Docket No. 03-35306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES RICHARD SMITH,

Appellant,

-vs.-

SALISH KOOTENAI COLLEGE, a Montana corporation, and the COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Appellees.

On Appeal from United States District Court for the District of Montana
Missoula Division, Cause No. CV 02-55-M-LBE
The Honorable Leif B. Erickson, Presiding

APPELLEE SALISH KOOTENAI COLLEGE'S PETITION FOR REHEARING *EN BANC*

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FEDERAL RULES

I. STATEMENT OF ISSUES

A three-judge panel ("Panel") issued its decision in this matter on August 13, 2004. *See Smith v. Salish Kootenai College; Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Reservation*, U.S.D.C. Cause No. CV 02-55-LBE (9th Cir. Aug. 6, 2004) (hereinafter "slip op."). Writing for the Panel, Judge Ronald M. Gould held that the tribal court of the Confederated Salish & Kootenai Tribes ("Tribes") lacked subject matter jurisdiction over a civil lawsuit brought by Appellant James Richard Smith ("Smith") in tribal court against Appellee Salish Kootenai College ("SKC"), which is a tribal entity, for its conduct occurring on tribal land.

Pursuant to Fed. R. App. P. 35(b), the Panel's decision in the present case conflicts with decisions from the United States Supreme Court, and decisions from the Ninth Circuit Court of Appeals relating to tribal court jurisdiction, including but not limited to the following cases:

Strate v. A-1 Contractors, 520 U.S. 438 (1997);

Montana v. United States, 450 U.S. 544 (1981);

Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269 (1959);

McDonald v. Means, 309 F.3d 530 (9th Cir. 2002); and

Nevada v. Hicks, 533 U.S. 353 (2001).

Pursuant to Fed. R. App. P. 35(b)(1)(A), consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions. Therefore, SKC respectfully requests that the Court grant its Petition for Rehearing *En Banc*.

II. PROCEDURAL BACKGROUND

This case arises out of a claim filed by Smith against SKC. SKC is a tribally-chartered college located within the exterior boundaries of the Flathead Indian Reservation. Smith was a student in SKC's equipment operating class and was injured when a dump truck in which he was riding went out of control and rolled. Smith and one other occupant were injured and a third student killed. The dump truck belonged to SKC and Smith was in the course of instruction at the time of the accident. Smith was not a member of the Tribes.

After a tribal court jury returned a verdict in favor of SKC, finding that SKC was not negligent, Smith challenged the tribal court's subject matter jurisdiction for the first time. The tribal court and tribal appellate court both held that the Tribes had subject matter jurisdiction over Smith's claims against SKC.

Before the tribal appellate court issued its ruling, Smith refiled his lawsuit in the United States District Court for the District of Montana. The district court also found that the Tribes had jurisdiction over Smith's claim, concluding that SKC was a tribal entity, and the tortious conduct alleged in Smith's amended federal court complaint occurred on tribal land.

On appeal, the Panel reversed the district court's decision, holding that the Tribes lacked subject matter jurisdiction over Smith's claim because Smith is a non-member of the Tribes. Slip op. at 10634. From this decision, SKC seeks a rehearing *en banc*.

III. ARGUMENT

For purposes of its decision, the Panel based its analysis upon two assumptions: (1) SKC is a tribal entity and, therefore, treated as a tribal member for jurisdictional purposes; and (2) at least one of the claims in this matter (spoliation of evidence) arose on tribal land. *See* slip op. at 10626, 10628. Therefore, the Panel's decision represents the first case since the U.S. Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269 (1959), in which a tribal court has been denied jurisdiction

over a claim filed against a tribal member defendant for that tribal member's conduct on tribal land.

As discussed in detail below, the Panel's decision runs contrary to the doctrine set forth in *Williams v. Lee*, *supra*., and relies on an unprecedented and improper expansion of the jurisdictional rules set forth in *Montana v. United States*, 450 U.S. 544 (1981), and its progeny. By inappropriately expanding the scope of *Montana*, the Panel's decision also runs afoul of this Court's decision in *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002).

A. Because *Montana* Applies Only To Conduct By Non-Indians On Non-Indian Fee Land, *Montana* Is Inapplicable To This Case.

In *Williams*, the U.S. Supreme Court set forth the jurisdictional rules regarding cases involving non-member plaintiffs suing tribal member defendants for conduct occurring on tribal land. In *Williams*, the respondent Lee was a non-Indian who owned a store on the Navajo Indian Reservation. *Williams,* 358 U.S. at 217. Lee sued the Williamses who were members of the Navajo tribe to collect for goods sold to the Williamses on credit. *Id.* at 217-18. Lee sued in Arizona state court which

entered judgment in Lee's favor despite the Williamses' contention that the state of Arizona had no jurisdiction over Lee's claim. *Id.* at 218.

Reversing, the United States Supreme Court explained that Indian tribes have sovereignty over their own members and "exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants." *Id.* at 222. The Supreme Court further emphasized that Lee's status as a non-tribal plaintiff was irrelevant to the issue of jurisdiction: "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223.

Although *Williams* has never been overturned or otherwise diminished by subsequent authority, the Panel rejected the application of *Williams* to this case in favor of an expanded reading of the U.S. Supreme Court's decision in *Montana v. United States*, *supra*. In *Montana*, the Court established a general rule that Indian tribes lack civil regulatory authority over the conduct of non-members on non-Indian land within a reservation subject to two exceptions: (1) tribes may exercise jurisdiction over non-members who enter consensual relationships with the tribe or its members; or (2) tribes may exercise jurisdiction over non-members whose

activity directly affects the tribe's political integrity, economic security, health or welfare. *See Strate*, 520 U.S. at 446.

Subsequently, in *Strate*, the Court applied *Montana*'s general rule to a tribes' adjudicative authority, holding that an Indian tribe has no jurisdiction over a claim between non-members over conduct occurring on non-Indian fee land. The dispute in *Strate* "'arose between two non-Indians involved in [a] run-of-the-mill [highway] accident'" on a state-controlled highway located within the Fort Berthold Indian Reservation. *Id.* at 457. Because the accident occurred on non-Indian land between non-Indian litigants, there was no basis under *Montana*'s general rule for the tribal court to exercise jurisdiction. On their facts, *Montana* and *Strate* are simply inapplicable to this case, as SKC was a tribal member being sued over conduct occurring on tribal land.

Starting with the Panel's two assumptions, that SKC is a tribal entity and Smith's spoliation claim arose on tribal land, the application of *Montana*'s general rule in this case is, on its face, inappropriate. This claim involves neither the conduct of a non-member, nor a claim that occurred on non-Indian fee land. Thus, under the facts of this case, *Williams* is clearly the applicable authority regarding jurisdiction.

The Panel rejected application of *Williams* by suggesting it has been subsumed within *Montana*'s "first exception" set forth above. The Panel rejected the application of *Williams* on the premise that, "[i]n *Strate*, the Supreme Court made clear that, after *Montana, Williams* is best understood as an example of *Montana*'s first exception – not as a separate jurisdictional doctrine." Slip op. at 10622.

The Court in *Strate* stated no such thing. Rather, the Court merely listed the relationship at issue in *Williams* as one example of a consensual relationship that could fall within *Montana*'s first exception to its general rule denying tribal jurisdiction in cases involving non-member conduct on non-Indian fee land. Specifically the Court in *Strate* explained as follows:

> *Montana*'s list of cases fitting within the first exception . . . indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants). . . . Measured against these cases, the Fredericks-Stockert highway accident presents no "consensual relationship" of the qualifying kind.

Strate at 457.

The Court in *Strate* merely cited the commercial relationship at issue in *Williams* as one example of a "consensual relationship" within the *Montana* exception. However, nothing in the foregoing language in *Strate* suggests that *Williams* has been overruled, or relegated strictly to a mere exception to the general rule in *Montana*. Furthermore, the general rule in *Montana*, followed in *Strate*, applied only to jurisdiction over **non-member conduct on non-Indian fee land**. The fact that the sales transaction at issue in *Williams* is cited as but one example of a consensual relationship that may apply to *Montana's* first exception is a far cry from either overruling *Williams*, or in any way diminishing its application to the facts of this case.

The most recent authority cited by the Panel, and the only case directly on point with the present case, is *Winer v. Penny Enterprises*, 674 N.W.2d 9 (N.D. 2004). In that case, the Supreme Court of North Dakota held that *Williams*, not *Montana,* applied where a claim was brought by a non-member against a tribal member in tribal court for an accident occurring on the reservation. The Court explained as follows:

> We are not convinced that Strate heralds a new analysis for determining whether a state court has jurisdiction over an action brought against an

> Indian arising from conduct occurring within the exterior boundaries of an Indian reservation. . . .
>
> * * *
>
> [a]ll of the cases relied upon by Winer which have applied the Strate analysis have involved situations testing tribal court jurisdiction over non-Indian defendants where the conduct occurred on a right-of-way. [citations omitted] We have not found any cases wherein the Strate analysis has been used to determine whether a state court has jurisdiction over a tort action brought against an Indian arising on a right-of-way within the exterior boundaries of a reservation. Rather courts have refused to apply Strate beyond the context in which it was decided. [citation omitted]
>
> If Strate signals a drastic departure from the state court jurisdictional principles enunciated in Williams v. Lee and its progeny, it is well hidden in the Strate decision. Strate is distinguishable from this case, and until the Supreme Court declare otherwise, we conclude Strate does not govern our analysis here.

Id. at 14-15.

The Court further emphasized that *Strate* is inapplicable to claim against tribal member defendants because, "the interests implicated, when a non-Indian is sued 'are very different from those present' when a non-Indian sues an Indian in state court over an incident occurring in Indian

country." *Winer* at 15 (quoting *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 148.)

As the Court explained in *Winer,* principals enunciated in *Williams* regarding claims by non-member plaintiffs against member defendants arising on Indian land are still applicable in this case because *Strate* has never been applied in this context. Based on the foregoing, the Panel's conclusion that under *Strate,* "*Williams* is best understood as an example of *Montana*'s first exception – not as a separate jurisdictional doctrine" is not supported by the Court's holdings in *Montana*, *Strate*, or any other authority cited in the Panel's decision. Therefore, the panel erred by applying *Montana* to this case to deny tribal court jurisdiction.

B. The Panel's Conclusion That *Montana*'s General Rule Applies To Cases Arising On Indian Land Directly Conflicts With *Montana* Itself, And The Ninth Circuit's Analysis Of The *Montana* Rule In *McDonald v. Means.*

The Panel's application of *Montana*'s general rule is in direct conflict with the plain language of *Montana* itself and with this Court's decision in *McDonald v. Means, supra*. The Panel's decision is grounded in its expansive application of *Montana's* general rule, holding that it applies to actions arising both on Indian and non-Indian land. Slip. op. at

10625. The Panel held that the status of land ownership under *Montana* is only one factor to consider in *Montana*'s analysis, rather than a dispositive issue. *Id.* at n. 6. The Panel's analysis in this regard is entirely contrary to the Ninth Circuit's application of *Montana*'s general rule in *McDonald*.

In *McDonald*, the plaintiff, Kale Means, was injured in an accident when she collided with a horse that had wandered onto Route 5. *Id.* at 536. Route 5 was located within the exterior boundaries of the Northern Cheyenne Indian reservation, and Means was an enrolled member of the Northern Cheyenne Tribe. *Id.* The horse belonged to McDonald, who was not a member of the Northern Cheyenne Tribe. *Id.* Means filed a lawsuit against McDonald in Northern Cheyenne tribal court, alleging that McDonald was negligent in allowing his horse to wander onto Route 5.

McDonald then filed a claim in United States District Court challenging the tribal court's jurisdiction over Means's lawsuit. *Id.* The district court held that the tribal court lacked jurisdiction over the case and it was appealed to this Court. *Id.* The issue before this Court, therefore, was whether the Northern Cheyenne tribal court had jurisdiction over a non-member for an accident occurring on tribal land.

The Court held that Route 5 was a BIA road and, therefore, was not the equivalent of alienated fee land. *Id.* at 540. As such, the Court concluded that the Northern Cheyenne Tribe had not relinquished its "gatekeeping" authority over the road and, consequently, the tribal court had jurisdiction over McDonald. *Id.* at 540.

In relevant part to the present case, the Court recognized that the *Montana* rule was limited by its terms to "the conduct of nonmembers on land within a reservation that is owned in fee by a non-Indian." *Id.* at 536 (citing *Montana v. United States*, 450 U.S. 544, 565-66 (1981). The Court in *McDonald* specifically declined to apply the language of *Nevada v. Hicks, supra*., to the case explaining that *Hicks* was very factually specific and self-limiting, rendering it of no precedential value:

> McDonald argues that the majority's analysis "is not consistent with" the Supreme Court's decision in *Nevada v. Hicks*, . . . , that the ownership status of land is not dispositive in determining that a tribal court lacks jurisdiction over a civil claim against state officers who enter tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation. 533 U.S. 360. However, the Court noted that "our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court

> jurisdiction over nonmember defendants in general." *Id.* at 358, n. 2; see also *Id.* at 386 (Ginsburg, J., concurring) (writing separately to emphasize that the question of tribal jurisdiction over other nonmember defendants remains open). **The limited nature of Hick's holding renders it inapplicable to the present case**.

McDonald at 540 (emphasis added).

Likewise, in *McDonald* this Court declined to apply either *Montana* or *Strate* beyond the limitations recognized in both those cases, dealing strictly with the issue of tribal jurisdiction over the conduct of non-members on non-Indian fee land. As this Court explained in *McDonald:*

> *Montana* itself limited its holding to nonmember conduct on non-Indian fee land, 450 U.S. at 557 ("The power of the Tribe to regulate non-Indian fishing and hunting owned in fee by nonmembers of the Tribe.") and *Strate* confirmed that limitation, 520 U.S. at 446 ("*Montana* thus described a general rule that . . . Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation. . . .). Even if *Hicks* could be interpreted as suggesting that the *Montana* rule is more generally applicable than either *Montana* or *Strate* have allowed, *Hicks* makes no claim that it modifies or overrules *Montana*.

McDonald at 540 n. 9.

The foregoing analysis and narrow application of *Montana*, *Strate* and *Hicks* employed by this Court in *McDonald* is entirely in conflict with the expansive application the Panel used in the present case. It constitutes a complete departure from this Court's previous analysis of tribal jurisdiction, and in particular the relevance of ownership status over the land at issue.

In further explaining that the land status does not matter, the Panel further distinguished *McDonald* by stating as follows:

> McDonald concluded that, "under *Montana*," the Tribe could exercise jurisdiction based on the facts of that case. [citation omitted]. McDonald . . . does not announce a rule that *Montana* analysis only applies if there is a non-member *and* the action arose on non-tribal land. Instead, *McDonald* held that the exercise of jurisdiction in that case was permissible "under *Montana*."

Slip op. at 10622 n.4.

SKC respectfully disagrees with the Panel's description of *McDonald*. This Court in *McDonald* squarely rejected the application of *Montana*'s general rule precisely because the accident in question arose on tribal land, and thus did not involve a claim arising on alienated fee land. This Court explained in *McDonald* as follows:

> Having concluded that Route 5 falls outside the direct scope of *Strate*, we nevertheless consider whether the facts support jurisdiction under the *Montana* rule that tribes lack authority over the conduct of nonmembers on non-Indian fee land within the reservation. [citation omitted]
>
> * * *
>
> In granting the Route 5 right-of-way, the Northern Cheyenne Tribe relinquished some, but not all, of the sticks that form the landowner's traditional bundle of gatekeeping rights. . . . **We conclude that under *Montana*, the tribe retained enough of its gatekeeping rights that Route 5 cannot be considered non-Indian fee land, and that the Tribe thus maintains jurisdiction over Route 5**.

McDonald at 537, 539-40 (emphasis added).

Implicit in the Court's holding is that because Route 5 could not be considered non-Indian fee land, *Montana*'s general rule did not apply. Thus, this Court in *McDonald* rejected the application of *Montana*'s general rule regarding jurisdiction over the conduct of non-members on non-Indian fee land precisely because that case, as this one, arose on Indian land. Therefore, the Court in *McDonald* expressly rejected Means's argument that under *Hicks,* the ownership status of land is not dispositive

in determining that a tribal court lacks jurisdiction over a civil claim. *Id.* at 540.

To summarize, this Court in *McDonald* held as follows:

> (1) In a case between a member plaintiff and a nonmember defendant arising out an accident on Indian land, the tribes had subject matter jurisdiction;
>
> (2) This Court specifically declined to apply *Montana*'s general rule barring jurisdiction over a non-member for conduct occurring on non-Indian fee land because the claim in *McDonald* did in fact arise on Indian land. Therefore, neither *Montana*'s general rule, nor its exceptions, could apply.
>
> (3) This Court explicitly rejected Means's argument that under *Hicks*, the ownership status of land was not dispositive in determining tribal court jurisdiction under *Montana*. This Court expressly held, "The limited nature of *Hicks*'s holding renders it inapplicable to the present case." *Id.* at 540.
>
> (4) This Court specifically declined to expand the scope of *Montana* and *Strate* beyond their self-limiting application only to "nonmember conduct on non-Indian fee land." *Id.* at 540 n. 9. The Court further stated that "Even if *Hicks* could be interpreted as suggesting that the *Montana* rule is more generally applicable than either *Montana* or *Strate* have allowed, Hicks makes no claim that it modifies or overrules *Montana*." *Id.*

When compared with the Panel's analysis and conclusions regarding tribal jurisdiction over SKC, this Court's analysis in *McDonald* could not be more irreconcilable with the present case. All the following analysis and conclusions expressed by the Panel in this case are patently at odds with *McDonald*:

> (1) This case involves a non-member plaintiff suing a tribal member in tribal court for tortious conduct occurring on tribal land. Yet, opposite to the conclusion in *McDonald*, the the Panel determined that the tribes lacked jurisdiction;
>
> (2) Unlike *McDonald*, the Panel has expressly applied an unprecedented expansion of the *Montana* rule to bar jurisdiction over a claim against a tribal member defendant for its conduct occurring on tribal land.
>
> (3) Unlike *McDonald*, the Panel expressly adopted, rather than rejected, Smith's argument that under *Hicks* the ownership status of land is not dispositive in determining tribal court jurisdiction under *Montana*.
>
> (4) The Panel in the present case held, " the general rule of *Montana* applies to both 'Indian and non-Indian land' whenever a nonmember is a party to a claim litigated in tribal court. Slip op. at 10620 (citing *Hicks*, 533 U.S. at 360). This reasoning was specifically rejected by this Court in *McDonald*, in which the Court declared that *Hicks* was inapplicable due to its self-limiting nature, and supported no such statement

> of law or otherwise any expansive reading of *Montana*.

McDonald at 540.

Based on the foregoing, the Panel in this case based its conclusions on an overly expansive analysis of *Montana*, *Strate*, and *Hicks,* which was rejected by this Court in *McDonald*. The Panel's analysis could not be more inconsistent with this Court's previous and far more restrictive application of those cases in *McDonald*.

C. The Panel's Analysis Of *Montana*'s First Exception Is Erroneous Under The Applicable Facts And Law.

Assuming *arguendo* the *Montana* rule applies to this case, the Panel's analysis of the first exception to that rule, that Smith's claim does not arise out of his consensual relationship with SKC, is erroneous. The Panel reasoned that Smith's claim arose out of "separate Montana tort law that applied between SKC and Smith rather than arising from any contractual relationship Smith has as student at SKC." Slip op. at 10631. However, virtually every allegation in Smith's amended complaint is founded directly within that consensual relationship:

> SKC, its officers, agents and employees were responsible for adequately maintaining,

inspecting and repairing the dump truck as a safe training vehicle for course work.

SKC negligently failed to adequately maintain, inspect and repair the dump truck as a safe training vehicle for course work.

SKC was negligent for providing this particular dump truck to students for course work and training in its condition and state of repair in May 1997.

SKC has an absolute and non-delagable duty to protect the safety of is students, which duty is breached by:

(a) Lack of and/or improper maintenance of the dump truck.

(b) Lack of and/or improper supervision of the driver (Smith) and of the co-student (Burland) whom the College seems to claim was in charge of the truck and was directed to be instructing Smith at the time of the rollover.

(c) Lack of experience by the driver of the dump truck due to improper or inadequate training.

* * *

(k) Failure to warn the students of the unsafe mechanical condition of th dump truck.

Am. Compl. at ¶¶ 24-27.

Under black-letter Montana tort law, "in the absence of duty, there is no negligence. *Graham v. Montana State University*, 235 Mont. 284, 287, 767 P.2d 301, 303 (1988). Simply, SKC would not owe the foregoing duties to Smith alleged in his complaint absent the consensual student/instructor relationship. Montana tort law would impose no duty on SKC to provide Smith with a safe learning environment if he was not an enrolled student. Montana tort law would impose no duty on SKC to supervise or train Smith if he was not an enrolled student. Montana tort law would impose no duty on SKC to warn Smith of any alleged dangerous conditions relating to the dump truck if he was not an enrolled student. As the Panel itself noted, "Smith would not have been in the dump truck apart from his course" at SKC. Slip op. at 10630.

The simple fact that Smith's remedies arise under Montana tort law, rather than contract law, does nothing to sever the intrinsic and necessary ties between Smith's claims against SKC and his consensual relationship with SKC. The Panel suggests that a contract claim would create the necessary ties between Smith and SKC to fall within *Montana*'s first exception. SKC respectfully suggests that the consensual relationship with

Smith is every bit as essential to creating the specific tort liability alleged in Smith's amended complaint as it would be to creating any contract liability between them. This consensual relationship is entirely different than the "run of the mill traffic accident" at issue in *Strate*. *Strate*, 520 U.S. at 457. The Panel's decision to the contrary relies on a distinction without a difference, and is fundamentally undermined by the very allegations of Smith's own amended complaint.

IV. CONCLUSION

If the Panel's decision in this case is allowed to stand, it will not only lead to an unprecedented erosion of tribal sovereignty, but will leave in place entirely inconsistent applications of the law relating to tribal jurisdiction. For all the foregoing reasons, SKC respectfully requests the Court grant its Petition for Rehearing *En Banc*.

DATED this 26th day of August, 2004.

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By_____
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CERTIFICATION OF COMPLIANCE TO
FED. R. APP. P. 32(c)(2) AND CIRCUIT RULE 40-1

I CERTIFY THAT:

1. Pursuant to Fed. R. App. P. Rule 32(c)(2) and Ninth Circuit Rule 40-1, the attached ***Appellee Salish Kootenai College's Petition for Rehearing En Banc***

__√__ contains __4107__ words, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED this 26th day of August, 2004.

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By_____
Robert J. Phillips
Attorneys for Appellee Salish Kootenai College

CERTIFICATE OF MAILING

I, Robert J. Phillips, one of the attorneys for Appellee Salish Kootenai College in the above-entitled action, hereby certify that on the 26th day of August, 2004, I served the within ***Appellee Salish Kootenai College's Petition for Rehearing En Banc*** upon the attorneys of record by mailing two (2) true copies thereof in an envelope, securely sealed, postage prepaid and addressed as follows:

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