Appellate Case No. 16-4175

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally recognized Indian Tribe, and a federally chartered corporation, UTE ENERGY HOLDINGS, a Delaware LLC, Plaintiffs/Appellants, v. BARRY G. LAWRENCE, District Judge, Utah Third Judicial District Court, in his Individual and Official Capacities, LYNN D. BECKER Defendants/Appellees.	United States District Court for the District of Utah (Central Division) Hon. Clark Waddoups Case No. 2:16-CV-00958-CW

APPELLEE HONORABLE BARRY G. LAWRENCE'S BRIEF

Brent M. Johnson
Keisa L. Williams
Attorneys for Hon. Barry G. Lawrence
Defendant/Appellee
Utah Administrative Office of the Courts
P.O. Box 140241
Salt Lake City, Utah 84114-0241
Tel: (801) 578-3800

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statement of related cases

There is one prior related appeal, Becker v. Ute Indian Tribe, 13-1472, 770 F.3d 944 (10th Cir. 2014), and one concurrent appeal, Ute Indian Tribe v. Lawrence, 16-4154.

STATUTES

Statement of the issue presented for review

Should Judge Barry Lawrence be dismissed from this action based on judicial immunity? The district court decision is reviewed de novo. See Ledbetter v. City of Topeka, Kan., 318 F.3d 1183, 1187 (10th Cir. 2003).

Statement of the case

The Appellants have set forth many statements that are not relevant to the issue involving Judge Lawrence. The statements also include material that Judge Lawrence may ultimately be required to resolve in the State case. Judge Lawrence therefore cannot state whether he agrees or disagrees with most of the Appellants' statements. The issues involving Judge Lawrence are primarily legal and not factual. To the extent facts are relevant to Judge Lawrence's arguments they are included in the appropriate section. This brief is identical to the brief in case no. 16-4154, as the issues for Judge Lawrence are the same in both cases.

Summary of the argument

Although the lower court did not directly address Judge Lawrence's involvement in the case, because the case was resolved due to lack of a federal question, resolution of that issue may impact whether Judge Lawrence will continue to be a party.

Judge Lawrence is entitled to judicial immunity. Although a judge may be subject to a lawsuit seeking prospective injunctive relief, such a lawsuit is

expressly conditioned on a viable allegation that the judge violated a declaratory decree or declaratory relief was unavailable. The Appellants claim that the series of Tenth Circuit cases between the Ute Tribe and the State of Utah established a declaratory decree that governs Judge Lawrence in this particular case. The Appellants have not identified language in a declaratory decree that might apply to Judge Lawrence. However, even if such a declaratory decree exists, a tribe may agree to be sued in a state court. There is an important distinction between a tribe as a ruling entity and a tribe as a party to litigation. A tribe may waive its immunity with regard to litigation.

The validity of the Appellants' waiver is a threshold issue. Judge Lawrence was entitled to address the subject matter question without any requirement to defer to others. Any declaratory decree is thus irrelevant and an action may not be maintained against Judge Lawrence.

Argument

1. Judge Lawrence should be dismissed from this case.

The Appellants filed this suit against Judge Barry Lawrence under 42 U.S.C. § 1983 and § 1985. Judge Lawrence was then named in federal district court case no. 2:16-CV-0098, which is also on appeal under case no. 16-4154, as a

third-party defendant.[1] The trial court's decisions in both cases did not directly address the legitimacy of the claims against Judge Lawrence. The Appellants' opening brief also does not directly address Judge Lawrence's involvement.[2] Judge Lawrence would therefore seem to have little interest in this appeal. However, because Judge Lawrence's involvement is tied to whether the case moves forward, and Judge Lawrence's involvement is tied to the issues in dispute, Judge Lawrence participates in hopes this Court will ensure that Judge Lawrence is no longer in the middle of the dispute between the parties.

Judge Lawrence is absolutely immune from suit.[3] This court should recognize that any claims against Judge Lawrence may not proceed.

2. Judge Lawrence is entitled to absolute immunity.

The Appellants allege that Judge Lawrence violated a declaratory decree

---

[1] As noted above, Judge Lawrence has also filed a brief in that appeal. The briefs are identical because the issues related to Judge Lawrence are the same in both cases.

[2] The brief mentions the alleged declaratory decree and that the federal court has authority to enforce the decree in this case. According to the Appellants, enforcing the decree eliminates the State court's authority. Judge Lawrence therefore has an interest in resolving that issue as soon as possible.

[3] There are potential standing issues based on whether all the Appellants may proceed against Judge Lawrence considering they are not litigants in the state court case, and based on whether the Ute Tribe as a sovereign ruler may proceed against Judge Lawrence when its role in the State court case is as a sovereign litigant. As will be seen below, there is an important distinction between a tribe's role as a sovereign ruler and a tribe's role as a sovereign litigant. The arguments in this brief will suggest why there may be questions about standing, but the issue is ultimately resolved in a different way.

issued in the series of cases between the Ute Tribe and the State of Utah.[4] The Appellants therefore attempt legal action against Judge Lawrence under 42 U.S.C. § 1983 and § 1985. The Appellants are vague in their allegations against Judge Lawrence. The Appellants have not identified specific language in a declaratory decree. The Appellants' claim under § 1985 is particularly vague as the Appellants failed to address § 1985 in their complaint. The Appellants' claims lack merit because the relevant allegations are vague and do not implicate any declaratory decree.

Judges have historically been absolutely immune from lawsuits. See e.g. Stump v. Sparkman, 435 U.S. 349, 355 (1978) ("[A] judicial officer, in exercising the authority vested in him, should be free to act upon his own convictions, without apprehension of personal consequences to himself.") (citation omitted). The immunity is rooted in common law and ensures that a judge is allowed to freely make a decision without worry of being named in a lawsuit based on the judge's decision. The immunity is absolute. See Forrester v. White, 484 U.S. 219, 227 (1988) ("[T]he doctrine of absolute judicial immunity has not been particularly controversial.")

[4] The most recent published case is Ute Indian Tribe v. Utah, 790 F.3d 1000 (10th Cir. 2015).

In Pulliam v. Allen, 466 U.S. 522 (1984), the U.S. Supreme Court recognized that judicial immunity generally prohibits civil lawsuits against judges. The court determined, however, that judicial immunity did not prohibit prospective injunctive relief. Id. at 541. ("We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer . . . .") In response to Pulliam, Congress amended 42 U.S.C. § 1983 to state that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Thus, the only potential exception to judicial immunity relevant to this case is the allegation that the judge violated a declaratory decree.[5] However the exception is not applicable because even if there is a declaratory decree granting the Ute Tribe jurisdiction over this type of case, the declaratory decree is irrelevant to the facts and legal principles of this case.

3. A tribe may waive certain rights as a sovereign.

The Ute Tribe is a sovereign entity and Judge Lawrence absolutely respects that sovereignty. As a sovereign entity, the Ute Tribe has the right to govern various affairs within the territory of the Ute Nation. Caselaw throughout various

[5] Because the Appellants failed to elaborate on § 1985 claims, the brief does not specifically address that section. Considering that § 1985 contemplates recovery of damages, it is likely that judicial immunity would also apply to any § 1985 claims.

jurisdictions is clear that states may not encroach into areas over which a tribe has exclusive authority. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) ("Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government.") However, the cases also recognize that there are exceptions to a tribe's sovereignty. For example, a tribe's sovereign authority can be abrogated by an act of Congress. Id. at 56. ("Congress has plenary authority to limit, modify or eliminate powers of local self-government which the tribes otherwise possess.") Their sovereignty might also be impacted through their acts of self-determination. In particular, a tribe may waive its sovereign immunity through contract. See e.g. J.L.Ward Associates Inc. v. Great Plains Tribal Chairman's Health Bd., 842 F.Supp.2d 1163, 1178 (D.S. Dak. 2012) ("An Indian tribe or tribal entity may waive its sovereign immunity by contract if it does so with requisite clarity.") (citation omitted) The cases recognize a distinction between a tribe as a sovereign ruler and a tribe as a sovereign litigant.

In Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998), the U.S. Supreme Court determined that state courts may assume jurisdiction over otherwise immune Indian tribes and entities "where Congress has authorized the suit or the tribe has waived its immunity." In C&L Enterprises Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001), the court recognized that tribes may waive their immunity through contract. The

dispute was whether the tribe had waived immunity through an arbitration clause that stated: "The [arbitration] award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." Id. at 415. The contract also had a choice of law provision that stated: "The contract shall be governed by the law of the place where the Project is located." Id. The U.S. Supreme Court determined that the tribe had waived its immunity through the clauses and could be sued in state court. Id. at 423. ("[W]e conclude that under the agreement the Tribe proposed and signed, the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma State court.")

4. A waiver of immunity may extend to causes of action arising within tribal territories.

Many courts have followed C&L Enterprises in determining that, although a tribe might normally have subject matter jurisdiction over a particular suit, by waiving immunity through a contract provision, the tribe submitted itself to the jurisdiction of a state court. The Supreme Court of Washington addressed a case similar to this one. In Outsource Services Management LLC v. Nooksack Business Corp., 333 P.3d 380, 381 (Wash. 2014) the "Nooksack Business Corporation (Nooksack), a tribal enterprise of the Nooksack Indian Tribe, signed a contract with Outsource Services Management LLC to finance the renovation and

expansion of its casino." The contract contained a provision addressing the sovereign immunity of the Nooksack Business Corporation. Id. The Corporation agreed to an "irrevocable limited waiver of its sovereign immunity from suit" and agreed to be sued in "any court of general jurisdiction in the state." Id. The tribal corporation failed to make a payment and Outsource filed suit in a state superior court. Id. The tribal corporation filed a motion to dismiss. Id. The tribal corporation acknowledged the immunity waiver, but claimed that the dispute occurred entirely on tribal land and therefore the state court did not have subject matter jurisdiction. Id. The trial court rejected the argument and the tribal corporation appealed to the Washington Supreme Court.[6]

The Washington Supreme Court first recognized the posture of the case and the question presented:

> [W]hen asked whether state courts have jurisdiction in a case that occurs on a reservation, we carefully consider the interests and authority of the tribe. Normally, the tribe's interest in self-governance is a separate interest than those of the parties. For example, if two parties on a reservation had a dispute in an area of the law regulated by the tribe but chose to file in state court, the state court would have to consider the separate question of the tribe's interest in governing the matter. Even if the parties had agreed to state court jurisdiction,

[6]The tribal court followed the appropriate procedure for challenging state court jurisdiction. After losing in the trial court, the tribal corporation did not file an independent action in federal court, but instead appealed to the Washington Supreme Court. If losing tribes are permitted to repeatedly challenge state court decisions about tribal sovereign immunity, then the federal district courts become de facto appellate courts, rendering meaningless doctrines such as Younger and Rooker-Feldman.

> the state court may find that jurisdiction is nonetheless inappropriate because it would infringe on the tribe's right to govern the matter.

Id. at 382-383. (citation omitted) The Washington Court then found:

> This case is entirely different. The tribe itself – acting through its tribal enterprise – consensually entered into a contract where it both waived its sovereign immunity and consented to jurisdiction in state court for claims related to that contract. It . . . waived its sovereign immunity with respect to any claim related to the contract.

Id. at 383. The court explained that because "Nooksack made the decision to enter into that contract and consent to those provisions, we do not see how state court jurisdiction would infringe on the tribe's right to self-rule." Id. The Washington court emphasized: "In fact, we believe the opposite is true: ignoring the tribe's decision to waive sovereign immunity and consent to state court jurisdiction would infringe on the tribe's right to make those decisions for itself." Id.

In Bradley v. Crow Tribe of Indians, 67 P.3d 306 (Mont. 2003), a tribal member sued his own tribe in a state court. Bradley also has similarities to this case. The tribal member alleged that "he entered into a seven-year service contract with the Tribe, by which he agreed to provide consulting services and act as program director for the planning and construction of a power plant on tribal property." Id. at 307. The contract had a provision stating: "The parties agree that any action at law, suit in equity, or judicial proceeding for the enforcement of this agreement shall be instituted only in the courts of the State of Montana, and it

is mutually agreed that this agreement shall be governed by the laws of the State of Montana." Id. at 308. (certain emphases omitted)

The Supreme Court of Montana first recognized that "Indian tribes generally enjoy common-law immunity from suit, although this right is subject to the control of Congress." Id. at 310. (citation omitted) "[T]he sovereign immunity of Indian tribes 'is a matter of federal law and is not subject to diminution by the States.'" Id. (citing Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 756, (1998)). The court then cited Santa Clara Pueblo for the proposition that "Indian Tribes may waive their right to sovereign immunity and consent to suit in state courts." Id. "Any waiver of sovereign immunity . . . must be unequivocally expressed." Id. (citing C&L Enterprises, 532 U.S. at 418). The Supreme Court of Montana upheld the trial court's determination that the tribe had waived its immunity and therefore the state trial court had jurisdiction. Id. at 312.

Thus, even when a suit involves a tribe member suing a tribe for activities that allegedly occurred on tribal land, and the tribe might otherwise have jurisdiction over a lawsuit of that type, a tribe may waive its immunity and in doing so waives its right to resolve the dispute in its courts. As recognized by the Washington Supreme Court, by honoring such a waiver, a court honors the tribe's right to self-determination.

In this case, even if a declaratory decree grants the Ute Tribe authority over this type of dispute, the declaratory decree does not apply because, contrary to the Appellants' assertion, the Ute Tribe may waive its rights as a potential litigant. The question is, regardless of any decree granting authority, did the tribe waive its immunity. The state court addressed that question and determined the Ute Tribe waived its immunity, taking the dispute out of the realm of any declaratory decree. The Appellants therefore may not proceed against Judge Lawrence because he is cloaked with immunity and the only potential exception to that immunity does not apply.

5. A state court may determine whether it has jurisdiction over a tribe.

In some ways, this case involves the intersection of state law, federal law, and tribal law. If a tribal entity validly waives its sovereign immunity, a state court may have subject matter jurisdiction. If a tribal entity has not validly waived its sovereign immunity, a state court does not have subject matter jurisdiction. The question is then whether the state court may determine if it has jurisdiction, or the tribal court must first determine whether it has jurisdiction, or a federal court must resolve the question. As can be seen from the above cases, state courts may determine whether they have jurisdiction.

In Michael Minnis & Assoc. P.C. v. Kaw Nation, 90 P.3d 1009, 1012 (Okla. App. 2003), the question was whether a state court must or should defer to a tribal court on whether a tribe had waived its sovereign immunity, or whether the state court could determine the question through a case filed in state court. Id. ("Monroe filed a motion to dismiss asserting: . . . failure to exhaust tribal remedies.") The Oklahoma court discussed the tribal exhaustion doctrine, a policy the federal courts have adopted. Id. at 1013. Under that doctrine, "[i]n deference to the tribal rights of self-government, and as a matter of *comity*, a *federal* court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies." Id. (emphasis in original) The question in Kaw was whether the tribal exhaustion doctrine applies to the states. The Oklahoma Court of Appeals determined that it does not. Id. at 1014 ("[T]he exhaustion doctrine does not apply in state court actions.")

At least one state has determined that the doctrine applies to the states. However that state also determined that the doctrine does not apply in the type of situation presented by this case. In Drumm v. Brown, 716 A.2d 50, 61 (Conn. 1998), the Connecticut Supreme Court determined that the doctrine applies. Id. ("[T]he courts of this state must apply the exhaustion of tribal remedies doctrine.")

A more important question, at least for purposes of this case, was whether exhaustion is required "in the absence of a pending parallel tribal proceeding." Id. at 64. The Connecticut court reviewed the U.S. Supreme Court cases that adopted the doctrine and found that the doctrine "presupposes an ongoing proceeding in the tribal court." Id. See e.g. Rhines v. Weber, 544 U.S. 269, 274 (2005) in which the U.S. Supreme stated that "one court should defer action on causes properly within its jurisdiction until the court of another sovereignty with concurrent powers and already cognizant of the litigation, has had an opportunity to pass upon the matter." The Connecticut court concluded that "nothing in the record or in the representations of the parties indicates that any relevant proceedings were pending in the tribal court . . . therefore [the] court's application of the doctrine to the case, and the judgment dismissing the action on that basis, were improper." Drumm, 716 A.2d at 66. At the very least, a tribal court must have already assumed jurisdiction in order for the doctrine to apply.

In this case, when Mr. Becker filed in the state court, there was no case pending in a tribal court and therefore even if the tribal exhaustion doctrine were to apply in this jurisdiction, it did not apply in this circumstance. The State court had authority to determine its jurisdiction.

This conclusion leads back to the sometimes difficult intersection of federal, state, and tribal law. Considering that a tribe may waive its immunity, and considering that a state court has authority to determine whether it has jurisdiction, the difficulty is perhaps lessened by looking at the role under which the tribe is involved in a case. A tribe is a sovereign ruler and a tribe may be a sovereign litigant. This is perhaps the best way to recognize that a state trial court may decide its jurisdiction without worry of being haled into federal court because the decision allegedly violates a declaratory decree. The tribe as a sovereign litigant raises its defenses in the trial court. If unsuccessful, the tribe may ultimately appeal to a state appellate court. And if unsuccessful there, the tribe may seek U.S. Supreme Court review. The Appellants' cause of action against Judge Lawrence thus fails because U.S. Supreme Court and other jurisdictions' precedent is clear that a tribe may waive its sovereign immunity, even for claims arising solely on tribal land, and therefore any declaratory decree from the Ute Tribe cases would not apply. The Ute Tribe is appearing as a litigant and not as a ruling entity. The Appellants' claim also fails because the state court had authority to determine its jurisdiction and retain the case.[7]

[7] In the federal district court case, Judge Lawrence also argued in favor of applying long-standing principles that require or encourage a federal court to defer to the state court. The doctrines include Younger abstention, Colorado River abstention, Rooker-Feldman and a general failure to state a claim upon which relief may be granted. The district court did not address the

6. Judge Lawrence may be called upon in the state court case to resolve issues raised in this case.

The Appellants have raised other issues in arguing there is a federal question, such as the contract needed to be approved by the federal government. Because those issues may ultimately come before Judge Lawrence in the state court, Judge Lawrence should not and will not address those issues. Judge Lawrence does not belong in a lawsuit between the two parties. Judge Lawrence is hopeful that this court will recognize and resolve that issue.

Conclusion

If this court upholds the lower court's decisions on federal question jurisdiction, that will also resolve the claim against Judge Lawrence. However, if the court reverses the lower court's decisions, Judge Lawrence asks this court to recognize that the Ute Tribe series of cases does not apply and therefore Judge Lawrence should no longer be in the midst of this case.

Dated this 5th day of December, 2016.

/s/ Brent M. Johnson
Brent M. Johnson
Administrative Office of the Courts

arguments, but the principles also support dismissing Judge Lawrence from the case.

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLEE HONORABLE BARRY G. LAWRENCE'S BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Sophos Endpoint Advanced, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

/s/Jeni Wood
Jeni Wood
Legal Secretary to Brent M. Johnson

Certificate of Compliance

Section 1. Word Count

As required by Fed.R.App.P.32(a)(7)(c), I certify that this brief is proportionally spaced and contains 4362 words.

I relied on my word processor to obtain the count and it is WordPerfect;

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/Jeni Wood
Jeni Wood
Legal Secretary to Brent M. Johnson

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was filed electronically with the Court via the CM/ECF system on this 5th day of December, 2016 to:

Frances C. Bassett
Thomas W. Fredericks
Jeremy Patterson
Thomasina Real Bird
Counsel for Plaintiffs

David K. Isom
Counsel for Defendant Lynn D. Becker

/s/Jeni Wood
Jeni Wood
Legal Secretary to Brent M. Johnson