Nos. 09-17349 & 09-17357

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATER WHEEL CAMP RECREATION AREA, INC., *ET AL.*,

Appellees / Cross-Appellants,

v.

THE HONORABLE GARY LARANCE, *ET AL.*,

Appellants / Cross-Appellees.

Appeal from the U.S. District Court for the District of Arizona
Docket No. 2:08-cv-00474-DGC
U.S. District Judge David G. Campbell

BRIEF OF *AMICUS CURIAE* THE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION IN SUPPORT OF APPELLANTS / CROSS-APPELLEES THE HONORABLE GARY LARANCE AND JOLENE MARSHALL AND SUPPORTING REVERSAL AS TO THE RELIEF GRANTED TO APPELLEE / CROSS-APPELLANT ROBERT JOHNSON

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae is the National American Indian Court Judges Association (NAICJA). NAICJA is a non-profit membership organization of present and former judges from approximately 400 American Indian and Alaska Native tribal courts. Established in 1969, NAICJA provides continuing education and technical resources to enhance the operation of tribal judiciaries. NAICJA fosters positive relationships between tribal judiciaries and the justice systems of non-tribal governments – the federal and state courts. NAICJA also seeks to further public knowledge and understanding of tribal courts.

NAICJA and its members are keenly aware of this Court's expertise in cases where, following exhaustion of tribal remedies under *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), federal courts review tribal court rulings upholding tribal court jurisdiction over non-Indians under *Montana v. United States*, 450 U.S. 544 (1981). For two decades, this Circuit has required that post-exhaustion review by district courts of tribal court *Montana* jurisdictional rulings be conducted under the clear error standard. This standard allows *de novo* review of the *Montana* legal issues but requires deference to the factual findings of the tribal courts made on the record compiled there.

NAICJA is very concerned that the district court here departed markedly from this established law. The district court accepted and considered factual submissions regarding tribal jurisdiction that were not presented to the tribal court. (Applts' Br., 25-31; ER 16-17, 146-155). This simply is not reconcilable with exhaustion or clear error, and, if allowed to stand, will eviscerate the duty to exhaust tribal remedies.

As context for this *amicus* brief, NAICJA respectfully requests that this Court keep in mind the considerable federal interests in tribal court authority and integrity. *See, e.g.,* the Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601(5) ("tribal justice systems are an essential part of tribal governments"); the Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. § 3651(6) ("Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands"). Indeed, Congress appears once again to be on the verge of increasing its support for tribal courts in terms of appropriations, other resources, and required relationships with federal and state courts. *See* The Tribal Law and Order Act, S. 797, 111th Cong., 1st Sess. (2009). NAICJA urges this Court not to allow rulings such as that of the district court hereto displace these efforts or their goals.

SUMMARY OF ARGUMENT

The district court here overturned a tribal court's ruling upholding tribal jurisdiction under *Montana v. United States* based on a different record than was before the tribal court. The district court's approach is fundamentally at odds with the doctrine requiring exhaustion of tribal remedies set forth in *National Farmers Union* and *Iowa Mutual* – including this Court's requirement that district court review of tribal court *Montana* jurisdictional rulings be conducted under the clear error standard based on the record developed in tribal court.

If the district court's approach is left uncorrected, the tribal exhaustion doctrine and this Court's clear error standard will effectively be nullified. Particularly in light of the dozens of cases that reach federal court from tribal courts annually, this Court must correct this point in this case and for future cases.

ARGUMENT

I. *NATIONAL FARMERS UNION* AND *IOWA MUTUAL* ESTABLISH THAT FEDERAL COURT REVIEW OF TRIBAL COURT *MONTANA* JURISDICTIONAL RULINGS IS ALLOWED AFTER EXHAUSTION OF TRIBAL REMEDIES, INCLUDING THE DEVELOPMENT OF THE RECORD IN TRIBAL COURT

In the landmark case of *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), the Court determined that consideration by federal courts of questions of tribal jurisdiction under federal law is subject to an important "exhaustion of tribal remedies doctrine."

> Thus, we conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed . . . . Rather the existence and extent of a tribal court's jurisdiction will 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.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself.

471 U.S. at 855-56 (footnotes omitted). Two years later, in *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), the Court unequivocally reaffirmed that the tribal exhaustion doctrine "direct[s] that tribal remedies must be exhausted" before questions of tribal jurisdiction are addressed by federal courts. 480 U.S. at 15.

The tribal exhaustion doctrine is grounded in the "vital role" that tribal courts play in achieving tribal sovereignty and the "longstanding" federal policy of tribal self-government. *National Farmers Union*, 471, U.S. at 856; *Iowa Mutual*, 480 U.S. at 14-16. In light of this, the Court articulated the doctrine's three underlying reasons as follows: 1) the forum whose jurisdiction is being challenged must have the *first opportunity to evaluate the factual and legal bases for the challenge*; 2) the orderly administration of justice in federal courts will be served, and procedural difficulties will be minimized, *by requiring a full record to be developed in tribal courts* and by allowing tribal courts a full opportunity to determine their own jurisdiction, before federal courts review questions of tribal

jurisdiction; and, 3) the federal courts will benefit from tribal court explanations of and expertise regarding questions of tribal jurisdiction. *National Farmers Union*, 471 U.S. at 856-57 (emphasis added); *see also Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) (describing these as "three imperatives arising from the nature of tribal sovereignty").

In *Iowa Mutual*, the Court went on to hold that proper respect for sovereign tribal legal institutions and the federal policy supporting them directs federal courts to stay their hand in order to give the tribal courts' entire systems – *i.e.*, tribal trial and appellate courts -- a full opportunity to determine their own jurisdiction based on the evidentiary record compiled in the tribal trial courts. 480 U.S. at 15-16 (reiterating that tribal courts must be given "the first opportunity to evaluate the factual and legal basis" for challenges to their jurisdiction). Where the tribal trial and appellate courts have not been given that full opportunity, "federal courts should not intervene" because "unconditional" access by litigants to federal courts, or premature intervention by federal courts in questions of tribal jurisdiction, would "impair the authority of tribal courts." *Iowa Mutual*, 480 U.S. at 15-16.

The only exceptions to exhaustion are the three enumerated in *National Farmers Union*, 471 U.S. at 857 n.21 (harassment / bad faith; patently violative; and, futility), and these exceptions must be construed strictly. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407-1409 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096

(1992). But unless excused, full exhaustion is a condition precedent to federal court review of tribal jurisdictional rulings under *Montana v. United States* and its progeny. *National Farmers Union*, 471 U.S. at 852-53 and 857; *Iowa Mutual*, 480 U.S. at 19-20.

II. FOR TWO DECADES NOW, THIS COURT HAS ESTABLISHED THAT IN SUCH INSTANCES FEDERAL COURT REVIEW MUST BE CONDUCTED UNDER THE CLEAR ERROR STANDARD

The tribal exhaustion doctrine is now twenty-five years old. From its inception, this Court's understanding of and expertise regarding the exhaustion doctrine have been noteworthy. *See Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (*en banc*) (taking an "independent review of the applicable law governing the [abstention] duty of a federal court in cases involving [tribal] jurisdiction over civil matters arising out of business transactions commenced on tribal lands. . . ."); *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999), *as amended* 197 F.3d 1031 (9th Cir. 1999) (even if exhaustion is not raised or addressed in a district court, this Court can "examine the issue *sua sponte* because of the important comity considerations involved.").

Accordingly, this Court has consistently affirmed district court decisions adhering to the doctrine. *See, e.g., Stock West Corp. v. Taylor*, 964 F.2d at 917 (affirming district court's abstention and dismissal for failure to exhaust tribal remedies, even though factual record before federal court regarding underlying

dispute presented a colorable question of tribal court jurisdiction, substantial legal interpretations needed to be conducted in the first instance by the tribal courts). Similarly, this Court has corrected district court misunderstandings or misapplications of the doctrine. *See, e.g., Allstate Indem. Co. v. Stump,* 191 F.3d at 1076 (vacating district court's judgment on the merits of tribal jurisdiction, and remanding for stay pending exhaustion of tribal remedies); *Crawford v. Genuine Parts Co.*, 947 F.2d at 1407-1409 (reversing district court's refusal to allow exhaustion of tribal remedies); *accord Burlington N. R.R. Co. v. Crow Tribal Council,* 940 F.2d at 1244-47 (vacating district court's failure to dismiss or stay pending exhaustion of tribal remedies).

This Court has led the way in developing critical ground rules for implementing the exhaustion doctrine to which district courts must adhere. Among these ground rules is the standard of review for federal courts following exhaustion of tribal remedies. *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1313 (9th Cir. 1990), *cert. denied,* 499 U.S. 943 (1991), holds that district court review of tribal court jurisdictional rulings under *Montana* must be conducted under the "clear error" standard.

Other jurisdictions have expressly followed *FMC. See, e.g., Duncan Energy Co. v. Three Affiliated Tribes,* 27 F.3d 1294, 1300 (8th Cir. 1994), *cert. denied,* 513 U.S. 1103 (1995) (citing *FMC* in holding, *inter alia,* that district courts should

review tribal court factual findings under a "deferential, clearly erroneous standard"); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996), *cert. denied*, 520 U.S. 1139 (1997) ("We are persuaded by the Ninth Circuit's analysis" in *FMC*, and "we hold that when reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts' findings of fact for clear error"); *see also Williams-Willis v. Carmel Fin. Corp.*, 139 F.Supp.2d 773, 779 (S.D. Miss. 2001) (given facts alleging colorable claim of tribal jurisdiction, jurisdiction should first be addressed in tribal court where "these facts are appropriately to be developed").

The clear error standard allows for federal court review of issues of federal law *de novo*. *FMC*, 905 F.2d at 1314. In contrast, review of factual findings is limited to analysis of the evidence considered by the tribal court. As this Court in *FMC* explained

> [F]ederal courts must show some deference to a tribal court's determination of its own jurisdiction.
>
> The *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the "orderly administration of justice in the federal court." This indicates a deferential, clearly erroneous standard of review for factual questions. This standard accords with traditional judicial policy of respecting the factfinding ability of the court of first instance

Id. at 1313 (citations omitted) (emphasis added).

Generally, clear error exists only when, on the entire evidence as adduced in the original court, the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie,* 532 U.S. 234, 242 (2001) (citation omitted); *accord United States v. Hinkson,* 585 F.3d 1247, 1260-1261 (9th Cir. 2009) (*en banc*) (under "clear error" review a district court will be reversed only if that court "makes an error of law, rests its decision on clearly erroneous findings of fact, or we are left with 'a definite and firm conviction that the district court committed a clear error of judgment'") (citations omitted); *California Pharm. Ass'n v. Maxwell-Jolly,* 596 F.3d 1098, 1104 (9th Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3581 (Mar. 24, 2010) (No. 09-1158) (applying *Hinkson* clear error standard to civil proceedings and reiterating that a district court's fact findings will be accepted unless they are "illogical," "implausible" or "without 'support in inferences that may be drawn from the facts in the record.'").

The clear error standard's deference to district court fact findings in federal proceedings distinguishes it from the appellate review standard of *de novo* in that clear error review is on the record. *United States v. Hinkson,* 585 F.3d at 1260-1261 (clear error standard required appeals court to determine whether district court made a mistake in weighing the evidence that was before the district court "in the record"); *Lentini v. Calif. Ctr. for the Arts,* 370 F.3d 837, 848-50 (9th Cir. 2004) (district court's fact findings and damage calculations from bench trial

which are "'plausible in light of the record viewed in its entirety' [are] not clearly erroneous")**.**

In contrast, under *de novo* review an appellate court can in extraordinary circumstances consider factual evidence not adduced in the district court, but even then the appellate court should remand to the district court to evaluate the effect of that evidence. *See Powell v. U. S. Bureau of Prisons*, 927 F.2d 1239, 1242-1243 and n.7 (D.C. Cir. 1991) (where new evidence first came to light on appeal during *de novo* review of district court's ruling, appeals court remanded the matter to the district court for reconsideration because "'[D]etermining the significance of the new evidence requires factual inquiries, a duty strictly within the province of the district court.'") (citations omitted).

Significantly, under the clear error standard, an appellate court's role is to determine whether a district court erred in its fact finding on the record before it, not to decide how the appellate court would have ruled on that record had it been asked to do so in the first instance. *California Pharm. Ass'n v. Maxwell-Jolly*, 596 F.3d at 1104 ("Under [the clear error] standard '[a]s long as the district court got the law right, it will not be reversed simply because the appellant court would have arrived at a different result if it had applied the law to the facts of the case'"); *accord United States v. Hinkson:*

> . . . we know from *Yellow Cab Co.* and its progeny that our review of a factual finding may *not* look to what we would have done had we

> been in the trial court's place in the first instance, because that review would be de novo and without deference.

585 F.3d at 1261.

Likewise, under clear error review, when federal courts are reviewing tribal court *Montana* rulings, they are not determining how they would have ruled on tribal court jurisdiction in the abstract or even in the first instance, they are determining whether the tribal courts' *Montana* rulings are clearly erroneous based on the record before the tribal court. At minimum, under the clear error standard, district courts must test tribal court *Montana* rulings based on the same factual record that was before the tribal courts that issued the rulings. "Promotion of tribal self-government and self-determination requires that the tribal court have 'the first opportunity to evaluate the factual and legal basis for the challenge;'" and, federal court review must be based on the "full record . . . developed in tribal courts." *National Farmers Union*, 471 U.S. at 856-857 (emphasis added); *FMC*, 905 F.2d at 1313 ("tribal courts . . . develop the factual record" and federal courts must respect the tribal courts "factfinding ability"). [1]

[1] We note in this regard that the question whether a tribal court has subject matter jurisdiction under *Montana* over a particular case can be revisited by a tribal court if new evidence is presented there after an initial tribal court ruling affirming jurisdiction which casts doubt on the tribal court's jurisdiction. The same rule applies in federal courts since the question whether a court has subject matter jurisdiction can be raised there at any time. *Kontrick v. Ryan*, 540 U.S. 443, 445 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate

This issue was properly handled in *Atkinson Trading Co., v. Shirley*, 210 F.3d 1247, 1250-52 (10th Cir. 2000), *rev'd on other grounds*, 532 U.S. 645 (2001), where the Court of Appeals affirmed the district court's decision to grant summary judgment upholding the Navajo Supreme Court's *Montana* jurisdictional ruling, and where the summary judgment submissions in the district court were based solely upon "the entire record developed below" in the tribal proceedings. The district court in *Atkinson Trading Co.* stated:

> As part of this action, the parties have submitted the entire record developed below, including transcripts and exhibits from the [Navajo Tax Commission] proceedings and the appellate record created in the [Navajo] Supreme Court. Based on that record, Plaintiff and the Tribe have filed cross-motions for summary judgment on the jurisdictional issue. Plaintiff has also filed a motion for a trial *de novo*, which the Court will address initially.
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> ****
>
> . . . Plaintiff would have this Court engage in a new fact-finding effort, even though Plaintiff had an opportunity to fully develop all the relevant facts in the administrative proceedings held by the [Navajo Tax Commission].

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instance."). Analogously, if a federal court engaged in a *National Farmers Union* review of a tribal court's ruling under *Montana* is presented with critical evidence which may bear upon the *Montana* question, but which was not presented to the tribal court, one appropriate course for the district court is to send the case back to the tribal court for that court's reconsideration of the *Montana* question based on the new evidence or any other evidence which either party may then wish to present there bearing upon that question. In contrast, what occurred here is that the district court made an independent jurisdictional determination under *Montana* based on evidence never seen by the tribal court and which the tribal court was never given an opportunity to consider.

****

> There is no need for a *de novo* trial that would afford Plaintiff a second opportunity to contradict facts that it did not contest in the first proceeding."

Atkinson Trading Co. v. Gorman, No. 97-1261, slip op. at 1-4 (D.N.M Aug. 21, 1998).

III. THE DISTRICT COURT'S ACCEPTANCE AND CONSIDERATION OF EVIDENCE NOT PRESENTED TO THE TRIBAL COURT WAS NOT IN ACCORD WITH THE EXHAUSTION DOCTRINE OR THE CLEAR ERROR STANDARD

The district court's deviation from the tribal exhaustion doctrine and this Court's standard of review under that doctrine is startling. The district court considered a self-serving *post hoc* declaration of Appellee Robert Johnson which contained Mr. Johnson's views on various facts (including his subjective beliefs regarding his relationship with the Tribe) which he offered for the first time in federal court to undermine the tribal court's jurisdictional ruling. In overturning the tribal court's ruling, the district court expressly relied on the Johnson declaration (Applts' Br., 25-31, ER 16-17, 146-155)—a declaration which the tribal courts had never seen nor had the opportunity to consider, and as to which the declarant was never subject to cross-examination.

After itemizing the various excerpts from Johnson's declaration which it found probative respecting the tribal court's *Montana* rulings, the district court continued to err when it chastised the tribal parties (ER 17) for not presenting new

evidence in the district court to counter statements set forth in the Johnson declaration:

> Defendants have presented no evidence to contest Johnson's factual assertions. They rely instead on the Tribal Court's factual findings. Although the Tribal Court found that Johnson had extensive contacts with [the Tribe], it did not address the voluntariness of those contacts. *See* Dkt. #26-3 at 5-7. Defendants have the burden of proof with respect to *Montana's* consensual relationship exception. *Plains Commerce Bank*, 128 S.Ct. at 2720. The Court concludes that they have not shown that Johnson's contacts with the tribe were voluntary. (Footnote omitted).

The district court's approach on this matter simply cannot be reconciled with the clear error standard, let alone the tribal exhaustion doctrine. Notwithstanding that the party asserting or defending tribal jurisdiction has the ultimate burden of proof to show that tribal jurisdiction exists, the answer to *Montana* questions of tribal jurisdiction by each and every court must be determined based on the record established in tribal court. Otherwise, *National Farmers Union* federal court review proceedings will inexorably turn into entire new trials in federal district court on the *Montana* question—replete with discovery and involving live testimony and cross examination as regards all contested facts. Discovery in tribal courts regarding *Montana* jurisdiction issues would also become cursory or non-existent, and any review by tribal appellate courts based on the record of tribal trial

court proceedings would serve no purpose.[2] Indeed, if what occurred here is legally acceptable, the duty to exhaust tribal remedies before invoking federal court review on the *Montana* question would be rendered meaningless.

[2] *Amicus* notes that Appellee / Cross Appellant Johnson repeatedly ignored discovery requests and discovery orders in tribal court, compounding the problem in this case. (Applts' Br., 26; ER 119-20, 164, 196-200).

CONCLUSION

For the above-stated reasons, that portion of the district court's decision which granted relief to Appellee / Cross-Appellant Robert Johnson, should be reversed or vacated.

DATED this 21st day of May, 2010,

Respectfully submitted,

*/s/ Carl Bryant Rogers**

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Fed. Rs. App. P. 29(c) and 26.1, *Amicus Curiae*, the National American Indian Court Judges Association (NAICJA) hereby states that it is a non-profit corporation. NAICJA has no parent corporation and is not a publicly held corporation.

DATED this 21st day of May, 2010,

/s/ Carl Bryant Rogers

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 3,535 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 Office Word Version 2003 in style 14 point, Times New Roman font.

DATED this 21st day of May, 2010,

/s/ Carl Bryant Rogers

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CERTIFICATE OF SERVICE

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

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 21st day of May, 2010,

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