

No. 10-408

OCT 22 2010

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In the  
**Supreme Court of the United States**

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GLACIER ELECTRIC COOPERATIVE, INC.,  
*Petitioner,*

v.

THE ESTATE OF SCOTT SHERBURNE, RON BIRD  
AND HERB GILHAM, Individually and on behalf  
of Glacier Construction, Inc.,  
*Respondents.*

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*On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Ninth Circuit*

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**BRIEF IN OPPOSITION**

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**COUNTER-STATEMENT OF**  
**QUESTION PRESENTED**

The only question that may be properly presented to this Court is the issue framed in Petitioner's Complaint and argued before the District Court: Whether Petitioner Glacier Electric Cooperative is prohibited from challenging tribal court subject matter jurisdiction a second time after expressly abandoning the issue during its first appeal to the U.S. Court of Appeals for the Ninth Circuit.

**RULE 29.6 DISCLOSURE STATEMENT**

Respondent Glacier Construction, Inc., a Montana company, is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of Glacier Construction, Inc.

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**STATEMENT OF THE CASE**

Respondents (the Estate of Scott Sherburne, Ron Bird and Herb Gilham, Individually and on behalf of Glacier Construction, Inc.) brought suit in Blackfeet Tribal Court in 1992 for claims which arose out of contractual dealings between petitioner and respondents for construction on the Blackfeet Reservation of electrical power transmission facilities. Petitioner, Glacier Electric Cooperative, is an electric cooperative located in Cut Bank, Montana. Approximately eighty percent (80%) of its members are individuals and businesses that reside on the Blackfeet Reservation. A majority of the individual customers of Glacier Electric Cooperative are members of the Blackfeet Tribe and reside within the exterior boundaries of the Blackfeet Reservation.

At the conclusion of the trial between the parties, judgment was entered against petitioner on May 19, 1993. An Appeal was filed by Petitioner in the Blackfeet Tribal Appellate Court. The petitioner did not make any objections during closing argument, nor did it raise any due process or other error with respect to the closing argument in its appeal to the Blackfeet Tribal Court of Appeals.

After the Blackfeet Tribal Appellate Court affirmed the Judgment, the petitioner opposed granting the Tribal Court judgment comity and challenged subject matter jurisdiction before the United States District Court. Judge Paul G. Hatfield, in a Memorandum and Order dated January 20, 1998, Pet.App. 81a, held that the Blackfeet Tribal Court had subject matter jurisdiction under the analysis approved by the United States Supreme Court in *Montana v. United States*,

450 U.S. 544 (1981). Judge Hatfield's Memorandum and Order also addressed the subsequent decision of the United States Supreme Court in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Pet.App. 84a-97a.

Petitioner appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit, but expressly abandoned the issue of subject matter jurisdiction and only challenged Judge Hatfield's ruling on comity. See Brief of Appellant, Excerpt, In the United States Court of Appeals for the Ninth Circuit, Res.App. 1-3b, note 6 ("the Co-op abandons its position" regarding tribal court jurisdiction); see also Letter from Tiffany B. Lonnevik to Kathleen Butterfield, Resp.App. 5-6b ("our appeal in Bird does not involve any issues of tribal jurisdiction").

The decision by the Ninth Circuit Court of Appeals in *Bird v. Glacier Electric Coop. Inc.*, 255 F.3d 1136 (9<sup>th</sup> Cir. 2001) did not declare the judgment entered by the Blackfeet Tribal Court to be invalid. The Ninth Circuit carefully and consciously limited its holding to the due process requirement of extending comity to a tribal court judgment and ruled that that the Blackfeet Tribal Judgment was not entitled to comity for enforcement outside the boundaries of the reservation. The Ninth Circuit expressly stated that it declined to "... address whether there may be further proceedings in the tribal court." *Bird*, 255 F.3 at 1139, N.2.

In 2008, during continuing efforts by respondents to obtain a Debtor's examination in Tribal Court, the petitioner filed this action in the United States District Court to once again challenge subject matter jurisdiction. The complaint filed by petitioner in the United States District Court did not raise any "special



circumstances” nor “due process” grounds. Its sole argument was that the tribal court lacked subject matter jurisdiction. Pet.App. 138a. The Complaint filed by Petitioner in 2008 makes clear that it was again challenging subject matter jurisdiction and it is devoid of any argument of due process or special circumstances that would warrant a reconsideration of subject matter jurisdiction. As stated in its Complaint:

28. The Defendants’ Tribal Court Judgment is void because the Tribal Court did not have subject matter jurisdiction over the Glacier Construction business dispute.

App. 138a.

During oral argument, counsel on behalf of respondent confirmed to the United States District Court that respondents were not and would not seek to enforce the judgment from assets outside the Blackfeet Reservation. Pet.App. 27a and 39a. The district court held that the issue of tribal subject matter jurisdiction was “res judicata” based on petitioner’s abandonment of the issue in its first appeal. Pet.App. 34a-38a. In an unpublished memorandum decision, the Ninth Circuit affirmed, holding that “issue preclusion attached to the district court’s 1998 decision. . . . the determination of subject matter jurisdiction made by the district court was never disturbed.” Pet.App. 2a-3a.

### **REASONS FOR DENYING PETITION**

1. The petition presents no issue worthy of this Court’s attention. The issue decided by the lower courts is one of ordinary civil procedure – the inability of a party to re-litigate an issue expressly abandoned

on appeal 10 years earlier in a proceeding between the same parties. The decisions by the lower courts were based upon basic fundamental concepts of civil procedure: law of the case, *res judicata* and issue preclusion. The petitioner is simply asking this Court to correct a perceived error by the lower courts which would entitle the petitioner to re-litigate tribal court subject matter jurisdiction many years after expressly abandoning the issue below. Res.App. 1b and 5b. The recent decision by the district court which granted respondents' Motion for Summary Judgment and was affirmed by the Ninth Circuit was grounded on well-established precedent of this Court and of the Ninth Circuit. *Cocke v. Halsey*, 41 U.S. 71 (1842); *Sherrer v. Sherrer*, 344 U.S. 343, 68 S.Ct. 108 (1948) and *Donnovan v. Mazzola*, 761 F.2d 141 (9<sup>th</sup> Cir. 1985) *citing, Sherrer v. Sherrer, supra.* Pet.App. 81a-98a.

The petitioner concedes that there is no conflict among the circuits that requires this Court's intervention. Petitioner only argues that the Ninth Circuit decision on issue preclusion contradicts decisions of this Court and Ninth Circuit precedent. *See* Petition at 13-15. The petitioner attempts to manufacture a change of facts that governed the decision on subject matter jurisdiction by United States District Judge Paul G. Hatfield in his Memorandum and Order of January 20, 1998. The underlying facts did not and could not change with respect to the determination that the tribal court had subject matter jurisdiction. Petitioner's large and pervasive presence on the Reservation and its contractual dealings with respondents and other members of the Tribe have not changed between the time of the initiation of the underlying action in tribal court in 1992 and today. The only pertinent fact which

petitioner seeks to avoid is that it had the opportunity to challenge subject matter jurisdiction, it did so at the District Court level in 1998 and then expressly abandoned the issue on its first appeal to the Ninth Circuit. See Brief of Appellant, Excerpt, In the United States Court of Appeals for the Ninth Circuit, Res.App. 1-3b, note 6 (“the Co-op abandons its position” regarding tribal court jurisdiction); see also Letter from Tiffany B. Lonnevik to Kathleen Butterfield, Resp.App. 5-6b (“our appeal in Bird does not involve any issues of tribal jurisdiction”).

2. Contrary to petitioner’s assertions, there has been no change in the law governing tribal court subject matter jurisdiction. The subject matter jurisdiction analysis undertaken by Judge Hatfield was based upon the decisions that are still controlling today: *Montana v. United States, supra* and *Strate v. A-1 Contractors, supra*. While petitioner argues that the decision in *Plains Commerce Bank v. Long Family Land and Cattle Company*, 128 S.Ct. 2709 (2008) represented a change in the law, its reliance upon the decision is misplaced. Nothing in *Plains Commerce Bank* supports the proposition offered by the petitioner – that federal courts should ignore the doctrines of *res judicata* and issue preclusion to allow a non-Indian party an opportunity to re-litigate subject matter jurisdiction in their effort to prevent the enforcement of a tribal court judgment within the tribe’s reservation. Clearly, the petitioner is asking this Court to bend and twist its precedent in order to undo petitioner’s abandonment of its challenge to tribal court subject matter jurisdiction 10 years ago.

As the Ninth Circuit noted in its decision, Pet.App. 1a, subject matter jurisdiction is a threshold inquiry.

Whether labeled “*res judicata*” or “issue preclusion”, the petitioner is not entitled to revisit subject matter jurisdiction or collaterally attack the decision by Judge Hatfield on subject matter jurisdiction. Subject matter jurisdiction was litigated by the same parties under the same facts in 1998. The petitioner attempts to now change the issue from subject matter jurisdiction as argued below, to due process in its petition to this Court. However, due process issues challenged in a foreign court with respect to enforcement of a foreign judgment on foreign ground are not a valid basis of collateral attack in the federal courts. A court in a sovereign state cannot interfere with the proceedings in a court of another sovereign state. ***Banco Nactional DeCuba v. Sabbitino***, 376 U.S. 398, 428 (1964). The lower courts expressly followed the decision in ***Banco Nactional DeCuba***, *supra*, holding that an action by a foreign court may not be examined by a federal court even if the foreign action is in conflict “with our notions of justice – if those acts are executed within the foreign states’ territory.” ***Tchacosch Co. Ltd. v. Rockwell Int. Corp.***, 766 F.2d 1333, 1335-36 (9<sup>th</sup> Cir. 1995) *citing*, ***Banco Nactional DeCuba v. Sabbitino***, 376 U.S. 398, 428 (1964) and ***Underhill v. Hernandez***, 168 U.S. 250, 252 (1987).

3. Finally, petitioner asks this Court to consider “special circumstances” in an effort to circumnavigate the doctrines of *res judicata* and issue preclusion. However, petitioner failed to raise or ask the district court to consider any “special circumstances” in its Complaint, its Response Opposing Respondents’ Motion for Summary Judgment, its Statement of Genuine Issues, its Memorandum in Support of Motion for Summary Judgment, or in its Reply Memorandum. It did not argue “special circumstances” at the hearing

before the district court on summary judgment. Although the claim for “special circumstances” is not properly before this Court, respondents do take issue with petitioner’s characterization of certain facts.

First, petitioner advances another new argument of “special circumstance” not raised before the district court— a perceived threat to national security by cutting off of electricity to two border crossing stations on the Canadian border. Factually, the argument lacks any support as evidenced in the transcript of oral argument before the district court and by the recent proceedings in tribal court. Pet.App. 27a and 39a. Respondents simply seek to collect the judgment through payment of power bills for electricity sold to customers of petitioner within the reservation who are tribal members and tribal businesses. Respondents do not seek to cut off power to anyone inside or outside the reservation, nor is there is any threat of cutting wires or burning power poles. Petitioner’s “special circumstance” of national security is a recent fabrication without any factual basis.

Second, petitioner argues that enforcement of the judgment would bankrupt or ruin the electric cooperative and qualifies as a “special circumstance.” Petitioner fails to mention that a declaratory judgment action was filed in tribal court by respondents against Federated Insurance Company, petitioner’s insurer. The declaratory judgment action sought and obtained a declaration that the policy of insurance would apply to the judgment entered against petitioner. Resp.App. 7b.

**CONCLUSION**

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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