Docket No. 09-17349 (appeal)
Docket No. 09-17357 (cross-appeal)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATER WHEEL CAMP RECREATIONAL AREA, INC. et al.,
Plaintiffs and Appellants,

vs.

GARY LARANCE, The Honorable Judge in his capacity as the Chief and Presiding Judge of the Colorado River Indian Tribes Tribal Court; et al.,
Defendants and Appellees.

Appeal From The United States District Court
For The Central District of California, District of Arizona, Phoenix
D.C. No. 2:08-cv-00474-DGC

BRIEF OF AMICUS CURIAE COLORADO RIVER INDIAN TRIBES IN SUPPORT OF APPELLANTS GARY LARANCE, ET AL.

ELLISON FOLK
(Cal. State Bar No. 149232)
WINTER KING
(Cal. State Bar No. 237958)
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816

ERIC SHEPARD
(Ariz. State Bar No. 21323)
COLORADO RIVER INDIAN TRIBES
Office of the Attorney General
26600 Mohave Road
Parker, AZ 85344
Telephone: (928) 669-1271
Facsimile: (928) 669-5675

Attorneys for Amicus Curiae Colorado River Indian Tribes

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No(s).

FEDERAL CASES

FEDERAL RULES

LAWS OF THE COLORADO RIVER INDIAN TRIBES

INTRODUCTION

The district court in this case erroneously concluded that the Tribal Court of the Colorado River Indian Tribes ("CRIT" or "Tribes") lacked jurisdiction to hear an eviction action brought by the Tribes against Robert Johnson, a non-Indian who has owned and operated a resort on tribal land pursuant to a lease with the Tribes for over twenty years. The crux of the court's reasoning is that Johnson's extensive dealings with the Tribes—evidenced by scores of letters to the Tribes, meetings with tribal officials, and rent checks paid to CRIT—had not been undertaken "voluntarily." Thus, according to the district court, Johnson had not entered into the type of consensual relationship with the Tribes required to maintain tribal court jurisdiction under *United States v. Montana*, 450 U.S. 544 (1981).

The only evidence the district court cites in support of this theory is a declaration submitted by Johnson to the district court (but not to the tribal court) stating that, when he purchased the Water Wheel Resort, Johnson was unaware he would have to deal with CRIT in developing and operating it. The evidence in the record flatly contradicts this statement. Even if Johnson's declaration were accurate, however, the evidence presented by CRIT in the tribal court proceedings shows that Johnson continued to operate his business on tribal land—voluntarily—long after learning that he would have to comply with tribal law to do so.

The district court also erred in concluding that the second prong of the *Montana* test was not at issue in this case. Under that prong, a tribal court can exercise jurisdiction over a non-member when his activities threaten the economic security of the tribe. As the Tribal Court of Appeals held, this second exception formed an alternative basis for the tribal court's jurisdiction, as Johnson's refusal to vacate CRIT's property after the expiration of the lease threatened the Tribes' economic security.

As a result of the district court's error, Robert Johnson remains on the Tribes' land—land held in trust by the United States for the Tribes' benefit—without the Tribes' permission. Johnson has not paid rent to the Tribes in years, yet he continues to collect rent from those who stay at the Water Wheel Resort. Nothing in the record or the law governing tribal court jurisdiction supports—much less mandates—this inequitable result.

STATEMENT OF INTEREST

Amicus curiae Colorado River Indian Tribes is a federally recognized Indian tribe whose Reservation is located along the Colorado River in southeastern California and western Arizona. In 2007, CRIT filed an action in the tribal court of the Colorado River Indian Tribes seeking to evict Appellees/Cross-Appellants Water Wheel Camp Recreational Area, Inc. ("Water Wheel") and Robert Johnson from the Tribes' land and recover related damages. Water Wheel and Johnson

filed this action in federal district court, seeking review of the tribal court's jurisdictional determination pursuant to *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985).

CRIT will be directly affected by the outcome of this case. Most immediately, this Court's decision will impact how and whether CRIT can regain possession of its property from Johnson and Water Wheel and recover the damages awarded to CRIT by the tribal court. More generally, this Court's decision will affect CRIT's ability to enforce commercial contracts against non-members in tribal court.

The purpose of this amicus brief is to discuss the evidence presented by CRIT to the tribal court demonstrating Johnson's voluntary, consensual business relationship with the Tribes and the economic impact of Johnson's refusal to return possession of the property to CRIT. CRIT's familiarity with this evidence and the tribal court proceedings make it well-suited to present this information to the Court. CRIT also supports the position of the Hon. Gary LaRance, et al. (together, "Tribal Court") both as Appellants and Cross-Appellees.

CRIT requested consent from the parties to this appeal to file this amicus brief. While the Tribal Court consented to this filing, Water Wheel and Johnson did not. Accordingly, CRIT is filing a motion for leave to file an amicus brief in

support of the Tribal Court's appeal concurrently with this brief, pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

HISTORY OF THE TRIBAL COURT PROCEEDINGS

In October 2007, CRIT filed suit in tribal court seeking to evict Water Wheel and Johnson from land held in trust by the United States for the benefit of the Tribes. ER at 300. For many years, Water Wheel and Johnson had occupied the Tribes' property pursuant to a lease with the Tribes. In July 2007, however, this lease expired. Excerpts of Record ("ER") at 222, 227. Although neither Johnson nor Water Wheel had permission to remain on the Tribes' property after expiration of the lease, they refused to leave. ER at 110. Thus, to regain possession of its land, CRIT filed suit.

This straightforward landlord-tenant dispute became more complex when Johnson and Water Wheel challenged the tribal court's jurisdiction under *United States v. Montana*, 450 U.S. 544 (1981). ER at 261-62. Because Johnson and Water Wheel are not tribal members, the tribal court held hearings, heard testimony, and took evidence to determine whether it had jurisdiction over them pursuant to the Supreme Court's decision in *Montana*. ER at 288, 261-62. Four months after CRIT filed its complaint, the tribal court concluded that it did have jurisdiction. ER at 264, 266, 268.

The Tribal Court of Appeals upheld this determination. In its comprehensive analysis of *Montana* and the cases following it (ER at 178-187), the appellate court noted that the United States Supreme Court has "consistently upheld the exercise of tribal authority over non-member activity *on tribal or other Indian owned land* within an Indian reservation." ER at 182 (emphasis in original).[1] Operating a business on tribal land pursuant to a lease with the Tribes therefore "fully satisfie[d] the consensual relationship prong of the *Montana* test." *Id*. at 183. The Tribal Court of Appeals also concluded that Johnson and Water Wheel's actions—failing to pay substantial amounts of rent owed to the Tribes and refusing to return the Tribes' property after the expiration of the lease—threatened the economic security of the Tribes. *Id*. at 183-84. Thus, the Tribal Court of Appeals upheld the tribal court's jurisdiction under both prongs of the *Montana* test.

Water Wheel and Johnson filed this action in federal district court seeking to overturn the tribal court's jurisdictional determination. ER at 351-61.

[1] The court distinguished the one possible exception to this rule—*Nevada v. Hicks*, 533 U.S. 353 (2001)—by its "truly unusual" facts, and noted that the actions challenged in that case actually arose from an investigation of *off-reservation* crimes. ER at 182.

ARGUMENT

A. More Than Twenty Years of Consensual Business Dealings Between Johnson and CRIT Satisfy the Jurisdictional Requirement of *United States v. Montana*.

As the district court recognized, a tribal court may exercise jurisdiction over a non-member if that non-member has entered "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565-66; ER at 4-5. While the district court acknowledged that Johnson's dealings with the Tribes were "extensive" (ER at 17), the court concluded they were "largely involuntary" and thus insufficient to establish jurisdiction over Johnson. *Id.* In reaching this conclusion, however, the district court apparently discounted Johnson's dealings with CRIT on behalf of his company, Water Wheel. Moreover, the district court ignored the fact that Johnson continued to operate his business on CRIT's land long after Johnson realized that doing so would require him to comply with CRIT's laws. Given the voluminous evidence in the record indicating Johnson's decades-long business relationship with the Tribes, the district court's conclusion must be overturned.

1. All of Johnson's Actions—Even Those Taken as President of Water Wheel—Must Be Considered in Determining Tribal Court Jurisdiction.

According to the district court, the Tribal Court had failed to prove that Johnson "*personally* chose to enter into a consensual relationship with the tribe," and therefore had failed to establish jurisdiction over Johnson. ER at 18 (emphasis

added). By distinguishing between the actions Johnson took in his personal capacity and his actions as an agent of Water Wheel, the district court suggests that Johnson's extensive dealings with the Tribes on behalf of Water Wheel could not be used to establish tribal court jurisdiction over Johnson.

The district court was wrong as a matter of law. As the Supreme Court has held, a defendant's status as an employee of a corporation does not insulate him from jurisdiction in a forum where he has had sufficient contacts. *Calder v. Jones*, 465 U.S. 783, 790 (1984); *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("Each defendant's contacts with the forum State must be assessed individually."); *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 521-22 (9th Cir. 1989) (holding that Arizona long-arm jurisdiction extended to corporate officers who had sufficient contacts with Arizona); *Hardin Roller Corp. v. Universal Printing Machinery, Inc.*, 236 F.3d 839, 842 (7th Cir. 2001) (noting that "the Constitution does not shield persons who act as corporate agents from individual-capacity suits," and holding that Wisconsin state law did not provide such a shield, either). While these cases arose in the context of analyzing whether an individual's contacts were sufficient to establish personal jurisdiction, the "minimum contacts" test under *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), closely resembles the "consensual relationship" analysis under

Montana. *See Smith v. Salish Kootenai College*, 434 F.3d 1127, 1138 (9th Cir. 2006).

The district court's distinction between Johnson's actions in his personal and professional capacity finds no support in CRIT's own law, either: nothing in CRIT's tribal code limits jurisdiction based on an individual's role as corporate officer. *See* Amicus Curiae CRIT's Request for Judicial Notice ("CRIT RJN"), Exh. H (CRIT Law & Order Code § 101). Thus, all actions taken by Johnson—whether in his capacity as president of Water Wheel or simply as an individual—must be considered in determining the tribal court's jurisdiction over him. *See Calder*, 465 U.S. at 790; *Davis*, 885 F.2d at 522. As discussed below, these actions were extensive and "consensual."

2. Johnson's Continued Operation of Water Wheel Demonstrates that His Commercial Dealings with CRIT Were Voluntary.

The heart of the district court's determination that the tribal court lacked jurisdiction over Johnson is its conclusion that Johnson's relationship with the Tribes was "involuntary." ER at 17. In reaching this conclusion, the district court relies heavily on the fact that, prior to purchasing Water Wheel, Johnson allegedly had been told by the company's previous owners that the Bureau of Indian Affairs ("BIA"), not CRIT, would administer the lease, and that the County of Riverside would be responsible for inspecting development on the property. ER at 16. This "fact" was presented to the district court by Johnson in a declaration that had not

been submitted to the tribal court, and thus was not part of the tribal court proceedings. Nonetheless, according to the district court, Johnson's misunderstanding of CRIT's role at the time he purchased Water Wheel indicates that Johnson never "intentionally" or "voluntarily" enter into a business relationship with CRIT.

Amicus curiae CRIT agrees with the Tribal Court's argument that the district court erred in its interpretation of *Montana*. Appellants' Principal Brief at 18. Nothing in *Montana* or the cases following it suggests that, in order for an Indian tribe to exercise jurisdiction over a non-member, the tribe must rebut the non-member's subjective (and erroneous) belief that his actions will not create a relationship with the tribe. *Id*. Indeed, *Montana* lists "commercial dealings" as one example of consensual relationships (450 U.S. at 565), indicating that commercial dealings are, by nature, consensual.

However, even if CRIT were required to prove that Johnson's commercial dealings with CRIT were "voluntary," CRIT provided that proof to the tribal court. When Johnson purchased Water Wheel in 1981, the prime asset of the company was its lease with CRIT. ER at 147, 263, 265-66. As Johnson admits in his declaration, he was well aware of the terms of the lease when he purchased Water Wheel. ER at 147. And, as the district court held in analyzing the tribal court's jurisdiction over Water Wheel, the lease expressly names CRIT as the lessor, and

references the Tribes and the reservation status of the land throughout. *See, e.g.*, ER at 4, 219, 221. The lease even contains a provision requiring Water Wheel and its agents, such as Johnson, to abide by the Tribes' laws, including those laws pertaining to tribal court jurisdiction. ER at 249; *see also* ER at 7-8. Thus, by purchasing Water Wheel, Johnson consensually, intentionally, and voluntarily entered into a commercial relationship with the Tribes.

Moreover, even if it were true that Johnson was unaware of CRIT's role as lessor and regulatory authority when he first purchased Water Wheel, undisputed evidence demonstrates that Johnson continued to operate the Resort long after he learned that doing so would require paying rent to CRIT and following CRIT's laws. According to Johnson's own declaration, in 1986—more than *twenty years* before CRIT filed suit against him in tribal court—a BIA official directed Johnson to send rental payments to CRIT. ER at 147. In the years that followed, CRIT required Johnson to comply with the Tribal Code and Tribal procedures in developing the Resort. ER at 148, 265-66. Thus, Johnson knew well before 2007 that he was operating a business on CRIT's land subject to CRIT's laws. If he did not want to be engaged in business dealings with the Tribes, he could have sold the company or found another, off-reservation location to conduct his business. He did not do so.

Instead, Johnson continued operating his business on tribal land and even proposed new business ventures on the Reservation that were entirely unrelated to the Water Wheel Resort. CRIT RJN, Exh. A. Johnson repeatedly met with Tribal officials to discuss the development of the property, sent letters to the Tribes indicating his desire to develop the property for CRIT's benefit, and paid rent to the Tribes. ER at 265-66.

CRIT presented voluminous evidence of this ongoing, voluntary relationship in the tribal court proceedings. For example, in one letter to the Tribes, Johnson proposed a change in the use of the Water Wheel property from that authorized in Water Wheel's lease. In closing, Johnson wrote:

> Our existing lease requires us to maximize the leased property to its full potential. ¶ . . . With the completion of our master plan, we will have maximized the leased property to its fullest potential *to insure the Tribe's maximum income*.

CRIT RJN, Exh. B (Letter from Johnson to CRIT (April 6, 1989), introduced as Plaintiff's Exhibit 28 at the March 14, 2008 Tribal Court evidentiary hearing on jurisdiction) (emphasis added). Later that year, Johnson wrote again to CRIT, stating: "Water Wheel Resort has been in business on tribel [sic] property for 19 years. We have maximized the leased property to its fullest potential so that the tribes would receive maximum income." Docket #26, Exhibit E-4.

In another letter, dated May 18, 2000, Johnson wrote:

> The process for development of Water Wheel Resort for the last 20 years has been I contact [tribal building inspector] Mr. Howard and inform him of what my intentions are (of which I have on all projects.) If Mr. Howard has any problems or questions about what I am doing he request[s] I contact [Tribal] Realty (Mrs. Fisher) of which I have done on all projects.
>
> *Mr. Laffoon my desire is to work with you and be 100% compliance [sic] in my lease and to run and develop a private mobile home park to the benefit of the Colorado River Indian Tribes* and Water Wheel Resort.

Docket # 26, Exhibit G-1a (Letter from Johnson to CRIT, introduced as Exhibit 42 at the March 14, 2008 Tribal Court evidentiary hearing) (emphasis added). The Tribes submitted no fewer than eight additional letters from Johnson to the Tribes in which Johnson proposed various development opportunities for the Water Wheel property (ER at 266), and additional correspondence in which Johnson proposed new development elsewhere on the Reservation. CRIT RJN, Exh. A.

Johnson himself testified in tribal court that he had met with tribal officials and employees *between 80 and 105 times* to discuss the development and operation of Water Wheel Resort. ER at 265-66. Some of these meetings took place in tribal offices, some at the Water Wheel Resort, which is located within CRIT's Reservation. *Id*. CRIT also introduced numerous receipts showing that, until 2000, Johnson regularly paid *to CRIT* the annual rent and percentage of gross receipts due under the lease (ER at 263, 265), and, when Water Wheel could not

make the required payments, Johnson wrote to CRIT to provide an explanation for this failure. CRIT RJN, Exh. C.

Johnson also participated in the (ultimately unsuccessful) attempts to renegotiate Water Wheel's annual rent under the lease. ER at 266. In pursuit of this goal, Johnson sent several letters to Herman Laffoon, Jr., the Commercial Manager of CRIT Realty Services, and attended a meeting with representatives of the Tribes and the United States. *Id.* (citing tribal court Exhibits 77, 85 and 87).

Even after these rent negotiations failed, Johnson sought and received from the CRIT Department of Revenue and Finance annual business licenses to operate the Water Wheel Resort on the Colorado River Indian Reservation. CRIT RJN, Exhs. D & E. In his applications for these licenses, Johnson expressly consented "to the jurisdiction of the tribal court of the Colorado River Indian Tribes and service of process in matters arising from the conduct of business." *Id*. Exhs. F & G at 2.

All of this evidence indicates that Johnson intentionally and voluntarily engaged in a consensual business relationship with the Tribes. The district court erred in concluding otherwise.

B. Johnson's Actions Also Threaten the Economic Security of the Tribes.

The district court erroneously asserted that the second prong of *Montana* was not at issue in this case. ER at 21. The Tribes successfully argued throughout

the tribal court proceedings that Johnson's activities threatened the economic security of the Tribes. ER at 183-84. Specifically, CRIT argued that, by refusing to vacate CRIT's land after the expiration of Water Wheel's lease, both Water Wheel and Johnson were preventing CRIT from earning any income from the land. ER at 184. The fair market rental value of the land occupied by Johnson was determined at trial to be nearly $200,000 per year. ER at 116. As the Tribal Court of Appeals concluded: "Nothing could more clearly imperil the economic security of an Indian tribe than losing control over both its own lands and the rental income derived therefrom." ER at 184. Therefore, the district court erred in rejecting this basis for tribal court jurisdiction, as well.

CONCLUSION

For the foregoing reasons, CRIT respectfully requests that this Court reverse the district court's order granting declaratory relief to Johnson.

Date: May 21, 2010

Respectfully submitted,

/s/Winter King
ELLISON FOLK
WINTER KING
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Attorneys for Amicus Curiae Colorado River Indian Tribes

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A) because this brief contains 3,168 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft WORD 2007 in 14 point font, Times New Roman.

/s/Winter King
WINTER KING

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 21, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, to the following non-CM/ECF participants:

Michael Leland Frame
Law Office of Michael Frame
1308 Joshua Avenue
Parker, AZ 85344

Richard Timothy Moore
Law Offices of Tim Moore
707 Torrance Blvd., Suite 2200
Redondo Beach, CA 90277

Dated: May 21, 2010

/s/Natalia Thurston
NATALIA THURSTON