//s//

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

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure, Rule 32(a)(7)(A)because this brief contains 3,871 words and 13 pages, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, Rule 32(a)(7)(B)(iii).

DATE: May 26, 2015

//s//

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

ADDENDUM 28 U.S.C. § 1360

State civil jurisdiction in actions to which Indians are parties.

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

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

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of

any real or personal property, including water rights, belonging to any Indian or any Indian Tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

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

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.

NINTH CIRCUIT CASE NUMBER 13-56701

CERTIFICATE OF AUTHENTICITY

I certify that this APPELLANT'S REPLY BRIEF is identical to the version submitted electronically.

Date:

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

9th Circuit Case Number(s) **14-56760**

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

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

Signature (use "s/" format)

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

May 27, 2015

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

CLIFFORD WILSON MATHEWS CDC # AG5188
State of California Corrections
Wasco State Prison, Attn Litigation
P.O. Box 8800
Wasco, CA 93280

Signature (use "s/" format)

/s/