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This Land Is Our Land, or Coeur d'Alene Tribe of Idaho v. State of Idaho

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THIS LAND IS OUR LAND, OR COEUR D'ALENE TRIBE OF IDAHO V. STATE OF IDAHO

Pamela D. Bucy*

I. INTRODUCTION

When the United States government wanted to buy the lands of his exhausted and defeated people, Chief Seattle responded with a natural eloquence stemming from his oral tradition:[1]

> We love this earth as a newborn loves its mother's heartbeat. If we sell you our land, care for it as we have cared for it. Hold in your mind the memory of the land as it is when you receive it. Preserve the land and the air and the rivers for your children's children and love it as we have loved it.[2]

Chief Seattle's speech exemplifies his innocence regarding the ramifications of property ownership. The immediate occupation of the land by white settlers quickly brought home a full understanding of the Western concept of land ownership to the Native American People.

Invasion of tribal sovereignty, often by immense federal and state regulatory agencies has forced tribes to accept the concept of ownership and to operate within its parameters.[3] Recently tribes have begun to assert ownership rights over minerals, hunting and fishing, timber, and water throughout their reservations.[4] Generally these claims are based upon the treaties which established the reservations.[5] In order to establish exclusive ownership, tribes are filing quiet title actions against the states in which their reservations are located.[6] *Coeur d'Alene Tribe of Idaho v. State of Idaho*[7] is one such action. The Ninth Circuit's holding may provide guid-

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1. SUSAN JEFFERS, BROTHER EAGLE, SISTER SKY - A MESSAGE FROM CHIEF SEATTLE 25 (1991).

2. *Id.* at 20-21.

3. *See* Montana v. United States, 450 U.S. 544 (1981) (Crow tribe declares ownership of the Big Horn River bed in an attempt to gain regulatory control over non-Indian hunting and fishing within the border of the reservations).

4. *See, e.g., Id.*; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

5. *See Montana*, 450 U.S. at 544 (relying on treaties which created its reservation, the Tribe claimed authority to prohibit hunting and fishing by nonmembers of the Tribe even on lands within the reservation owned in fee simple by non-Indians).

6. *See, e.g.*, Manypenny v. United States, 948 F.2d 1057 (1991); Harrison v. Hickel, 6 F.3d 1347 (1993).

7. Coeur d'Alene Tribe of Idaho v. State of Idaho, 42 F.3d 1244 (9th Cir. 1994), *cert. grant-*

ance for tribes seeking to exercise the kind of ownership and control over their reservations that eluded Chief Seattle but is so necessary in today's world. This case note will present the procedural facts of *Coeur d'Alene* and explain the court's holding, focusing exclusively on the holding against the defendant state officials in their individual capacity Finally, this note will attempt to predict how the Supreme Court is likely to rule on this decision.

II. FACTS

On November 8, 1873, President Grant issued an Executive Order establishing a reservation in the Idaho Territory for the Coeur d'Alene Tribe.[8] Congress then ratified this Executive Order.[9] The Tribe claims that this Order gives them beneficial interest in the beds and banks of all navigable water within the reservation, including the submerged land under Lake Coeur d'Alene, subject only to the trusteeship of the United States.[10]

In *Coeur d'Alene Tribe of Idaho v State of Idaho*, the Coeur d'Alene Indian Tribe ("the Tribe") filed a complaint in federal district court in Idaho naming the State of Idaho, Idaho State Board of Land Commissioners, Idaho State Department of Water, and several state officials, both individually and in their official capacity, as defendants.[11] The complaint sought an order quieting title in favor of the Tribe to the beds, banks, and waters of all navigable water, including Lake Coeur d'Alene, within the boundaries of its reservation.[12] The Tribe claimed ownership through an Executive Order, which created the reservation,[13] and in the alternative through unextinguished aboriginal title.[14] The Complaint also sought a declaratory judgment designating the land and water in question for the exclusive use, occupancy, and enjoyment of the Tribe.[15] The complaint further requested that the court declare invalid all Idaho statutes and ordinances regulating the disputed lands and waters, and enjoin the State of Idaho, its agencies, and officials from taking any action regulating or affecting the Tribe's right to the lands and waters.[16]

In response, the defendants filed a motion to dismiss on the grounds

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ed, 116 S. Ct. 1415 (1996).

8. Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2049 (1997).
9. *Id.*
10. *Id., See also* Act of Mar. 3, 1891, ch. 543, § 19, 26 Stat. 1026-1029.
11. *Id.* at 1247.
12. *Id.*
13. Exec. Order, ch. 543 § 19, 26 Stat. 989, 1026-29 (1891).
14. *Coeur d'Alene*, 42 F.3d at 1247.
15. Coeur d'Alene Tribe of Idaho v. State of Idaho, 798 F Supp. 1443, 1445 (D. Idaho 1992).
16. *Id.*

that the action was barred by the Eleventh Amendment[17] and the complaint failed to state a claim upon which relief could be granted.[18] The district court held that the Eleventh Amendment prohibited all claims against Idaho and its agencies.[19] Finding the quiet title and declaratory relief retroactive in nature, the court concluded the Eleventh Amendment barred the action because it was equivalent to seeking damages.[20] Finally, following the rationale of *Montana v. United States*,[21] the district court declared the Tribe's claim to title indefensible.[22] This ruling allowed the court to dismiss the claim for injunctive relief against the officials because the complaint failed to state a violation of federal law Violation of federal law was the exception to Eleventh Amendment Immunity, established in *Ex Parte Young*,[23] on which that cause of action was based.[24] The Tribe appealed.[25]

III. HOLDING

The Ninth Circuit Court of Appeals agreed with the district court, and affirmed the part of its ruling which stated that the Eleventh Amendment barred all claims against the State of Idaho and its agencies, as well as the quiet title action against the state officials.[26] However, the Ninth Circuit reversed and remanded the district court's dismissal of the declaratory and injunctive relief sought against the state officials, thus also reversing the lower court's holding that the Tribes failed to state a claim.[27] The appellate court held that the injunctive and declaratory relief sought by the Tribe against the state officials did not constitute damages, but instead precluded future violations of federal law, and therefore was not barred by Eleventh Amendment immunity [28]

Relying on *Florida Department of State v. Treasure Salvors, Inc.*,[29]

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17. U.S. CONST. amend. XI (stating that the judicial power of the United States does not extend to cases commenced or prosecuted against one of the United States by Citizens of another state, or citizens of a foreign state).

18. *Coeur d'Alene I*, 798 F. Supp. at 1445.

19. *Coeur d'Alene*, 42 F.3d at 1247.

20. *Id.*

21. *Montana*, 450 U.S. at 544. (Supreme Court held that submerged lands presumptively passed to the state upon entry into Union, unless affirmative, pre-statehood action, in favor of the Tribe, defeats state title).

22. *Coeur d'Alene*, 42 F.3d at 1247.

23. Ex Parte: Edward T. Young, 209 U.S. 123 (1908) (permits a suit against a state official that provides injunctive relief to vindicate constitutional rights).

24. *Coeur d'Alene*, 42 F.3d at 1247.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1254.

29. State of Florida, Dept. of State v. Treasure Salvors, Inc., 689 F.2d 1254 (5th Cir. 1982) (the

the Court of Appeals concluded that if, upon remand, the district court finds that the property at issue belongs to the Tribe under the federal Executive Treaty, it may declare the Tribe the owner of the disputed property against everyone except the State of Idaho.[30] If this is so declared, the Tribe will then have the right to prohibit state officials from interfering with their possessory interest in the property However, it will not hold clear title to the disputed property [31] The Court of Appeals reacted to this apparent dilemma by stating:

> Our conclusion undoubtedly will not satisfy any of the parties involved. However, just as we may not exercise jurisdiction over the state to more fully resolve this controversy, we may not decline jurisdiction to the extent that it exists. (citations omitted.) We will not refuse to enforce the federal rights of Indian tribes against action by state officials merely because we cannot afford them complete relief.[32]

The State of Idaho appealed this decision to the Supreme Court.[33] Recognizing the potential impact of this decision on state sovereignty, twenty-three states, including Montana, and various government agencies filed amicus briefs on behalf of the State of Idaho.[34]

IV DISCUSSION OF PRIOR LAW

The Eleventh Amendment was created in reaction to a Supreme Court opinion which construed Article III, Section 2,[35] of the Constitution to give the Supreme Court original jurisdiction over a suit brought by a South Carolina citizen against the State of Georgia.[36] The Supreme Court's decision to accept jurisdiction "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted."[37]

The Eleventh Amendment states:

Court quieted title to artifacts in favor of treasure hunters against everyone except the State of Florida).

30. *Coeur d'Alene*, 42 F.3d at 1255.

31. *Id.*

32. *Id.*

33. Petitioners' Brief at 1, Coeur d'Alene Tribe of Idaho v. State of Idaho, 42 F.3d 1244 (9th Cir. 1994).

34. Telephone Conversation with Steven W Strack, Deputy Attorney General, State of Idaho, February 26, 1997.

35. U.S. CONST. art. III, § 2 (stating that the judicial power shall extend to all cases in Law and Equity between a State and a citizen of another state).

36. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 97 (1984) (citing Chisolm v. Georgia, 2 Dall. 419, 1 L.Ed. 1282 (1934)).

37. *Id.* (quoting Monaco v. Mississippi, 292 U.S. 313, 325 (1934)).

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[38]

"The Eleventh Amendment stands not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty "[39] Thus, with limited exception, a state's sovereign immunity as recognized by the Eleventh Amendment bars suit against it in federal courts.

A. Eleventh Amendment Exceptions

Despite this broad interpretation of the Eleventh Amendment, states have not escaped suits in federal courts, as the courts recognized several exceptions to Eleventh Amendment immunity [40] The Supreme Court held that a state may waive its Eleventh Amendment immunity by expressly consenting to a waiver of immunity, or impliedly, by an act of Congress which clearly abrogates state immunity, or if the case falls within the *Ex Parte Young*[41] doctrine.[42]

1. Express Consent

A state waives Eleventh Amendment immunity upon unequivocal consent to be sued.[43] Only legislative enactment, stating the state's clear intention to subject itself to suit in federal court, constitutes an express waiver or consent to suit.[44]

2. Plan of Convention or Implied Waiver

If a state does not expressly waive its sovereign immunity, a court may find an implied consent or waiver in order to bypass Eleventh

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38. U.S. CONST. amend. XI.

39. Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991).

40. Marc S. Feinstein, *Cheyenne River Sioux Tribe v. South Dakota, Indian Gaming, and the States Eleventh Amendment Immunity: Where Will the Conflict in the Circuits Fuse?*, 39 S.D.L. Rev. 604, 623-624 (1994)

41. *Ex Parte Young*, 209 U.S. at 168 (permits a suit against a state official that provides injunctive relief to vindicate constitutional rights).

42. Feinstein, *supra* note 40, at 624.

43. *Pennhurst*, 465 U.S. at 99.

44. Amber J. Ahola, *"Call It Revenge of the Pequots," or How American Indian Tribes Can Sue States Under the Indian Gaming Regulatory Act Without Violating the Eleventh Amendment*, 27 U.S.F L. Rev. 907, 917 (1993).

Amendment immunity [45] This theory begins with the premise that states impliedly gave up certain rights to the federal government upon entering the Union.[46] Referred to as the "plan of convention" theory,[47] it states that "by entering a field of economic activity that is federally regulated, the state impliedly consent[s] to be bound by that regulation and to be subject to suit in federal court."[48] Abrogating a state's Eleventh Amendment immunity using this doctrine requires Congress to clearly and unequivocally void state immunity and requires the state to enter a field of economic activity regulated by the federal government.[49] However, the Court in *Blatchford v Native Village of Noatak*, held that the "plan of convention" theory did not apply to suits brought by Indian tribes against states.[50]

3. The *Ex Parte Young* Doctrine

The *Ex Parte Young* doctrine is not technically an exception to a state's Eleventh Amendment immunity because it actually deals with the actions of state officials, not with actions of the state.[51] This doctrine, however, has been used effectively to overcome Eleventh Amendment immunity [52]

In 1906, the Minnesota Railroad Commission, by way of legislative acts, implemented a price fixing plan for the carriage of various classes of merchandise.[53] The passage of the acts resulted in the filing of nine equity suits in federal circuit court.[54] The suits, brought by stockholders of the respective railroad companies, named numerous defendants including Edward T Young, the Attorney General of the State of Minnesota.[55] One purpose of the suits was to enjoin Young from enforcing the provisions of the acts or instituting any action or proceeding against the railway com-

45. *Id.*

46. *Blatchford*, 501 U.S. at 780-82 (a damages action brought against the Tribe by a state citizen).

47. *Id.*

48. *Id.*

49. Ahola, *supra* note 44, at 918.

50. *Blatchford*, 501 U.S. at 782-84. The Court held that it was the "mutuality of the concession" upon entering the Union that created this waiver between sister states. Thus, tribes could not possibly have consented as they were not parties to the constitutional convention. The Court further reasoned that if states were unable to sue tribes because of this lack of mutual consent, tribes also lacked the ability to sue states. *Id.*

51. Ahola, *supra* note 44, at 916 n.70.

52. *See, e.g.*, Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982); *Pennhurst*, 465 U.S. at 102; Almond Hill Sch. v. United States Dep't of Agric., 768 F.2d 1030, 1034 (1985).

53. *Ex Parte Young*, 209 U.S. at 128.

54. *Id.* at 129.

55. *Id.*

pany and its officers.[56]

The circuit court issued a temporary restraining order against Attorney General Young.[57] Young promptly moved to dismiss all claims against him on the ground of Eleventh Amendment immunity, stating that, as Attorney General of the State of Minnesota, a suit against him was essentially a suit against the state.[58] Nevertheless, the court granted the temporary injunction against Young.[59]

Following the injunction, Young filed a petition in state court requesting an order to compel compliance with the acts.[60] After this order was issued and served upon the Northern Railway Company,[61] the federal circuit court ordered Young to show cause why he should not be punished for contempt.[62] Young's answer stated the same Eleventh Amendment argument set out in his earlier Motion to Dismiss.[63] A contempt order was issued against Young.[64]

On appeal, the Supreme Court held that the acts passed by the Minnesota legislature were unconstitutional.[65] The Court then held that a suit challenging the constitutionality of a state official's action was not one against the state; therefore the Eleventh Amendment did not prevent federal courts from issuing equitable relief.[66] The Court reasoned that a state official acted without state authority when he enforced a law that violated an individual's constitutional rights.[67] The doctrine attempts to honor state sovereignty with this narrowly tailored exception, while at the same time give life to the idea of federal supremacy under the Supremacy Clause.

4. The *Ex Parte Young* Doctrine and Property Claims

In 1897, the Supreme Court held that the Eleventh Amendment did not bar real property claims against state officials.[68] The Supreme Court extended the exception to personal property cases.[69] In *Treasure Salvors*, treasure hunters filed an action seeking a declaration of title to an aban-

56. *Id.* at 129-130.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 133.
61. *Id.*
62. *Id.* at 134.
63. *Id.*
64. *Id.*
65. *Id.* at 149.
66. *Id.* at 159.
67. *Id.*
68. Tindal v. Wesley, 167 U.S. 205 (1897).
69. *Treasure Salvors*, 458 U.S. at 685-89.

doned ship located on the ocean floor off the Florida Keys and enjoining Florida Archive officials from releasing artifacts from the ship.[70] Recognizing the delicate balance required to maintain state sovereignty and Federal Supremacy in property title disputes, the Supreme Court developed a middle ground approach in *Treasure Salvors*.[71] The Court articulated the following test to determine whether a suit against state officials is barred by the Eleventh Amendment:

> a. Is this action asserted against officials of the State or is it an action against the State itself? b. Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? c. Is the relief sought by [plaintiffs] permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury?[72]

Application of this test established two clear cut, although arguably contrary, rules. First, federal courts may not hear quiet title actions in which the state claims an interest in the property without state consent.[73] Second, an action seeking to enjoin state officials from an ongoing violation of federal law is not precluded simply because the determination of the issue might put the plaintiff in possession of the disputed property [74] While the Court did not acknowledge the difficulty of logically reconciling the two rules, it has since held that it is nevertheless bound by both.[75] The *Coeur d'Alene* case clearly illustrates the difficulty of harmonizing these two rules.

V ANALYSIS

In deciding the issue of whether declaratory and injunctive relief against state officials was appropriate in *Coeur d'Alene*, the Ninth Circuit meticulously followed the reasoning used by the Supreme Court in the *Treasure Salvors* case. One important aspect of the court's decision is not necessarily its analysis, but its willingness to make the analysis at all. The court's examination of this issue is a strict analysis of Eleventh Amendment immunity under *Ex Parte Young* and its progeny with no discussion of federal Indian law

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70. *Id.* at 670.
71. *Id.* at 685-89.
72. *Id.* at 690 (quoting Quern v. Jordon, 440 U.S. 332, 346-47 (1979)).
73. *Id.* at 685-89.
74. *Id.*
75. *Coeur d'Alene*, 42 F.3d at 1252.

A. Application of the Treasure Salvors Test

The Ninth Circuit's desire to keep this case in federal court manifested itself in the court's diligent application of the three part test articulated in *Treasure Salvors*. However, the *Treasure Salvors* case dealt with personal property, not real property.[76] At no time in its analysis did the *Coeur d'Alene* court distinguish between the two. This deficiency resulted in the court's failure to address adequately the possible effects of its holding on the State of Idaho's interest in the property

1. Is this an action asserted against officials of the state or is it an action brought against the state itself?

Granting declaratory and injunctive relief in a quiet title action against state officials claiming interest in the property undoubtedly impacts a state's interest in the disputed property Acknowledging this difficulty, the court stated that "the fiction that an action in violation of federal law cannot be an action of the state breaks down when confronted by the state's claim of title to property "[77] The *Coeur d'Alene* court found that states have a right to claim title to property in derogation of federal law and still enjoy protection from suit by virtue of the Eleventh Amendment.[78] However, the court further concluded that this does not create an exception to the rule that state officials are bound by the federal law when there is a conflict between state and federal law [79]

The general criterion for determining when a suit against state officials is actually a suit against the state is the effect of the relief sought.[80] Suits seeking retroactive damages are barred by the Eleventh Amendment.[81] The court states that although this rule appears to bar relief, the *Ex Parte Young* exception is applicable.[82] This exception provides that state officials violating federal law are not deemed to be acting within state authority, and thus are not shielded by state immunity [83] In reaching its decision, the court failed to discuss the potential effect that its ruling would have on the State of Idaho's interest in the property [84] Instead the

76. *Treasure Salvors*, 458 U.S. at 670. Treasure hunters sought a declaration of title to an abandoned ship and all artifacts from the ship and an injunction preventing Florida officials from releasing any of the artifacts. *Id.*

77. *Coeur d'Alene*, 42 F.3d at 1254.

78. *Id.*

79. *Id.*

80. *Pennhurst*, 465 U.S. at 101.

81. *Id.* at 103.

82. *Coeur d'Alene*, 42 F.3d at 1251.

83. *Id.*

84. *Id.*

court found that the injunctive and declaratory relief sought by the Tribe did not constitute damages, when it stated:

> it seeks a determination under federal law of the Tribe's right to possess, use, and control the beds, banks, and waters of navigable waterways within the Coeur d'Alene Reservation in the future. Thus to the extent that the declaration and injunctive relief binds state officials in accordance with what the district court finds to be the Tribe's right to the property, it is allowable.[85]

A scenario in which this relief would not adjudicate the state's interest in the property is difficult, if not impossible, to imagine. The State of Idaho clearly understands the implications of the court's ruling. The State argued that even though strict principles of res judicata may not apply, as the state is no longer a nominal party in the determination of this quiet title dispute, an adjudication of title in favor of the tribe will be a practical bar on any further assertions of state ownership of the property.[86] Because such a holding from a federal court of appeals would serve as precedent in all further proceedings, the state concludes that "for all practical purposes the state would be forever foreclosed from asserting its sovereignty over the disputed property."[87]

Nevertheless, the Ninth Circuit refused to recognize this relief as providing any kind of final adjudication on the State of Idaho's interest.[88] The court stated that if the district court determines that the property belongs to the Tribe, it can declare the Tribe the owner against everyone except the State of Idaho. It further concluded that even if the Tribe ultimately prevails on the merits of the case, neither the Tribe nor Idaho will hold clear title to the property

While formulating a remedy alleviating this dilemma would prove difficult, it may be possible. The Ninth Circuit court did not address this issue. Therefore, the task of separating this remedy from a direct adjudication of state title must either be tackled by the Supreme Court or left to further litigation between the parties. Unfortunately for the Tribe, this gives the Supreme Court little incentive to adhere to the strict *Ex Parte Young* analysis established by the court of appeals.

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85. *Id.* at 1255.

86. Petitioners' Brief at 30, Coeur d'Alene Tribe of Idaho v. State of Idaho, 42 F.3d 1244 (9th Cir. 1994).

87. *Id.*

88. *Coeur d'Alene*, 42 F.3d at 1255.

2. Does the challenged conduct constitute an unconstitutional withholding of property or merely tortious interference with property rights?

The court rightly devoted only one paragraph to its analysis of this element of the test.[89] The court began with the general premise that state officials acting within the scope of state law and violating no federal law are protected by state Eleventh Amendment immunity.[90] The court added that the determination of whether federal rights have been violated often requires a trial on the merits.[91] Thus, the court concluded that merely alleging an unconstitutional withholding of property should satisfy this prong of the test.[92] The Tribe's claim to ownership based upon a federal treaty combined with the regulatory actions of the state officials constituted a sufficient allegation.[93] To require plaintiffs to do more would defeat the purpose of notice pleading by forcing plaintiffs to prove much of their case in the pleadings in order to get the case to trial.

3. Is the relief sought by the Plaintiffs permissible prospective relief or is it analogous to a retroactive award, i.e. damages?

The court began its analysis of this prong by citing the general rule that suits against state officials seeking relief, which is retrospective in nature, such as damages, are prohibited by the Eleventh Amendment.[94] Instead of focusing on the effect that a positive ruling in favor of the Tribe would have on the State of Idaho, the court focused on the effect that the proposed remedy would have on the Tribe. The court stated the issue in this way:

> Although it has often been stated that the Eleventh Amendment forbids relief that would require the payment of funds from the state treasury, the overriding question is whether the relief sought would remedy future rather than past wrongs. An injunction that will in practical effect require payment of funds out of the state treasury is nonetheless permissible if it requires only that officials conform their future actions to federal law.[95]

By formulating the issue in this way, the court again escaped acknowledging the "practical effect" of the proposed remedy on the State of Idaho,

89. *Id.* at 1251.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1251 (citing Ulaleo v. Paty, 902 F.2d 1395, 1398 (9th Cir. 1990)).
95. *Id.* at 1252.

and kept the case within the *Ex Parte Young* doctrine.

The court only touched on the effect its remedy would have on Idaho in its attempt to follow the two contradictory rules established in *Treasure Salvors*. The first of the *Treasure Salvors* rules states that federal courts may not hear actions to quiet title to property in which the state claims an interest without the state's consent.[96] The second provides that declaratory and injunctive relief against state officials to prevent future violations of federal law is available even if that relief works to put the plaintiff in possession of property also claimed by the state.[97]

The circuit courts are split over the application of these rules. Some adhered to the *Ex Parte Young* doctrine and allowed suits enjoining state officials from violating federal law in the quiet title context.[98] Yet other circuits held that declaratory and injunctive relief that necessarily involves the adjudication of a state's property interest is comparable to damages and is therefore precluded.[99] The *Coeur d'Alene* court concluded that these holdings, barring injunctive and declaratory relief against state officials, were foreclosed by the Supreme Court precedent of *Treasure Salvors'* second rule.[100] The Court held that "while the conflict between the two rules presents a conceptual difficulty that perhaps cannot be resolved logically, we are nevertheless bound by both."[101] As a result, the court ruled that because the declaratory and injunctive relief sought by the Tribe would not compensate for past violations of constitutional rights, but would instead prevent future violations, the action against the state officials was not barred by state immunity [102]

Although the court did not address how to best implement this remedy, it did recognize the difficult position in which all parties would be left subsequent to a trial on the merits declaring the Tribe the owner of the disputed property [103] However, as this holding simply keeps the Tribe in federal court, the court concluded by saying:

> just as we may not exercise jurisdiction over the state to more fully resolve this controversy, we may not decline jurisdiction to the extent that it exists. (citations omitted). We will not refuse to enforce the feder-

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96. *Treasure Salvors*, 458 U.S. at 685-89.

97. *Id.*

98. *See, e.g., id.*

99. *See, e.g.*, John G. & Marie Stella Kennedy Mem. Found. v. Mauro, 21 F.3d 667, 673 (5th Cir. 1994); Fitzgerald v. Unidentified Wrecked & Abandoned Vessel, 866 F.2d 16, 17 n.1 (1st Cir. 1989); Harrison v. Hickel, 6 F.3d 1347, 1348 (9th Cir. 1993).

100. *Coeur d'Alene*, 42 F.3d at 1252.

101. *Id.*

102. *Id.* at 1254.

103. *Id.* at 1255.

> al rights of Indian tribes against action by state officials simply because we cannot afford them complete relief.[104]

Even if the Supreme Court upholds the ruling of the appellate court, the Tribe still faces the burden of proving ownership. However, the court of appeals holding allows them to attempt to do so in a less biased forum, federal court.

B. Applicable Indian Law and the Montana Presumption

In its rote application of the *Treasure Salvors* test, the court failed to discuss the implications of the plaintiff's status as an Indian tribe. The *Ex Parte Young* doctrine was established to protect an individual against state violation of guaranteed federal rights.[105] As the Couer d'Alene tribe is technically a quasi-sovereign nation, the applicability of the doctrine is unclear.[106] This issue was not addressed by the court. However, one underlying policy surrounding the *Ex Parte Young* exception seeks to allow disadvantaged plaintiffs to escape a forum adverse to the protection of Constitutional rights.[107] Indian tribes have historically received unfavorable treatment in state courts and this may account for the court's failure to address the issue.[108]

The court's approach was surprising given the settled case law surrounding land title disputes available in the area of federal Indian law [109] In 1823 in *Johnson v. M'Intosh*, the Court established that tribes did not own fee title to their lands, but a lesser interest that the Court characterized as a "right of occupancy "[110] A century later, in *Montana v. United States*, the Court confirmed that in settling disputes over submerged lands, courts must start with the presumption that the beds of navigable waters remain in trust for future states and pass to the new states when they enter the Union.[111]

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104. *Id.*

105. *Ex Parte Young*, 209 U.S. at 168.

106. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (holding that although the Cherokee tribe succeeded in demonstrating that it was a "state" capable of managing its own affairs, the tribe could not be considered a "foreign state" for the purposes of filing suit against Georgia. The Court instead denominated Indian tribes as "domestic dependent nations").

107. *Ex Parte Young*, 209 U.S. at 168.

108. United States v. Kagama, 118 U.S. 375 (1886) (holding that because the citizens of the States where reservations are located are often the tribes deadliest enemies because of historical animosity, major crimes should be tried in federal court).

109. *See Montana*, 450 U.S. at 553 (The Supreme Court held that the Federal Government holds lands under navigable waters in trust for future States, to be granted to such States when they enter the Union, and there is a strong presumption against conveyance of such lands by the United States).

110. Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

111. *Montana*, 450 U.S. at 553.

In *Montana*, the Crow Tribe claimed title to the submerged lands of the Big Horn River by virtue of the treaty establishing its reservation.[112] The Court rejected the Tribe's claim, holding that "the mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land "[113] The Court added that there is a strong federal policy against conveyance, and, therefore, unless there is evidence of some "international duty or public exigency, submerged lands will not be held to have been conveyed."[114]

Aware of the similarities with the *Montana* case, and that resolution of the ownership question was inevitable, the *Coeur d'Alene* court proceeded to decide the Eleventh Amendment immunity issue. If invoked, this presumption against Indian title would preclude an Eleventh Amendment analysis. If there is no legitimate claim to ownership of the disputed property based on a federal treaty, then the Tribe cannot allege an ongoing violation of federal law Thus the case would no longer fall within the *Ex Parte Young* exception.

VI. CONCLUSION

The Ninth Circuit's decision in *Coeur d'Alene Tribe of Idaho v State of Idaho* does not give the Coeur d'Alene tribe title to the disputed land. The Ninth Circuit, with its rote application of the *Ex Parte Young* doctrine and its progeny, simply kept the Tribe in federal court. This decision allows the Tribe to attempt to prove ownership in a forum which they consider to be more favorable, or less biased. The Tribe, like any other plaintiff whose federal rights have been violated, deserves such a forum.

Notwithstanding, the Tribe is not like any other individual plaintiff. For 170 years, the Supreme Court has placed tribes in a separate category from other plaintiffs and by doing so has developed an immense body of federal Indian law The question is whether the Supreme Court will analyze the *Coeur d'Alene* case from an Indian law or an *Ex Parte Young* perspective. If the Supreme Court begins its analysis with the *Montana* presumption against Indian title, the Tribe is out of federal court. Because the Ninth Circuit failed to address the effect of its holding on the State of Idaho's interest in the property, the Supreme Court has little incentive to follow the strict *Ex Parte Young* analysis used in *Coeur d'Alene.*

However, the Supreme Court should recognize the underlying policy, assisting disadvantaged plaintiffs in the protection of constitutional rights, behind *Ex Parte Young* and the need for a trial on the merits of ownership

112. *Id.* at 554.
113. *Id.*
114. *Id.*

of the disputed property and follow the strict *Ex Parte Young* analysis provided by the Ninth Circuit. Though the ramifications of ownership were unclear to Chief Seattle, they are very clear to the Coeur d'Alene Tribe and a dismissal of this action before a trial on the merits in federal court will, for all practical purposes, destroy any chance the Tribe has to exercise this modern understanding.

POSTSCRIPT

On June 23, 1997, the United States Supreme Court issued its decision in the case of *Idaho v Coeur d'Alene Tribe of Idaho*.[115] Surprisingly, the Supreme Court conducted an *Ex Parte Young* analysis in rendering its decision and did not invoke the *Montana* presumption.[116] Not surprisingly and regardless of this fact, in a PLURALITY OPINION, the Court reversed the Ninth Circuit's decision.[117] Justice Kennedy delivered the opinion of the Court concluding that the Tribe's suit against the state officials could not proceed in federal court.[118]

The Court defined the scope of the *Ex Parte Young* doctrine. It found that regardless of the fact that the officials had been named and served as individuals, the State of Idaho would continue to have an interest in the litigation because state policies and procedures were at issue.[119] The Court held that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of reflexive reliance on an obvious fiction.[120]

The Court summarily dismissed the Tribes reliance on the *Treasure Salvors* case finding that the state officials in *Treasure Salvors* were acting beyond the scope of their state-conferred authority, a theory the Tribe did not allege.[121] Next, the Court held that although an ongoing violation of federal law is "ordinarily sufficient" to invoke the *Young* exception, the Tribe's suit was essentially the equivalent of a quiet title action which implicated special sovereignty issues.[122] Furthermore the "far-reaching and invasive relief" sought by the Tribe would essentially shift all benefits

115. Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997).
116. *Id.* at 2040.
117. *Id.* at 2043.
118. *Id.*
119. *Id.* at 2034.
120. *Id.*
121. *Id.* at 2040.
122. *Id.*

of ownership from the State to the Tribe.[123] The Court finally held that courts, in determining the applicability of the *Young*, exception should consider "whether there are 'special factors counseling hesitation.'"[124] Thus, the Court determined that the applicability of the *Young* exception is to be ascertained on a case by case basis. Finally holding,

> [u]nder these particular and special circumstances, the Young exception is inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.[125]

Justice O'Connor concurred with this judgment.[126] However, she disagreed with the principal opinions holding that courts must engage in a case specific analysis.[127] She felt that the principal opinion replaced a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law with a vague balancing test.[128] Justice O'Connor found the fact that the Tribe sought "to divest the State of all regulatory power over submerged lands, —in effect to quiet title to sovereign lands" dispositive.[129] For Justice O'Connor this remedy took the case out of the *Young* exception because it made it a suit against the state.[130]

Unlike the principal opinion, however, Justice O'Connor realized that the mere availability of a state forum should not be a weighty factor in determining federal court jurisdiction.[131] Notwithstanding, although she alluded to the "adequacy" of the state forum, she did not recognize or discuss the historically unfavorable treatment that tribes have received in state forums.[132]

The Dissent, authored by Justice Souter, disagreed with both the principal opinion and Justice O'Connor, holding that "[t]his is a perfect example of a suit for relief cognizable under *Ex Parte Young*."[133] Citing *United States v Lee*, the Dissent held that a quiet title claim should not displace the application of the *Young* exception.[134] In Lee, the Court held

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123. *Id.*
124. *Id.* at 2039.
125. *Id.* at 2043.
126. *Id.*
127. *Id.* at 2045 (O'Connor, J., concurring in part and concurring in the judgment).
128. *Id.* at 2047.
129. *Id.*
130. *Id.*
131. *Id.* at 2045.
132. *Id.* at 2056 n.11 (Souter, J., dissenting).
133. *Id.* at 2049.
134. *Id.* at 2050 (citing United States v. Lee 106 U.S. 196 (1882)).

federal officers to be subject to a possessory action for land claimed by the United States on the basis of federal law [135] The Dissent relying on the *Lee* analysis, felt that the majority opinions sanctioned a kind of tyranny which should be unavailable in a government which claims to protect liberty and personal rights.[136] The Dissent found that this case was no more or less the "functional equivalent" of an action against the state then any other *Young* suit.[137] The Dissent concluded stating,

> [n]one of the considerations that the principal opinion would weigh in the course of its balancing process in this case is a legitimate reason for questioning jurisdiction over state officials, and nothing about property title or regulatory jurisdiction justifies the majority's exception to *Young's* guarantee of a federal forum to a private federal claimant against state officials.[138]

The Dissent, though, would have allowed the Tribe to proceed with its claim in federal court. Nowhere in the Dissent's opinion was it noted that this particular plaintiff was an Indian tribe. Again like the majority opinions, the historical treatment of tribes in state courts was not noted. Thus the implications of this case on tribes seem clear. Regardless of the fact that tribes have consistently received unfavorable treatment in state court, tribes will be forced to bring suit in often biased forums. As the four Justice Dissent clearly points out, this case could fit within the *Young* exception. The United States Supreme Court's decision in *Idaho v Coeur d'Alene Tribe of Idaho*, represents yet another defeat for tribes in their ongoing struggle for sovereignty

135. *Lee*, 106 U.S. at 204.
136. *Idaho*, 117 S. Ct. at 2050.
137. *Id.* at 2053.
138. *Id.* at 2059.