IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KROLICKI, TREASURER FOR THE STATE OF NEVADA; KATHY AUGUSTINE, CONTROLLER FOR THE STATE OF NEVADA; AND THE STATE OF NEVADA,
Petitioners,
vs.
THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE, AND THE HONORABLE JOHN P. DAVIS, DISTRICT JUDGE,
Respondents,
and
NYE COUNTY, NEVADA,
Real Party in Interest.

No. 37973

FILED

MAR 28 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying the State of Nevada and its treasurer and controller's motion to dismiss a civil action brought against them. Because the district court was compelled to dismiss the action under NRS 41.032(1) and the collateral estoppel doctrine, we grant this petition.

The underlying controversy concerns whether the State's statutory scheme for distributing federal funds received under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq., violates that Act's mandate that the State Legislature give counties such as Nye County priority in the allocation of funds. Under the Mineral Leasing Act of 1920, the Geothermal Steam Act of 1970, 30 U.S.C. § 1001 et seq., and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1701 et seq., the federal government collects annual revenue generated from the lease

of federal lands for the purpose of extracting minerals, fuels, or geothermal resources. Section 191 of Title 30, governing the disposition of the revenue derived from federal land leases, mandates that 50% of the revenue be paid back to the state in which the leased lands or deposits are located. Section 191 also provides that such money is to be used by the state and its subdivisions as the state legislature may direct, but with priority of allocation being given "to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter," for planning, construction and maintenance of public facilities, and provision of public services.

Nevada is among the states that receive federal money under 30 U.S.C. § 191. Currently, its statutory scheme for distributing this revenue provides that the first $7 million received under § 191 in a given fiscal year must be deposited in the state distributive school account in the state general fund,[1] and only the amount received in excess of $7 million—if any—is to be deposited in a separate "account for revenue from the lease of federal lands."[2] Of the money deposited into this latter account, just 75% is allocated to the counties in which the minerals, fuels, and geothermal resources are extracted.[3] From this split sum, the counties must yet again distribute 25% of the money they receive to the school district in the county.[4] Finally, the remaining 75% must be used for

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[1]See NRS 328.450(1).

[2]See NRS 328.450(2).

[3]See NRS 328.460(2). The remaining 25% is allocated again to the state distributive school account in the state general fund.

[4]See id.

construction and maintenance of roads and other public facilities, public services, and planning, as § 191 states.[5] Based on the foregoing, Nye County understandably contends that Nevada's statutory scheme for disposing of the revenue received under § 191 fails to give priority to the counties most burdened by the mining activities on leased federal lands.

On July 19, 1999, therefore, Nye County filed a complaint in the U.S. District Court for the District of Nevada against the State, State Treasurer Krolicki, and State Controller Augustine, seeking declaratory and injunctive relief, as well as an accounting. The State and the State officers moved to dismiss the action for lack of subject matter jurisdiction based on the U.S. Constitution's Eleventh Amendment immunity,[6] and Nye County opposed the motion.

On March 29, 2000, the federal district court dismissed all claims against the State and the State officers. In summary, the court adjudicated that the Eleventh Amendment immunity precluded Nye County's action against the State and State officers, and that this immunity had been neither waived nor abrogated. Nye County did not appeal from the federal district court's order.

Instead, on December 18, 2000, Nye County filed the underlying lawsuit, this time for monetary damages, injunctive relief and an accounting, in the Fifth Judicial District Court of Nye County against the same defendants, based on the same facts. The State and its officers

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[5]See NRS 328.470. The state treasurer and the state controller are charged with executing NRS 328.450 and NRS 328.460, respectively, pursuant to those statutes.

[6]Petitioners also moved to dismiss for failure to state a claim upon which relief could be granted, under FRCP 12(b)(6).

again moved to dismiss for lack of subject matter jurisdiction and failure to state a claim for relief, asserting as defenses collateral estoppel, the Eleventh Amendment immunity, sovereign immunity, NRS 41.031(3), and NRS 41.032(1). The district court denied the motion, concluding in part that collateral estoppel did not apply because Nye County's claims were not adjudicated on their merits in the federal action. Petitioners filed this original writ proceeding challenging that denial.

Among their several contentions, petitioners assert that the district court manifestly abused its discretion in refusing to dismiss this case because they have sovereign immunity from suit under NRS 41.032(1), and because collateral estoppel precluded Nye County's suit. That is, they contend that the issue of sovereign immunity was previously decided in their favor by the federal court. Because the resolution of these contentions is dispositive, we address these issues first.

The doctrine of collateral estoppel, also known as issue preclusion, bars relitigation of particular issues that have been actually litigated and necessarily decided in a prior action.[7] The test to determine whether collateral estoppel applies has three prongs:

> (1) the parties to the prior action must be identical to, or in privity with, the parties in the current action; (2) the

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[7]Executive Mgmt. v. Ticor Title Ins. Co., 114 Nev. 823, 835, 963 P.2d 465, 473 (1998). The doctrine "relieves parties of the cost and vexation of multiple lawsuits, prevents inconsistent decisions, encourages reliance on adjudication by minimizing the possibility of inconsistent decisions, and conserves judicial resources." 18 Lawrence B. Solum, Moore's Federal Practice § 132.01(3) (3d ed. 2001) (hereinafter Moore's Federal Practice). The doctrine embodies the policy that one fair opportunity to litigate an issue is enough. Id.

initial ruling must have been on the merits and final; and (3) the issues in the two actions must be identical.[8]

Additionally, the issue decided must have been necessary to the prior judgment.[9]

It is easy to see that the first prong is met. Undisputedly, the parties to both the federal court action and the state court action are identical. The second prong is also satisfied. When Nye County did not appeal from the federal court's decision, the jurisdictional judgment became final. "A valid final judgment for lack of jurisdiction or improper venue does not bar relitigation of the claim, but does bar relitigation of the [jurisdictional] issues actually litigated and necessarily decided."[10] Hence, contrary to the district court's conclusion, the federal court's valid jurisdictional judgment, although not on the merits, has preclusive effect on the issues decided.

The third prong requires us to examine whether the jurisdictional issues determined by the federal court are identical to the

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[8]Clark v. Columbia/HCA Info. Servs., 117 Nev. __, __, 25 P.3d 215, 224 (2001); see also LaForge v. State, University System, 116 Nev. 415, 419, 997 P.2d 130, 133 (2000).

[9]University of Nevada v. Tarkanian, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994).

[10]Moore's Federal Practice § 132.03(5)(c); see also American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932) ("[P]rinciples of res judicata apply to questions of jurisdiction as well as to other issues."); Shaw v. Merritt-Chapman & Scott Corp., 554 F.2d 786, 789 (6th Cir. 1977) (stating that while dismissal for lack of jurisdiction does not serve as adjudication on the merits, it does constitute a binding determination on the jurisdictional question); Sopcak v. Northern Mountain Helicopter, 924 P.2d 1006 (Alaska 1996) (holding that collateral estoppel barred relitigation of a jurisdictional question determined by prior federal court action).

issues the district court must decide to determine petitioners' immunity from suit in state court. We recognize at the outset that the overarching issue decided by the federal court was petitioners' Eleventh Amendment immunity, which does not apply in a state court proceeding.[11] But Nye County's contention that this point precludes an identity of issues is incorrect.

Although petitioners cannot assert Eleventh Amendment immunity in state court, they can nevertheless assert their inherent sovereign immunity from private actions filed in this state's courts.[12] The two immunities apply in different forums, but they are analogous,[13] and their resolution involves overlapping issues. Specifically, both the Eleventh Amendment and state sovereign immunity preclude private suits[14] brought against the states except under three circumstances: (1) when the states have waived their sovereign immunity and consented to

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[11]See, e.g., Will v. Michigan Dept. of State Police, 491 U.S. 58, 63-64 (1989) (stating that the Eleventh Amendment does not apply to state courts).

[12]See Alden v. Maine, 527 U.S. 706 (1999) (holding that the State of Maine could assert its inherent sovereign immunity in a private suit filed in a Maine court).

[13]See Alden v. State, 715 A.2d 172, 174 (Me. 1998) (determining that the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual), aff'd sub nom. Alden v. Maine, 527 U.S. 706 (1999).

[14]States cannot invoke their sovereign immunity in suits brought by other states or the United States in federal courts. See South Dakota v. North Carolina, 192 U.S. 286, 318 (1904); Principality of Monaco v. State of Mississippi, 292 U.S. 313 (1934).

suit, (2) when Congress has validly abrogated the states' immunity, or (3) when the application of the Ex Parte Young[15] doctrine, and its progeny, is appropriate.[16]

In Nevada, by virtue of NRS 41.031, the State has generally waived its sovereign immunity from private suits, but several statutory exceptions exist. The federal court held that one such exception, NRS 41.031(3)--which specifically exempts from waiver the State's Eleventh Amendment immunity--demonstrated that petitioners had not waived their immunity in federal court. Because NRS 41.031(3) is inapplicable in state court, we must determine if another exception applies here. Petitioners rely on NRS 41.032(1), which states that no action can be brought against the State and its officers which is:

> Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction[.]

The County's suit fits neatly into this description: it is based upon the State officers' strict execution of NRS 328.450 and NRS 328.460, which have not been declared invalid by any court.[17] Accordingly, as a matter of

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[15]209 U.S. 123 (1908).

[16]See Alden, 527 U.S. at 754-56; Schall v. Wichita State University, 7 P.3d 1144 (Kan. 2000).

[17]Nye County suggests that the "due care" language creates a factual issue as to whether Krolicki and Augustine can be said to be acting with due care when they are enforcing statutes that violate the Supremacy Clause. This contention lacks merits, however, as the provision expressly protects an officer enforcing an invalid statute as long as the statute has not been actually declared invalid by a court of competent jurisdiction.

law, NRS 41.032(1) establishes that petitioners have not waived their sovereign immunity in this case.[18]

The only issues remaining as to petitioners' claim of sovereign immunity are whether Congress has validly abrogated petitioners' immunity and whether the Ex Parte Young exception should apply. Before determining that petitioners' Eleventh Amendment immunity barred Nye County's suit, the federal court had to decide if either of these circumstances applied to that action. In its eleven-page judgment, the federal court clearly adjudicated that Congress had not abrogated the State and the officers' immunity under the Mineral Leasing Act, and that the Ex Parte Young doctrine did not apply to Nye County's claims for prospective injunctive relief against the State officers. Thus, these two issues were previously litigated and decided by the federal court action, and Nye County is collaterally estopped from relitigating them in state court.

A writ of mandamus may issue to compel the performance of an act which the law requires as a duty resulting from an office, trust or

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[18]Although the federal court also considered NRS 41.032(1) in its analysis, the statute was not necessary to the court's judgment, and collateral estoppel therefore does not bar relitigation of this issue. That is, the State officers' immunity is derivative of the State's; therefore, NRS 41.031(3) alone established the State's and its officers' immunity in federal court. See Tarkanian, 110 Nev. at 599, 879 P.2d at 1191 (stating that for collateral estoppel to apply, issue must have been necessary to prior judgment); Natural Resources Defense Council v. Cal. DOT, 96 F.3d 420, 421 (9th Cir. 1996) ("State immunity extends to state agencies and to state officers, who act on behalf of the state and can therefore assert the state's sovereign immunity.").

station,[19] or to control an arbitrary or capricious exercise of discretion.[20] Although we generally decline to entertain writ petitions challenging the denial of a motion to dismiss, as they inefficiently consume valuable judicial resources, exceptions are still made for those cases in which a dismissal was required under clear authority.[21]

"Private suits against nonconsenting States . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'"[22] We conclude that petitioners can assert their sovereign immunity from Nye County's suit under NRS 41.032(1), and that the collateral estoppel doctrine prevents the County from relitigating whether the immunity has been abrogated by Congress and if the Ex Parte Young exception applies. Because the district court was obligated to dismiss the action against petitioners, we grant this petition and direct the clerk of this court to issue a writ of mandamus

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[19]NRS 34.160.

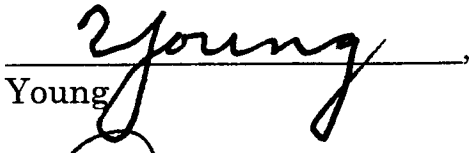
[20]See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

[21]See Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997).

[22]Alden, 527 U.S. at 749 (quoting In re Ayers, 123 U.S. 443, 505 (1887)).

instructing the district court to vacate its prior order and grant petitioners' motion to dismiss.[23]

It is so ORDERED.[24]



_____, J.
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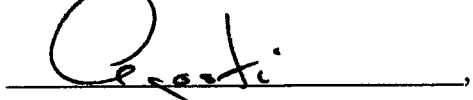

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Leavitt

cc: Hon. John P. Davis, District Judge
Attorney General/Carson City
Kenneth C. Cory
Nye County Clerk

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[23]We are not unsympathetic towards Nye County's predicament, and that of other counties which might be similarly impacted by the State's questionable statutory scheme for distributing the federal land lease revenue. Quite possibly, the County's claim for prospective injunctive relief against the State officers would have withstood the defense of sovereign immunity under the Ex Parte Young doctrine if it had initially been brought in state court. In this case, however, NRS 41.032(1) and the constraints of the collateral estoppel doctrine preclude Nye County's action.

[24]We vacate the stay of the district court proceedings entered on August 29, 2001.