No. 16-4154

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,
Plaintiffs - Appellants,

v.

HONORABLE BARRY G. LAWRENCE, et al.,
Defendants- Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
NO. 2:16-CV-00579-CW
HONORABLE JUDGE ROBERT J. SHELBY

APPELLEE LYNN D. BECKER'S PETITION FOR PANEL REHEARING AND REQUEST FOR REHEARING *EN BANC*

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I. STATEMENT REQUIRED BY FED. R. APP. P. 35(b)(1)(B)

This proceeding, together with the companion appeal 16-4175, involves the following questions of exceptional importance:

A. Whether a non-Indian may enforce his contract ("Contract") with an Indian tribe in a federal or state court where the tribe – clearly and expressly in a written Contract approved by the resolution of the tribe's governing body:

(1) "specifically surrenders its sovereign power to the limited extent necessary to permit the full determination of questions of fact and law and the award of appropriate remedies" in any legal proceeding to enforce the Contract;

(2) waives tribal sovereign immunity with respect to the legal proceeding;

(3) "unequivocally" and "expressly" submits to federal jurisdiction to enforce the contract, and to state court jurisdiction ("any court of competent jurisdiction") if federal jurisdiction of the legal proceeding is determined to be lacking;

(4) agrees that such courts shall have "original and exclusive jurisdiction" of the dispute;

(5) waives any requirement of tribal law stating that tribal courts have exclusive original jurisdiction over all matters involving the Tribe;

(6) waives any requirement that the dispute be brought in tribal court; and

(7) waives any requirement to exhaust tribal court remedies.[1]

B. Whether, after years of litigation of the Contract dispute in federal and state court, an Indian tribe is entitled to commence and maintain an action in tribal court and enjoin the pending action in state court.

Throughout the United States, non-Indians commonly contract with Indian tribes under the critical, express conditions that the contract must be enforceable in a state or federal court, and not in tribal court. The Contract here clearly expressed, not only these conditions themselves, but also the materiality of these conditions to the Contract.

If even this clear Contract can result in four years and counting of state and federal litigation resulting in an order allowing tribal court litigation of the dispute, contracting between Indian tribes and non-Indians in the United States will be severely damaged. Both Indian tribes and non-Indians will be injured throughout the United State by this unfortunate result, hindering Indian self-governance and self-determination.

The rulings here should be reconsidered and reversed, and tribal court litigation enjoined, so that this dispute may be resolved by the process and in the courts that the parties agreed, and so that future contracting parties can contract with

1 All of these provisions are in Article 23 of the Contract. Agreement pp. 8-9. Appx 38-39.

confidence that their agreements not to litigate in a tribal court are effective and enforceable in state and/or federal court.

II. PRELIMINARY STATEMENT

Here, Becker shows that this Court based its entire opinion ("Ruling") in this appeal upon Public Law 280,[2] which was not properly before the Court. The Ruling should therefore be reversed, and the judgment of the district court affirmed.

III. REASONS WHY THE PETITION SHOULD BE GRANTED

A. Public Law 280 Was Not Properly Before the Court

Becker moved to dismiss the district court action for lack of federal question jurisdiction under 28 U.S.C § 1331.[3] His motion did not cite or rely upon PL 280.[4] The Tribe did not cite PL 280 in its opposition to Becker's motion.[5] The district court did not cite or rely upon PL 280 in dismissing the action for lack of jurisdiction.[6]

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2 Public Law 280, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360.
3 Becker's Motion to Dismiss. Appx 271-319.
4 Id.
5 Plaintiffs' Objection to Becker's Motion to Dismiss. Appx 533-42.
6 Transcript of August 16, 2016 Hearing (Appx 581-665); Order Following Oral Ruling (Appx 574-75).

Because the district court granted Becker's motion to dismiss and therefore dismissed the entire action for lack of subject matter jurisdiction, the district court held that the other pending motions (the Tribe's motion for preliminary injunction and Judge Lawrence's motion to dismiss on other grounds) were moot.[7] The district court therefore did not address or resolve the other pending motions, and those motions and issues are not before the Court on this appeal.

This Court's entire analysis relies upon its erroneous foundation that PL280 is "of special importance" to this appeal.[8] Not only is PL 280 not of special importance to this appeal, PL 280 should not be considered because the district court did not decide any PL 280 issue, and Becker did not base any of his motion to dismiss on PL 280.

B. The Court's Rulings on Public Law 280 Are Not Supported by the Record

Had PL 280 been at issue in Becker's motion to dismiss, Becker could have and would have advanced the following arguments and evidence.

The Court acknowledges and holds that PL 280 would apply here only if Becker's claim arose in "Indian country"[9] or within the boundaries of the

7 Order Following Oral Ruling (Appx 574-75).
8 Ruling p.6.
9 "Public Law 280 does not apply to a civil suit unless the claim arises in Indian country." Ruling p. 13.

reservation. The Court then states that "The parties do not dispute that Mr. Becker's contract claim arose on the reservation."[10] The remainder of the Court's ruling rests on an erroneous inference from this statement. That erroneous inference is that Becker should be charged with admitting this pivotal PL 280 boundaries issue. The correct inference is exactly to the contrary – Becker did not need to address the reservation boundaries issue because PL 280 was not at issue in his motion to dismiss.

If and when this boundaries issue is actually presented, Becker will show that his Contract and his relationship to the tribe and his activities do not satisfy the "boundaries" requirement of PL 280. For example, much of the negotiations of the Contract occurred between persons outside the boundaries of the reservation. The Contract required Becker to engage in significant activity off the reservation and outside of the state of Utah, including sales, consultation, promotional, technical and other meetings, activities and services. The revenue to which Becker's 2% interest attached flowed from Ute Energy LLC, a Delaware LLC located outside of the reservation and outside of the state of Utah. This revenue was not measured as a function of oil and gas production or any royalty or revenue from trust assets.

10 Ruling p. 6.

Moreover, PL 280 does not address a state court's jurisdiction over Indian tribes or tribal entities, but only over individual Indians,[11] and therefore does not apply to this action.

PL 280 does not apply where a tribe has waived sovereign immunity and consented to state court jurisdiction. *Williams v. Lee* plainly holds that Public Law 280 does not prevent state court jurisdiction where a tribe "assents" to such jurisdiction.[12] Numerous times since 1959 when *Williams v. Lee* was decided, the United States Supreme Court[13] and other courts[14] have held that state courts have jurisdiction of Indian matters where Indian tribes and tribal entities, otherwise immune, have waived sovereign immunity and/or consented to the jurisdiction of a state court.

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11 PL 280 applies to state court "civil causes of action between *Indians* or to which *Indians* are parties…." *Bryan v. Itasca County*, 426 U.S. 373, 388-89 (1976) (PL 280 applies only to state jurisdiction over individual Indians and does not apply to "state jurisdiction over the tribes themselves"); *Outsource Services Management, LLC v. Nooksack Business Corp.*, 292 P.3d 147, 157-58 (Wash. App. 2013) , *aff'd on other grounds, Outsource Services Management, LLC v. Nooksack Business Corp.*, 333 P.3d 380 (Wash. 2014).

12 *Williams v. Lee*, 358 U.S. U.S. at 219 (1959) ("the Cherokee nation … is a distinct community … in which the laws of Georgia can have no force … *but with the assent of the Cherokees themselves*, or in conformity with treaties, and with the acts of congress"). (Emphasis added.)

13 *C&L Enterprises, Inc. v. Citizen Band Potowatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 415 (2001); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

14 *Outsource Services Management, LLC v. Nooksack Business Corp.*, 333 P.3d 380 (Wash. 2014).

Finally, as *Williams v. Lee* declared, the issue of tribal sovereign immunity from state court jurisdiction "has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[15] As the Washington Supreme Court recently recognized in a case remarkably similar to this action, "it would be nonsensical for a state court to tell a tribe" that the tribe's waiver of immunity from state court action and the tribe's governing body's decision to submit to state court jurisdiction "infringes on the tribe's own autonomy."[16]

The PL 280 position that the Tribe urged on appeal – and that this Court has accepted – would prevent most Indian tribes in the United States from entering into valid commercial contracts with non-Indians that can be enforced outside of tribal courts if the contract is for services or goods within the boundaries of the reservation. This is so because federal courts are rarely available to adjudicate commercial contract disputes to which Indian tribes are parties (because few Section 1331 federal questions arise and because federal courts have no diversity jurisdiction where an Indian tribe is a party). And under this Court's ruling, the state courts of most states would be deprived of the ability to adjudicate such disputes. Commerce between

15 *Williams v. Lee*, 358 U.S. 217, 220 (1959).

16 *Outsource Services Management, LLC v. Nooksack Business Corp.*, 333 P.3d 380, 383 (Wash. 2014) ("We do not see how it protects tribal sovereignty to refuse to allow tribes to make this decision for themselves. Instead, we believe that allowing tribes and tribal enterprises to enter into such contracts expressing their consent to state court jurisdiction and waiving sovereign immunity respects their right to self-rule.")

Indians and non-Indians will be severely diminished if commercial contracts are effectively enforceable only in tribal courts.

The Court's ruling portends ill: if a Contract with multiple, clear provisions aimed at assuring enforcement of this Contract in federal or state court is held to require tribal court adjudication, to prevent state court jurisdiction over the dispute, and to allow federal adjudication only as an appeal from trial about, commerce with Indian tribes will be severely diminished.

C. The State Court Has Already Resolved the PL 280 Issues in Becker's Favor

As Becker has shown in his 16-4175 petition for rehearing filed today, on February 10, 2107, Becker filed a Rule 28(j) letter in this appeal showing that the State District Court, in the pending state action between the parties, resolved issues pertinent to the 16-4175 appeal in Becker's favor. The State District Court also resolved the PL 280 issue in Becker's favor.

In a well-reasoned opinion, and based upon a complete summary judgment record, the State District Court held that PL 280 does not bar Becker's state court claims. Because the State District Court has already decided, on a full record, the PL 280 issues that this Court's ruling would send back to the federal district court for the development of a factual record, comity counsels against federal reconsideration of an issue already decided by a state court.

IV. CONCLUSION

For the foregoing reasons, Becker respectfully requests that this Petition be granted.

Respectfully submitted this 8th day of September, 2017.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing: (1) all required privacy redactions have been made per 10th Cir. R. 25.5; (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, ESET Endpoint Antivirus, and according to the program are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2017, the foregoing was served upon all counsel of record via the Court's ECF system.

/s/ David K. Isom