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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Arrow Midstream Holdings, LLC, and Arrow Pipeline, LLC, Plaintiffs, Appellants, and Cross-Appellees, v. 3 Bears Construction, LLC and Tesla Enterprises, LLC, Defendants and Appellees, v. Tesla Enterprises, LLC, Defendant, Appellee, and Cross-Appellant.	Supreme Court No. 20150057 Dunn Co. Court No. 2014-CV-00084

ON APPEAL FROM ORDER OF DISMISSAL WITHOUT PREJUDICE AND JUDGMENT NUNC PRO TUNC DATED AS OF JANUARY 5, 2015

DUNN COUNTY DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
THE HONORABLE ZANE ANDERSON

APPELLEE THREE BEARS CONSTRUCTION, LLC'S PETITION FOR REHEARING

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[¶1] In its December 29, 2015 opinion, this Court overlooked or misapprehended significant points regarding tribal jurisdiction. While understandable, it failed to discuss a recently adopted federal regulation, 25 CFR 169.9 which directly contradicts this Court's determination that the right-of-way is the equivalent of fee land and thus subject to state and not tribal jurisdiction. It also failed to accord proper respect for the federally sanctioned authority of the Fort Berthold District Court. This misapprehends federal laws respecting the jurisdiction of tribes and their courts over Reservation matters. 25 U.S.C. §§ 476, 1322, 1326, 3601, 3651-52; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (U.S. 1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"). The Court also misapprehended multiple points which stemmed from deciding this matter as if it were a federal court reviewing tribal jurisdiction after exhaustion of tribal court remedies, instead of a state court deciding its own jurisdiction under the federal laws which expressly limit state court jurisdiction in matters involving Indian interests.

I. THE COURT PLAINLY INFRINGED ON THE TRIBE'S JURISDICTION BY PURPORTING TO DETERMINE WHETHER OR NOT THE TRIBAL COURT HAD JURISDICTION.

[¶2] This Court began its discussion of law with a correct statement that the pivotal issues were infringement or preemption, based upon *Williams v. Lee*, 358 U.S. 217 (1959).

[¶3] But this Court did not apply the law from *Williams* to this matter. Instead, this Court held that there is no infringement because the tribal court does not have jurisdiction; and that it knows the tribal court does not have jurisdiction because this Court itself has said so. Besides being wrong in its assertion that the tribal court lacks jurisdiction, the Court's opinion puts the cart before the horse. Currently the tribal court is exercising

jurisdiction over the case, without any party even moving to dismiss for want of jurisdiction. JNA, passim. Under these facts, for this Court to weigh in on whether it thinks the tribal court has jurisdiction, without any respect for the ongoing tribal court proceedings or the orderly process which the tribal court is required to follow to resolve any questions regarding its jurisdiction, is an infringement on tribal authority.

[¶4] In fact, even in federal courts, which unlike this Court actually have jurisdiction to determine the scope of tribal jurisdiction, a decision like this Court issued on December 29, 2015 would be barred because it improperly infringes on tribal authority under the more deferential test which federal courts apply to their own courts. *E.g.*, *Prescott v, Little Six, Inc.*, 387 F.3d 753, 356 (8th Cir. 2004). Under this rule of law, parties must generally exhaust tribal court remedies, even in cases against non-Indians on reservation fee land. *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1299-1301 (8th Cir. 1994). After such exhaustion, a federal court is permitted to sit in a position similar to a court of appeals. The federal court is limited to the factual record which the parties created in the tribal court, and reviews tribal court findings of fact under an "abuse of discretion" standard. *Duncan Energy,* 27 F.3d at 1300 (citing *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990)). It is bound by tribal court decisions of tribal law, and its review is limited to whether the tribal court exceeded federally imposed limits on tribal court jurisdiction. *Prescott*, 387 F.3d at 756. In contrast, State Court jurisdiction is much narrower. *Williams*, 358 U.S. at 272. In effect, this Court's decision permits a party to evade these federal exhaustion requirement and to evade the binding federal law which provides that only tribes and then potentially federal courts have authority to issue binding determinations on tribal court jurisdiction.

[¶5] Under *Williams*, this Court should have solely asked itself whether it would infringe upon tribal authority if it issued a decision that the Tribe's Court did not have jurisdiction over a case which was proceeding in the Tribe's Court, where no party had even moved to dismiss that tribal court suit. The Court's assertion that it knows best and the tribal court lacks jurisdiction plainly infringes upon the Tribe's authority.

II. THE COURT WRONGLY DECIDED WHETHER THE TRIBAL COURT HAD JURISDICTION BASED ON THE FACTS UNDER THE RECORD IN THIS CASE.

[¶6] The question of whether the tribal court has jurisdiction must be based upon the pleadings, facts, and law presented in that court. It is simply indisputable that under the posture and record in the tribal court, that court does have jurisdiction. Like most other courts, the Tribe's court employs notice pleading. Three Affiliated Tribes R. Civ. Proc. 6. 3 Bears' complaint sufficiently alleged on its face a basis for tribal court jurisdiction. Aplt. App. 76-83. To date no party has even filed a motion to dismiss that complaint for want of jurisdiction, and therefore neither 3 Bears nor any other party has put forward any facts relevant to that question. This Court wrongly based its decision on what it claimed was a lack of facts showing the Tribe retained jurisdiction over the right-of-way.

[¶7] In the tribal court, which is where the binding record is to be created (if any party eventually challenges tribal court jurisdiction), 3 Bears will easily be able to establish to the court that the land at issue is subject to tribal jurisdiction regardless of whether it is considered the equivalent of fee land. In fact, a recent federal regulation directly contradicts this Court's decision. 80 Fed. Reg. 72492, 72538 (November 19, 2015), 25 CFR 169.9 (clarifying that rights of way over trust land. . . are subject to tribal law . . . and are generally not subject to State law). The land at issue here is unquestionably Indian trust land, and this Court simply lacks jurisdiction to adjudicate interests in that land or to

exercise jurisdiction where inconsistent with federal regulation. 25 U.S.C. § 1322(b), and the Tribe retains its "plenary jurisdiction", over acts by both Indians and non-Indians on that land. *Plains Commerce Bank v. Long Family Cattle Co.*, 554 U.S. 316, 328 (2008).

[¶8] Additionally important, the applicable facts for jurisdictional analysis in the tribal court under the current posture are the allegations in the Complaint, interpreted in the light most favorable to 3 Bears. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The tribal court will decide its jurisdiction under the facts presented to it. To date those facts or assumed facts are unquestionably sufficient to establish jurisdiction, and this Court therefore erred in holding that the Tribe's court lacks jurisdiction over the case before the Tribe's court.

III. THIS COURT MISAPPLIED TRIBAL EXHAUSTION AND COMITY RULES.

[¶9] On the issue of tribal exhaustion, the Court overlooked or misapprehended the points that: (1) exhaustion is required unless tribal jurisdiction would be "patently violative of express jurisdictional prohibitions" *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985); (2) the exhaustion requirement is not dependent upon whether the tribal action is filed first, *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993); and (3) the exhaustion doctrine applies to suits between non-Indians where Indian interests are involved. *Stock West Corp. v. Taylor*, 964 F.2d 912, 918-919 (9th Cir. 1992). Correct application of these rules mandates a finding that exhaustion was required

[¶10] This Court committed three related errors in its analysis of comity. First, the Court applied the wrong standard of review. The district court had discretionary authority to defer out of comity to the tribal court. Resp. Br. ¶15. This Court's analysis of comity, Op. ¶29-30 is based upon de novo review. For this reason alone, this Court should reconsider, and affirm the district court under the applicable abuse of discretion standard.

[¶11] Second, this Court failed to recognize, let alone analyze, the quagmire that it placed the parties in by ordering the lower court to exercise jurisdiction over a matter involving the encumbrance of tribal land which is simultaneously proceeding in the tribal court. *E.g.*, *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 665 N.W.2d 899, 917 (Wis. 2003). This Court missed that significant factor in the comity analysis because it mistakenly and paternalistically believes that if this Court says the tribal court lacks jurisdiction, the tribal court will merely abide by this Court's usurpation of tribal jurisdiction. That is plainly wrong. In the tribal court, this Court's opinion is non-binding, and 3 Bears expects that given this Court's misapprehension of basic rules of Indian law this Court's opinion will have virtually no persuasive force before the tribal court judges.

[¶12] Finally, under both federal law and this Court's own precedent, this Court should defer out of comity to the tribal court because the exercise of State jurisdiction would "'undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.'" Aplt. Resp. ¶14 (quoting *Rolette Cnty. Soc. Serv. Bd. V. B.E.*, 2005 ND 101, ¶ 6, 697 N.W.2d at 335). It is obvious that this Court opining that the Tribe's Court lacks jurisdiction over a pending tribal court matter greatly undermines and infringes upon the Tribe's authority to determine the issue itself. *Cf. Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (grounding the federal exhaustion policy discussed above on the non-infringement); *Nat'l Farmers Union*, *supra* (same).

IV. THIS COURT WRONGLY CONCLUDED THAT IT WAS NOT NECESSARY TO REACH 3 BEARS ARGUMENT BASED UPON PUBLIC LAW 280.

[¶13] In paragraph 31 of its opinion, this Court stated, without analysis, that it did not have to reach 3 Bears' argument based upon amendments to Public Law 83-280

(hereinafter PL-280). The Court should reconsider that decision and hold that PL-280 bars State jurisdiction.

[¶14] PL-280 prohibits state jurisdiction over civil actions involving Indians in Indian Country unless a majority of the Tribe's members consent. 25 U.S.C. §§ 1322, 1326. Congress also intended to prohibit states from adjudicating "the ownership or right to possession of [trust property] or any interest therein" Section 1322(b). Accordingly, "[t]he state may no longer unilaterally assert its jurisdiction, and neither may the tribal council acting alone cede jurisdiction to the state on behalf of the tribe. . . . only the Indians, collectively rather than as individuals, may cede jurisdiction to the state, and without such collective action the state has no jurisdiction . . ." *Malaterre v. Malaterre*, 293 N.W.2d 139, 143 (N.D. 1980). Moreover, PL-280 "is a 'governing act of Congress' as that phrase is used in *Williams*" and "only strict compliance" with its terms can invoke state jurisdiction. *Id.* The Court's holding violates these principles. The two tribal members owning 3 Bears cannot consent to state jurisdiction simply by organizing their business under state law. By labeling an Indian owned LLC a non-member, the Court has effectively circumvented PL-280, a congressional prohibition on its jurisdiction.

[¶15] The Court also overlooked the fact that Tesla sued 3 Bears **and** its Indian owners. That claim is plainly barred by both *Williams* and PL-280. In its opinion, this Court held that 3 Bears is a non-Indian. While 3 Bears disagrees in whole with the Court's decision, 3 Bears asks the Court to more narrowly reconsider whether 3 Bears is an "Indian" for the specific claims at issue. Under PL-280, the State courts lack jurisdiction over claims to which an Indian is a party. As 3 Bears discussed in detail in its response brief on appeal, it is, as a matter of tribal law, an Indian for purposes of construction work on the

Reservation. Resp. Br. At §9; *see also* 25 U.S.C. § 1322. And that is the exact context of the current claims. 3 Bears is an Indian for those claims.

CONCLUSION

[¶16] For the forgoing reasons, 3 Bears respectfully requests that its Petition for Rehearing be granted.

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AFFIDAVIT OF SERVICE

I, Debra A. Foulk, being first duly sworn, deposes and states that she is a citizen of the United States, of legal age, and not a party to nor interested in the above-styled action, and that on January 11, 2016, she filed **APPELLEE THREE BEARS CONSTRUCTION, LLC'S PETITION FOR REHEARING** in the above matter electronically to the Court at supclerkofcourt@ndcourts.gov and served the same to the parties as follows:

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HALENE A. PHELPS NOTARY PUBLIC STATE OF COLORADO

Subscribed and sworn to before me this 11th day of January, 2016.

Halene A. Phelps

Notary Public

My Commission Expires 9/13/18.