No. 14-2150

In the
United States Court of Appeals
for the Seventh Circuit

STIFEL, NICOLAUS & COMPANY, INC., et al.,

Plaintiffs-Appellees,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS and
LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:13-cv-00372-wmc.
The Honorable **William M. Conley**, Judge Presiding.

AMICI CURIAE BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, ONEIDA TRIBE OF INDIANS OF WISCONSIN, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ST. CROIX CHIPPEWA INDIANS OF WISCONSIN, HO-CHUNK NATION OF WISCONSIN and NAVAJO NATION IN SUPPORT OF DEFENDANT-APPELLANT LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS AND REVERSING THE DISTRICT COURT'S JUDGMENT

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AMICI CURIAE

Amici Curiae are the National Congress of American Indians ("NCAI"), the Oneida Tribe of Indians of Wisconsin, the Red Cliff Band of Lake Superior Chippewa Indians, the St. Croix Chippewa Indians of Wisconsin, the Ho-Chunk Nation of Wisconsin, and the Navajo Nation ("Tribal amici"). Established in 1944, the NCAI is the oldest and largest American Indian organization, representing more than 250 Indian tribes and Alaskan native villages. Tribal amici are federally recognized Indian tribes exercising inherent sovereign authority.

NCAI and Tribal amici's interest in this case lies in protecting tribal sovereignty. Except for the Navajo Nation, Tribal amici are located within the United States Court of Appeals for the Seventh Circuit. Tribal amici have an interest to promote Tribal Court jurisdiction for nonmember conduct on Tribal land that adversely affects Tribal self-government.

NCAI and the governments of the Tribal amici have authorized this amicus filing in support of the Lac Du Flambeau Band of Superior Chippewa Indians and its Lake of the Torches Economic Development Corporation.

No party's counsel has authored this brief in whole or in part. No party or party's counsel has contributed money that was intended to fund preparing or submitting the brief. No person contributed money that was intended to fund preparing or submitting the brief, other than the amici curiae, its members, or its counsel.

ARGUMENT

I. The evolution of the Tribal Court exhaustion doctrine

Almost thirty years ago, the Supreme Court formulated the tribal court exhaustion doctrine in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). The doctrine requires "a federal court to stay its hand" while a tribal court determines its own jurisdiction. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 16 (1987). While not a bar to federal jurisdiction, "exhaustion is required as a matter of comity . . . ." *Id*. at 15. The exhaustion doctrine furthers the congressional policy of supporting tribal self-government, promotes the orderly administration of justice, and allows federal courts to obtain the benefits of tribal courts' expertise. *National Farmers,* 471 U.S. at 856-57. In general, federal courts should only reach questions about the extent of tribal civil jurisdiction after tribal courts have had a full opportunity, including tribal appellate review, to address them. *Id*. at 856 n. 21; *Iowa Mutual*, 480 U.S. at 16-17.

Since *National Farmers* and *Iowa Mutual*, "[t]he exhaustion requirement has become a staple of Indian law practice and scholarship." Frank Pommersheim, *"Our Federalism" In the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. Colo. L. Rev. 123, 145 (2000). In its first decade "federal district and appellate courts … issued over eighty reported decisions construing and applying *National Farmers Union* and *Iowa Mutual*." Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law:*

A Vehicle for Reassessment of the Tribal Exhaustion / Abstention Doctrine, 80 Marq. L. Rev. 531, 535 (1997). By contrast, this Court has had only two opportunities to apply the exhaustion doctrine, the first more than two decades ago, *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993), cert. denied, (510 U.S. 1019 (1993), and the second very recently in a case involving the challenging context of an on-line payday lending operation, *Jackson v. Payday Financial, LLC*, 2014 WL 4116804 (7th Cir. Aug. 22, 2014). The following review is offered to provide guidance about how the exhaustion doctrine has developed nationwide in a range of cases involving tribal litigants, as well as how to apply it in this case.

A. The Supreme Court's exhaustion doctrine

National Farmers involved a claim filed in tribal court by a tribal member against a public school district. After a default judgment in favor of the tribal member, the school district and its insurer filed suit in federal district court to enjoin the tribal court action. *National Farmers*, 471 U.S. at 847-48. The Supreme Court first held that the extent of a tribe's jurisdiction was a matter of federal common law, and therefore within the courts' federal question jurisdiction. *Id*. at 852-53.

Next, *National Farmers* addressed whether tribal civil jurisdiction over non-Indian defendants was permissible. The Court declined to follow *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which held that tribal criminal jurisdiction over non-Indians had been implicitly divested. *National Farmers*, 471 U.S. at 853-54. Instead, after

reviewing legislative and executive branch policy, the Court concluded that tribal civil jurisdiction over non-Indians "is not automatically foreclosed." *Id*. at 855.

Rather than answer the jurisdictional question, however, the Court held that tribal courts should have the first opportunity to determine their own jurisdiction. *Id*. at 856. Assessing the extent of a tribe's jurisdiction in any given case would require, "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id*. at 856. Tribal courts should be given the first opportunity to conduct this examination because: "Congress is committed to a policy of supporting tribal self-government and self-determination, . . . the orderly administration of justice will be served by allowing a full record to be developed in the tribal court . . . .," and "[e]xhaustion of tribal court remedies will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise . . . ." *Id*. at 856-57.

The Court did recognize three exceptions to the exhaustion requirement: "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers*, 471 U.S. at 857 n. 21. In *Strate v. A-*

1 Contractors, 520 U.S. 438 (1997), the Court appeared to add a fourth exception when it commented that parties may also be exempt from exhausting tribal remedies when it is "plain" that the tribe lacks jurisdiction under *Montana v. United States,* 450 U.S. 544 (1981), and there is otherwise no federal grant of tribal jurisdiction. *Strate*, 520 U.S. at 460 n.14; *see also Nevada v. Hicks*, 533 U.S. 353, 369 (2001).

Just two years after *National Farmers*, the Court in *Iowa Mutual* affirmed the exhaustion doctrine, stating: "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." 480 U.S. at 14-15. Most recently, the Court has declined to review several major cases raising challenges to exhaustion. *E.g., Grand Canyon Skywalk Dev't v. 'Sa' Nyu Wa,* 715 F.3d 1196 (9th Cir. 2013), *cert. denied,* 134 S.Ct. 825 (2013); *Elliott v. White Mountain Apache Tribal Court,* 566 F.3d 842 (9th Cir. 2009), *cert. denied,* 558 U.S. 1024 (2009). Since *National Farmers* and *Iowa Mutual*, federal support of tribal courts has increased.

"Congress has …pursued a substantive legislative agenda of strengthening tribal [court] capacity and enhancing tribal self-governance to include authority over people and territory." Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs,* 85 U. Colo. L. Rev. 759, 798 (2014). *See, e.g.,* the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 124 Stat. 54 (codified as amended in scattered Sections of 42, 25, 22 and 18 U.S.C.) (2013) (recognizing and affirming inherent tribal powers to exercise domestic violence jurisdiction over all persons); the Tribal Law

and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (including measures to strengthen tribal courts and develop tribal justice systems); the Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559 , 114 Stat. 2778 (2000) (strengthening and improving the capacities of tribal court systems); the Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (recognizing and strengthening tribal justice systems).

B. Federal Circuits have adopted strong presumptions in favor of exhaustion

Since *Strate v. A-1 Contractors*, 520 U.S. at 460 n.14, lower federal courts have clarified that there are many circumstances in which it is not at all "plain" that tribal jurisdiction is lacking, and that exhaustion is therefore required. In *Grand Canyon Skywalk,* the most recent Ninth Circuit decision in which *certiorari* was denied, the court described exhaustion as a "prerequisite to a federal court's exercise of its jurisdiction." *Grand Canyon Skywalk Dev't v. 'Sa' Nyu Wa,* 715 F.3d 1196 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 825 (2013). "'[U]nder *National Farmers,* the federal courts should not even make a ruling on tribal court jurisdiction ... until tribal remedies are exhausted.'" *Id*. (quoting *Stock West, Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221, 1228 (9th Cir.1989)).

The First and Ninth Circuits have described the presumption in favor of exhaustion as mandating that "colorable" or "plausible" claims of tribal court jurisdiction be considered first by tribal courts. *See Elliott v. White Mountain Apache Tribal Court*, 566

F.3d at 848 ; *Atwood v. Ft. Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir. 2000). This Court recently adopted similar language in *Jackson v. Payday Financial, LLC*, 2014 WL 4116804, at *12 , concluding that exhaustion was not required because there was no "no colorable claim" that the tribal court had jurisdiction. In a recent case, the Eighth Circuit adopted an even stronger presumption in favor of exhaustion: "the exhaustion requirement should be waived only if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law." *DISH Network Services, LLC v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013).

While federal courts may ultimately review the jurisdictional questions, they initially defer to tribal courts on close calls because they are in a better position to assess the facts, create the record, and interpret their own jurisdictional and procedural rules. *See DISH Network*, 725 F.3d at 883 ("In circumstances where the law is murky or relevant factual questions remain undeveloped, the prudential considerations outlined in *National Farmers Union* require that the exhaustion requirement be enforced.").

C. Courts generally require exhaustion in cases involving tribal parties, even those involving sovereign immunity and forum selection clauses.

In general, federal courts are most likely to require exhaustion when the tribe or a tribal entity is a party. This is particularly so in two circuits, the Eighth and Ninth, which hear the highest number of exhaustion cases. *See, e.g., Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020 (8th Cir., 2014); *Grand Canyon Skywalk Dev't,* 715 F.3d at 1200; *see also*

Ninigret, 207 F.3d at 32 ("Civil disputes arising out of the activities of non-Indians on reservation lands almost always require exhaustion if they involve the tribe"). This approach is consistent with the exhaustion doctrine's purposes, given that cases involving the tribe or tribal entities are likely to involve applications of tribal law and procedure, and also to touch on issues at the core of tribal self-governance. *See Grand Canyon Skywalk*, 715 F.3d at 1200; *Ninigret*, 207 F.3d at 34. In addition, while a pending tribal court action is not a prerequisite to exhaustion, *see Ninigret*, 207 F.3d at 31; *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F,3d 974, 976 (9th Cir. 2003), an ongoing case in tribal court strengthens the argument for exhaustion at least on administrative efficiency grounds. *Compare Altheimer*, 983 F.2d at 814 (rejecting exhaustion when no case was pending in tribal court).

In this case, there are difficult factual and legal questions for the tribal court to resolve, including the complicated record concerning the Tribe and tribal corporation's sovereign immunity and the scope of the forum selection clauses, which arise in the context of several contracts between the Parties. *See Lake of the Torches Econ. Dev. Coro. v. Saybrook Tax Exempt Investors, LLC*, Order on Defendants' Motions to Dismiss and Related Matters at 28-32, No. 13 CV 115, Lac du Flambeau Tribal Court (Aug. 27, 2012) (finding some of the forum selection clauses to preclude tribal court jurisdiction and one to be ambiguous, requiring further factual development to resolve.) The First Circuit concluded that the exhaustion doctrine contemplates that tribal courts will engage

precisely these kinds of difficult questions of interpretation. *See Ninigret*, 207 F.3d at 33.

1. Exhaustion and sovereign immunity

With respect to waivers of sovereign immunity, the Eighth and Ninth Circuits allow tribal courts to address the extent of a tribe's waiver in the first instance. *See Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (citation omitted) (the tribal exhaustion requirement applies to issues of tribal sovereign immunity and determining whether immunity has been waived "requires 'a careful study of the application of tribal laws, and tribal court decisions.'"); *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999), cert. denied, 529 U.S. 1099 (2000) (a purported waiver of sovereign immunity does not do away with the exhaustion requirement; such issues are the very questions the Supreme Court said were to be decided in the first instance by tribal courts). Another approach is for the federal court to address the sovereign immunity issues, but nonetheless to require exhaustion on the substantive matters involved in the litigation. *See Ninigret*, 207 F.3d at 28-29. Here, where the merits of the dispute are bound up with the immunity issue, requiring exhaustion at the outset respects tribal sovereignty and the Supreme Court's exhaustion rationale.

2. Exhaustion and forum selection clauses

Tribal exhaustion is also required when forum selection clauses are present. In *Ninigret*, the First Circuit required exhaustion in a case brought by a non-Indian

contractor against a tribal housing authority where the claims arose from contracts for work outside of the reservation. *See Ninigret*, 207 F.3d at 33. The First Circuit declined to interpret the contracts' forum selection clauses itself, concluding instead that "[a]t this stage, the pivotal question is not which court the parties agreed would have jurisdiction, but which court should in the first instance, consider the scope of the tribal court's jurisdiction and interpret the pertinent contractual clauses (including any forum-selection proviso."). *Id*. The court reasoned that "where . . . the tribal exhaustion doctrine applies generally to a controversy, an argument that a contractual forum-selection clause either dictates or precludes a tribal forum should not be singled out for special treatment, but should be initially directed to the tribal court." *Id*.; *see also Basil Cook Enterprises, Inc., v. St. Regis Mohawk Tribe*, 117 F.3d 61, 63 & 69 (2nd Cir. 1997) (exhaustion required to interpret arbitration clause provision); *Bank One v. Lewis*, 144 F.Supp.2d 640, 651 (S.D. Miss. 2001), aff'd, 281 F.3d 507 (5th Cir. 2002), cert denied, 537 U.S. 818 (2002) (exhaustion required to interpret forum selection and arbitration clause); *Snowbird Const. Co., Inc. v. U.S.*, 666 F. Supp. 1437, 1444 (D. Idaho 1987) (exhaustion required to interpret forum selection provision).

The tribal court can construe the contractual provisions and determine whether they unambiguously commit the parties to a non-tribal forum. The tribal court undertook that analysis in this case, and concluded that "with one exception . . . Each of the forum selection clauses . . . Is unambiguously permissive, allowing the Parties to bring a

separate suit in [tribal court] against the defendants." *Lake of the Torches Econ. Dev. Corp.,* Tribal Court Order on Defendants' Motions to Dismiss and Related Matters at 21. With respect to the one provision that might have been a mandatory forum selection clause, the tribal court concluded that ruling at the motion to dismiss stage would be premature given ambiguities in the contract. *Id*. at 32

Two of the three purposes of the exhaustion doctrine—promoting the orderly administration of justice and cultivating tribal court expertise—are directly served by requiring exhaustion in forum selection cases, as is the over-arching goal of promoting tribal sovereignty that "forms the epicenter of the tribal exhaustion doctrine." *Ninigret*, 207 F.3d at 33. This Court need not reverse *Altheimer* in order to embrace an analysis more in line with other Circuits. *Altheimer* can be distinguished by the absence of any pending tribal case and the fact that the federal court had jurisdiction over the underlying dispute. *See Altheimer*, 983 F.2d at 814. Here, the Tribal Court case was initiated prior to the present federal court lawsuit, but after the federal court had determined that it lacked jurisdiction to hear the underlying contract claims. *Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Econ. Dev. Corp.*, 12-CV-255-WMC, 2013 WL 2300991 (W.D. Wis. Apr. 1, 2013).

This case presents the sort of tangled factual and procedural history that *National Farmers* intended for tribal courts to address. *See National Farmers*, 471 U.S. at 856-57 ("The risks of the kind of 'procedural nightmare' that has allegedly developed . . . will

be minimized if the federal court stays its hand . . . ."). Complex issues of contract interpretation and tribal sovereign immunity, particularly when they involve a tribe or tribal entity as a party, stand to benefit from the tribal court's expertise, and allowing the tribal court that opportunity serves the doctrine's larger purpose of protecting tribal self-government. *See id*. at 856.

D. The district court did not rely on any of the well-defined exceptions to the exhaustion requirement

National Farmers articulated three exceptions to the exhaustion requirement. *National Farmers,* 471 U.S. 845, 856 n.21. Exhaustion is not necessary when asserting tribal jurisdiction is motivated by bad faith or a desire to harass, when the action patently violates express jurisdictional prohibitions, or when exhaustion would be futile because of no opportunity to challenge the court's jurisdiction. *Id*. at 856 n. 21. Subsequent cases have expanded on the meaning of these exceptions, clarifying that they apply in relatively narrow circumstances.

First, patent violations of express jurisdictional prohibitions tend to be obvious and rare. Statutes that expressly provide for exclusive federal court jurisdiction may excuse exhaustion. The Supreme Court interpreted the Price-Anderson Act, which established exclusive federal jurisdiction for all tort claims from nuclear accidents, to implicitly exempt the parties from the tribal exhaustion requirement. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-87 (1999); *see also Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (no exhaustion required for action brought under Resource

Conservation and Recovery Act, which places exclusive jurisdiction in federal courts). Similarly, claims under statutes that expressly prohibit tribal regulation or fail to waive federal sovereign immunity from suit are exempt from exhaustion under this exception. *See Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (no exhaustion required because Hazardous Materials Transportation Act contains a provision specifically preempting tribal licensing requirements, which were the remedy sought by plaintiffs); *Louis v. U.S.*, 967 F. Supp. 456 (D.N.M. 1997) (no exhaustion required in case brought against the U.S. under Federal Tort Claims Act).

Otherwise, if the federal statute does not expressly prohibit tribal regulation or jurisdiction, or provide for exclusive federal jurisdiction, courts require exhaustion. In several cases courts have held that the Indian Gaming Regulatory Act did not preclude exhaustion. *See Sac & Fox Tribe of Mississippi in Iowa v. U.S.*, 264 F. Supp. 2d 830 (N.D. Iowa 2003), aff'd in part and rev'd in part on other grounds, 340 F.3d 749 (8th Cir. 2003); *Hartman v. KickapooTribe Gaming Com'n*, 176 F. Supp.2d 1168 (D. Kan. 2001), aff'd, 319 F.3d 1230 (10th Cir. 2003); *Abdo v. Fort Randall Casino*, 957 F. Supp. 1111 (D.S.D. 1997); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996). Nor have the Employment Retirement Income Security Act (ERISA), the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Truth in Lending Act (TILA) precluded tribal exhaustion. *See Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995)

(ERISA); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043 (E.D. Wis. 1999) (RICO); *Williams-Willis v. Carmel Financial Corp.*, 139 F. Supp. 2d 773 (S.D. Miss. 2001) (TILA).

The bad faith and futility exceptions to exhaustion are equally narrow. The bad faith exception does not apply when parties merely raise unsubstantiated concerns or allegations of bias. *See Ninigret*, 207 F.3d at 39. Rather, there must be "evidence of affirmative misleading or other misconduct." *Id*. In the Ninth Circuit, the party seeking an exemption from the exhaustion requirement must show that the tribal court, and not just one of the parties, has acted in bad faith. *Grand Canyon Skywalk*, 715 F.3d at 1201 ("a broader interpretation would unnecessarily deprive tribal courts of jurisdiction and violate the principles of comity that underlie the exhaustion requirement"). Similarly, the futility exception is not applied to circumstances in which the party alleges general unfairness, risk of bias, or unsubstantiated concerns about the tribal court system. *See Ninigret*, 207 F.3d at 36-37. "The requirements for this exception are rigorous: absent tangible evidence of bias . . . a party cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes." *Id*. at 37. Likewise, in *Grand Canyon Skywalk*, the court stated that the futility exception "applies narrowly to only the most extreme cases," such as where there is no functioning tribal court at all. 715 F.3d at 1203 (citing to *Krempel v. Prairie Island Indian Cmty*, 125 F.3d 621, 622 (8th Cir. 1997)).

The district court did not mention or analyze any of these exceptions to the

exhaustion requirement, and none would apply in this case. There is no statute expressly preempting or prohibiting tribal jurisdiction, and there have been no allegations that there is tangible evidence of bias, bad faith, or the absence of a tribal court system. Given that none of the exceptions apply and there is at least a colorable claim of tribal court jurisdiction, the district court erred when it failed to require Appellees to exhaust its tribal court remedies in the pending tribal court case.

II. Tribes have civil jurisdiction over non-members who enter into commercial relationships with tribes on tribal lands.

The Supreme Court has acknowledged that an Indian tribe's "authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mutual*, 480 U.S. at 17. In *Montana v. United States*, 450 U.S. 544 (1981) the Court considered whether an Indian tribe could regulate a non-Indian on non-Indian fee land, but "readily" agreed with the Ninth Circuit Court of Appeals that the Tribe "may prohibit nonmembers from hunting or fishing on land belong to the Tribe" and that the Tribe "may condition their entry" on tribal land. *Id.* at 557. Six years ago, the Supreme Court reiterated the rule that Indian tribes "retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers." *Plains Comm. Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 327 (2008).

Under *Montana* the critical inquiry is whether the nonmember's conduct occurred on Tribal land because Indian tribes possess "considerable control over

nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. at 454, *see also Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152-53 (1980) ("Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest"). On tribal land, nonmembers remain "subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). Further, civil jurisdiction over the activities of non-Indians on tribal land "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18. Unlike the facts underlying *Jackson v. Payday Financial, LLC*, 2014 WL 4116804, at *1-3, the transaction in this case included considerable nonmember action and conduct on tribal land.

Oddly, the district court's brief *Montana* analysis relies almost exclusively on *Nevada v. Hicks*, 533 U.S. 353 (2001), while ignoring the Ninth Circuit's recent decision in *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). The Supreme Court twice emphasized in *Hicks* that the "ownership status of land" "may sometimes be a dispositive factor," *Hicks*, at 360, but that tribal ownership was not "dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws." *Id.* at 370. Instead, the State's involvement as a party was dispositive because "the actions of these state officers cannot threaten or affect [Tribal]

interests [because they are] guaranteed by the limitations of federal constitutional and statutory law to which the officers are fully subject." *Id.* at 371. Thus, the questions considered in *Hicks* – "whether regulatory jurisdiction over state officers in the present context is necessary to protect tribal self-government or to control internal relations, and, if not, whether such regulatory jurisdiction has been congressionally conferred" – are not present in this case. *Id.* at 360.

The Ninth Circuit's decision in *Water Wheel* provides the more relevant analysis for cases like this one that do not involve state officers pursuing off-reservation crime. *Water Wheel* balanced an Indian tribe's power to exclude and establish conditions on non-member conduct occurring on tribal land, as established in *Merrion*, with the limitations of a tribe's civil jurisdiction over nonmembers on non-Indian fee land within a reservation, as set forth in *Montana*. As the *Water Wheel* court recognized, *Merrion* was decided after *Montana*, yet the Supreme Court did not apply the *Montana* standards to the Tribe's assertion of authority on tribal land. *Water Wheel*, 642 F.3d at 810. *Water Wheel's* approach was most recently affirmed in *Grand Canyon Skywalk,* 715 F.3d at 1204 ("the district court correctly relied upon *Water Wheel,* which provides for [determining] tribal jurisdiction [over non-Indians on tribal land] without even reaching the application of *Montana.*").

A. Even under the *Montana* exceptions, there is Tribal Court jurisdiction here.

If the nonmember activity occurs on non-Indian lands over which the tribe has lost

its gatekeeping authority, tribes have jurisdiction pursuant to what have become known as the *Montana* exceptions. *See Montana*, 450 U.S. at 565-66; *Strate* , 520 U.S. at 446. The Ninth Circuit was correct when it determined that "*Montana* limited the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land." *Water Wheel*, 642 F.3d at 810. Assuming, for sake of argument, that *Montana* applies to a tribe's jurisdiction over nonmember's conduct on tribal land, then both exceptions permit the Tribal Court to exercise jurisdiction. *Cf. Merrion* at 147 ("Requiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself").

Under *Montana*'s first exception, tribes may regulate the conduct of a nonmember who enters into a "consensual relationship" with the tribe or tribal members. *Montana* 450 U.S. at 565. In *Strate*, the Supreme Court discussed the types of consensual relationships that would qualify, based on the list of cases in *Montana* itself. *See* 520 U.S. at 457. Each of the cases involved the tribe's right to regulate commercial activity within tribal territory. *See id*. First, in *Williams v. Lee*, 358 U.S. 217, 223 (1959), the Supreme Court held that the tribal court had jurisdiction over a lawsuit arising out of an on-reservation sales transaction between a nonmember plaintiff and tribal member defendants. In the next two Supreme Court cases from *Montana*'s list, the Court approved tribal taxation of non-Indian commercial activities within tribal territory. *See*

Strate, 520 U.S. at 457 (citing *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Colville*, 447 U.S. at 152-54).

The cases listed in *Montana* all support the proposition that tribes have inherent authority to prescribe the terms and conditions under which nonmembers may transact business on their reservations. *See Strate*, 520 U.S. at 457. Some of these cases affirm tribal authority to impose conditions on nonmember economic activity without discussing land status. In *Colville*, for example, the tribes' cigarette sales' taxes were upheld on the grounds that tribes have inherent authority to tax "non-Indians entering the reservation to engage in economic activity." *Strate*, 520 U.S. at 452 (quoting *Colville*, 447 U.S. at 153). It is also clear, however, that the tribes' interests are strongest when the activity occurs on or relates to tribal land. *See Merrion*, 455 U.S. at 144-45; *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 440 (1989) (opinion of Stevens, J.) (approving zoning of non-Indian fee land in portion of the reservation that was dominated by tribal trust land).

Here, the Tribe's good faith allegations of fraud directly affect the parties' consensual relationship. Where a non-Indian company voluntarily enters into a multi-million dollar economic development contract with a tribal entity and both parties are represented by counsel, "[g]iven the consensual nature of the relationship and the potential economic impact of the agreement," tribal jurisdiction under *Montana* is a reasonable conclusion. *Grand Canyon Skywalk,* 715 F.2d at 1206. In this case, Appellees

knowingly entered into a commercial relationship with the Tribe concerning an on-reservation tribal resource, and entered onto Tribal lands to do so. This activity falls within *Montana's* first exception.

Tribes also have jurisdiction over nonmember conduct on fee lands within their reservations "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The Supreme Court has clarified that to qualify under the "direct effects" exception, nonmember conduct must do more than pose a risk to individual tribal members. *See Strate*, 520 U.S. at 458. Rather, the nonmember conduct must interfere with the *tribe*'s ability to make its own laws and be ruled by them. *See id*. at 458-59; *see also Plains Commerce*, 554 U.S. at 341 ("[t]he second exception authorizes . . . civil jurisdiction when non-Indian 'conduct' menaces the 'political integrity . . . of the tribe'" (quoting *Montana*, 450 U.S. at 566)). Here, the second Montana exception also applies because the health or welfare of the tribe, indeed its ability to survive as a government for its members, is compromised when, as alleged here, a nonmember's voluntary conduct and activities threaten a tribal government's fiscal solvency. *See Grand Canyon Skywalk,* 715 F.3d at 1204 ("the financial implications of the agreement [alone] likely place it squarely within" the second *Montana* exception).

CONCLUSION

Amici Curiae appreciate the opportunity to present several of the established principles applicable to tribal court exhaustion and tribal jurisdiction over nonmembers, which have been set forth by the Supreme Court and several other Circuit Court of Appeals.

Dated: September 12, 2014

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing the *Amici Curiae* Brief of National Congress of American Indians, Oneida Tribe of Indians of Wisconsin, Red Cliff Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin, Ho-Chunk Nation of Wisconsin and Navajo Nation in Support of Defendant-Appellant Lac Du Flambeau Band of Lake Superior Chippewa Indians and Reversing the District Court's Judgment complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,166 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 97-2003 in 12 point Palatino Linotype font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of September, 2014, the *Amici Curiae* Brief of National Congress of American Indians, Oneida Tribe of Indians of Wisconsin, Red Cliff Band of Lake Superior Chippewa Indians, St. Croix Chippewa Indians of Wisconsin, Ho-Chunk Nation of Wisconsin and Navajo Nation in Support of Defendant-Appellant Lac Du Flambeau Band of Lake Superior Chippewa Indians and Reversing the District Court's Judgment was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit Court by using the appellate CM/ECF system. The following participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system:

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