IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16583

JOHN T. HESTAND,
Plaintiff-Appellant,
v.

GILA RIVER INDIAN COMMUNITY and
LINUS EVERLING,
Defendants-Appellees.

PLAINTIFF-APPELLANT JOHN T. HESTAND'S CORRECTED REPLY BRIEF

Appeal from the Judgment of the United States District Court
For the District of Arizona
D.C. No. 2;16-CV-04522-JJT
(Honorable John J. Tuchi)

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I. THE DISTRICT COURT ERRED BY NOT GRANTING THE DEFENDANTS' MOTION TO DISMISS BASED ON THE FEDERAL LAW OF SOVEREIGN IMMUNITY.

The Plaintiff-Appellant ("Appellant") was employed by the Gila River Indian Community ("Community" or "Appellee 1") as Senior Water Counsel in 1998. In October 2010, the Appellant, who was at the time the oldest attorney, with the most years of experience and the longest tenure with the Community, was subjected to a reduction in force ("RIF") for the 2011 fiscal year and was the only employee of the Law Office to have his employment impacted.

On September 13, 2013, the Appellant filed a Complaint in the Gila River Indian Community Court against the Community, Linus Everling in his capacity as General Counsel ("Appellee 2"), and in his personal capacity.[1] On December 11, 2015 the Community Trial Court issued its Order granting the Motion to Dismiss filed by Appellees 1 and 2 and Mr. Everling in his personal capacity. The Trial

[1] The Tribal Court Complaint alleged Count I [Failure to comply with the Community's Reduction in Force Policy], Count II [Failure to comply with the Community Council's Resolution GR-10], Count III [Harassment], Count IV [Age Discrimination through termination of Hestand's employment] Count V [Age Discrimination through refusal to reinstate Hestand], Count VI [Retaliation], Count VII [Breach of Contract], Count VIII [Breach of Covenant of Good Faith and Failure Dealing], Count IX [Wrongful Termination], Count X [Intentional Interference with Employment Relationship]. Count XI [Intentional Infliction of Emotional Distress], Count XII [Negligent Infliction of Emotional Distress].

Court granted the Motion to Dismiss and dismissed the Appellant's Complaint with prejudice based solely on the issue of sovereign immunity. [2]

On September 22, 2016, The Gila River Indian Community Court of Appeals ("Community Court of Appeal") issued its Order regarding the Appellant's Tribal Court of Appeals. The Community Court of Appeal upheld the dismissal of the Appellant's Tribal Court Complaint against Appellees 1 and 2 and remanded the Appellant's Tribal Complaint against Mr. Everling, in his personal capacity, to the Community Trial Court. The Community Court of Appeals stated that "[t]here is no need for this Order to be in the form of an opinion." The Community Court of Appeals further stated: "So clear is this principle [sovereign immunity] that we find it unnecessary to provide any case citation in support thereof."

On December 22, 2016, the Appellant filed his Complaint in the Federal District Court for the District of Arizona. On May 15, 2017 the Appellees filed a Motion to Dismiss on Preclusion Grounds—claiming that the doctrines of *res judicata*/claims preclusion and collateral estoppel/issue preclusion prohibited federal courts from reviewing a tribal court decision dismissing a tribal court complaint based on the doctrine of sovereign immunity. On May 30, 2017, the Appellant filed a Response in Opposition to the Motion to Dismiss which argued,

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[2] The Community Trial Court relied on only two Community Court of Appeals' decisions with no references to federal tribal sovereign immunity law.

that while the Tribal Court decision did not meet the requirements for *res judicata*/claims preclusion and collateral estoppel/issue preclusion, the Motion to Dismiss must be denied based on the requirement that Federal Courts conduct de novo review of federal questions decided by Tribal Courts—particularly the federal question of tribal sovereign immunity. On July 13, 2017, the District Court held oral argument and on the same day issued an Order granting the Appellees' Motion to Dismiss that provided no information about the reason or basis for the Order.[3] The Trial Court appeared to accept the Appellees' claim that only a challenge to a Tribal Court's jurisdiction warranted federal court review and tribal court decisions on other federal questions, such as tribal sovereign immunity, could not be reviewed by federal courts.

a. FEDERAL COURTS HAVE ULTIMATE AUTHORITY OVER OVER ISSUES INVOLVING FEDERAL QUESTIONS.

28 U.S.C. § 1331, which states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States" is the basis for many federal court actions. "A district court may exercise federal question jurisdiction if the court is satisfied that the claim is one

[3] The District court's Order stated in its entirety; "At issue is Defendants' Motion to Dismiss (Doc. 19). The Court held a hearing on the Motion on July 13, 2017. Considering the parties' briefs and arguments at the hearing, and for the detailed reasons stated by the Court at the hearing, IT IS ORDERED granting

'arising under' federal law.'"[4] *Attorney's Process and Investigation Services, Inc. v. Sac and Fox Tribe of the Mississippi In Iowa,* 401 F.Supp.2d 952, 957 (D.C. Iowa 2005) "[A] federal court has original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Auto-Owners Insurance Company v. Tribal Court of the Spirit Lake Indian Reservation,* 495 F.3d 1017, 1020 (8th Cir. 2007) **A** "non-frivolous claim of a right or remedy under a federal statute is sufficient to invoke federal question jurisdiction" *Id*.

"It is well settled that this statutory grant of jurisdiction [28 U.S.C. § 1331] will support claims founded upon federal common law as well as those of a statutory origin." *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 850 (1985) "We apply federal common law when a federal rule of decision is necessary to protect uniquely federal interests." *Wilson v. Marchington,* 127 F.3d 805, 812 (9th Cir. 1997)

Federal courts of appeal use a *de novo* standard of review when reviewing the decisions of federal district courts involving questions of law. This includes:

- Federal legal questions. *Arizona Public Service Company v. Asaas,* 77 F.3d 1128, 1132 (9th Cir. 1995) and *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1314 (9th Cir. 1990)

[4] 28 U.S.C. § 1291 provides federal courts of appeals with appellate jurisdiction over final decisions of district courts. *Berrey v. Asarco Incorporated,* 439 F3d 636 (10th Cir. 2006)

- Federal subject matter jurisdiction. *Alaska v. Babbitt*, 75 F.3d 449, 451 (9th Cir. 1995) and *Boozer v. Wilder*, 381 F.3d 931, 934 (9th Cir. 2004)

- Legal conclusions of district courts. *Evans v. Shoshone–Bannock Land Use Policy Commission*, 736 F.3d 1298, 1302 (9th Cir. 2013)

- Mixed questions of law and fact. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d at 1313

- Questions of statutory interpretation. *Mader v. United States*, 619 F.3d 996 (8th Cir. 2011)

- Meaning of documents. *Villa De Jardines Association v. Flagstar Bank*, FSB, 227 Ariz. 91, 97, 253 P.3d 288, 294, FN 6 (App. Az, 2011)

- *Res Judicata* and injunctive relief. *Leon v. IDX Systems Corporation*, 464 F.3d 951 (9th Cir. 2006)

- Motion to dismiss. *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1015 (9th Cir. 2016)

- Summary judgment. *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944, 949 (9th Cir. 2000)

- Standing to challenge a summons. *Miccosukee Tribe of Indians of Florida v. United States*, 698 F.2d 1326, 1330 (11th Cir. 2012)

Federal courts of appeals review a federal district court's factual findings for clear error. *Evans v. Shoshone–Bannock Land Use Policy Commission, supra*

b. FEDERAL COURTS HAVE ULTIMATE AUTHORITY OVER OVER ISSUES INVOLVING TRIBAL SOVEREIGN IMMUNITY

"Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an intricate web of judicially made Indian law." *Wilson v. Marchington*, 127 F.3d at 813 Federal Indian law is "implemented by statute, treaty, by administrative regulations, and by judicial decisions." ***N****ational Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S at 851 "Federal courts are the final arbiters of federal law" specifically including federal Indian law. *Arizona Public Service Company v. Asaas*, 77 F.3d at 1133

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Arizona v. Tohono O'Odham Nation*, 818 F.3d 549, 562 (9th Cir. 2016) Decisions by tribal courts regarding sovereign immunity are subject to de novo review by the federal courts. Indian tribes are "no longer "possessed of the full attributes of sovereignty" *Santa Clara Pueblo v. Martinez* ,436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 1978. "[S]overeignty the Indian tribes retain is of a unique and limited character" (with their incorporation into the United States, "Indian tribes have lost many of the attributes of sovereignty") . . . Because tribal immunity is a matter of federal common law, not a constitutional guarantee, its scope is subject to congressional control and modification. *Crowe Dunlevy v. Stidham*, *supra*.

The "power of the Federal Government over the Indian tribes is plenary." *National Farmers Union Ins. Co. v. Crow Tribe of Indians, supra.* "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. Title I of the ICRA [Indian Civil Rights Act], 25 U.S.C. §§ 1301-1303, represents an exercise of that authority." *Santa Clara Pueblo v. Martinez, supra.* Federal courts determine "whether Congress has statutorily waived an Indian tribe's sovereign immunity" de novo. *Id.* "Whether Congress has abrogated the sovereign immunity of Indian tribes by statute is a question of statutory interpretation and is reviewed de novo." *Arizona v. Tohono O'Odham Nation*, 818 F.3d at 555

Tribal sovereign immunity is also subject to restriction by federal common law. *See National Farmers Union Ins. Co. v. Crow Tribe of Indians, supra., Wilson v. Marchington, supra.,* and *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 188 L.Ed.2d 1071, 2014.

Examples of federal court review of tribal court decisions regarding tribal sovereign immunity include:

"Whether a suit is barred by a Tribe's sovereign immunity is an issue of law that we determine de novo." *Baker Electric Cooperative, Inc. v. Chaske*, 28 F.3d 1466, 1471 (11th Cir. 1994) "Questions of tribal sovereign immunity are reviewed

de novo." *Berrey v. Asarco Incorporated, supra.* and *Fort Yates Public School District # 4 v. Murphy,* 786 F.3d 662, 666 (8th Cir. 2015)

Federal Courts "review de novo whether an Indian tribe possesses sovereign immunity." *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002) and *Demontiney v. United States,* 255 F.3d 801, 805 (9th Cir. 2001) "Issues of tribal sovereign immunity are reviewed de novo." *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015)

Federal Courts "review de novo the district court's denial of tribal sovereign immunity." *Crowe Dunlevy v. Stidham*, 640 F.3d 1140 (2011) and Arizona *Students' Association v. Arizona Board of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) Federal Courts "review de novo the district court's dismissal of a complaint for sovereign immunity." *Furry v. Miccosukee Tribe of Indians of Florida,* 685 F.3d 1224, 1227 (11th Cir. 2012) Federal courts also "review de novo a district court's decision on a motion to dismiss for lack of subject matter jurisdiction." *Bodi v. Shingle Springs Band of Miwok Indians, supra.* and *Longo v. Seminole Indian Casino–Immokalee*, 813 F.3d 1348, 1349 (11th Cir. 2016)

"Determining whether the tribe has waived immunity, or whether Congress has abrogated its immunity, requires a careful study of the application of tribal laws, and tribal court decisions." district court properly "stayed its hand until after

the ... Tribal Courts have the opportunity to resolve the question." *Sharber v. Spirit Mountain Gaming Inc*., 343 F3d 974 (9th Cir. 2003)

The case relied on by the Appellees and the District Court to deny the fact that Tribal Court decisions involving federal sovereign immunity are not subject to de novo review by the federal courts is *Frigard v. United States*, 862 F.2d 201 (9th Cir. 1988). *Frigard* provides no support for the claim that a tribal court can prohibit the federal courts from reviewing, de novo, the tribal courts decision regarding tribal sovereign immunity. *Frigard* involved a suit, in the United States District Court for the District of Hawaii, with parties who alleged that they should be allowed to sue the CIA under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), which waives federal sovereign immunity for suits for damages against the United States for injury or loss of property caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant. The District Court determined that the actions of the CIA fell within exceptions to the Federal Tort Claims Act and that the Act did not waive the United States' federal sovereign immunity. The decision of the district was subject to review by the Ninth Circuit pursuant to 28 U.S.C. § 1291.

The Ninth Circuit noted that "[o]rdinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court. Here, however, the bar of sovereign immunity is absolute: no other court has the power to hear the case, nor can the Frigards redraft their claims to avoid the exceptions to the FTCA." *Frigard v. United States*, 862 F.2d at 204. Subject to a request for certiorari review (which evidently did not occur) all Court actions were completed with the Ninth Circuit's review of the District Court's decision. Federal court review of federal question sovereign immunity decisions made by tribal courts is a proper exercise of 28 U.S.C. § 1331. Unlike *Frigard*, federal court review of tribal sovereign immunity decisions has not been exhausted. The Appellees' arguments involving federal court review of tribal court decisions on federal questions is the equivalent of arguing that a decision of the Arizona District Court could have *res judicia*/claims preclusion or collateral estoppel/issue preclusion effect on a direct appeal to the Ninth Circuit. However, as with a decision of a tribal court on a federal question is subject to de novo review, a decision by a federal district court on *res judicia*/ claims preclusion or collateral estoppel/issue preclusion. "A district court's ruling on claim preclusion is also reviewed de novo." *Holcombe v. Hosmer*, 477 F.3d 1094, 1097 (9th Cir. 2007) "[W]hether or not collateral estoppel applies is

reviewed de novo." *Wabakken v. California Department of Corrections and Rehabilitation*, 801 F.3d 1143, 1148 (9th Cir. 2015)

The District Court erred when it failed to deny the Appellants Motion to Dismiss based on preclusion issues from the Community Courts decision to dismiss the Appellant's complaint solely and exclusively on the law of sovereignty immunity. The District Court was required to conduct a de novo review of the federal question of sovereign immunity.

c. FEDERAL COURTS HAVE ULTIMATE AUTHORITY OVER OTHER ISSUES INVOLVING FEDERAL INDIAN LAW.

There are a number of federal questions that routinely are considered by tribal courts which are routinely reviewed by the federal courts based on a de novo standard of review. The Appellees and the District Court focused almost exclusively on the issue of whether a tribe had triable jurisdiction over a party who was seeking federal court review of the tribal jurisdiction. intimated that the only issue that a federal court can consider, particularly with a de novo standard of review

"[T]he determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law," *Heldt v. Payday Financial, LLC*, 12 F.Supp.3d 1170**,** 1179 (D.C. South Dakota 2014) See also: *Luckerman v. Narragansett Indian Tribe*, 965 F.Supp.2d 224 (D.C. Rhode Island 2013)

"[A]lthough the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court." *Sharber v. Spirit Mountain Gaming Inc*., 343 F3d 974 (9th Cir. 2003) See also *Auto-Owners Insurance Company v. Tribal Court of the Spirit Lake Indian Reservation*, 495 F.3d at 1022

The right to federal court review of the jurisdiction of tribal courts is as certain as the right to federal court review of s tribes claim of sovereign immunity. The "exhaustion rule allows a party to challenge in federal court a tribal court's assertion of jurisdiction only after that party has exhausted the remedies available in the tribal court system." *Atkinson Trading Company, Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000)

"The question of tribal court jurisdiction is a federal question of law, which we review de novo." The Smith Court explained that in considering tribal court decisions regarding tribal jurisdiction federal courts "review findings of fact for clear error." The Court also stated that "There is no simple test for determining whether tribal court jurisdiction exists."

The Appellant, like Smith, filed his Complaint in the Community Courts because of the requirement to exhaust his tribal remedies. The Smith Court belied

the Appellants arguments when it wrote: “Indeed, even though Smith invoked the jurisdiction of the tribal courts, he may still challenge the court's subject matter jurisdiction on appeal.”.

Citing to *Smith v. Salish Kootenai College*, 434 F.3d 1127, (9th Cir. 2006) the Appellees argued that the Appellant had no right to challenge the jurisdiction of the Community Court in the District Court stating that “Hestand never challenged the jurisdiction of the tribal courts, where he chose to file suit.”

Not only is the existence and extent of tribal jurisdiction subject to de novo review by federal courts but “[w]hether a tribal court properly exercised its jurisdiction is a question of law reviewed de novo.” *Ford Motor Company v. Todecheene*, 394 F.3d 1170, 1173 (9th Cir. 2005) See also *Arizona Public Service Company v. Asaas, supra* and *Attorney's Process and Investigation Services, Inc. v. Sac and Fox Tribe of the Mississippi In Iowa*, Supra

"Tribal jurisdiction over non-Indians is a question of federal law reviewed de novo." *Arizona Public Service Company v. Aspaas, supra.* See also *Big Horn County Electric Cooperative, Inc. v. Adams, supra* “The extent of tribal court subject matter jurisdiction over claims against nonmembers of the Tribe is a question of federal law which we review de novo.” *Belcourt Public School District v. Davis*, 786 F.3d 653, 657 (8th Cir. 2015) See also *Heldt v. Payday Financial,*

LLC, 12 F.Supp.3d 1170 (D.C. South Dakota 2014) and *Fort Yates Public School District # 4 v. Murphy*, 786 F.3d 662, 666 (8th Cir. 2015)

We also review de novo the scope of a tribe's ability to regulate or adjudicate matters affecting non-Indians. . . . [A] non-Indian challenging an exercise of tribal adjudicatory or legislative power states a claim that arises under federal law *Arizona Public Service Company v. Aspaas*, 77 F.3d at 1132 "[N]on-Indian defendants must exhaust tribal court remedies before seeking relief in federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction." *El Paso Natural Gas Company v. Neztsosie*, 136 F.3d 610 (9th Cir. 1998) "The question whether an Indian tribe retains the power to compel a non-Indian ... to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law...." *Luckerman v. Narragansett Indian Tribe*, 965 F.Supp.2d 224, 227 (D.C. Rhode Island 2013)

II. THE DISTRICT COURT ALSO ERRED BY GRANTING THE MOTION TO DISMISS WHEN THE DEFENDANTS FAILED TO ESTABLISH THE REQUIREMENTS OF *RES JUDICATA*/CLAIMS PRECLUSION

Before a claim of res judicata/claims preclusion can be granted the movant must establish that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Holcombe v. Hosmer*, 477 F.3d 1094, 1097 (9th Cir.

2007) "[T]he former decision is final and was made on the merits." *In re Reaves*, 256 B.R. 306 (9th Cir. 2000) "Determining whether a particular ruling fulfills each factor necessary for *res judicata* to apply requires a careful assessment of what each factor demands." *Polsby v. Thompson,* 201 F.Supp.2d 45 (D.C. District of Columbia 2002)

The "doctrine of res judicata applies only if the litigation in the previous proceeding resulted in a judgment on the merits." *Vasquez v. Yii Shipping Company*, 692 F.3d 1192 (11th Cir. 2012) Even if the Appellant did not have a right to a federal court de novo review of the Community's determination of tribal sovereign immunity, he Appellees failed to establish that the Community Court's decision was on the merits of the Appellant's claims, rather than procedural matters.

III. THE DISTRICT COURT ALSO ERRED BY GRANTING THE MOTION TO DISMISS WHEN THE DEFENDANTS FAILED TO ESTABLISH THE REQUIREMENTS OF COLLATERAL ESTOPPEL/ISSUE PRECLUSION

"Collateral estoppel applies when four requirements are met: (1) the issue decided in the prior action was identical to the one presented in the suit in question; (2) a court of competent jurisdiction rendered a final judgment on the merits in the prior action; (3) the party against whom the doctrine is asserted was a party to the prior action or in privity with such a party; and (4) the factual issue against which the doctrine is interposed has actually and necessarily been litigated and

determined in the prior action. *Ellis v. Board of Jewish Education, 722 F.Supp.2d 1006 (D.C. Illinois 2010*

"A final order or judgment is a determination by the court on the issues presented by the pleadings which ascertains and fix . .es absolutely and finally the rights of the parties to the litigation…To determine whether a judgment is final, a court should look to its substance rather than to form. *Id.* A "judgment is 'on the merits' in the sense that it may be pleaded to bar a subsequent action where it amounts to a decision concerning the rights and liabilities of the parties based on ultimate facts or facts disclosed by pleadings, evidence, or both, and on which the right of recovery depends irrespective of formal, technical, or dilatory objections or contentions." *Id*

"Finally, for collateral estoppel purposes, finality "requires that the 'potential for appellate review must have been exhausted." *Id*. The review of the Community Court's decision on sovereign is subject to continued appeal through the federal courts.

Respectfully submitted this 28th day of June 2018.

/s/

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3659 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Date: June 28, 2018

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CERTIFICATE OF SERVICE

I certify that on June 28, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 28, 2018

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