

Norman M. Semanko, ISB No. 4761  
Matthew J. McGee, ISB No. 7979  
Sarah A. McCormack, ISB No. 9683  
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  
sam@moffatt.com

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

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

**I. INTRODUCTION**

In an effort to involve yet another court in a dispute over the scope of the Coeur d’Alene Tribe’s (the “Tribe”) ownership of certain submerged lands within the Coeur d’Alene reservation, the Tribe has obtained a default judgment (the “Tribal Judgment”) against non-member defendants Steve W. Hawks and Deanne A. Hawks (the “Hawks”), imposing tribal civil

penalties in the amount of \$3,900, and now seeks recognition of that Tribal Judgment from this Court. The Hawks request that the Court dismiss this case because the Court does not have subject matter jurisdiction to hear the matter. In the event the Court finds its exercise of jurisdiction appropriate, the Court should stay the proceedings pending resolution of certain issues being litigated in the state courts of Idaho, which issues bear upon the Tribe's jurisdiction to obtain such Tribal Judgment.

## II. BACKGROUND

The Hawks own real property on the St. Joe River within the Coeur d'Alene Tribal Reservation. *See* Complaint at ¶ 7, ECF No. 1. The Hawks also own a boat garage and pilings within the St. Joe River. *Id.* at ¶ 8. They claim a water right appurtenant to such real property with a diversion structure in the St. Joe River, which claim the Tribe has objected to in the Coeur d'Alene-Spokane River Basin Adjudication (the "CSRBA"), Case No. 49576 in the District Court of the Fifth Judicial District of the State of Idaho, Twin Falls County, a state water rights adjudication case. *See* Docket, Subcase No. 91-7173 Exh. A to the Affidavit of Matthew J. McGee; Objection, dated June 24, 2015, Exh B, McGee Aff.. The Tribe asserts that each of the water diversion structure and the boat garage and pilings within the St. Joe River are illegal encroachments. *See* McGee Aff., Exh. B; Complaint, Exh. 2 at ¶ 8, ECF No. 1-2.

On June 24, 2015, the Tribe submitted an Objection to the Hawks' claimed domestic water right, asserting that the point of diversion, which consists of a water diversion structure in the St. Joe River, was an unpermitted encroachment, and therefore, the Hawks' claimed water right should not exist. *See* McGee Aff., Exh. B. Since that time, the Tribe and the Hawks have conducted discovery and filed numerous pre-trial motions, including cross-motions for summary judgment, to resolve, among other issues, the scope of the Tribe's ownership of

certain submerged lands under the St. Joe River and Lake Coeur d'Alene within the reservation. *See* McGee Aff., Exhs. A & C. At present, summary judgment motions are fully briefed and pending before the special master, and a trial on the submerged lands issue is scheduled to occur in October 2016. *See id.*

In January 2016, in the midst of litigation with the Hawks and others over the submerged lands issue, the Tribe sought to domesticate in Idaho state court a default judgment that was entered against similarly situated individuals (the Johnsons) by the Tribal Court of the Coeur d'Alene Tribe of the Coeur d'Alene Indian Reservation for violation of the Coeur d'Alene Tribal Code. *See* Notice of Appeal, Benewah County Case No. CV-2016-0025, McGee Aff., Exh. D. The Johnsons' dock, like the Hawks' dock and diversion structure, was purportedly subject to the permitting requirements of the Tribe, and the judgment the Tribe sought to domesticate in Idaho state court, like the Tribal Judgment at issue here, was for civil penalties and removal of the alleged encroachment. After the parties briefed the issues, the state court in Benewah County entered a memorandum decision on the Tribe's motion for order of recognition, and entered a judgment of recognition, which has been appealed to the Idaho Supreme Court. *See id.*

On May 13, 2016, nearly a year after filing its Objection in the CSRBA, the Tribe filed suit against the Hawks in tribal court for violation of the Coeur d'Alene Tribal Code by the maintenance of the dock and pilings in the St. Joe River without a permit. *See* Complaint, Exh. 2 ¶¶ 11, 14, ECF No. 1-2. On July 18, 2016, the tribal court entered the Tribal Judgment, a default judgment for a civil penalty of \$3,900 related to the allegedly unpermitted encroachment, and entitling the Tribe to remove the same. *See* Complaint, Exh. 1, ECF No. 1-1. In an effort to obtain a quick ruling from this Court that the Tribe will claim establishes, by default, the

ownership and jurisdiction it has argued earnestly for in the CSRBA since June 2015, the Tribe improperly seeks recognition of the Tribal Judgment in this federal forum.

### III. ARGUMENT

#### A. The Court Should Dismiss the Tribe's Suit Because the Court Lacks Subject Matter Jurisdiction.

Dismissal of a claim is appropriate under Federal Rule of Civil Procedure 12(b)(1) when the court lacks subject-matter jurisdiction over the claim. Federal subject-matter jurisdiction must exist at the time the action is commenced. *Morongo Band of Mission Indians v. Cal. Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). A Rule 12(b)(1) motion may either attack the sufficiency of the complaint to establish federal jurisdiction (a facial challenge) or allege a lack of jurisdiction that exists despite the formal sufficiency of the complaint (a factual challenge). *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). A facial attack asserts lack of federal jurisdiction based on the complaint alone, and the court must accept all allegations of fact in the complaint as true and construe them in the light most favorable to the plaintiffs. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

In this case, the Tribe's Complaint confuses the alleged rules governing a federal court's recognition of tribal judgments with this Court's jurisdiction to hear this matter. The Tribe cites *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) as the source of the Court's jurisdiction. *See* Complaint ¶ 3, ECF No. 1. However, *Wilson* does not create federal court jurisdiction. *Wilson* involved a tribal member's attempt to enforce a jury award in the amount of \$246,100 arising out of a traffic accident on a right of way on reservation land against a non-

member in Montana federal court. *Id.* at 807. The jurisdictional requirements for diversity jurisdiction were met, and the case sets forth guidance concerning federal recognition of tribal judgments, *not* the jurisdiction of federal courts to recognize and enforce a tribal judgment. *Wilson* is about the federal court's ability to enforce a tribal court judgment as a matter of comity. *See id.* at 809-10. *Wilson* relies upon the other jurisdictional authority cited by the Tribe, *Hilton v. Guyot*, 159 U.S. 113 (1895), which addresses comity in the recognition of foreign judgments. *Id.* Neither *Wilson* nor *Hilton* stand for the proposition that federal courts have jurisdiction over *all* cases involving the recognition of a tribal or foreign judgment. *See id.*

Federal courts are courts of limited jurisdiction. *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). A federal court has subject matter jurisdiction over an action that either arises under federal law, or when there is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000. *See* 28 U.S.C. §§ 1331, 1332(a). To adequately plead diversity jurisdiction, the plaintiff must "allege affirmatively the actual citizenship of the relevant parties." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001).

In this case, the Complaint fails to allege the diverse citizenship of the parties. *See* Complaint ¶¶ 1-2. That alone is grounds for finding a lack of diversity jurisdiction. *See Kanter, supra.* Even assuming the Complaint adequately alleges diversity of citizenship, there is no dispute that the amount in controversy does not exceed \$75,000. The amount in controversy is a civil penalty in the amount of \$3,900. *See* Complaint, Exhibit 1. There is no diversity jurisdiction.

In addition, the Tribe's lawsuit does not involve a federal question under 28 U.S.C. § 1331. Cases involving federal questions are those cases "arising under the

Constitution, laws, or treaties of the United States.” *See* 28 U.S.C. § 1331. “A suit arises under the law that creates the cause of action.” *American Well Works v. Layne & Bowler Co.*, 241 U.S. 257 (1916). There is no general federal statute or treaty creating a federal cause of action for recognition and enforcement of tribal judgments. In fact, 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). The statute cited by the Tribe, 28 U.S.C. § 1362, merely tracks the “federal question” statute, and relates to civil actions brought by a tribe “wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.”

The matter in controversy in this case does not arise under the Constitution, laws, or treaties of the United States. The matter in controversy is a question of comity, and, like full faith and credit, the applicability of such doctrine does not by virtue of its mere existence create “federal question” jurisdiction. In the case of judgments rendered by the courts of another state, diversity jurisdiction must exist in order to enforce such judgments in federal court, unless there is a federal question *other than* the issue of full faith and credit. *See Minnesota v. Northern Sec. Co.*, 194 U.S. 48 (1904) (pleading the Full Faith and Credit Clause in a complaint does not establish federal question jurisdiction). Likewise, it follows that for a tribal court judgment like the one that is the subject of the Complaint, diversity jurisdiction should exist in order to enforce such judgment in federal court, unless there is a federal question other than comity under *Wilson* and *Hilton*. To be clear, in *Wilson*, the Ninth Circuit did not hold that 28 U.S.C. § 1331 creates federal court jurisdiction for all actions to enforce tribal judgments. *See Wilson, supra*. It held that principles of comity apply to the recognition of tribal court judgments in federal court, and

then proceeded to hold that the judgment at issue in that case would not be recognized or enforced because the tribal court lacked subject matter jurisdiction. *See id.* at 813-15.

The allegations and authority recited by the Tribe do not establish this Court's jurisdiction to hear the matter. Therefore, the Hawks respectfully request that the Court dismiss the Complaint.

**B. Absent Dismissal, the Court Should Exercise its Authority to Stay This Case.**

Even if the Court finds that the Tribe has adequately alleged diversity jurisdiction or that federal question jurisdiction exists, the Court should exercise abstention and stay the instant proceedings to recognize and enforce the judgment at issue until such time as Idaho state courts have resolved certain critical, and pending, ownership and jurisdictional questions. In what can only be described as litigation gamesmanship, the Tribe has commenced in earnest tribal prosecution, and the pursuit of recognition and enforcement of the judgment at issue, and other similar penal judgments against other non-member owners of water-front property within the reservation, since it began its participation in CSRBA. In short, this domestication case involving an alleged \$3,900 civil penalty, and others like it, are being pursued for the purpose of propping up a position the Tribe has taken, and is presently litigating, in the CSRBA.

In the interest of "wise judicial administration," federal courts may stay a case involving a question of federal law where a concurrent state action is pending in which identical issues are raised. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 815 (1976).

In this case, the issues that will define any dispute over this Court's recognition of a tribal court judgment are already in dispute before two different Idaho state courts. First, the scope and extent of tribal ownership of submerged lands within the reservation, and thus the

Tribe's jurisdiction to regulate the Hawks' structures in or adjacent to the St. Joe River, is the subject of pending litigation in the CSRBA. That very issue has been briefed on cross-motions for summary judgment in that proceeding, and, pending the determination on such cross-motions, is currently scheduled to be heard before a special master in October, 2016. *See* McGee Aff., Exhs. A & C.

Critically, the issue of the Tribe's jurisdictional reach and its ownership of submerged lands was raised by the Tribe in the CSRBA by virtue of its objection to certain elements of the Hawks' claimed water rights, including the Hawks' point of diversion. *See* McGee Aff., Exh. B. In very simple terms, the Tribe has taken the position that it owns all presently submerged lands within the reservation pursuant to *Idaho v. United States, et al.*, 533 U.S. 262 (2001), and alleged that structures in and adjacent to the St. Joe River which are owned by certain non-members are illegal encroachments. In contrast, the Hawks, and others similarly situated, have argued that the extent of the Tribe's jurisdiction is more limited insofar as the Tribe's entitlement was granted effective 1873, *see United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) (upholding the finding that the United States reserved 1873 submerged lands for the Tribe), prior to the construction of the Post Falls Dam in 1907 that raised the ordinary high water mark, thus altering what lands within the reservation were submerged. *See In re Sanders Beach*, 147 P.3d 75, 80-82 (2006); *Erickson v. State*, 970 P.2d 1, 4 (1998); *Deffenbaugh v. Wash. Water Power Co.*, 135 P. 247, 253-54 (1913). This bears upon an absolutely critical issue that must necessarily be resolved when this Court passes upon the validity of the Tribal Judgment at issue—whether the tribal court patently lacks subject matter jurisdiction to enter the Tribal Judgment at issue in the first place.



Second, the Tribe recently proceeded to seek the domestication of a tribal default judgment for a civil penalty and encroachment removal in the district court for Benewah County against similarly-situated defendants—non-member owners of real property adjacent to the St. Joe River who maintained a dock. *See* Notice of Appeal, Benewah County Case No. CV-2016-0025, McGee Aff., Exh. D. The circumstances of that case are virtually identical to the circumstances presented to the Court in this case, and after litigating the propriety of the state court’s recognition of a tribal default judgment, the district court entered an order favorable to the Tribe. *See id.* That case is on appeal to the Idaho Supreme Court. *See id.*

With the foregoing matters already proceeding in earnest in the state courts of Idaho, it is appropriate for the Court to stay this matter under the *Colorado River* doctrine. Courts consider several non-exclusive factors to determine if exceptional circumstances exist to warrant a stay:

(1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

*R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011) (citations omitted). “These factors are to be applied in a pragmatic and flexible way, as part of a balancing process rather than as a mechanical checklist.” *Am. Int’l Underwriters (Philippines), Inc. v. Cont’l Ins. Co.*, 843 F.2d 1253, 1257 (9th Cir. 1988).

In this case, nearly all of the factors weigh in favor of a stay. The state court of Idaho first assumed jurisdiction over water rights, including adjudication of the elements thereof,

when the CSRBA was initiated several years ago. The Tribe itself raised the issue that allegedly illegal encroachments on lands held in trust for the benefit of the Tribe invalidated the Hawks' water rights in Idaho state courts more than a year ago. *See McGee Aff.*, Exh. B. It was the Tribe that brought the dispute over encroachments and the scope of its ownership of submerged lands first before the Idaho state courts in the CSRBA, not the Hawks. Then, more recently, the Tribe raised the issue of recognition and enforcement of a tribal judgment in a closely related encroachment matter in the state court in Benewah County, successfully urging that court to assume jurisdiction over the property at issue—a dock on the St. Joe River over submerged lands. Idaho courts clearly assumed jurisdiction over the alleged encroachments at issue, a factor weighing in favor of a stay.

The order in which the forums obtained jurisdiction likewise weighs in favor of a stay of these proceedings. The question of priority addresses not merely where a matter was filed first, but the progress made in the two competing actions. *See Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 21 (1983); *D.A. Osguthorpe Family Partnership v. ASC Utah, Inc.*, 705 F.3d 1223, 1235 (10th Cir. 2013); *see also Stewart v. Western Heritage Ins. Co.*, 538 F.3d 488, 492-93 (5th Cir. 2006) (priority factor favors abstention when federal case has not proceeded past filing of complaint). As described *supra*, the scope of tribal ownership of submerged lands—which will ultimately make clear the scope of tribal jurisdiction to assess and enforce the civil penalties and removal relief that are the subject of the Tribal Judgment at issue—has been the subject of dispute for more than a year in the CSRBA, and for months in the related state court judgment recognition matter. Each court has received substantial briefing, records have been made, and in the CSRBA, a hearing on the merits of the issue is scheduled subject to a pending determination on cross-motions for summary judgment.

Avoiding piecemeal litigation, avoiding forum shopping, and the state court's protection of the federal litigant's interests all also clearly favor staying the matter. The Tribe is not merely forum shopping, it is forum canvassing, effectively inviting numerous forums to weigh in on its authority and jurisdiction and risking inconsistent rulings. *See Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 297 (9th Cir. 1996) ("We have recognized that forum-shopping can in some cases justify *Colorado River* abstention, *see Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1372 (9th Cir. 1990), and there is some indication that such tactics have been employed in this case, *see Fireman's Fund*, 790 F.Supp. at 964 ("[T]he multiple and overlapping assertions of these challenges in state court, before the Commissioner, and in this court causes this court to question [the insurers'] tactics")."). Although the purpose of the Tribe's approach is somewhat unclear, the filing of this matter in the federal forum cannot be viewed as anything other than a dysfunctional litigation tactic. It is certainly not a straight-forward effort to achieve recognition and enforcement of a \$3,900 civil penalty. If it were, the Tribe might simply seek recognition in state court in Benewah County. Indeed, the Tribe has already achieved successful recognition in that court under identical circumstances, indicating that the state court can adequately protect its interests. Now the Tribe wants to use this Court as a tool, in an awkward attempt to involve every forum in the state in a dispute over the scope of its authority inside the reservation. The Court should not countenance the Tribe's efforts to gain an upper hand in the CSRBA by using judgments delineating nominal civil penalties to invite inconsistent jurisdictional rulings and results in multiple forums.

The *Colorado River* doctrine affords this Court an exception to its obligation to exercise its jurisdiction (to the extent such jurisdiction exists, *see* Section III.A *supra*) where parallel state court proceedings are proceeding that will resolve identical or substantially similar

issues. If the Court finds it has jurisdiction over the controversy, it should nonetheless stay proceedings relating to the recognition and enforcement of the Tribal Judgment until such time as the state court presently addressing the ownership and jurisdictional questions before this Court are resolved.

#### IV. CONCLUSION

For the foregoing reasons, the Hawks respectfully request that the Court dismiss the case pursuant to Rule 12(b)(1). In the alternative, the Hawks request that the Court stay proceedings pending resolution of the scope of the Tribe's ownership of submerged lands in Idaho state court.

DATED this 13th day of September, 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

