No. _____

In the
Supreme Court of the United States

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.

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

PETITION FOR WRIT OF CERTIORARI

JULIA A. FOLLANSBEE
FOLLANSBEE & ASSOCIATES
61510 COUGAR TRAIL
BEND, OR 97701
TELEPHONE: (541) 318-5991
FACSIMILE: (541) 318-5981
juliafollansbee@appealaid.net

PAUL R. HAFFEMAN
Counsel of Record
DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.
THE MILWAUKEE STATION
THIRD FLOOR
101 RIVER DRIVE NORTH
P.O. BOX 2103
GREAT FALLS, MT 59403-2103
TELEPHONE: (406) 761-5243
FACSIMILE: (406) 761-4126
paul.haffeman@dhhtlaw.com

Counsel for Petitioner

September 22, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Blank Page

QUESTION PRESENTED

This Court has explained that while "*jurisdiction* is a question of whether a . . . court has the power . . . to hear a case, ... *relief* is a question of the various remedies a . . . court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all[.]" *Davis v. Passman,* 442 U.S. 228, 239 n.18 (1979). And, "[t]he nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy[.] [T]he breadth or narrowness of the relief which may be granted . . . is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers,* 390 U.S. 557, 561 (1968).

In 2001, the Court of Appeals for the Ninth Circuit refused to extend comity to the tribal court judgment at issue here, holding that Petitioner's due process rights had been violated at trial in the Blackfeet court. *Bird v. Glacier Electric Cooperative, Inc.,* 255 F.3d 1136, 1151 (9th Cir. 2001). In 2010, on the sole ground of issue preclusion, that same court is allowing the Respondents to pursue enforcement of the judgment in tribal court, within the exterior boundaries of the reservation, against the assets of non-Indian Petitioner, an electric cooperative, on non-Indian fee land, including electric utility rights-of-way granted by Congress and by individual members of the electric cooperative.

In this context, the question presented is whether preclusion of the issue of tribal subject matter

jurisdiction to *hear* a case bars the federal courts from considering whether Respondents may enforce *in tribal court* the relief they were granted there – a substantial money judgment – despite the lack of due process at the trial.

LIST OF PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Glacier Electric Cooperative, Inc. has no parent corporation and that no other publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

APPENDIX

TABLE OF CITED AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

Blank Page

OPINIONS BELOW

The unpublished opinion of the Ninth Circuit is reprinted in the Appendix (at 1a-3a). The Ninth Circuit's opinion in *Bird v. Glacier Electric Cooperative, Inc.* is reported at 255 F.3d 1136, 1151 (9th Cir. 2001) and is reprinted in the Appendix (at App. 42a-77a). The district court's 1998 decision granting the Respondents' motion for summary judgment on the issue of tribal jurisdiction was not reported, and is reprinted in the Appendix (at 81a-98a). The 2009 decision of the district court granting the Respondents' motion for summary judgment was not reported, and is reprinted in the Appendix (at 4a-7a).

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit filed its memorandum disposition on June 25, 2010. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review that opinion on a writ of certiorari.

CONSTITUTIONAL PROVISION

No person shall be . . . deprived of life, liberty, or property, without due process of law[.] U.S. Const. amend. V.

STATUTORY PROVISION

"No Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law . . . ." 25 U.S.C. § 1302(8).

STATEMENT OF THE CASE

1. Tribal Court Proceedings

This case began in 1992 in Blackfeet tribal court on the Blackfeet Indian Reservation in Montana against Glacier Electric Cooperative ("GEC"), alleging tribal law claims for breach of Tribal Employment Preference Ordinances ("TERO") and Blackfeet constitutional provisions, and state law claims for breach of contract, constructive fraud, defamation, and negligent misrepresentation. Doing business as Glacier Construction, Inc. with headquarters on the reservation, two enrolled tribal members and one non-tribal member filed the lawsuit on behalf of themselves and Glacier Construction. The lawsuit arose when GEC terminated its relationship with Glacier Construction, fearing liability from that company's sub-standard work and use of untrained employees in replacing utility poles and other tasks associated with maintaining GEC's electrical distribution system in Montana's Glacier, Pondera, and Flathead counties.

GEC, a non-tribal member, unsuccessfully contested in tribal court that court's jurisdiction over the dispute. In 1993, trial before an all-Blackfeet jury resulted in a judgment against GEC for $2,157,181.60, including punitive damages, plus Glacier Construction's costs and court and jury costs, at the legal rate of interest until paid. App. 132a-134a. In 1995, the tribal appeals court upheld the judgment except for the tribal law claims. There was no reduction of the amount of the judgment.

2. Comity Proceedings in Federal District Court and the First Appeal in *Bird*

In 1996, Glacier Construction petitioned the federal district court in Great Falls, Montana to recognize and enforce the judgment as a matter of comity. On cross-motions for summary judgment, GEC argued that its fundamental due process rights were violated in tribal court and that the tribal court lacked subject matter jurisdiction. On January 21, 1998, District Judge Hatfield ruled that the tribal court did have jurisdiction, under the exceptions recognized in *Montana v. United States,* 450 U.S. 544, 564-66 (1981), to the general rule that there is no tribal jurisdiction over non-tribal members. App. 84a-97a. One year later, on January 22, 1999, Judge Hatfield ruled that GEC was accorded due process at trial, and held that "the underlying tribal court judgment is entitled to recognition and enforcement in the federal courts." App. 80a.

GEC appealed the decision to recognize and enforce the judgment, limiting its argument to the due process requirement of comity. *See Wilson v. Marchington,* 127 F.3d 805, 809-11 (9th Cir. 1997)(explaining that due process and jurisdiction are mandatory requirements for the extension of comity to Indian tribes). GEC's brief described numerous due process violations. App. 169a-218a. The Ninth Circuit focused only on one: Respondents' closing argument. It held that Glacier Construction's inflammatory closing argument in tribal court was meant to incite the all-Blackfeet jury to decide against GEC and its manager on grounds of alleged historic oppression of whites against Indians, resulting in a violation of GEC's due process rights. The court reversed, refusing to extend

comity as a matter of law. *Bird,* 255 F.3d at 1152. In so doing, the court refused to "depart from traditional due process values requiring fundamental fairness" *or to weigh any tribal interests* because "the procedures in the Blackfeet tribal court system are similar to those of Anglo-Saxon law." *Id.* at 1143-44 (emphasis added). The court observed that the request for comity was based on a "tribal court judgment here arising from a tribal court system with express rules and procedures based on Anglo-Saxon law." *Id.* at 1144. At this point, GEC thought the case was probably over.

3. Enforcement Proceedings in Tribal Court and the Request for Injunctive and Declaratory Relief in Federal Court in *Sherburne*

In February 2002, the Respondents petitioned the *tribal* court for an Order to Enforce and Aid in the Execution of the Judgment, never mentioning *Bird*. They sought a debtor's exam in which

> the defendant/debtor, Glacier Electric Co-op, shall appear before the [tribal] Court concerning the property and other assets of the defendant that are located upon the Blackfeet Indian Reservation and subject to execution for the purpose of satisfying the underlying Judgment. See Title 25, Chap. 14, MCA (Proceedings in Aid of Execution), incorporated into the Blackfeet Tribal Law and Order Code of 1967 (as amended) pursuant to Chap. 2, Sec. 2 of said Code.

App. 224a. GEC contested this petition on various grounds, including the federally adjudicated violation of its due process rights at trial. App. 227a-230a.

Over the next *seven years* spent litigating enforcement in the tribal courts, GEC lost repeatedly, despite the fact the Respondents attempted to effect and/or reach GEC's off-reservation assets over which the tribe had no jurisdiction. For example, in 2003, the tribal court signed an order for a debtor's exam stating that GEC was "forbidden . . . from disposing of any of its property." App. 131a. A significant portion of GEC's assets are off the reservation, including its headquarters. Later, the Respondents requested more debtor's exams that purported to assert authority over off-reservation assets and/or persons and records. The tribal courts assented. App. 102a-103a; App. 107a-112a; App. 232a-234a; App. 113a-128a. In 2007, the Respondents filed a "Motion for Order Requiring Judgment Debtor to Submit to Examination" in which they requested that GEC's manager be ordered to appear in tribal court with various financial records relating to both on-and off-reservation assets. App. 232a-234a. In 2008, the tribal court granted that motion and ordered:

> All files pertaining to this cause will be brought into this Court and reviewed including all witnesses to this cause of action.
>
> The above pertains to the property located on the Blackfeet Indian Reservation. This includes equipment, easements, rights of ways, and all other property owned or controlled by Glacier Electric Co-Op.

App. 111a-112a. GEC's manager responded by pointing out: "All of that information is currently located off the Blackfeet Indian Reservation, either at Glacier Electric's headquarters in Cut Bank or

elsewhere." App. 236a. GEC's manager did not appear at the debtor's exam set for April 22, 2008. The tribal court then found GEC and its counsel in contempt:

> Plaintiff's Glacier Electric Co-op and their attorney, Paul R. Haffeman are in contempt of this court and fined one thousand ($1,000.00) dollars to be paid before the next hearing, which will be held on the 25th day of June 2008 at 11:00 o'clock a.m. Failure to appear without the manager and all records and documents pertaining to this case will result in further fines for contempt.

App. 103a.

On April 21, 2008, GEC filed a Complaint for Injunctive and Declaratory Relief in federal district court. App. 138a-150a. The relief GEC requested was: (1) that Respondents be enjoined from proceeding with a debtor's exam "directed at persons, documents and property located off the Blackfeet Reservation;" (2) that the court declare "the rights and legal relations of the parties regarding the due process rights of GEC and its employees;" and (3) that the tribal court judgment and all other orders of the tribal court [be declared] void because of a lack of subject matter jurisdiction." App. 150a.

On February 18, 2009, a hearing was held on cross-motions for summary judgment. App. 8a-41a. GEC stated:

> We are simply asking the court to enjoin the plaintiffs from continuing their tribal court

> enforcement efforts on the basis that they have–that the tribe itself has no authority to assist them in their enforcement efforts, because the judgment that's involved in this case is null and void because of a lack of due process.

App. 16a.

With respect to GEC's first request for relief, the court recognized that "the tribal court, by reason of [*Bird*], does not have any recognizable capacity to attempt to enforce its judgment off-reservation." App. 39a. At the hearing Respondents acknowledged this was a problem by agreeing to abandon their off-reservation collection efforts, informing the court: "our enforcement efforts would be solely as to assets located within the reservation. . . . there are substantial assets within the reservation."[1] App. 23a; App. 27a.

With respect to the third request for relief, the district court ruled *sua sponte,* without distinguishing between claim and issue preclusion, that the issue was "res judicata" because GEC had not appealed the 1998 ruling on tribal jurisdiction over the initial dispute and could not in 2009 collaterally attack that jurisdiction. App. 34a-38a.

But, the district court never decided the second request for relief: that it declare "the rights and legal relations of the parties regarding the due process

---

[1] While Glacier Construction abandoned the issue of tribal jurisdiction over off-reservation records, it did not abandon the issue of off-reservation witnesses, including GEC's manager.

rights of GEC and its employees" following *Bird*. Apparently, the court thought this issue was subsumed in its *sua sponte* ruling on "res judicata." Nevertheless, this issue was directly before the court:

> So the anamoly in this case is that what we're talking about is a multi-million dollar judgment, which the Ninth Circuit Court of Appeals has already said is flawed by due process. And the defendants in this action are continuing to try to enforce that judgment. And we're asking that those enforcement efforts be stopped at this point in time and the case be brought to a final rest.

App. 17a. Respondents had acknowledged previously that this was the argument GEC was making:

> First and foremost, [GEC] contends in its Response Brief to this Court that the "Jurisdictional issue before the Court . . . is different than [sic] the jurisdictional issue considered by Judge Hatfield in 1998, because at that time the Defendants[] were making no effort to enforce their Judgment in Tribal Court."

App. 243a.

Thus, on the sole ground that GEC had not appealed tribal court jurisdiction in *Bird*, the district court decided GEC was barred from contesting Respondents' right to petition the tribal court to enforce the judgment – the *relief* given – despite the legal determination in *Bird* that: (1) GEC's due process rights had been violated and that (2) the

Respondents were held to traditional due process values because the Blackfeet had adopted Anglo-Saxon law.

In short, the court conflated tribal jurisdiction to *hear* this dispute with the question of what *relief*, if any, a tribal court may enforce where a non-tribal member's due process rights are violated at trial. The result was an erroneous application of the doctrine of res judicata[2] to the question of whether Respondents could enforce the judgment in tribal court.

4. The Second Ninth Circuit Appeal in *Sherburne*

In the unpublished one-page memorandum decision at issue here, the Ninth Circuit held: "[i]ssue preclusion attached to the district court's 1998 decision. . . . the determination of subject matter jurisdiction made by the district court was never disturbed." App. 2a-3a. To support its ruling, the court quoted *Wilson v. Marchington,* 127 F.3d 805, 811 (9th Cir. 1997): "the existence of subject matter jurisdiction is a threshold inquiry in virtually every federal examination of a tribal judgment." App. 3a.

Like the district court, the Ninth Circuit conflated the question of what *relief*, if any, is available where due process is absent in a tribal court with the

---

[2] Because in this Court's jurisprudence, "res judicata" is synonymous with claim preclusion, *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984), the Ninth Circuit's memorandum disposition agreed with Petitioner that issue preclusion, not claim preclusion, was the appropriate doctrine to consider.

question of *subject matter jurisdiction* over the underlying dispute. The *Marchington* quotation is puzzling. *Marchington* was concerned only with tribal subject matter jurisdiction over an accident on a state highway following this Court's decision in *Strate v. A-1 Contractors,* 520 U.S. 438 (1977). Neither *Strate* nor *Marchington* had anything to do with a federally adjudicated lack of due process in comity proceedings but where nevertheless, there were subsequent enforcement proceedings in tribal court. *Marchington* does not compel a "threshold inquiry" into *subject matter jurisdiction* when the major issue is the violation of GEC's *due process* rights in tribal court.

REASONS FOR GRANTING THE PETITION

1. Issue Preclusion Does Not Apply When the Issues are Not Identical and the Controlling Facts Have Changed

a. the issues are not identical

If the Blackfeet tribal courts can enforce this judgment, it cannot be due to issue preclusion. "Under [the doctrine of issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979). But there is a caveat: issue preclusion "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts . . . remain unchanged."

Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 599-600 (1948).

"Jurisdiction" is defined as "the general power to exercise *authority* over all persons and things within its territory" as well as "the power to . . . issue a decree." *BLACK'S LAW DICTIONARY* 855 (7th Deluxe ed. 1999)(emphasis added). What GEC is contesting is the tribal court's authority to issue decrees to enforce a judgment that was rendered without due process against a non-Indian electric cooperative, on non-Indian fee land, and against property not otherwise controlled by the Blackfeet tribe because it was generated and transmitted on non-Indian fee land. Because "the breadth or narrowness of the relief which may be granted . . . is a distinct question from whether the court has jurisdiction over the parties and the subject matter[,]" *Avco Corporation,* 390 U.S. at 561, the matter of tribal authority to order enforcement of such a defective judgment cannot be identical with the matter of a tribal court's initial jurisdiction over the subject matter of the dispute.

Applying *Montana* and its exceptions, District Judge Hatfield decided in 1998 *only* that the tribal court had subject matter jurisdiction over the original action alleging tribal and state claims. Respondents' subsequent *tribal court* enforcement efforts, made after the due process adjudication in *Bird,* were not before him, nor could they could have been. The questions raised at the initial stages of the dispute concerning tribal authority to hear the case are entirely different from those raised at the end concerning tribal authority to enforce a defective judgment.

Respondents argued to the Ninth Circuit: "if a Tribal Court of Appeals does not have the authority to enforce through contempt or other measures its execution procedures under its tribal code, then its jurisdiction is, in effect, nullified." App. 21a. This argument is misplaced. First, to challenge a court's authority to order relief following a defective judgment does not nullify that court's jurisdiction to hear the case initially. It simply challenges the court's authority to award any *relief* where fundamental fairness was lacking. "A plaintiff may have a cause of action [in tribal court] even though he be entitled to no relief at all[.]" *Davis v. Passman,* 442 U.S. 228, 239 n.18 (1979). Second, this argument is beside the point when the question surrounding issue preclusion is whether the jurisdiction to *hear* a case is identical in all respects with the jurisdiction *to order enforcement* of a judgment obtained without due process.

b. the controlling facts have changed

Since 2001, the controlling facts have also changed. As a result of *Bird,* the lack of due process at trial in the Blackfeet court is now an adjudicated fact. It is also a fact that the legal landscape has changed. The application of *Montana's* exceptions to the general rule that there is no tribal jurisdiction over non-Indians has been clarified in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.,* 128 S. Ct. 2709 (2008). *Plains* should now control the question whether a tribal court has the authority to *enforce* execution of this judgment on the reservation in the way the Respondents contemplate: "equipment, easements, rights of ways, and all other property owned and controlled by Glacier Electric Co-Op," App. 112a, as well as "payments on power bills or accounts

receivable of the Defendant, Glacier Electric, the judgment debtor [,] from the Glacier Electric payment office located within the boundaries of the Blackfeet Reservation and from customers within the Reservation who owe money to Defendant." App. 101a.

Not only logic, but the timing of these legal proceedings firmly divide the jurisdictional inquiries in *Bird* and *Sherburne*. No one could know when tribal subject matter jurisdiction was upheld in the tribal and federal district courts in *Bird* that ultimately, the Ninth Circuit would hold there was no due process, or that the Respondents would nonetheless petition the tribal court in *Sherburne* to assist in enforcing the judgment. Not only is the lack of due process now an adjudicated fact; it implicates due process as a *legal principle*. It is therefore a "controlling fact" that is "essential to a judgment." *Montana v. United States,* 440 U.S. 147, 159 (1979).

Under these circumstances, issue preclusion is neither warranted nor wise where "the factual and legal context in which the issues of this case arise has . . . materially altered" since 2001. *Id.* at 162. "'[Issue preclusion] is not meant to create vested rights in decisions that have become obsolete or erroneous with time[.]'" *Id.* at 161 (*quoting Sunnen,* 333 U.S. at 599).

2. The Decision on Issue Preclusion Contradicts this Court's and Ninth Circuit Precedent

Respondents insisted to the Ninth Circuit that GEC abandoned the issue of subject matter jurisdiction and that "[j]urisdiction is jurisdiction." The Ninth Circuit agreed, but its decision conflicts with its own and this Court's precedent: that issue preclusion "must be

confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts . . . remain unchanged." *Sunnen,* 333 U.S. at 599-600; *accord, Sasson v. Sokoloff,* 424 F.3d 864, 872 n.4 (9th Cir. 2005)("the issue sought to be precluded from relitigation must be *identical* to that decided in a former proceeding"); *Clements v. Airport Auth. of Washoe County,* 69 F.3d 321, 330 (9th Cir. 1995)("In issue preclusion, the only litigation barred is the *re*-litigation of an issue that has been *actually* litigated and *necessarily* decided.").

GEC cannot "abandon" an issue that has never seen the light of day: whether a tribal court has the authority to enforce a judgment that a federal appellate court has held was obtained without due process, and to do so within the exterior boundaries of a reservation against a non-tribal member and against non-Indian assets. "[W]here no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte,* thereby eroding the principle of [due process] so basic to our system of adjudication." *Arizona v. California,* 530 U.S. 392, 412-13 (2000); *Headwaters Inc. v. United States Forest Serv.,* 399 F.3d 1047, 1055 (9th Cir. 2005)(*quoting Arizona*); *accord, California Diversified Promotions, Inc. v. Musick,* 505 F.2d 278, 280-81 (9th Cir. 1974)(warning that *sua sponte* dismissals without an opportunity to be heard may further violate due process). In *Headwaters*, the Ninth Circuit observed that "[o]ur research failed to find a single case in which this court has upheld a dismissal for claim or issue preclusion where the parties were not given any opportunity to be heard on the issue." 399 F.3d at 1055 & n.6 (listing illustrative cases).

Here, the district court's *sua sponte* ruling "did not subject its res judicata decision to the rigors of the adversarial process." *Nevada Employees Ass'n v. Keating,* 903 F.2d 1223, 1225 (9th Cir. 1990).

The district court could not determine *sua sponte* that tribal jurisdiction to grant and enforce a writ of execution on the judgment – the very one obtained without due process – was "res judicata" when that particular issue was never "*actually* litigated and *necessarily* decided." *Clements,* 69 F.3d at 330. The Ninth Circuit declined to decide this very issue of tribal court enforcement because the question was not before it. *Bird,* 255 F.3d at 1139 n.2. And Judge Hatfield did not consider whether there was due process in the Blackfeet trial when he ruled in 1998 that the tribal courts had jurisdiction. He did not consider whether there was due process in the Blackfeet trial until 1999 – and in *Bird,* the Ninth Circuit reversed Judge Hatfield on the very issue of due process.

The district court's 2009 dismissal of GEC's Complaint under these circumstances was itself a violation of due process, because that court plainly had not previously decided the issue of whether the defective tribal judgment could be enforced in the tribal court. *California Diversified,* 505 F.2d at 280-81.

3. The Traditional Reasons for Issue Preclusion Do Not Apply

The reasons for prohibiting parties from relitigating issues that were litigated are: "[t]o preclude parties from contesting matters that they

have had a full and fair opportunity to litigate, which protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana,* 440 U.S. at 153-54.

None of these reasons for preclusion applies. GEC has never had a full and *fair* opportunity to litigate *anywhere* whether Respondents may enforce the defective judgment against GEC within the exterior boundaries of the Blackfeet Reservation on utility rights-of-way and on non-Indian fee land, and with respect to *payments owed* from electrical service generated, transmitted, and administrated on non-Indian fee land, non-Indian property, and non-Indian utility rights-of-way. *See* App. 99a-101a. The Ninth Circuit did not reach this issue in 2001: "[b]ecause we have only the suit by Glacier Construction and its principals, to recognize and enforce the tribal court judgment, *we do not address . . . whether there may be further proceedings in the tribal court*." *Bird,* 255 F.3d at 1139 n.2 (emphasis added). This question was left open. If consideration of tribal authority to enforce the judgment is not precluded, then the Ninth Circuit must be reversed and this case remanded to federal district court for a reconsideration of the question under the current legal standards. If ultimately it is held that there is no tribal authority to enforce a fundamentally unfair judgment, then that is the end of the story for Respondents. If there is tribal jurisdiction, then the question becomes to what extent the federal courts may provide injunctive and declaratory relief over the assets Respondents want to execute upon on the reservation – GEC's land, buildings, and equipment on non-Indian fee land and

utility rights-of-way, as well as payments owed for the electricity that GEC has provided.

Respondents have denied the power of the federal courts to order injunctive and declaratory relief: "[t]he Federal Court does not have power or jurisdiction to prevent enforcement of the Judgment on the Reservation." App. 239a. But this Court decided in *Plains* that the federal courts *do* have such power when non-Indians are involved and non-Indian fee land is at stake, even where the *Montana* exceptions arguably apply. 128 S. Ct. at 2719-20. It has long been established that the question of whether a tribal court has authority over nonmembers is a federal question that is squarely within the jurisdiction of the federal courts to decide. *See Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15 (1987); *Nat'l Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845, 852-53 (1985). Further, it is a "settled principle" that "[i]f the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." *Plains,* 128 S.Ct. at 2717. Therefore, the federal courts should also have the power to declare a judgment against non-Indians null and void for lack of due process; to declare that the tribal courts have no authority to enforce a judgment obtained without due process against non-Indians on non-Indian fee land and other property not controlled by the tribe; and to enjoin Respondents from continuing their enforcement efforts in tribal court on any or all of those grounds. The district court here should not have paved the way with its "res judicata" ruling for enforcement of a fundamentally defective tribal judgment anywhere, including on non-Indian fee land and non-Indian property on the reservation:

> It has long been the law of the United States that a foreign judgment cannot be *enforced* if it was obtained in a manner that did not accord with the basics of due process. The guarantees of due process are vital to our system of democracy. We *demand* that foreign nations afford United States citizens due process of law before recognizing foreign judgments; *we must ask no less of Native American Tribes.*

Marchington, 127 F.3d at 811 (citation and quotation omitted)(emphasis added).

Finally, there is no vexatious or piecemeal litigation for Respondents in having to defend such an issue that has never been fairly litigated. There is no reason to conserve judicial resources or rely on previous judicial action when the issues this case presents are ones of first impression and need the considered judgment of the federal courts.

If the Blackfeet tribal courts pay lip service to due process for non-tribal members, and have the power to enforce this judgment that has been held to violate due process and fundamental fairness, then the "ingredients of 'civilized jurisprudence'" are missing. *See Bird,* 255 F.3d at 1143 (in comity analysis, comparing *Bank Melli Iran v. Pahlavi,* 58 F.3d 1406 (9th Cir. 1995) ("The due process defects in the revolutionary Iranian courts were fundamental.")). Like the due process defects in the Iranian courts in *Bank Melli Iran*, the defect here in the Blackfeet tribal court was fundamental despite the fact that, unlike the Iranian courts, the Blackfeet have adopted Anglo-Saxon law and follow traditional notions of due process. The ultimate question is whether the federal

courts should defer to this result where the sovereignty of Indian Nations is "'unique and limited'" and centered "on the land held by the tribe and on tribal members within the reservation." *Plains,* 128 S. Ct. at 2718 (*quoting United States v. Wheeler,* 435 U.S. 313, 323 (1978)). But this is a question for another day, once the false barrier of issue preclusion is removed.

4. Special Circumstances Mitigate Against Issue Preclusion

a. due process with respect to trial of non-Indians in tribal courts is an area where doctrine should not be frozen

This Court has another caveat to the application of issue preclusion: "whether other special circumstances warrant an exception to the normal rules of preclusion." *Montana,* 440 U.S. at 155. The facts of this case present an excellent example of why this exception should apply.

This Court observes: "[u]nreflective invocation of [issue preclusion] against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Id.* at 163. This observation is especially pertinent where the "domestic dependent status of Indian nations is not well developed." *Bird,* 255 F.3d at 1141 &n.10 (*citing Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831)). And, Indian law "is one of the most active areas of law in the early twenty-first century." F. Cohen, *Handbook of Federal Indian Law* xii (2005 ed.). The Constitutional issue of due process as it relates to

non-Indians tried in tribal courts, and as it applies to *property* of non-Indians, is not an area where doctrine should be frozen by an erroneous application of issue preclusion.

Consequently, where due process was held to be lacking for a non-tribal member like GEC in the Blackfeet trial court, responsiveness on the part of federal courts is critical, for

> [t]he Bill of Rights does not apply to Indian tribes. Indian courts differ from traditional American courts in a number of significant respects. And nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.

Plains, 128 S. Ct. at 2724 (internal quotations and citations omitted).

Here, GEC never consented to have its due process rights forfeited in the tribal courts, especially where "[t]he Blackfeet Judicial System [claimed to] possess a *deep and abiding concern for assuring due process and equal protection of law to all litigants."* App. 136a

(emphasis added).[3] What is more, "Indian tribes have lost many of the attributes of sovereignty." *Montana,* 450 U.S. at 563. Tribes retain only the powers of self-government, which "'involve *only the relations among members of a tribe.*'" *Id. (quoting Wheeler,* 435 U.S. at 326)(emphasis added in *Montana).* Enforcing a judgment against a non-Indian like GEC does not invoke the Blackfeet's retained power of self-government: "'The areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe[.]*'" *Id. (quoting Wheeler,* 435 U.S. at 326 (emphasis added in *Montana*)). No control of internal relations in the Blackfeet tribe, such as tribal membership, domestic relations, or rules of inheritance, are involved here either. *Id.*

b. the Blackfeet Code conforms with the traditional notion of due process and there are no tribal interests requiring deference

One commentator has said that tribal codes such as the Blackfeet Tribal Law & Order Code are "unquestionably Anglo-American documents." Brakel, Samuel J., *American Indian Tribal Courts–The Costs of Separate Justice* 17 (1978). In 2001, quoting this

---

[3] *See also Tall White Man v. Blackfeet Indian Housing Auth.,* No. 99-AP-37 (Blackfeet Ct. App. filed Apr. 4, 2007)("In order to prevent manifest injustice [the court's order] is hereby vacated"); *Brown v. Schlaht,* No. 95-CA-40 (Blackfeet Tribal Ct. filed Oct. 9, 1995)("the Court is also compelled to consider the fairness to all parties concerned under long-standing principles of justice embraced by the Blackfeet Code and Constitution"). These Blackfeet decisions are reprinted in Appendices X and Y.

commentator, the Ninth Circuit held that "[i]t follows that our conception of due process for these tribal courts should be similar to that for federal and state courts. . . . we see no reason to depart from traditional due process values requiring fundamental fairness." *Bird,* 255 F.3d at 1144 & n.13. The court stated it need not weigh any tribal interests where Blackfeet law is patterned after Anglo-Saxon law. Instead, "[w]here the rights are the same under either legal system, federal constitutional standards are employed[.]" *Id.* at 1143 (*quoting Randall v. Yakima Nation Tribal Court,* 841 F.2d 897, 900 (9th Cir. 1988)). The court looked to the Indian Civil Rights Act of 1968 ("ICRA"), which provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or *property* without due process of law[.]" 25 U.S.C. § 1302(8) (emphasis added). Because the only remedy for such a violation is habeas review, the Ninth Circuit used the ICRA only as an analogy. *Bird,* 255 F.3d at 1143 & n.12. The court acknowledged that Constitutional due process concerns were not meant to "'disrupt settled tribal customs and traditions.'" *Id.* at 1143 (*quoting* F. Cohen, *Handbook of Federal Indian Law* 670 (1982 ed.)). Nevertheless, the court refused to weigh any tribal concerns because the Blackfeet have adopted Anglo-Saxon law and procedures. *Id.* at 1143-44 & n.13.

One issue in *Bird* was GEC's failure to object–after being overruled on every single objection it raised during the trial – to the inflammatory closing argument. The Ninth Circuit dealt at length with this issue, holding with the majority of federal appellate courts that a fundamental error that goes to the very integrity of the trial may be reviewed for plain error

absent a contemporaneous objection. 255 F.3d at 1144-48. But at oral argument here, the panel seemed to believe that the Blackfeet *tribal courts* require such an objection under its *own* notions of due process and that "for us to go further to say the tribal court has no jurisdiction period, that's a pretty major step." Oral Argument, Ninth Circuit, Feb. 2, 2010 at http://www.ca9.uscourts.gov/ (Media Recordings, No. 09-35216). But nowhere, prior to this case, have the Blackfeet ever informed non-Indians being tried in their courts that this was their legal requirement, and no Blackfeet Code has so stated. The idea to invoke this newly created rule apparently came from the only federal appellate decision cited in *Bird,* 255 F.3d at 1147-48, where objection to closing argument in a civil case was waived if not made. *See Deppe v. Tripp,* 863 F.2d 1356 (7th Cir. 1988). But this Court warns: "nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Plains,* 128 S. Ct. at 2724. As a non-Indian, Petitioner could hardly consent to a tribal legal requirement that was unrevealed at that time.

"The due process clause explicitly protects not only liberty, but also property rights." *Bird,* 255 F.3d at 1148. This is precisely why the Ninth Circuit rejected the Seventh Circuit's decision in *Deppe,* which held that in *civil* litigation a failure to object to closing argument cannot invoke review for plain error because "[i]n civil cases where economic and property interests are usually at stake, as opposed to criminal cases where more substantial liberty interests are involved, a plain error doctrine is unneeded." *Deppe,* 863 F.2d

at 1364. In short, the Ninth Circuit recognized that property is no less important than liberty under the Fifth Amendment.

Finally,

> [b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H.R. Rep. No. 474, 23rd Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Oliphant v. The Suquamish Indian Tribe, 435 U.S. 191, 210 (1978). Is enforcement of *this* tribal judgment acceptable to Congress? Where a fundamental right such as due process is at stake, issue preclusion should not have the upper hand *even if it were applicable.* "Unreflective invocation of collateral estoppel [e.g., issue preclusion] with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana,* 440 U.S. at 163. And, due process is hardly unimportant. It is "perhaps the most majestic concept in our whole constitutional system." *Joint Anti-Facist Refugee Comm. v. McGrath,* 341 U.S. 123, 174 (1951).

With such important concerns at stake, the "special circumstances" exception to issue preclusion should apply. "'Redetermination of issues is warranted if there is reason to doubt the . . . *fairness of procedures* followed in prior litigation.'" *Kremer v. Chem. Constr. Corp.,* 456 U.S. 461, 481 (1982)(*quoting Montana,* 440 U.S. at 164 n.11)(emphasis added). This should apply no less to litigation in tribal courts. Redetermination of whether there is tribal jurisdiction to enforce this judgment is even more warranted now, where there is not reason to doubt, but it is *beyond* doubt there was fundamental unfairness in the Blackfeet trial, *and* where the Blackfeet have adopted Anglo-Saxon law. Under these circumstances, unreflective invocation of issue preclusion is not justified where the issues of the initial jurisdiction over the dispute and the authority to enforce the relief awarded in the absence of due process are distinct. *Cf. Montana,* 440 U.S. at 163; *Avco Corp.,* 390 U.S. at 561.

c. seizure of GEC's property within the exterior boundaries of the Blackfeet reservation could have serious consequences for national security

There is yet another special circumstance that warrants an exception to issue preclusion, assuming *arguendo* such preclusion applies. This circumstance is of such import, it merits a separate discussion. On August 31, 2010, the Blackfeet Court of Appeals filed the "Order Granting Petition for Writ of Execution" which, in effect, "direct[ed] the tribal police or BIA to seize payments on power bills or accounts receivable of the Defendant, Glacier Electric, the judgment debtor from the Glacier Electric payment office located within the boundaries of the Blackfeet Reservation and from

customers within the Reservation who owe money to Defendant." App. 101a.

If the Blackfeet courts have, as they claim, the power to order the judgment satisfied by GEC's on-reservation assets – including payments from customers, non-Indian fee land, and non-Indian property and utility rights-of-way – and if, as Respondents claim, "[t]he Federal Court does not have power or jurisdiction to prevent enforcement of the Judgment on the Reservation," App. 239a, there are truly serious concerns for this Court. "Whether a tribal court has [such] authority over nonmembers is a federal question." *Plains,* 128 S.Ct. at 2716 (citing cases). Whether a tribal court has exceeded the limits of its jurisdiction, even with respect to the *Montana* exceptions, is a question federal courts have authority to determine, as a matter arising under federal law. *Strate v. A-1 Contractors,* 520 U.S. at 448, 449-459 (1997)(*citing Nat'l Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845, 852-53 (1985)). This Court has "frequently noted" that the "'sovereignty that the Indian tribes retain is of a unique and *limited* character.'" *Plains,* 128 S.Ct. at 2718 (*quoting Wheeler,* 435 U.S. at 323) (emphasis added). "It centers on the land held by the tribe and on tribal members within the reservation." *Id.* "[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe." *Nevada v. Hicks,* 533 U.S. 353, 392 (2001)(O'Connor, J., concurring in part and concurring in judgment).

GEC supplies electricity to two ports of entry between the United States and Canada. Given the limited sovereignty of the Blackfeet Nation, this Court should take note of what is ultimately at stake in

Respondents' efforts to execute now upon payments due and other GEC assets in utility rights-of-way and on non-Indian fee land GEC owns. It is nothing less than "the Government's compelling interests in safety and in the integrity of our own borders." *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656, 672 (1989). The manager of GEC stated as much in his affidavit regarding GEC's request for injunctive and declaratory relief:

> GEC's use of such on-reservation assets is a necessary link for providing service to individuals and businesses off the reservation, including to both sides of two ports of entry on the U.S./Canadian border, and into Canada.
>
> (5) If the plaintiffs in *Bird v. Glacier Electric Cooperative, Inc.,* Blackfeet Tribal Cause No. 92CA-269 use the information demanded in their debtor exam to execute on and seize GEC assets within the exterior boundary of the Blackfeet Reservation, irreparable harm will result to persons and businesses outside the reservation. It is not possible to estimate the damages that would result from an interruption in electrical service to an unknown number of customers for an unknown period of interrupted service. Loss of electric service and maintenance assets would seriously undermine GEC's ability to provide service both on and off the reservation. This would, in turn, cause considerable harm to the ability of schools, hospitals, governmental entities and others to provide essential services both on and off the reservation, and would interrupt commerce both

> on and off the reservation as well, and into Canada.

App. 153a-154a.

One panel judge's response to this problem was to say: "well, what ordinarily happens, as we all know, [] if someone with a judgment threatens to execute on specific pieces of personal property, the *ordinary responsible defendant*, once the judgment is clearly capable of execution, they just *pay the money.*" Oral Argument, Ninth Circuit, Feb. 2, 2010 at http://www.ca9.uscourts.gov/ (Media Recordings, No. 09-35216). This is an extraordinary remark. Aside from the due process rights and values GEC has tried to protect for the past eight years for itself and all other non-Indian defendants in tribal courts, GEC is a very small electric cooperative. As the Respondents observed at oral argument, "80 percent of their customers are tribal members." Oral Argument, Ninth Circuit, Feb. 2, 2010 at http://www.ca9.uscourts.gov/ (Media Recordings, No. 09-35216). How GEC is to come up with the money to pay a judgment of $2,157,181.60, plus costs, with interest running at 7% per annum since 1993 in order to conform to someone's notion of a "responsible" defendant, or to have its payments seized by tribal police and/or the BIA for electrical services already provided, and at the same time supply electricity to tribal members and two ports of entry on our northern border with Canada without raising its rates for electricity considerably higher – or

be forced to shut down for lack of operating capital – is unanswered.[4]

CONCLUSION

This Court has said: "tellingly, with only 'one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on *non-Indian land.*'" *Plains,* 128 S. Ct. at 2722 (*quoting Hicks,* 533 U.S. at 360)(emphasis added in *Plains).* Only last year in this seventeen-years-long litigation has it become apparent that Respondents, aided by the tribal courts, maintain that just such authority exists to enforce the judgment simply because some of GEC's assets, which Respondents want to seize and/or sell to satisfy the judgment, are within the exterior boundaries of the reservation. Only on August 31, 2010, did it become clear that the tribal courts are ordering that payments to GEC due and owing from customers, including non-tribal members, within the exterior boundaries of the Blackfeet reservation be seized. App. 99a-101a. Issue preclusion does not foreclose consideration of these recent facts or the fact of the due process violation, decided long after the

---

[4] This Court may take judicial notice of the fact that Senators John Tester and Max Baucus of Montana and Secretary of Homeland Security Janet Napolitano held hearings in Havre, Montana on August 25, 2010, to address issues of Montana's border safety and integrity. App. 250a-252a. And in 2002 GEC warned, with respect to the requested writs of execution, that "any effort to seize the Co-op's assets could disrupt electrical service to thousands of individuals and businesses on the Blackfeet Indian Reservation, and adversely effect not only the economy, but the safety and welfare of the public as well." App. 229a.

federal district court determined there was tribal court subject matter jurisdiction over the original dispute.

This case is of enormous significance to this Nation and to the Indian tribes, numbering over 500, whose members are also citizens of the United States. This is the first time an Indian tribal court, knowing full well that its judgment was adjudicated to be unrecognizable and unenforceable in comity proceedings for a lack of fundamental due process, has nevertheless proceeded to enforce the judgment on its own, issuing numerous decrees that assert tribal authority over payments due and owing to GEC; over non-tribal members, non-Indian fee land, non-Indian property, and a non-tribal institution and its employees and agents not on the reservation, notwithstanding the fact that the tribal court has professed, even before the tribal trial took place, a "deep and abiding concern for assuring due process and equal protection of law to all litigants." App. 136a.

For all the reasons discussed, Petitioner respectfully requests that this Honorable Court grant the Writ.

Respectfully submitted,

PAUL R. HAFFEMAN
Counsel of Record
DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.
The Milwaukee Station, Third Floor
101 River Drive North
P.O. Box 2103
Great Falls, Montana 59403-2103
(406) 761-5243
paul.haffeman@dhhtlaw.com

JULIA A. FOLLANSBEE
FOLLANSBEE & ASSOCIATES
61510 Cougar Trail
Bend, Oregon 97701
(541) 318-5991
juliafollansbee@appealaid.net

Counsel for Petitioner

Blank Page