

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 22-0345

LEONIE CANDICE WEBB

Respondent/Appellant,

-VS-

JAYLENE CECELIA PHILLIPS,

Petitioner/Appellee.

APPELLANT'S OPENING BRIEF

Appealed from the Seventeenth Judicial District of the
State of Montana, in and for the County of Phillips

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STATEMENT OF THE ISSUES

Whether, under Federal Indian law principles, is it reversible error for a district court to fail to make a specific finding of fact as to the parties' status as Indian persons?

STATEMENT OF THE CASE

This matter revolves around the Montana Seventeenth Judicial District Court's *Order* denying Appellant Leonie Candice Webb's *Motion to Dismiss for Lack of Subject Matter Jurisdiction*. It is Appellant's position that following this Court's decision in *In re Estate of Big Springs*, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, if a state district court's ruling implicates principles of Federal Indian law, the district must make specific findings as to the parties' Indian status to properly evaluate whether it has subject matter jurisdiction. Here, the District Court only made a finding as to Appellant. But as the record establishes, all of the parties are likely Indians. A majority of the events took place in Indian country. Thus, the District Court lacks subject matter jurisdiction.

STATEMENT OF FACTS

Appellant is not contesting the District Court's findings of fact as they relate to the underlying dispute. This appeal is solely concerned with the District Court's ability to adjudicate suits involving Indian persons over events the substantial majority of which occurred within the exterior boundaries of an Indian reservation.

I. Procedural Background.

Appellee Jaylene Phillips (“Jaylene”) filed for a Temporary Order of Protection on August 23, 2021 in Phillips County, Montana. Jaylene’s request was granted on August 27, 2021. After a hearing on October 27, 2021, the District Court converted the Temporary Order of Protection to a Permanent Order of Protection pursuant to the District Court’s December 15, 2021 Order. (Ex. 1.) On May 10, 2022, Appellant Candice Webb (“Candy”) filed a Motion to Dismiss the Permanent Order of Protection for lack of subject matter jurisdiction. (Ex. 2.) On June 3, 2022, the District Court denied the Motion to Dismiss. (Ex. 3.) Appellant appeals the Order Denying the Motion to Dismiss.

II. The Who, What and Where.

a. The Who: Parties and their Status.

Candy is a member of the Lummi Nation, a federally-recognized tribe in Washington State. (Ex. 1 at 2:27–3:2.) Candy is also eligible for membership in the Little Shell Chippewa Cree Tribe here in Montana. (*Id.* at 3:1–2.) Candy resides near Lodge Pole, Montana, within the exterior boundaries of the Fort Belknap Indian Community (“FBIC”). (*Id.* at 2:26–27.)

Frank Webb (“Frank”) and Jaylene have two minor children together, K.L.W. and O.T.W. (*Id.* at 2:7.) Frank is Candy’s son. (*Id.* at 2:7–8.) Frank resides a short distance from Candy within the exterior boundaries of the FBIC. (*Id.* at 2:26–27.)

Frank’s father, and Candy’s husband, Dennis Webb (“Dennis”), is an enrolled member of FBIC. (Ex. 2 at 2:2.) Frank is not currently enrolled in any federally-recognized tribe (Ex. 1 at 2:26–27), but because of the status of his parents, Frank is likely an Indian and eligible for enrollment with FBIC. Regardless, the District Court did not make a finding regarding Frank’s Indian status.

Jaylene resides in Billings, Montana. (*Id.* at 3:2.) During briefing on the Motion to Dismiss, Appellant asserted—without contradiction by the Appellee—that Jaylene is eligible for enrollment with FBIC. (Ex. 2 at 2:3.) That said, the District Court did not inquire as to Jaylene’s Indian status at the October 27, 2022 hearing.

Finally, neither child is currently enrolled in any federally-recognized tribe. (Ex. 1 at 2:25.) Again, the District Court failed to make any inquiry into their status. Based on the status of their parents, the children are most likely Indians and eligible for enrollment with FBIC.

b. The What: What Happened?

On May 21, 2021, Frank asked Jaylene to come to his residence within the exterior boundaries of the FBIC to help get the kids’ hair ready for their kindergarten graduation ceremony that afternoon in Dodson, Montana. (*Id.* at 3:4–7.) Jaylene testified at the October 27, 2021 hearing that from the moment she arrived, Frank appeared “irritated and agitated”. (*Id.* at 3:8.) Evidently, Frank was angry Jaylene was seeing another man. (*Id.* at 3:10–13.) An argument ensued and Jaylene became

concerned for her safety. (*Id.* at 3:13–18.) While at the residence, Jaylene downloaded a recording application to her cell phone so she could record the escalating situation. (*Id.*)

It is unclear how long Frank, Jaylene and the children were at Frank's home, but at some point the group left for Dodson, with Candy driving, to attend the graduation ceremony. Frank continued to berate Jaylene during the car ride, even escalating to physical abuse at one point. (*Id.* at 3:21–22.) Candy participated with verbal abuse. (*Id.* at 3:24–25.)

When the parties arrived in Dodson, Candy drove around Dodson for about twenty minutes as Frank continued to berate Jaylene. (*Id.* at 4:1–3.)

c. The Where: Locations of the Incident.

It is undisputed that Candy and Frank traveled from Lodge Pole, Montana, situated within the exterior boundaries of FBIC, to Dodson, Montana, just outside FBIC boundaries. Depending on which mapping site is used, Dodson can be anywhere from 2 to 3 miles from the FBIC boundary.

The road a person takes from Lodge Pole to Dodson significantly impacts their time spent within FBIC. The District Court made no findings as to which route the parties traveled.

From Lodge Pole, there are two routes someone can take: Route 5, which heads north until it intersects with U.S. Highway 2, or Route 11, which heads east

until it intersects with State Highway 204 which runs north/south outside the FBIC boundaries. According to Google Maps, if you take Route 5, it is approximately 33.8 miles. It would take a driver about 33 minutes to travel this route. Again, according to Google Maps, approximately 31.3 miles, or about 30 minutes, of this drive is entirely within the exterior boundaries of the FBIC.

A driver would spend significantly less time on tribal land should they take the Route 11 to State Highway 204 route. There, approximately 11.3 miles, or roughly 14 minutes, are within FBIC. The remaining approximately 25.3 miles are outside Indian country.

A determination as to which route the parties undertook is important. It is undisputed that the initiation of the abuse started within the exterior boundaries of the FBIC. It is similarly undisputed the parties then traveled to Dodson. During the entire ride, Jaylene was continually abused by both Frank and Candy. Therefore, a determination as to which road the parties took has a significant impact on jurisdiction.

In her brief opposing Appellant's *Motion to Dismiss*, Jaylene argued that there was evidence presented at the October 27 hearing that the parties drove around for at least 20 minutes upon their arrival in Dodson—outside the boundaries of FBIC—and continued to abuse Jaylene. Jaylene did not point to the record as to where this evidence existed. Nor did the District Court make a specific finding to such effect.

Based on the District Court's *Order*, it is unclear what evidence the District Court relied on to make its findings and conclusions other than the general undisputed evidence that Frank and Candy abused Jaylene. Under normal circumstances, this finding would be sufficient, but because the District Court failed to inquire as to the parties' Indian status and/or make specific findings as to what route the parties took to get to Dodson, there is a substantial likelihood that FBIC's courts have exclusive jurisdiction.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's findings of fact to determine whether they are clearly erroneous. *Ace Leasing, Inc. v. Boustead*, 2002 MT 213, ¶ 16, 311 Mont. 285, 55 P.3d 371. Findings of fact are clearly erroneous if they are not supported by substantial evidence in the record. *Id.* This Court reviews a conclusion of law to determine whether the district court's interpretation was correct. *Id.* Determinations regarding subject matter jurisdiction are reviewed de novo. *BNSF Ry. Co. v. Cringle*, 2010 MT 290, ¶ 11, 359 Mont. 20, 247 P.3d 706.

SUMMARY OF ARGUMENT

The District Court failed to make **any** finding as to Jaylene, Frank or the children's Indian status. The District Court also failed to specifically determine the precise location of where the events justifying the issuance of a permanent Order of Protection occurred. This failure to make specific determinations as to Indian status

and location infringes on FBIC's inherent sovereignty to adjudicate disputes between its own persons over events that occurred within its own territory.

Instead, the District Court leveraged a fraction of the incident that occurred outside the exterior boundaries of FBIC to justify its exercise of jurisdiction. The District Court's denial of Candy's *Motion to Dismiss* was improper, as the record firmly establishes that there is a substantial likelihood that the parties are all Indians and that the vast majority of the events occurred within Indian country. Candy is asking this Court to vacate the Order of Protection so that the District Court can adequately inquire into the parties' Indian status and location of the dispute to ensure that it does not impede on what is otherwise FBIC's exclusive province.

ARGUMENT

Tribal sovereignty is a bedrock principal that must be reinforced to uphold inherent tribal self-governance. Recognition of these principals requires that state courts must evaluate the interests at stake. But to properly evaluate the interests, state district courts must determine two things: the parties' status as Indians and where the events took place. Here, the district court did not evaluate either.

I. Status and Location are the Two Most Important Facts in Indian Law.

Prior to European contact, Indian tribes were independent, self-governing societies; they exercised their sovereign authority over their territory and all people within it, including non-Indians. *See Duro v. Reina*, 495 U.S. 676, 685 (1990)

(overruled by statute, 25 U.S.C. § 1301, *et seq.*) (“A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign’s territory, whether citizens or aliens. *Oliphant v. Suquamish*, 435 U.S. 191 (1978)] recognized that tribes can no longer be described as sovereigns in this sense.”). However, upon incorporation into the United States, tribes lost parts of that authority by “ceding their lands to the United States and announcing their dependence on the Federal Government.” *Oliphant v. Suquamish*, 435 U.S. 191, 208 (1978).

That said, at its core, tribes retain that inherent tribal sovereignty to adjudicate disputes between its members that occur within its territory. *See, e.g., Williams v. Lee*, 358 U.S. 217, 220 (1959) (“Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.”); *Fisher v. District Ct.*, 424 U.S. 382, 389 (1976) (tribal court jurisdiction exclusive with regard to adoption proceeding involving tribal members). Then by necessity, whether a tribal or state court can exercise its civil jurisdiction turns on the status of the parties and the location of the dispute.

The seminal case in Montana for discussion of subject matter jurisdiction of state courts over possible Indian affairs is *In re Estate of Big Springs*, 2011 MT 109, 360 Mont. 370. There, this Court, after a detailed discussion on the jurisprudence of subject matter jurisdiction as it relates to Indians, held that state district courts lack subject matter jurisdiction over civil adjudicatory disputes involving tribal members

for events that occurred exclusively within the exterior boundaries of an Indian reservation. *Id.* ¶ 58. The rule enunciated by this Court in *Big Springs* is a two-factor analysis, either of which divests state district courts of subject matter jurisdiction should either factor be satisfied. *Id.* ¶ 46. The first question asks whether the exercise of jurisdiction is preempted by federal law. *Id.* The second factor asks whether jurisdiction by a state court would infringe on tribal self-government. *Id.*

The *Big Springs* decision rested on satisfaction of the first disjunctive factor. *Id.* ¶ 53. Public Law 280, which details the requirements states must satisfy to assume civil jurisdiction over tribal members on tribal lands, preempted Montana state courts from exercising its concurrent jurisdiction. *See id.* *See also* §§ 3-1-301 - 302, MCA. To get to this decision required this Court to analyze the “three critical factors” when a case touches on Indian law principles: (1) the parties’ status as Indians; (2) the status of the land where the dispute took place; and (3) whether the case seeks a state’s adjudicatory or regulatory authority. *See Big Springs*, ¶ 50.

II. The District Court Failed to Consider the “Three Critical Factors.”

In *Big Springs*, this Court addressed the scope of Montana state courts’ subject matter jurisdiction as it relates to Indians and Indian land. Consistent with federal precedent, this Court held that when a state court is presented with an issue that invokes Indian law principals—like this exact present case—the touchstone of the analysis turns on (1) the status of the persons(s) at issue; (2) the status of the land

where the events occurred; and (3) whether the dispute invokes regulatory or adjudicatory state action. *Big Springs*, ¶ 28.

There is no doubt this case is invoking a state's adjudicatory authority, as Jaylene seeks an Order from the District Court preventing Candy or Frank from contacting herself and the children. The remaining argument focuses on the parties' status and location.

a. Status of the Parties.

There are three categories of party status: Indian member of the reservation in question ("Member Indian"), Indian non-member of the reservation in question ("Non-member Indian"), or non-Indian. *In re Estate of Big Springs*, ¶ 29 (citing *Montana v. United States*, 450 U.S. 544, 563-66 (1981)). "Member Indian", as the Montana Supreme Court defined in *Big Springs*, are "those Indian persons who are enrolled members of the tribe whose specific reservation is at issue." *Id.* ¶ 29. Non-Member Indian are "those persons who are Indians, but are not enrolled members of the specific tribe whose reservation is at issue (though they may be enrolled members of another tribe)". *Id.* Finally, Non-Indians are persons who are not Indians.

Here, the District Court did not make any effort to determine the status of Jaylene, the children, or Frank. There are five people involved in this matter: the two Respondents, Candy and Frank; and the three victims, Jaylene, O.T.W and K.L.W.

Candy is a non-member Indian as she is an enrolled member of the Lummi Tribe in Washington State.

Frank's Indian status is undetermined because the District Court did not make a finding in its written order. That said, Frank is likely an Indian eligible for enrollment with the FBIC. Both of Frank's parents are Indians: Candy is a non-member Indian and Dennis is an enrolled member of FBIC. Thus, by simple biological processes, Frank is at the very least an Indian—and may even be eligible for enrollment with FBIC. But again, the District Court did not make such a finding in its December 15, 2021 *Order*.

Jaylene's status is similarly undetermined for the same reason as Frank's—the District Court did not inquire as to her status. But as mentioned above, during briefing on the Appellant's *Motion to Dismiss*, it came to light that Jaylene is eligible for enrollment with the FBIC. Therefore, there is also a likelihood that Jaylene fits within the definition of "Indian", further underscoring the importance of making such a determination.

More importantly, the children's Indian status is undetermined. Like Frank and Jaylene, the District Court did not make a finding as to either of their status as an Indian. But based on the fact that there is a substantial likelihood Frank is an Indian, and at least some evidence Jaylene may be as well, O.T.W. and K.L.W. are also likely Indians.

In particular, when it comes to children, tribes have a uniquely important interest in maintaining jurisdiction over enrollment-eligible children. Indeed, Congress codified this interest by passing the Indian Child Welfare Act (“ICWA”). *See* 25 U.S.C. § 1901, *et seq.* While ICWA is not applicable to the current suit, it underscores the point that at least where enrollment-eligible children are involved, tribes have a keen interest in exercising its inherent sovereign authority. But not only does ICWA extend exclusive jurisdiction to those Indian children who are enrolled members of a tribe, it also extends this exclusive jurisdiction to those children *eligible* for enrollment with the tribe. 25 U.S.C. §§ 1903, 1911. This serves to draw an analogy to the present situation, where the children at issue have a substantial likelihood of being eligible for enrollment with FBIC. The District Court’s failure to inquire as to their possible Indian status essentially divested the FBIC of one of its most important functions of its retained sovereign authority—disputes involving its own children. Thus, the Court’s December 15, 2021 *Order* granting a permanent protection order against Candy and Frank should be reversed and remanded back to the District Court so it can make proper findings as to the parties’ status as Indians.

b. Status of the Land.

A land’s status “may be the dispositive factor for jurisdictional purposes.” *Big Springs*, ¶ 34 (citing *Nevada v. Hicks*, 533 U.S. 353, 360 (2001)). Indeed, the United States Supreme Court in *Strate v. A-1 Construction*, 520 U.S. 438 (1997) emphasized

the importance of where events take place on reservation lands. *Strate* involved a motor vehicle accident that occurred on a highway within an Indian reservation between two non-Indians. 533 U.S. at 442-44. While the parties' status was not at issue, the land status was.

A significant portion of the Supreme Court's analysis was dedicated to determining the nature of the land where the accident occurred. *Id.* at 454-456. It was undisputed that the accident occurred on a highway within the exterior boundaries of an Indian reservation. *Id.* It was also similarly undisputed that the land which underlaid the highway was held in trust for the benefit of the tribe. *Id.* at 454. But the Supreme Court held that based on the way the highway was built and maintained, it rendered the land equivalent to alienated, non-Indian land. *Id.*

The Supreme Court reached this conclusion by engaging in a detailed analysis as to how the highway was promulgated. Pursuant to a 1948 Congressional act, North Dakota was granted a highway right-of-way with the approval of the tribe. *Id.* at 454-455. The approval was conditioned, in part, on the state maintaining the highway. *Id.* at 454-456. The only reservation the tribe retained was the right to construct and maintain reasonable crossings. *Id.* In other words, the tribe had no power to exclude the public from using this highway. *Id.* at 454-456. The State maintained the highway, kept it open to the public, and guarded traffic control. *Id.* Moreover, the tribe received just compensation for this grant. *Id.* at 454-456. Therefore, because

tribal interests only tangentially touched on this dispute, tribal courts lacked subject matter jurisdiction to hear this case.

Here, this fact-heavy analysis was left by the roadside in the District Court. As mentioned above, there are two ways to reach Dodson from Lodge Pole: Route 5 to U.S. Highway 2 or Route 11 to Montana Highway 204. Depending on which path a person takes, they can be anywhere from about 15 minutes to over 30 minutes within the FBIC. Moreover, as *Strate* illustrates, any grant or easement overrunning the road should also be considered. But unlike *Strate*, the District Court failed to make any finding as to the route the parties took to get to Dodson. This fatal flaw by the District Court leaves bare the disregard to tribal sovereignty made in this case.

CONCLUSION

The District Court's lack of specific findings regarding the parties' Indian status and the status of the land leaves more questions than answers. To properly give deference to tribal sovereignty, the District Court must make specific findings where Indian interests are at stake. The District Court's lack of such findings is reversible error and must be remanded back in accordance with this Court's opinion.

DATED this 7th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M.R.App.P., I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word, is not more than [10,000 (principal brief) or 5,000 (reply or amicus brief)] words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 7th day of October, 2022.

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CERTIFICATE OF MAILING

The undersigned does hereby certified that I have filed a true and accurate copy of the foregoing Notice of Appeal with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing Notice of Appeal upon the Clerk of the District Court, each attorney of record, each court reporter from whom a transcript will be ordered, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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CERTIFICATE OF SERVICE

I, Thane P. Johnson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-07-2022:

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