

SUPREME COURT OF WASHINGTON

Outsource Services Management, LLC v. Nooksack Business Corp., 181 Wash. 2d 272

333 P.3d 380 (2014) · Decided August 21, 2014

SUMMARY

The Washington Supreme Court held that Washington state courts have subject matter jurisdiction over a contract claim against a tribal enterprise when the enterprise waived sovereign immunity and expressly consented to jurisdiction in Washington courts. The court concluded that honoring the tribal enterprise's contractual consent did not infringe tribal sovereignty or the tribe's right of self-rule. The court affirmed the Court of Appeals but declined to decide whether a waiver of sovereign immunity alone would confer state-court jurisdiction.

CASE DETAILS

COURT	Supreme Court of Washington
WRITING FOR THE COURT	Owens, J.; Madsen, C.J.; C. Johnson, J.; Fairhurst, J.; Stephens, J.; Wiggins, J.; Worswick, J. Pro Tem.
JURISDICTION	Washington
DECIDED	August 21, 2014
DISPOSITION	affirmed
PROCEDURAL POSTURE	Outsource sued Nooksack Business Corporation in Whatcom County Superior Court for breach of a loan agreement after Nooksack defaulted on payment obligations. The superior court denied Nooksack's motion to dismiss for lack of subject matter jurisdiction and certified the ruling for interlocutory appeal. The Washington Supreme Court granted review of the Court of Appeals decision affirming the exercise of jurisdiction.
STANDARD OF REVIEW	Subject matter jurisdiction is reviewed de novo because it presents a question of law.
PRECEDENTIAL VALUE	Published Washington Supreme Court opinion; precedential.
PARTIES	Nooksack Business Corporation v. Outsource Services Management LLC

TOPICS

tribal jurisdiction

tribal sovereignty

subject matter jurisdiction

breach of contract

commercial litigation

PRACTICE AREAS

tribal jurisdiction

tribal sovereignty

contracts

subject matter jurisdiction

commercial litigation

QUESTIONS PRESENTED

1. Whether a Washington superior court has subject matter jurisdiction over a contract claim arising on tribal land when a tribal enterprise waived sovereign immunity and expressly consented to jurisdiction in Washington state courts.
2. Whether the tribal enterprise's contractual consent to state-court jurisdiction may be considered in determining whether state-court jurisdiction would infringe the tribe's right to self-rule.
3. Whether waiver of sovereign immunity alone is sufficient to confer subject matter jurisdiction on Washington state courts.

HOLDINGS

1. Washington state-court jurisdiction over the contract claim does not infringe tribal sovereignty when the tribal enterprise has expressly waived sovereign immunity and consented in the contract to jurisdiction in Washington state courts.
2. Although parties cannot confer subject matter jurisdiction by agreement or consent, a tribal enterprise's consent to state-court jurisdiction may be considered in deciding whether exercising jurisdiction would infringe tribal sovereignty.
3. The court declined to decide whether waiver of sovereign immunity alone can establish state-court subject matter jurisdiction because Nooksack both waived sovereign immunity and consented to state-court jurisdiction.

KEY QUOTATIONS

“We hold that it does not infringe on the sovereignty of the tribe to honor its own corporation’s decision to enter into a contract providing for jurisdiction in Washington State courts.” (181 Wash. 2d at 274)

“Thus, we hold that where state court jurisdiction is limited solely to protect tribal sovereignty and the tribe’s right to self-rule, the limit does not apply when a tribal enterprise chooses to consent to such jurisdiction.” (181 Wash. 2d at 281)

“The issue of whether state court jurisdiction can be based solely on a waiver of sovereign immunity is not presented in this case, and thus we take no position on it.” (181 Wash. 2d at 282)

FACTUAL BACKGROUND

Nooksack Business Corporation, a tribal enterprise of the Nooksack Indian Tribe, entered into a financing contract with Outsource Services Management LLC for renovation and expansion of its casino. The contract included a limited waiver of sovereign immunity and expressly consented to arbitration and suit in federal and Washington state courts for claims related to the contract. After Nooksack failed to make a loan payment and

then failed to comply with three successive forbearance agreements, Outsource brought a breach-of-contract action in Whatcom County Superior Court.

PROCEDURAL HISTORY

The Whatcom County Superior Court held that it had subject matter jurisdiction because Nooksack had waived sovereign immunity and consented to Washington state-court jurisdiction. The Court of Appeals affirmed, but held more broadly that waiver of sovereign immunity alone was sufficient to confer subject matter jurisdiction. The Supreme Court affirmed the result while rejecting the broader reasoning and holding only that jurisdiction was proper where Nooksack both waived sovereign immunity and consented to state-court jurisdiction.

DISPOSITION

affirmed

CASES CITED

- Joy v. Kaiser Aluminum & Chemical Corp., 62 Wn. App. 909, 816 P.2d 90 (1991)
- Hoffer v. State, 110 Wn.2d 415, 755 P.2d 781 (1988)
- Powell v. Farris, 94 Wn.2d 782, 620 P.2d 525 (1980)
- Williams v. Lee, 358 U.S. 217, 220 (1959)
- Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 104 S. Ct. 2267, 81 L. Ed. 2d 113 (1984)
- In re Habeas Corpus of Wesley, 55 Wn.2d 90, 93, 346 P.2d 658 (1959)
- Skagit Surveyors & Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962 (1998)
- Michigan v. Bay Mills Indian Community, 572 U.S. 782, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014)
- Outsource Services Management, LLC v. Nooksack Business Corp., 172 Wn. App. 799, 814-15, 292 P.3d 147 (2013)
- Outsource Services Management, LLC v. Nooksack Business Corp., 177 Wn.2d 1019, 304 P.3d 115 (2013)

OPINION

OWENS, J.

*274f 1 Washington State courts have jurisdiction over civil cases arising on Indian reservations as long as it does not infringe on the sovereignty of the tribe. At issue in this case is whether Washington State courts have jurisdiction over a civil case arising out of a contract in which the tribal corporation waived its sovereign immunity and consented to jurisdiction in Washington State courts.

We hold that it does not infringe on the sovereignty of the tribe to honor its own corporation's decision to enter into a contract providing for jurisdiction in Washington State courts. Owens, J. FACTS f2 Nooksack Business Corporation (Nooksack), a tribal enterprise of the Nooksack Indian

Tribe,¹ signed a contract with Outsource Services Management LLC to finance the renovation and expansion of its casino.

The contract contained the following clause related to sovereign immunity and jurisdiction: Limited Waiver of Sovereign Immunity; Waiver of Rights in Tribal Court. Subject to the limitations on recourse in Section 8.30, the Borrower hereby expressly grants to the Lender and all Persons entitled to benefit from any Loan Document an irrevocable limited waiver of its sovereign immunity from suit or legal process with respect to any Claim.

In furtherance of this waiver, the Borrower hereby consents with respect to any Claim: (A) to arbitration in accordance with the provisions of Section 8.27, and (B) to be sued in (i) the United States District Court for Western District of Washington (and all federal courts *275to which decisions of the United States District Court for the Western District of Washington may be appealed), (ii) any court of general jurisdiction in the State (including all courts of the State to which decisions of such courts may be appealed), and (iii) only if none of the foregoing courts shall have jurisdiction, or only to permit the compelling of arbitration in accordance with Section 8.27, or the enforcement of any judgment, decree or award of any foregoing court or any arbitration permitted by Section 8.27, all tribal courts and dispute resolution processes of the Tribe.

The Borrower hereby expressly and irrevocably waives any application of the exhaustion of tribal remedies or abstention doctrine and any other law, rule, regulation or interpretation that might otherwise require, as a matter of law or comity, that resolution of a Claim be heard first in a tribal court or any other dispute resolution process of the Tribe. Clerk's Papers (CP) at 446 (emphasis added). ¶3 Nooksack failed to make a payment due on the loan.

Outsource and Nooksack executed three successive forbearance agreements, but after Nooksack failed to make required payments, Outsource filed suit in Whatcom County Superior Court for breach of the loan agreement. Nooksack acknowledged that it had waived sovereign immunity but argued that nonetheless, Whatcom County Superior Court did not have subject matter jurisdiction over the case because it involved a contractual dispute with a tribal enterprise that occurred on tribal land. ¶4 The trial court denied Nooksack's motion to dismiss, ruling that it had subject matter jurisdiction because Nooksack both waived sovereign immunity and consented to the jurisdiction of Washington State courts.

The trial court also certified its order for interlocutory appeal. Nooksack appealed, and the Court of Appeals found that review of the jurisdictional issue was justified under RAP 2.3(b)(4). The Court of Appeals issued a broader holding than the trial court, concluding that the waiver of sovereign immunity alone was sufficient to give the superior court subject matter jurisdiction in the case.

Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp., 172 Wn. App. 799, *276814-15, 292 P.3d 147 (2013). Nooksack petitioned for our review, which we granted. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 177 Wn.2d 1019, 304 P.3d 115 (2013). ISSUE ¶5 Does a Washington superior court have subject matter jurisdiction over this contract claim when Nooksack both waived sovereign immunity and consented to state court jurisdiction?

ANALYSIS ¶6 Nooksack contends that the superior court does not have jurisdiction over this claim because it arose out of a contractual dispute with a tribal enterprise that occurred on tribal land. Whether a court has subject matter jurisdiction is a question of law, and thus we review it de novo. *Joy v. Kaiser Alum. & Chem. Corp.*, 62 Wn. App. 909, 911, 816 P.2d 90 (1991) (citing *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). ¶7 There are very few limitations on the subject matter jurisdiction of superior courts in Washington.

Pursuant to the Washington State Constitution, superior courts “have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.” Wash. Const, art. IV, § 6. This original jurisdiction includes contract claims, the subject matter of the dispute in this case. f 8 However, the State has limited jurisdiction over civil disputes involving Indians that arise on Indian reservations.

See *Powell v. Farris*, 94 Wn.2d 782, 784-85, 620 P.2d 525 (1980) (holding that the State “may exercise some jurisdiction over some reservation conduct”). Washington State courts generally have jurisdiction over civil disputes in Indian country if either (1) the State has assumed jurisdiction pursuant to Public Law 2802 or (2) asserting jurisdiction would not infringe on the rights of the tribe to make its own laws and be ruled by them.

Id. at 784-87. ¶9 Importantly, both sides agree that this dispute does not fall within the scope of the civil jurisdiction that Washington assumed pursuant to Public Law 280. Thus, the question is whether asserting jurisdiction in this case would infringe on the rights of the tribe.

As described below, we do not see how asserting jurisdiction in this case would infringe on the tribe’s right to self-rule when its own tribal enterprise decided to consent to the jurisdiction of Washington State courts for claims related to the contract. 1. It Does Not Infringe on a Tribe’s Right to Self-Rule for State Courts To Respect the Decision of a Tribe or Tribal Enterprise To Consent to State Court Jurisdiction f 10 The purpose of limiting state court jurisdiction for matters arising on Indian reservations is to protect the rights of Indians to “ ‘make their own laws and be ruled by them.’ ” *Id.* at 786-87 (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct.

269, 3 L. Ed. 2d 251 (1959)). Thus, when asked whether state courts have jurisdiction in a case that occurs on a reservation, we carefully consider the interests and authority of the tribe. *Id.* at 787. Normally, the tribe’s interest in self-governance is a separate interest from those of the parties.

For example, if two parties on a reservation had a dispute in an area of the law regulated by the tribe but chose to file in state court, the state court would have to *278consider the separate question of the tribe's interest in governing the matter. *Id.* Even if the parties had agreed to state court jurisdiction, the state court may find that jurisdiction is nonetheless inappropriate because it would infringe on the tribe's right to govern the matter. *Id.* This case is entirely different.

The tribe itself — acting through its tribal enterprise — consensually entered into a contract where it both waived its sovereign immunity and consented to jurisdiction in state court for claims related to that contract. It first waived its sovereign immunity with respect to any claim related to the contract. See CP at 446 (“the Borrower hereby expressly grants to the Lender and all Persons entitled to benefit from any Loan Document an irrevocable limited waiver of its sovereign immunity from suit or legal process with respect to any [claim brought under the contract]”).³ The contract indicated an understanding by the parties that a waiver of sovereign immunity may not be enough to confer jurisdiction on a state court, as the contract went on to provide, “In furtherance of this waiver, the Borrower hereby consents with respect to any Claim... to be sued in... any court of general jurisdiction in the State (including all courts of the State to which decisions of such courts may be appealed).” *Id.* (emphasis added).

The dissent states that this provision is a contractual waiver only of sovereign immunity, not of jurisdiction issues, but that ignores the plain language of the contract, where Nooksack consented to be sued in any court of general jurisdiction in the state. Given that Nooksack made the decision to enter into that contract and *279consent to those provisions, we do not see how state court jurisdiction would infringe on the tribe's right to self-rule. ¶12 In fact, we believe the opposite is true: ignoring the tribe's decision to waive sovereign immunity and consent to state court jurisdiction would infringe on the tribe's right to make those decisions for itself.

Our decision is rooted in the United States Supreme Court's holding in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, PC*, 467 U.S. 138, 104 S. Ct. 2267, 81 L. Ed. 2d 113 (1984). In that case, an Indian tribe filed a claim in a North Dakota state court against a non-Indian company for negligence and breach of contract related to the design and construction of a water supply project on the reservation.

Id. at 141. The trial court dismissed the claim, ruling that it lacked subject matter jurisdiction because the claim arose in Indian country. *Id.* at 145. The North Dakota Supreme Court affirmed, but the United States Supreme Court vacated that decision. *Id.* at 145, 159.

The Supreme Court held that allowing the claim to proceed in state court did not impede on tribal self-government when “the suit is brought by the tribe itself.” *Id.* at 149. The Supreme Court's logic is sound, as it would be nonsensical for a state court to tell a tribe that its own decision to enter that court infringes on the tribe's own autonomy.

We find this case to be similar. Nooksack chose to enter into a contractual agreement waiving its sovereign immunity and consenting to state court jurisdiction; therefore, allowing such jurisdiction does not infringe on its tribe's right to make decisions for itself.

The trial court appropriately held that it had subject matter jurisdiction in this matter. 2. We Can Consider a Tribal Enterprise's Consent to Jurisdiction When Determining Whether State Jurisdiction Would Violate the Tribe's Right to Self-Rule ¶13 Nooksack argues that such a holding would be contrary to our long-standing rule that parties cannot confer subject matter jurisdiction by agreement or consent. *280See *In re Habeas Corpus of Wesley*, 55 Wn.2d 90, 93, 346 P.2d 658 (1959) ("A constitutional court cannot acquire jurisdiction by agreement or stipulation."); *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998) (holding that while litigants can waive their right to assert a lack of personal jurisdiction, they cannot waive subject matter jurisdiction). ¶14 We disagree.

While Nooksack is correct that parties cannot confer subject matter jurisdiction by agreement or consent, that does not mean we cannot take Nooksack's consent into account when determining whether jurisdiction would infringe on the tribe's right to self-rule. ¶15 The purpose of this unique limit on state court jurisdiction is to protect the independence of sovereign tribes.

Thus, it is reasonable to take into account decisions made by the tribe or tribal enterprise related to state court jurisdiction when determining whether such jurisdiction would infringe on their right to self-rule.

For instance, the United States Supreme Court considered the tribe's decisions when evaluating whether state court jurisdiction would interfere with tribal sovereignty in *Three Affiliated Tribes*. As discussed above, in that case, the tribe itself had filed suit in state court and the state court had dismissed the case for lack of jurisdiction.

The United State Supreme Court vacated the dismissal because it "fail[ed] to see how the exercise of state-court jurisdiction in this case would interfere with the right of tribal Indians to govern themselves under their own laws." 467 U.S. at 148.

The Court took particular note of the fact that "the suit [was] brought by the tribe itself." *Id.* at 149. The tribe's decision to enter state courts (thereby consenting to their jurisdiction) was an important part of the analysis as to whether such jurisdiction would infringe on the tribe's right to rule itself.

In this case, we believe the tribe's decision to contractually consent to state court jurisdiction is similarly important to the analysis. ¶16 Furthermore, adopting Nooksack's position would impose a significant limitation on the rights of other tribes *281and tribal enterprises in Washington. Other tribes and tribal enterprises may want to be able to assure parties with whom they contract that the parties can seek a remedy in Washington State courts, but adopting Nooksack's position would

prohibit them from doing so.⁴ We do not see how it protects tribal sovereignty to refuse to allow tribes to make this decision for themselves.

Instead, we believe that allowing tribes and tribal enterprises to enter into such contracts expressing their consent to state court jurisdiction and waiving sovereign immunity respects their right to self-rule. As the United States Supreme Court has recognized, “ ‘[A] party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe’s waiver of sovereign immunity from suit.’ ” *Michigan v. Bay Mills Indian Cmty.*, U.S., 134 S. Ct.

2024, 2035, 188 L. Ed. 2d 1071 (2014). As part of those contract negotiations, the tribe can choose whether to waive its sovereign immunity for claims related to that contract, and we respect its decision. The tribe can also choose to express consent to state court jurisdiction for claims related to that contract, and we respect that decision as well. ¶17 Thus, we hold that where state court jurisdiction is limited solely to protect tribal sovereignty and the tribe’s right to self-rule, the limit does not apply when a tribal enterprise chooses to consent to such jurisdiction.

Here, Nooksack chose to enter into a contract where it both waived sovereign immunity and consented to state court jurisdiction. Honoring Nooksack’s decision to enter into that contract and consent to state court jurisdiction does not infringe on the tribe’s sovereignty. *282 3.

The Court of Appeals Opinion Was Overly Broad ¶18 Finally, we want to address the broad scope of the Court of Appeals opinion, which held that Nooksack’s waiver of sovereign immunity was enough — in and of itself — to confer subject matter jurisdiction on Washington State courts. Such a broad holding is not necessary to resolve this case, where Nooksack both waived sovereign immunity and consented to state court jurisdiction.

Therefore, we do not adopt its reasoning. The issue of whether state court jurisdiction can be based solely on a waiver of sovereign immunity is not presented in this case, and thus we take no position on it. CONCLUSION ¶19 Nooksack consensually entered into a contract in which it waived sovereign immunity and consented to the jurisdiction of Washington State courts.

Under these circumstances, we hold that state court jurisdiction does not infringe on tribal sovereignty. We affirm the Court of Appeals, although under slightly different reasoning. Madsen, C.J.; C. Johnson, Fairhurst, Stephens, and Wiggins, JJ; and Worswick, J. Pro Tem., concur.

The parties do not dispute that Nooksack Business Corporation is owned and controlled by the Nooksack Indian Tribe, and thus has sovereign immunity. In 1953, Congress passed Public Law 280, which gave states permission to assume full civil and criminal jurisdiction over civil causes of action and criminal offenses occurring on a reservation. Pub. L. No. 83-280, § 7, 67 Stat. 588, 590 (1953).

Washington chose to assume civil jurisdiction in eight areas of the law, but contract law was not one of those areas. See RCW 37.12.010. Washington will also assume full civil jurisdiction over tribes that consent to it, RCW 37.12.021, but the Nooksack Indian Tribe has not given that consent. Furthermore, it appears that Public Law 280 permits states to assume jurisdiction only over Indians — not tribes — so it is questionable whether it would even allow Washington to assume full civil jurisdiction over tribes.

The dissent seems to imply that the contract’s reference to the waiver of sovereign immunity as “limited” undermines the waiver in some way, although the dissent does not state how. See dissent at 285. In fact, the reference to the “limited” nature of the waiver reiterates that the waiver of sovereign immunity applies only to claims related to this particular contract and does not waive the tribe’s sovereign immunity in other contexts.

The dissent states that future contracts should “fully waive sovereign immunity,” *id.* at 289 (emphasis added), which seems to imply that a waiver that is limited to claims related to the contract is somehow invalid.

We see no basis in the law for that requirement; furthermore, it would undermine the entire notion of sovereign immunity. The dissent appears to agree that parties may negotiate with tribes for contractual “consent to state court jurisdiction over the tribe for all claims arising from the contract.” Dissent at 289. That is exactly what happened here, as Nooksack agreed that it “hereby consents with respect to any Claim... to be sued in... any court of general jurisdiction in the State.” CP at 446.

We are hard pressed to imagine a clearer or more explicit consent to state court jurisdiction.