

IN THE SUPREME COURT OF THE STATE OF IDAHO

COEUR D'ALENE TRIBE, a federally
recognized Indian Tribe,

Plaintiff/Respondent

vs.

KENNETH and DONNA JOHNSON,

Defendants/Appellants.

Supreme Court
Docket No. 44478-2016

RESPONDENT COEUR D'ALENE TRIBE'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Benewah

* * * * *

Honorable Scott Wayman, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the District Court's July 15, 2016 Memorandum Opinion in which it ordered that the judgment of the Coeur d'Alene Tribal Court in Tribal Case No. CV-SC-2014-260 is recognized as valid and fully enforceable under the laws of the State of Idaho. The District Court based its order upon a finding that (1) based upon the plain language of I.C. § 10-1301 and upon *Sheppard*, tribal court judgments may be enforced under the Enforcement of Foreign Judgments Act; (2) the Tribal Court had both subject matter and personal jurisdiction over the Kenneth and Donna Johnson ("Johnsons") pursuant to the second exception of *Montana v. United States*, 450 U.S. 455 (1981); (3) Johnsons failed to exhaust their remedies in tribal court; and (4) Johnsons did not provide authority that the penal law rule is applicable to tribal judgments, and the Tribal Court judgment is not a penal judgment.

B. Statement of Facts

Johnsons own real property on the St. Joe River. R. Vol. I, p. 25. Johnsons put a dock over and pilings into the bed of the St. Joe River. *Id.* The Johnsons' property is located within the boundaries of the Coeur d'Alene Tribal Reservation ("Reservation"). R. Vol. I, p. 25. The beds and banks of the St. Joe River within the boundaries of the Reservation are owned by the United States in trust for the benefit of the Coeur d'Alene Tribe ("the Tribe"). *Idaho v. United States*, 533 U.S. 262 (2001). The Tribe requires landowners who encroach on submerged lands of the St. Joe River to obtain a permit from the Tribe. R. Vol. I, P. 44. The Tribe charges a fee for a permit. *Id.*

On June 5, 2014, the Tribe sent a letter to Johnsons telling them that they had to have a permit for the dock and pilings.¹ R. Vol. I, P.22. Johnsons did not apply for a permit for their dock and pilings. R. Vol. I, P. 44.

C. Course of Proceedings

After being ignored, the Tribe filed a lawsuit against Johnsons in the Tribal Court of the Coeur d'Alene Tribe ("Tribal Court") on October 8, 2014. R. Vol. I, pp. 24-27. In the lawsuit, the Tribe asked for damages and an order requiring Johnsons to remove their dock and pilings. *Id.* The Johnsons were served with a copy of the Summons and Complaint on October 14, 2014. Johnson ignored the lawsuit and chose not to appear or answer. R. Vol. I, p. 32. On March 17, 2015, Order of Default was entered and mailed to Johnsons. R. Vol. I, pp. 32-34. On March 24, 2015, the Tribe sent Johnsons notice, in accordance with Coeur d'Alene Tribal Rules of Civil Procedure 53(a)(2), that the Tribe was seeking a default judgment. R. Vol. I, pp. 36-37. Johnsons ignored the notice. R. Vol. I, p. 44. On April 1, 2015, the Tribal Court entered default judgment against the Johnsons. The judgment imposed a civil penalty in the amount of \$17,400 and permitted the Tribe to remove the trespassing dock. R. Vol. I, pp. 39, 40.

On January 22, 2016, the Tribe asked the District Court for recognition of the Tribal Court Judgment. R. Vol. I, pp. 5-7. Johnsons finally appeared and objected. R. Vol. I, pp. 56-83. A hearing was held. R. Vol. I, pp. 132-133. The District Court recognized the judgment. R. Vol. I, pp. 152, 154. Johnsons filed this appeal. R. Vol. I, pp. 160-164.

¹ The letter was sent Certified Mail by the United States Postal Service. R. Vol. I, p. 22. Johnsons received this letter on June 6, 2014, as is evidenced by the signature of defendant Donna Johnson on the Return Receipt. *Id.*

II. ARGUMENT

A. Standard of Review

This is an appeal from an order by the District Court granting recognition and enforcement of the Tribe's judgment filed in Idaho pursuant to I.C. § 10-1301 *et seq.* The order was based on giving full faith and credit to the Tribal Court decision. This is a question of law over which this Court exercises free review. *Burns v. Baldwin*, 138 Idaho 480, 483, 65 P.3d 502, 505 (2003). This Court will not set aside the trial court's findings of fact unless they are clearly erroneous. *State v. Howard*, 150 Idaho 471, 475, 248 P.3d 722, 726 (2011).

B. The Tribal Court judgment is entitled to full faith and credit.

The Idaho Supreme Court has held that tribal court judgments are entitled to full faith and credit. "Tribal court decrees, while not precisely equivalent to decrees of the courts of sister states, are nevertheless entitled to full faith and credit." *Sheppard v. Sheppard*, 104 Idaho 1, 7, 655 P.2d 895, 901 (1982). "The full faith and credit clause of the United States Constitution provides that each state shall give full faith and credit to the 'judicial proceedings of every other state' and that congress may pass general laws to implement this clause." *Id.*

C. The Tribal Court judgment is entitled to recognition and enforcement under full faith and credit.

Since Idaho gives full faith and credit to tribal court judgments, the next issue is whether *this* judgment is entitled to full faith and credit. Recognition and enforcement of a judgment under full faith and credit rests upon the existence of several criteria: (A) a valid and (B) final judgment, which is (C) rendered on the merits of the case. *Andre v. Morrow*, 106 Idaho 455, 680 P.2d 1355 (1984).

1. The Tribal judgment is valid.

The first test of *Andre* is whether the judgment is “valid.” The burden of proof is carried by the party challenging the validity of the judgment. “A final judgment entered by a court of competent jurisdiction is presumed valid and therefore the party asserting the invalidity of the judgment must carry the burden of proof sufficient to overcome the presumption.” *Sheppard*, 104 Idaho at 7, 655 P.2d at 901. To show a judgment is invalid, the challenging party must prove one of three factors are *not* met. *Andre*, 106 Idaho at 460, 680 P.2d at 1360. First, the judgment is invalid if it was rendered by a court that did not have competent subject matter jurisdiction. *Id.* Second, the judgment is invalid if the court did not have either jurisdiction over the person(s) whose rights are being adjudicated or over the tangible object in question, “if the judgment purports to adjudicate interests in a tangible thing.” *Id.* Third, the judgment is invalid if the judgment was not “rendered in compliance with the constitutional requirements of due process.” *Id.*

a. The judgment is valid because the Tribal Court had competent subject matter jurisdiction.

The District Court properly held that the Tribal Court judgment was valid because the Tribal Court had subject matter jurisdiction over the dock and pilings. Tribal courts “are competent law-applying bodies” and, as such, a tribal court’s own determination of its jurisdiction is entitled to deference. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011). Under *Montana v. United States*, the tribal court has the power to “exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.” *Montana*, 450 U.S. at 566, 101 S. Ct. at 1258. Tribes “retain inherent sovereign powers to exercise some forms of civil jurisdiction over non-

Indians on their reservations, even on non-Indian fee lands.” *Id.* at 565, 101 S. Ct. at 1257.

Montana set out two grounds for subject matter jurisdiction:

1. Jurisdiction to regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.
2. Jurisdiction, pursuant to its inherent powers, to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

The District Court correctly found that the Coeur d’Alene tribe had civil authority pursuant to the second basis.² The bed and banks of the St. Joe River, and the waters flowing over those submerged lands, are of significant historical importance to the Coeur d’Alene Tribe. *Idaho v. United States*, 533 U.S. at 274 (“A right to control the lakebed and adjacent waters was traditionally important to the Tribe, which emphasized in its petition to the Government that it continued to depend on fishing.”). Regulation and control over the submerged lands was critical to the purposes of the Coeur d’Alene Tribal Reservation, and that purpose would have “been defeated had [the Reservation] not included submerged lands.” *United States v. Idaho, United States v. Idaho*, 210 F.3d 1067, 1075 (9th Cir. 2000). One purpose of the Reservation as established in 1873 “was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resources.” *United States v. Idaho*, 95 F. Supp. 2d 1094, 1109 (D. Idaho, 1998).

The Tribe traditionally used the Lake Coeur d’Alene and St. Joe River waterways “for food, fiber, transportation, recreation, and cultural activities.” *Idaho v. United States*, 533 U.S. at

² Only the second basis for *Montana* jurisdiction is at issue.

265. “The Tribe depended upon the submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks.” *Id.* The Lake and rivers are an integral part of the Tribe’s traditional cultural activities. *United States v. Idaho*, 95 F. Supp. 2d at 1100 (“The waterways were tied to the Tribe’s recreational pursuits, religious ceremonies and burial practices. In this respect, the Lake and rivers served not only as the means by which the Tribe ensured its corporeal survival, but also as the source of the Tribe’s spiritual and cultural identity.”). As was evidenced by the findings in the *United States v. Idaho* opinions, “the Lake and associated waterways were essential to the Tribe’s traditional lifestyle.” *Id.* at 1100 & 1104.

Given the vital importance of the submerged lands within the Reservation to the Tribe, the construction of encroachments on the submerged lands threatens the political integrity, the economic security, and the health and welfare of the Tribe. The ability to regulate and control conduct upon the beds and banks of the St. Joe River is an essential element of the Tribe’s political integrity. The District Court’s finding that the Tribal Court had subject matter jurisdiction pursuant to *Montana* should be affirmed.

There is an additional, independent basis for Tribal Court subject matter jurisdiction: the right to regulate and exclude use of land held in trust for the benefit of the Tribe. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). Tribes “possess inherent sovereign powers.” *Id.*, 642 F.3d at 808. “From a tribe’s inherent sovereign powers flow lesser powers, including the power to regulate non-Indians on tribal land.” *Id.* at 808-09. One of the Tribe’s inherent sovereign powers is the power to exclude. *Id.* at 808. The Johnsons’ dock and pilings are over and in submerged lands of the St. Joe River. R. Vol. I, p. 25. Those lands are held in trust by the United States for the benefit of the Coeur d’Alene Tribe. *Idaho v. United*

States, 533 U.S. 262. The Tribe holds inherent sovereign powers to exercise civil authority to regulate use of the submerged lands in the Reservation to protect its political integrity, economic security, health and welfare. And, if Johnsons do not comply with the Tribe's regulations, it has the right to exclude the Johnsons from use of the submerged lands. This right to exclude Johnsons gave the Tribal Court subject matter jurisdiction under *Water Wheel*

b. The judgment is valid because the court had personal jurisdiction over the Johnsons.

There is no dispute on personal jurisdiction and is not raised as an issue on appeal by the Johnsons. Notwithstanding, the Johnsons own a dock and pilings that encroach on the submerged lands held in trust for the benefit of the Tribe. By placing the dock and installing the pilings, the Johnsons voluntarily submitted to the jurisdiction of the Tribal Court. *See also Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 819 ("Johnson lived on tribal land, which on its own serves as a basis for personal jurisdiction. Additionally, he was served with tribal process at the Water Wheel location on tribal land, and that service within the tribal court's territorial jurisdiction is also sufficient to confer personal jurisdiction.")

c. The judgment is valid because it meets the Constitutional requirements of due process.

Contrary to their assertion, the record establishes that the Johnsons were afforded more than adequate due process. *Appellant's Br.*, p. 18-20. At its core, procedural due process requires notice and opportunity to be heard. *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 127, 176 P.3d 126 (2007). The argument that Johnsons were not afforded adequate due process is based upon unsupported allegations that "the Tribal Court is dominated by the Tribal government" and the "Tribal government is particularly biased on questions of ownership regarding submerged lands, as reflected in the Tribal Code." *Id.*, p. 19-20. Johnsons further

allege that Tribe “has not hesitated to impose a large civil penalty.” *Id.* at 20. Johnsons cite no evidence that would tend to show they were denied due process, yet they conclude, “it is very difficult to see how the Johnsons were afforded due process.” *Id.* The history of the Tribal Court proceedings, however, shines a light making it clear to see how the Johnsons were afforded due process. R. Vol. I, pp. 5-11 and 17-40. The record establishes the Johnsons were given the following notices and opportunities to be heard:

- Letter seeking to resolve matter prior to litigation sent to Johnsons via certified mail, June 5, 2014. R. Vol. I, pp. 18, 21-22.
- Copy of Summons and Complaint sent to Johnsons via certified mail, October 14, 2014. R. Vol. I, pp. 5, 18,
- Johnsons served with copy of Summons and Complaint, October 14, 2014. R. Vol. I, pp. 5, 29-30.
- Copy of Order of Default sent to Johnsons, March 17, 2015. R. Vol. I, pp. 32-34.
- Notice of Hearing for Motion of Entry of Judgment mailed to Johnsons, March 24, 2015. R. Vol. I, pp. 6, 36-37.
- Copy of Tribal Court Judgment sent to Johnsons via certified mail, April 1, 2015. R. Vol. I, pp. 6, 39-40.
- Clerk’s Notice of Filing of Foreign Judgment mailed to Johnsons, January 26, 2016. R. Vol. I, pp. 10-11.

The Johnsons never appeared in the Tribal Court and never responded to the summons and complaint filed in that litigation. R. Vol. I, p. 17. The Johnsons received a copy of the Summons and Complaint and therefore received “notice and an opportunity to be heard.” *See Neighbors for a Healthy Gold Fork*, 145 Idaho at 127 (The procedural due process “requirement is met when the defendant is provided with notice and an opportunity to be heard.”). Johnsons received additional notice and opportunity to be heard when they were sent notice of the default

judgment. This is a procedural safeguard provided by the Tribe's Rules of Civil Procedure which go above and beyond Idaho law, and require that the non-appearing party receive notice of the default judgment. *See*, Coeur d'Alene Tribal Rules of Civil Procedure 53(a)(2).³ The Tribe complied with this additional notice requirement. As a result, Johnsons were provided four more "layers" of due process than they would have been entitled to in the state court.

There is no competent evidence in the record that the Tribal Court was biased against the Johnsons. Johnsons insinuate bias because the case involves questions of ownership regarding submerged lands. Appellants' Br., p. 19-20. Again, there is no evidence that this bias exists nor that it influenced the Tribal Court in entering its judgment. Johnsons also point to the imposition of "a large" civil penalty. *Id.* at 20. Yet, the civil penalty imposed by the Tribal Court was one fifth of the amount that could have been imposed. Although the Coeur d'Alene Tribal Code does authorize a civil penalty in the amount of \$500 per day, CTC 44-24.01, the Tribe only sought and received a penalty of \$100 per day. Moreover, Johnsons presented no evidence that the civil penalty violated due process.

The record in this case is clear: the Johnsons were afforded more than adequate due process in the Tribal Court. Rather than exercising the due process being offered to them, Johnsons rolled the dice and ignored the Tribal Court proceedings. That conscious strategy by the Johnsons does not render the due process offered by the Tribal Court insufficient. For these reasons, this Court should affirm the finding of the District Court.

2. It is undisputed that the tribal judgment is final.

There is no dispute the Tribal Court judgment was final.

³ The Tribal Code provides more due process than the Idaho Rules of Civil Procedure, where defendants who have not appeared in a lawsuit are not entitled to receive notice of an application for default judgment. *Meyers v. Hansen*, 148 Idaho 283, 288, 221 P.3d 81 (2009); *see also*, Idaho Rule of Civil Procedure 55(b)(2).

3. It is undisputed that the tribal judgment was on the merits.

There is no dispute that the Tribal Court judgment was on the merits of whether the Johnsons dock and pilings must be removed.

4. The Tribal Court judgment is entitled to full faith and credit because it is a valid, final judgment rendered on the merits of the case.

The Tribal Court judgment is entitled to recognition and enforcement under full faith and credit because Johnson failed to show any of the three Andre elements were not satisfied. First, the Tribal Court judgment was valid. Second, the Tribal Court judgment was final. Third, the judgment was rendered on the merits of the case. Therefore, the decision of the District Court that the Tribal Court judgment is entitled to full faith and credit should be affirmed.

D. Pursuant to the Exhaustion Doctrine, Johnsons waived their jurisdictional challenge.

The District Court observed that “Johnsons never appeared in tribal court to raise a jurisdictional challenge.” R. Vol. I, p. 145. In their appeal brief, Johnsons contend that they were not required to exhaust their tribal court remedies for two reasons: (1) the doctrine of exhaustion of remedies is not applicable pursuant to I.C. § 10-1301, *et seq.*; and (2) “[t]he Tribal Court’s jurisdiction was plainly lacking[.]” Appellant’s Br., pp. 10-11.

The United States Supreme Court has held litigants in tribal court are required to challenge the jurisdiction of the tribal court in tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (“[T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction . . . unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs.”).

The rule requiring litigants to first challenge the jurisdiction of the tribal court in tribal court is supported by the policy of giving tribal courts respect as competent judicial bodies. That proper respect for tribal legal institutions requires that those courts have full opportunity to consider the issues before them and to rectify any errors. *Iowa Mut. Ins. Co.*, 480 U.S. at 16-17. Those same policy considerations have been recognized by this Court. *See, e.g., Sheppard*, 104 Idaho at 8 (“We believe that this holding [recognizing a tribal judgment] will facilitate better relations between the courts of this state and the various tribal courts within Idaho.”) Since the Johnsons have not challenged, let alone exhausted, the issue of jurisdiction in Tribal Court the decision of the District Court should be affirmed.

E. All submerged land is trust land held by the United States for the benefit of the Tribe.

The Johnsons argue repeatedly that the submerged lands in question were not reserved for the Tribe by the United States in 1873. Johnsons assert:

The United States Supreme Court and the Ninth Circuit Court of Appeals, however, specifically recognized that the United States reserved, or set aside, the submerged lands that existed *prior to Statehood in 1890*. *See generally Idaho v. United States*, 533 U.S. 262 (2001), and *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) (upholding finding that the United States reserved 1873 submerged lands for the Tribe). It is *these* submerged lands within the reservation – and only these submerged lands – that are owned by the United States.

Appellants’ Brief, p. 6.

This argument mischaracterizes the holdings of the Federal District Court, Ninth Circuit Court of Appeals, and the Supreme Court of the United States. None of those Courts made such an acknowledgment limiting the scope of the submerged lands held in trust for the Tribe. This assertion is contrary to those opinions.

In *United States v. Idaho*, 95 F. Supp. 2d 1094, Judge Lodge held that “the United States retained, for the benefit of the Tribe, the submerged lands within the exterior boundaries of the present-day Coeur d’Alene Reservation.” *Id.* at 1116. Judge Lodge, then went on to order as follows:

1. Title is quieted in favor of the United States, as trustee, and the Coeur d’Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, to the bed and banks of the Coeur d’Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d’Alene Indian Reservation;
2. The United States, as trustee, and the Coeur d’Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of the Coeur d’Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d’Alene Indian Reservation;
3. The State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of the Coeur d’Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d’Alene Indian Reservation.

Id. at 1117.

Nowhere in his decision did Judge Lodge limit the Tribe’s beneficial interest in the submerged lands to only those existing in 1873 or 1890. Rather, the language of the order was broad and included “the bed and banks of the Coeur d’Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d’Alene Indian Reservation[.]” *Id.* at 1117. The Ninth Circuit Court of Appeals affirmed Judge Lodge’s order without modification.

On appeal, the Ninth Circuit Court of Appeals identified the issue before it as determining “the ownership of submerged lands within the present-day boundaries of the Coeur

d’Alene Indian Reservation, which [Reservation] was originally set aside by executive order in 1873.” *United States v. Idaho*, 210 F.3d 1067, 1070 (9th Cir. 2000). The Ninth Circuit held that:

Congress’s actions prior to statehood clearly indicate its acknowledgement, express recognition, and acceptance of the executive reservation, thereby establishing its intent to defeat the State’s title [to the submerged lands]. Accordingly, we affirm the district court’s ruling quieting title to submerged lands within the present-day Coeur d’Alene Reservation for the benefit of the Tribe.

Id. at 1074 (emphasis added).

From the Ninth Circuit, the case proceeded to the Supreme Court of the United States. *Idaho v. United States*, 533 U.S. at 262. The U.S. Supreme Court addressed the question of “whether the National Government holds title, in trust for the Coeur d’Alene Tribe, to lands underlying portions of Lake Coeur d’Alene and the St. Joe River.” *Id.* at 265. This question was answered in the affirmative, and the Ninth Circuit’s decision affirming Judge Lodge’s order was affirmed without modification. *Id.*

At no point in the history of the *United States v. Idaho* cases did the federal courts limit the Tribe’s beneficial interest in the submerged lands to only those lands existing in either 1873 when the boundaries of the Reservation were established or 1890 at Idaho’s statehood, nor did those opinions gauge the Tribe’s interest based upon the ordinary high water mark. Both of these arguments are assertions of the Johnsons’ own construction, and are not supported by the case law.

The Tribe’s beneficial interest was broadly stated as encompassing the submerged lands of Lake Coeur d’Alene and the St. Joe River lying within the current boundaries of the Reservation. The only straw Johnsons could grasp at in support of their argument is a statement the Ninth Circuit made in a footnote, Footnote 18, of its decision. This footnote was couched

within the portion of the Court's opinion addressing a cross-appeal brought by the Tribe and relating to the submerged lands within Heyburn State Park. The Tribe's cross-appeal raised the question of whether the district court erred in refusing to decide ownership of submerged lands within Heyburn State Park, which area was conveyed to the state of Idaho in 1908. *Id.* at 1079-80. In addressing that cross-appeal, the Ninth Circuit recognized that it was required to decide "whether the parties' pleadings [n.18] – specifically, the United States' complaint and the State's counterclaim – put at issue submerged lands within the Park." *Id.*

In its Footnote 18 the Ninth Circuit stated:

In construing the parties' pleadings, we bear in mind that the current physical situation in and around [Heyburn State] Park differs from the situation that existed in 1873, at the time of the executive reservation, and in 1908 and 1911, the years, respectively, that [Heyburn State] Park was authorized and conveyed to the State. Due to the construction of a dam, three small lakes have combined with the Lake into one large body of water. We read the United States' complaint in light of the physical situation as it existed prior to the construction of the dam.

Id. at 1080 n.18.⁴

In light of its context, this footnote does not support Johnsons' argument. The footnote was not addressing the extent of the Tribe's interest in the submerged lands within the boundaries of the present-day reservation. Moreover, this footnote did not modify or place limitations upon Judge Lodge's order that quieted title in favor of the United States, in trust for the Tribe, to the bed and banks of the Coeur d'Alene Lake and St. Joe River lying within the current boundaries of the Reservation, which order was affirmed, without modification by the

⁴ The Ninth Circuit rejected the Tribe's cross-appeal because the United States' complaint did not include lands within Heyburn State Park and the United States "disavowed any intent to quiet title to submerged lands within the Park." *Id.* at 1080. The Ninth Circuit also observed that the State also disclaimed any intent to litigate issues beyond those raised by the Complaint. *Id.*

Ninth Circuit. Judge Lodge's order was also not modified in any way by the Supreme Court of the United States.⁵

The record is clear that Johnsons' dock and pilings extend into the St. Joe River, whether those encroachments are within submerged lands that existed pre-statehood or whether those encroachments are within submerged lands that arose after statehood is not the relevant inquiry. Rather, the only inquiry is whether those encroachments are upon submerged lands of the St. Joe River within the boundaries of the Coeur d'Alene Tribal Reservation; it is undisputed that they are. Because the Johnsons' dock and pilings are located upon the submerged lands of the St. Joe River, which lands are held in trust for the benefit of the Coeur d'Alene Tribe, the Tribal Court had jurisdiction. *See, Water Wheel Camp Recreational Area, Inc.*, 642 F.3d 802; *see also, Montana*, 450 U.S. at 557 ("The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing a bag and creel limits.") (emphasis added, internal citations omitted).

The conclusion that the submerged lands are held in trust is consistent with Idaho law. Under Idaho law, public rights extend to artificially submerged lands. In *Burrus v. Edward Rutledge Timber Co.*, the question was whether Burrus could stop a timber company from placing and maintaining "boom sticks" over a "meadow" that was submerged by Lake Coeur d'Alene. 34 Idaho 606, 607, 202 P. 1067, 1068 (1921). Prior to 1906, Burrus used a meadow to

⁵ There is no competent evidence that Johnsons encroachments are not upon the submerged lands held in trust for the Tribe. Regardless, the holdings of the respective courts in *United States v. Idaho* established that the Tribe's beneficial interest in the submerged lands of the St. Joe River includes all of those submerged lands within the boundaries of the Coeur d'Alene Indian Reservation as those boundaries existed on the date of those decisions.

grow hay. *Id.* After 1906, the meadow was submerged when Washington Water Power Company built the dam on the Spokane River. *Id.* The water over the meadow was navigable. *Id.* Burrus claimed the timber company could not put the boom sticks on the meadow because he owned it. *Id.* at 606, 202 P. at 1067. The timber company argued that it could use the “meadow” for boom sticks because the public rights extended to submerged lands under navigable waters even if the water was at an artificial level created by a dam. *Id.* at 607, 202 P. at 1068. The Idaho Supreme Court held that “[w]here a permanent dam is erected in a navigable stream, causing the waters to rise above it to be raised, the rights of riparian owners above the dam, as against persons entitled to use the stream, are to be construed with reference to the changed conditions, and not as they existed before the dam was built.” *Id.* “The level of the waters of navigable lake, the public rights therein are correspondingly extended so long as the artificial level is maintained.” *Id.* (citing *Village of Pewaukee v. Savoy*, 79 N.W. 436 (1899)). Under *Burrus*, the public rights, in this case being the Tribal trust rights extended to the submerged land after the water rose.

F. Comity does not preclude the State Courts from recognizing and enforcing the underlying Tribal Court judgment.

If this Court determines that *Sheppard* is inapplicable or must be overruled, the District Court’s order that the Tribal Court judgment is entitled to recognition and enforcement may also be affirmed on the basis that the judgment meets the requirements for recognition and enforcement pursuant to principles of comity. Again, this Court may affirm recognition and enforcement of the Tribal Court judgment on the same grounds relied upon by the District Court, or it may affirm recognition and enforcement on alternative grounds. *See, e.g. Sheppard*, 104 Idaho at 7, 655 P.2d at 901 (“Where an order of a lower court is correct, albeit based on a different theory than that found dispositive by this Court, the lower court order will be affirmed.”).

A judgment should be afforded comity unless acceptance of the judgment “would be contrary or prejudicial to the interest of the nation called upon to give it effect.” *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997) (quoting *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir.1971)). In the federal context, there is a general principle that federal courts should recognize and enforce tribal judgments, and federal courts employ comity as the vessel for such recognition and enforcement. *Wilson*, 127 F.3d at 810. *Wilson* cautions, however, that a federal court must not recognize or enforce a tribal court judgment if: the tribal court did not have both personal and subject matter jurisdiction; and the defendant was not afforded due process by the tribal court. *Id.* *Wilson* also identified four discretionary bases upon which a Court may decline to recognize and enforce a tribal judgment on equitable grounds:

- (1) the judgment was obtained by fraud;
- (2) the judgment conflicts with another final judgment that is entitled to recognition;
- (3) the judgment is inconsistent with the parties' contractual choice of forum; or
- (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.

Wilson, 127 F.3d at 810. This Court may apply these same principles if it determines that comity is the proper tool for recognition and enforcement of tribal court judgments in the Idaho state courts.

The Coeur d’Alene Tribal Court had both subject matter and personal jurisdiction over the Johnsons pursuant to *Montana* and *Water Wheel*. See, *supra* § II.C. In the Tribal Court, the Johnsons received due process that exceeded the due process they would have been afforded in similar state court proceedings. The tribal judgment satisfies the mandatory requirements for

recognition and enforcement pursuant to comity. There are no equitable grounds to decline recognition and enforcement of the Tribal Court judgment. Johnsons have neither produced evidence nor alleged that the judgment was obtained by fraud. There are no other final judgments with which the judgment at issue conflicts. There is no issue of a contractual choice of forum. Finally, recognition of the Tribal Court judgment, or the cause of action upon which it is based, is not against the public policy of this State. To the contrary, Idaho public policy favors Idaho state court recognition and enforcement of tribal court judgments. *See, e.g. Sheppard*, 104 Idaho at 8, 655 P.2d at 902 n.2 (expressing Court's hope that granting recognition and enforcement to tribal court judgments would foster a good working relationship between the state and the tribal courts.)

If this Court overrules the precedent of *Sheppard* and concludes that recognition and enforcement of tribal court judgments should be based upon comity, not full faith and credit, then the foregoing establishes that the Coeur d'Alene Tribal Court judgment is entitled to recognition and enforcement, and the District Court's conclusion can be affirmed, under the alternative basis of comity.

G. The District Court correctly concluded the Penal Law Rule is inapplicable.

Johnsons assert that the District Court erred in finding that the Tribal Judgment is not a penal judgment. The Johnsons take the position that the Penal Law Rule precludes recognition and enforcement of the monetary penalty imposed by the Tribal Court against them for their encroachment.⁶ Johnsons describe the penal law rule as a “venerable and widely-recognized” rule that a state or country does not enforce the penal judgments of other states or countries unless required to do so by treaty.” *Appellants’ Br.*, p. 20. Yet, Johnsons do not cite any authority

⁶ Johnsons’ argument does not extend to the portion of the Tribal Court judgment ordering removal of the Johnsons’ encroaching dock and pilings.

establishing that the penal law rule is applicable to tribal court judgments, and, aside from the inapplicable Idaho Code § 10-1401, *et seq.*, they cite no Idaho authority adopting this common law rule.

As a preliminary matter, Johnsons' reliance on the Uniform Foreign Country Money Judgments Recognition Act, I.C. § 10-1401, *et seq.*, is misplaced. That law is patently inapplicable in this matter. According to I.C. § 10-1402, "foreign country" as it is used in that law, means a government other than:

- (a) The United States;
- (b) A state, district, commonwealth, territory or insular possession of the United States; or
- (c) Any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the full faith and credit clause of the United States Constitution.

As was already established, in Section II.C. of this brief, the Tribe's judgment is subject to determination under the full faith and credit clause. Therefore, that statute is inapplicable on its face.

Thus, according to the plain language of I.C. § 10-1401, this Court need only address the penal law issue if it overrules *Sheppard* and determines that tribal court judgments are not properly recognizable and enforceable under full faith and credit. In other words, this issue must only be reached if the Court determines that comity is the proper vehicle for recognition and enforcement of tribal court judgments by the courts of this state.

Under comity, one nation will generally "afford[] recognition within its territory to the legislative, executive, or judicial acts of another nation." *United States v. Federative Republic of Brazil*, 748 F.3d 86, 91 (2d Cir. 2014). The penal law rule is an exception to the principles of

comity, and according to that rule, the Courts of one country need not execute the penal laws of another. *Id.* at 91-92 (citing *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825)).

As discussed above, the policy reasons on which the penal law rule rests are not applicable to the judgments of tribal courts. The trust relationship between federally recognized tribes and the United States is significantly different than the relationship between the various states and between the United States and other nations. Again, as was stated by this Court in *Sheppard*, courts should consider holdings that “facilitate better relations between the courts of this state and the various tribal courts within Idaho.” This policy is a reflection of the special relationship between tribes, the federal government, and the State of Idaho.

In *Cherokee Nation v. Georgia*, Chief Justice John Marshall described the relationship between tribes and the federal government as “domestic dependent nations” and which “resemble that of a ward to his guardian.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Justice Marshall went on to say “They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants” *Id.* at 17. The unique position of Indian tribes “is perhaps unlike that of any other two people in existence But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.” *Id.* at 16. *Cohens’s Handbook of Federal Indian Law* describes the trust relationship as,

A robust and protective trust doctrine evolved in the contemporary era, however. Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal governments. Many administrative actions invoke the trust relationship as a basis for regulations implementing federal statutes. Most modern presidents’ policy statements regarding tribes also reaffirm the trust relationship.

§ 5.04(3)(a), 2012 Edition.

In arguing for the application of the penal law rule, the Johnsons ask this Court to adopt a rule not previously recognized in this State and to extend that rule in a way that has never been done. Again, Johnsons offer no legal authority whether Indian case law, treatises, or other secondary sources, which supports the application of the penal law rule to tribes. In asking the Court to adopt that rule, Johnsons also ask this Court to breach the trust relationship with Indian tribes of this State by refusing to recognize the judgment of the Coeur d'Alene Tribe. Adoption of Johnsons' position would restrict the Tribe's ability to use its judicial system to seek redress for injuries committed by non-Indians against the tribe while on tribal land. Neither policy nor case law support this result.


Given the unique relationship between the Tribe and the State of Idaho this Court should decline to enlarge federal common law, it should decline to extend the penal law rule to a circumstance in which it has never been applied, and it should decline to extend that rule to tribal court judgments.

IV. CONCLUSION

The district court's ruling should be affirmed.

DATED this 1st day of March, 2017.

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COEUR D'ALENE TRIBE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of March, 2017, I caused to be served two (2) true and correct copies of this RESPONDENT COEUR D'ALENE TRIBE'S BRIEF by the method indicated below, and addressed to all counsel of record as follows:

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