

Norman M. Semanko, ISB No. 4761
Matthew J. McGee, ISB No. 7979
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
nms@moffatt.com
mjm@moffatt.com
26714.0000

Attorneys for Defendants
Steve W. Hawks and Deanne A. Hawks

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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

Plaintiff,

vs.

STEVE W. HAWKS and DEANNE A.
HAWKS, husband and wife,

Defendants.

Case No. 2:16-cv-00366-CWD

**REPLY IN SUPPORT OF MOTION TO
DISMISS OR STAY**

I. INTRODUCTION

This case, involving the attempt at enforcement of a \$3,900 civil penalty, does not belong in this Court. There is not federal question jurisdiction, and the Tribe concedes that there is not diversity jurisdiction. Furthermore, even if this Court had federal question jurisdiction, this case represents a confusing pretextual attempt to collaterally demonstrate ownership of certain submerged lands under portions of the St. Joe River and Lake Coeur d'Alene in as many

parallel judicial forums and proceedings as possible. Instead of seeking clarity regarding an issue in dispute in a single appropriate forum, the Tribe has aggressively pursued numerous cases involving nonmember individuals with docks, pilings or water diversion infrastructure in the St. Joe River in order to collaterally quiet title in and to certain submerged lands via proceedings in the Coeur d'Alene Tribal Court, the Coeur d'Alene Spokane River Basin Adjudication ("CSRBA") district court, and the Idaho state district court in Benewah County, with an appeal pending before the Idaho Supreme Court. Now, the Tribe seeks to involve this Court. The Court should not countenance the Tribe's tactics, and should dismiss or stay the matter pending final resolution of certain state court cases.

II. ARGUMENT

A. The Court Does Not Have Section 1331 Jurisdiction.

1. *National Farmers* does not establish Section 1331 Jurisdiction.

In the Complaint, the Tribe asserts that the Court has jurisdiction over this action pursuant to *Hilton v. Guyot*, 159 U.S. 113 (1895), and *Wilson v. Marchington*, 127 F.3d 805 (1997). See Complaint ¶ 3, ECF No. 1. Now, it concedes that *Wilson* "never addressed diversity or federal question jurisdiction." See Response to the Motion to Dismiss or Stay ("Response") at 3, ECF No. 10. Having failed to adequately allege the basis of this Court's jurisdiction in the Complaint, the Tribe pivots in its Response. The Tribe now asserts that it is not *Wilson v. Marchington* that supports this Court's federal question jurisdiction, but rather, it is *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

The Tribe argues that "*National Farmers* made clear that the extent of an Indian tribe's jurisdiction over nonmembers, like the Hawks, is a federal question." Response at 4. Even assuming that is true, it does not address the issue before this Court. The grounds for the

Hawks' motion to dismiss has nothing to do with "an Indian tribe's jurisdiction over nonmembers, like the Hawks." The motion to dismiss has nothing to do with tribal jurisdiction at all. Anticipated federal defenses do not create federal question jurisdiction. See *California Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 541 (9th Cir. 2011) (anticipated federal preemption defense not sufficient to create federal question jurisdiction); see also *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944, 948 (10th Cir. 2014) (anticipated defense of tribal sovereign immunity not sufficient to create federal question jurisdiction). The issue before this Court is whether *this Court* has jurisdiction to rule upon the Tribe's cause of action to recognize and enforce a tribal judgment in the state of Idaho. At this time, the issue before the Court is whether the Tribe has adequately alleged a cause of action over which this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331, not whether the Tribe may exercise jurisdiction over the Hawks.

The Tribe describes *National Farmers* as having the "reverse factual outlay," then simply concludes that reverse factual outlay is unimportant and that the conclusions reached by the U.S. Supreme Court are equally applicable to this case. See Response at 3 n.1. If the Hawks' sought a declaration from this Court attacking the jurisdiction of the tribal court to enter the tribal judgment at issue in the first place, the Tribe's argument may have some merit. In *National Farmers*, that is what happened. The petitioners sought an injunction against the Crow Tribe relating to enforcement of a tribal judgment against them, contending that federal law had divested the Tribe of its jurisdiction over non-members. The U.S. Supreme Court decided "that § 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction." 471 U.S. at 857. That federal question has not, to date, been placed before this Court. The sole question before this Court on the Hawks' motion to dismiss is whether, in the

absence of diversity, *this Court* has jurisdiction to domesticate and enforce the tribal judgment at issue.

The Hawks have not, to date, challenged the limits of the Tribe's jurisdiction before this Court. Likewise, the Tribe has not sought a declaration from the Court delineating the limits or extent of its jurisdiction over the conduct or property of the Hawks. The Tribe simply wishes to domesticate and enforce a tribal default judgment in the state of Idaho. That does not, as the Tribe contends, establish federal question jurisdiction under 28 U.S.C. § 1331.

2. The applicability of federal law does not alone create federal question jurisdiction.

It is well settled “that the mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction.” *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986). To be clear, the Hawks do not dispute that, in the Ninth Circuit, federal district courts are to apply federal common law—and in particular the doctrine of comity—to the recognition of tribal judgments. That is the proposition for which *Wilson* stands. As *Merrell Dow Pharmaceuticals* teaches, however, the fact that a court may have to interpret federal law is not alone sufficient to establish federal question jurisdiction. “Arising under” jurisdiction exists when federal law creates a cause of action or where the vindication of a right turns on construction of federal law. *See id.*

First, the recognition of a tribal judgment involves the interpretation of the federal law of comity, as *Wilson* holds, but a cause of action for enforcement of a tribal judgment is not a federal cause of action. The Tribe cites no statute or treaty creating a cause of action for recognition and enforcement of a foreign judgment. Moreover, the Federal Rules of Civil Procedure acknowledge that enforcement of a judgment “must accord with the procedures of the state where the court is located.” FED. R. CIV. P. 69(a)(1).

Second, the Tribe has not demonstrated that this case presents a “substantial question” for purposes of demonstrating federal question jurisdiction. To demonstrate a “substantial question,” a plaintiff must show that “a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Gunn v. Minton*, 133 S. Ct. 1059, 1064, 185 L.Ed.2d 72 (2013). Here, the only federal issue raised is the applicability of *Wilson* to the recognition of tribal judgments, and that is not a disputed issue. In fact, the comity doctrine outlined in *Wilson* is codified in the Idaho Code, at Idaho Code Sections 10-1401 *et seq.* That clearly evidences that this case does not “really and substantially involve a dispute or controversy respecting the validity, construction or effect of federal law.” *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005). Generally, there is not federal question jurisdiction when the federal law at issue is not in dispute. *See id.* The federal law at issue in this case is not only not in dispute, but is codified in the statutes of Idaho. Furthermore, the Tribe’s scattershot approach—seeking to bolster its claim to ownership of certain lands in every forum available to it in the state of Idaho—threatens to create inconsistent rulings. *See* Section II.B *infra*. Absent diversity, this case does not belong in this Court.

Third, recognition of judgments among different U.S. jurisdictions relies upon the doctrine of full faith and credit, and recognition of a foreign sovereign’s judgment relies upon the doctrine of comity. Neither doctrine’s application to a given set of facts, without more, establishes federal question jurisdiction. *See Minnesota v. Northern Sec. Co.*, 194 U.S. 48 (1904) (pleading the applicability of federal full faith and credit in a complaint does not establish federal question jurisdiction). In fact, the claimed necessity of a federal comity analysis is an even less compelling jurisdictional hook than the claimed applicability of federal full faith and

credit. At least full faith and credit is grounded in the United States Constitution and 28 U.S.C. § 1738. *See Baker v. General Motors Corp.*, 522 U.S. 222 (1998). As the U.S. Supreme Court noted,

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons as are under the protection of its laws.

Hilton, 159 U.S. at 163-64.

If the applicability of federal constitutional and statutory full faith and credit to a given claim does not alone create federal question jurisdiction, the applicability of a prudential doctrine such as comity (which is by no means a doctrine exclusive to federal Article III courts, and is in fact codified in Idaho Code) should not alone create federal question jurisdiction.

The jurisdictional hook the Tribe relies upon to create federal question jurisdiction fails. A federal cause of action for enforcement of a tribal judgment does not exist, the federal law at issue is not in dispute, and the applicability of the federal doctrine of comity, like the applicability of full faith and credit, is alone insufficient to create federal question jurisdiction. The Court should dismiss the Complaint.

B. If the Court Finds It Has Jurisdiction, It Should Nonetheless Stay Proceedings.

The Tribe’s argument in response to a motion for stay under the *Colorado River* doctrine is, in summary, that the related proceedings in the CSRBA involve water rights and the related proceedings now before the Idaho Supreme Court involve a different party. That simple formulation is repeated, in one form or another, in the Tribe’s evaluation each of the eight factors

set forth in *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011). *See* Response at 6-8.

That formulation fails, however, to recognize that the legal issue—the scope and extent of tribal ownership of certain submerged lands, and the jurisdictional authority associated therewith¹—is among the fundamental legal issues being addressed in each of the state court proceedings at issue. The Tribe objected to certain claims for water rights on the grounds that the claimed point of diversion for the water right is on tribal land, that a permit predicated on a trespass could not issue, and therefore the claimants' water rights, including the Hawks' water rights, should not be decreed as valid water rights. The Hawks do not contend that this case has anything to do with water rights. The legal issue underlying the Tribe's objection to the Hawks' water rights, however, is very much the same legal issue underpinning the judgment the Tribe asks this Court to recognize.

Even more compelling, the state court proceedings involving the similarly-situated Johnsons involve *identical* legal issues to those presented in this case. Indeed, the Benewah County Court ruled in favor of the Tribe, relying upon *Sheppard v. Sheppard*, 104 Idaho 1, 655 P.2d 895 (Idaho 1982), and federal full faith and credit. The state court granted the Tribe's petition to recognize and enforce a virtually identical tribal court judgment for civil penalties and removal of encroachments against the Johnsons. That fact alone makes it absolutely clear that the Tribe is engaged in gamesmanship, and inviting state-federal court conflict. There is no rational explanation for the Tribe's decision to pursue domestication of a \$3,900 penal judgment before this Court *after* achieving the very same relief it seeks from this

¹ Once again, the Hawks are very much aware, and do not dispute, that the nature and scope of tribal jurisdiction is governed by federal common law. The ownership of land, which ownership establishes or defines some of the Tribe's jurisdictional authority, is not.

Court in the state court in Benewah County. The purpose for this awkward multi-forum approach remains unclear, because the Tribe is protected by the state court proceedings—a factor that favors a stay. For some reason, the Tribe takes offense that the Hawks have drawn attention to this puzzling issue. *See* Response at 6 (characterizing the Hawks discussion of the Tribe’s multi-forum tactics as “fling[ing] mud and cast[ing] slurs in an attempt to distract the Court from the real issue”). The Tribe does not, however, offer any explanation for involving this Court. The Johnson matter is on appeal to the Idaho Supreme Court. By filing and pursuing this virtually identical action in federal court at this time, the Tribe invites inconsistent rulings or results as between the state and federal courts of Idaho. That alone weighs heavily in favor of staying the matter.

Even if this Court finds that it has Section 1331 jurisdiction over a cause of action for the recognition and enforcement of a tribal court judgment, the Court should nonetheless stay proceedings pending resolution of the related state court matters, in accordance with the *Colorado River* doctrine.

III. CONCLUSION

For the foregoing reasons, the Hawks respectfully request that the Court dismiss the Tribe's suit for lack of subject matter jurisdiction, or in the alternative, stay further proceedings until such time as the identified state court proceedings have addressed the issue of tribal ownership of certain submerged lands, as well as the propriety of enforcement of extra-jurisdictional penal judgments.

DATED this 24th day of October, 2016.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By /S/ Matthew J. McGee
Matthew J. McGee – Of the Firm
Attorneys for Defendants Steve W.
Hawks and Deanne A. Hawks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2016, I filed the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS OR STAY** electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Peter J. Smith
peter@smithmalek.com

Jillian H. Caires
jillian@smithmalek.com

/S/ Matthew J. McGee
Matthew J. McGee