



FILED
United States Court of Appeals
Tenth Circuit

April 10, 2006

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DON WALTON,
Plaintiff - Appellee -
v.
THE PUEBLO OF SANTA CLARA;
THE PUEBLO OF SANTO DOMINGO;
Cross-Appellant, THE PUEBLO OF ZIA,
Amici Curiae.

TESUQUE PUEBLO; TESUQUE PUEBLO
FLEA MARKET; MARVIN HERRERA, individually
and in his official capacity as
Governor of Tesuque Pueblo; CLARENCE
CORIZ; NORBERT LENO; MICHAEL ALBERT
VIGIL; HAROLD SAMUEL; GARY MOQUINO;
ALLEN DURAN; ROBERT DORAME, JR.;
CLIFFORD MOQUINO, individually
and in their official capacities
as Tribal Councilors of Tesuque
Pueblo; DUANE SILVA, individually
and as an officer of Tesuque Pueblo;
TESUQUE TRIBAL COURT; TESUQUE
TRIBAL CONTRACTORS, 1-10,
Defendants - Appellants - Cross-Appellees.

JICARILLA APACHE NATION; THE NAVAJO
NATION; THE UTE MOUNTAIN UTE TRIBE;
THE PUEBLO OF ACOMA; THE PUEBLO
OF COCHITI; THE PUEBLO OF ISLETA;
THE PUEBLO OF JEMEZ; THE PUEBLO
OF LAGUNA; THE PUEBLO OF NAMBE;
THE PUEBLO OF SANDIA; THE PUEBLO
OF SAN JUAN; THE PUEBLO OF SANTA
ANA;

No.
04-2305
&
04-2310

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D. Ct. No. CIV-04-236 RB/WDS)

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Appellee.

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Domingo, and for the Jicarilla Apache Nation.

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Before TACHA, Chief Circuit Judge, EBEL, Circuit Judge, and CASSELL, Distri
Judge. (1)_

TACHA, Chief Circuit Judge.

Plaintiff-Appellee Don Walton brought this suit against Defendants-App

Tesuque Pueblo and various tribal officials (collectively, "tribal defendants") alleging violations of state and federal law after the tribe market vendor's permit. The tribal defendants moved to dismiss for lack of claiming sovereign immunity barred the action. The District Court denied in part, which the defendants now appeal, and granted the motion in part, which are the cross-appeals. We have jurisdiction under 28 U.S.C. § 1291 over the denial to dismiss based on sovereign immunity. See *Decker v. IHC Hosps., Inc.*, 984 F.2d 435 (10th Cir. 1992). We conclude the District Court erred in determining jurisdiction under *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 1000 (10th Cir. 1980), and therefore, we AFFIRM in part and REVERSE in part.

I. BACKGROUND

The Tesuque Pueblo issued Mr. Walton, a non-Indian, a vendor's permit

(1) The Honorable Paul G. Cassell, District Judge of the United States for the District of Utah, sitting by designation.

products at the Tesuque Pueblo Flea Market. After Mr. Walton had an altercation with another vendor, however, Tesuque officials revoked his permit. Mr. Walton filed suit against the tribal defendants in Tesuque Pueblo Tribal Court. The court granted the motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity. Mr. Walton filed a response and the Tribal Court conducted a hearing on the mat

hearing, where Mr. Walton appeared and was represented by counsel, the Trib ordered briefing on the issue of immunity and set a date for oral argument. argument-again, Mr. Walton appeared and was represented by counsel-the Trib Court granted the motion and dismissed the entire action as barred by sover immunity. Mr. Walton appealed the decision to the Pueblo of Tesuque Court which affirmed the Tribal Court.

Mr. Walton then commenced this action in the District of New Mexico. complaint sought habeas corpus relief and damages for deprivation of libert without due process of law in violation of the Indian Civil Rights Act, 25 □□ 13011303 ("ICRA"), as well as damages for breach of contract and various Again, the tribal defendants moved to dismiss for lack of jurisdiction base immunity. The District Court granted the motion with respect to Mr. Walton for a writ of habeas corpus but it denied the motion as to the remaining no claims. It reasoned that although Indian tribes are generally entitled to immunity under the Supreme Court's decision in Santa Clara Pueblo v. Martin U.S. 49 (1978), Mr. Walton's lawsuit fell within the narrow exception to Sa

Pueblo established by this Court in Dry Creek, 623 F.2d 682. This appeal f

II. DISCUSSION

We review a question of tribal sovereign immunity de novo. Berrey v. Inc., 439 F.3d 636, 643 (10th Cir. 2006). Indian tribes possess the same i suit traditionally enjoyed by sovereign powers. Santa Clara Pueblo, 436 U. with other forms of sovereign immunity, tribal immunity "is subject to the plenary control of Congress." Id. Accordingly, absent explicit waiver of express authorization by Congress, federal courts do not have jurisdiction suits against an Indian tribe. Id. at 58j9; Ordinance 59 Ass'n v. United S the Interior Sec'y, 163 F.3d 1150, 1153 (10th Cir. 1998). Mr. Walton argue District Court has jurisdiction pursuant to the ICRA, 25 U.S.C. □□ 13011303 pursuant to the Indian Self-Determination and Education Assistance Act, 25 □□ 450j50n ("ISDEAA"). We address each statute in turn.

A. The Indian Civil Rights Act

In Santa Clara Pueblo, the Supreme Court held that the ICRA does not a the maintenance of suits against a tribe nor does it constitute a waiver of 436 U.S. at 59. Further, the ICRA does not create a private cause of actio tribal official. Id. at 72. The only exception is that federal courts do under the ICRA over habeas proceedings. Id. at 58, 70 (citing 25 U.S.C. □ that "the only remedial provision expressly supplied by Congress" is the wr corpus). These holdings appear to conclusively resolve the jurisdictional

case—at least with respect to Mr. Walton's non-habeas claims—but two years Clara Pueblo, in Dry Creek, this Court recognized a limited exception to th Clara Pueblo.

In Dry Creek, the plaintiffs, non-Indians, sought to build guest accom a tract of land that they owned but that was located within an Arapahoe and reservation. 623 F.2d at 684. After obtaining the approval of the reserva superintendent, the plaintiffs began construction on the Dry Creek Lodge. lodge was completed, however, the two tribes' Joint Business Council permit Indian family to barricade a road on the family's property that had been th access to the lodge. Id. Dry Creek Lodge and the other plaintiffs sought tribal court, but the tribal judge refused to hear their case, stating that the displeasure of the Council" and that he would not do anything without t permission. Id. The plaintiffs then sought relief in state court and the to federal court. Id. The tribes moved to dismiss the case as barred by s immunity, but we permitted the suit to go forward in federal district court "[t]here has to be a forum where the dispute can be settled." Id. at 685.

Dry Creek has come to stand for the proposition that federal courts ha jurisdiction to hear a suit against an Indian tribe under 25 U.S.C. □ 1302, Santa Clara Pueblo, when three circumstances are present: (1) the dispute i Indian; (2) the dispute does not involve internal tribal affairs; and (3) t forum to hear the dispute. See Ordinance 59 Ass'n, 163 F.3d at 1156. Our

in this field is circumspect, and we have emphasized the need to construe the exception narrowly in order to prevent a conflict with Santa Clara. See *id.* v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir. 1984). Indeed, we have held that the rule has "minimal precedential value" and in the twenty-six years since we created the exception of Dry Creek itself, we have never found the rule to apply. See, e.g., *59 Ass'n*, 163 F.3d at 1158 (citing *Bank of Okla. v. Muscogee (Creek) Nat. v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984)); *Olguin v. Lucero*, 87 F.3d 401, 404 (10th Cir. 1992); *Nero v. Cherokee Nat. of Okla.*, 892 F.2d 1457, 1460 (10th Cir. 1989); *Enter Consultants, Inc. v. U.S. ex rel. Hoddel*, 883 F.2d 890, 892 (10th Cir. 1989); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982); *Ramey Const. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982)).

Here, too, we have no difficulty concluding that the Dry Creek exception is inapplicable. The District Court held that Mr. Walton, like the plaintiffs, had no tribal forum to settle the dispute. To the contrary, Mr. Walton sought a tribal forum, although the decision of that tribunal was ultimately unfavorable to him. A tribal court's dismissal of a suit as barred by sovereign immunity is simply not the same thing as having no tribal forum to hear the dispute, *Olguin v. Lucero*, 87 F.3d at 404 (holding that the third prong of the Dry Creek exception is not satisfied where a tribal court has expressly agreed to hear the dispute), and such a ruling would create a direct conflict with Santa Clara Pueblo. As such, the District Court erred

had jurisdiction pursuant to the Dry Creek exception over Mr. Walton's non-claims against either the Tesuque Pueblo or its individual officers.

As noted, however, federal courts do have jurisdiction under the ICRA habeas proceedings. Specifically, 25 U.S.C. § 1303 makes available to any non-Indian the privilege of the writ of habeas corpus . . . , in a court of the United States, to test the legality of his detention by order of an Indian tribe." Nevertheless, the District Court correctly dismissed Mr. Walton's habeas petition because Mr. Walton has not shown sufficient restraint on liberty to trigger the application of § 1303.(1) I find no error in the District Court's decision to grant summary judgment on Mr. Walton's habeas petition. I affirm the District Court's decision to grant summary judgment on Mr. Walton's habeas petition, a non-Indian, from the Tesuque Pueblo Flea Market

constitute a "detention" as that term is used in § 1303.(2) Cf. *Shenandoah* and health insurance, as well lost distributions and prohibitions on speech restraints on liberty to constitute a "detention" under § 1303 and therefor jurisdiction).

B. The Indian Self-Determination and Education Assistance Act

Mr. Walton also argues that federal jurisdiction exists under the ISDE U.S.C. § 450. The ISDEAA was enacted to promote tribal autonomy by permit to operate programs previously operated by the United States. See *Cherokee Okla. v. Thompson*, 311 F.3d 1054, 1055 (10th Cir. 2002), rev'd on other gro U.S. 631 (2005). Mr. Walton relies on § 450f(c) as a source of jurisdiction negligence claims. We disagree. Section 450f(c)(1) requires the government liability insurance for tribes carrying out self-determination contracts(3) the ISDEAA. In exchange for insurance coverage, the tribe agrees to waive immunity with respect to suits arising out of the tribe's performance of it

(1) The "detention" language in § 1303 is analogous to the "in custody" contained in the federal habeas statute. *Dry v. CFR Court of Indian Offens Choctaw Nation*, 168 F.3d 1207, 1208 n.1 (10th Cir. 1999).

(2) In an affidavit and in his complaint, Mr. Walton also claims that h from the Pueblo itself in July 2003, and that such banishment constitutes a restriction on liberty to trigger the application of § 1303. See *Poodry v. T of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996) (tribe member's banishme tribal lands sufficient to confer jurisdiction under § 1303). In December 20 the Governor of the Pueblo wrote Mr. Walton a letter clarifying that Mr. Wa been banished and was free to enter and traverse the Pueblo. Nothing in th indicates that Mr. Walton has not been permitted to gain entry to the Puebl December 2003. Therefore, we need not determine whether the banishment of Indian from tribal lands constitutes a detention under § 1303 because even as does, Mr. Walton has not shown that he is currently prohibited from enterin See *Maleng v. Cook*, 490 U.S. 488, 491-92 (1989) (habeas petitioner must suf "present restraint"); *Broomes v. Ashcroft*, 358 F.3d 1251, 1254 (10th Cir. 2 Maleng, "'in custody'" language of 2254 . . . requires habeas petitioners custody' under the conviction or sentence under attack when they file the party also *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004) party attacks the factual basis for subject matter jurisdiction, the court resolve disputed jurisdictional facts.").

(3) A self-determination contract is defined as:

[A] contract (or grant or cooperative agreement utilized under section 450e1 of this title) entered into under part A of this subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law

25 U.S.C. 450b(j).

duties. 25 U.S.C. § 450f(c)(3). In this case, however, Mr. Walton is not a self-determination contract and his claims do not arise from any such contract. See *Demontiney v. U.S. Dept. of the Interior*, 255 F.3d 801, 813 (9th Cir. 2001) (no immunity when plaintiff was not a party to a self-determination contract). Accordingly, the ISDEAA is not a source of jurisdiction.

III. CONCLUSION

Because Mr. Walton has not demonstrated the unavailability of a tribal court to hear his dispute regarding the revocation of his vendor's permit, the Dry Creek Act to Santa Clara Pueblo is inapplicable. We further conclude that the ISDEAA does not confer jurisdiction in this case. Accordingly, we REVERSE the District Court's grant of the tribal defendants' motion to dismiss for lack of subject matter jurisdiction and non-habeas claims. We AFFIRM the District Court's dismissal of Mr. Walton's writ of habeas corpus because banishment from the Tesuque Pueblo is not a sufficient restraint on liberty to confer jurisdiction under § 1303. All outstanding motions are DENIED. The case is DISMISSED for lack of jurisdiction.