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* INDIAN TRIBES AND NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANTS/ CROSS-APPELLEES THE HONORABLE GARY LARANCE AND JOLENE MARSHALL

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INTRODUCTION

Amicus curiae Nez Perce Tribe, Stillaguamish Tribe of Indians, Confederated Tribes of Siletz Indians of Oregon, Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Duckwater Shoshone Tribe (collectively "*Amici* Tribes"), and the National Congress for American Indians ("NCAI") submit this brief in support of Appellants/ Cross-Appellees The Honorable Gary LaRance and Jolene Marshall. *Amici* seek reversal of the portion of District Court's Order that erroneously granted the relief sought by Robert Johnson as follows: (1) that the California State Corporation Water Wheel is subject to the Colorado River Indian Tribes ("CRIT") Tribal Court jurisdiction, but that CRIT lacked jurisdiction over Robert Johnson, Water Wheel's principal owner; and (2) that tribal inherent power to exclude must be exercised within the *Montana v. United States,* 450 U.S. 544 (1981), framework. Excerpts of Record ("ER")[1] 15-21.

Appellants/ Cross-Appellees LaRance, et al., consented to the filing of this brief. However, Appellees/ Cross-Appellants Water Wheel, et al., withheld consent, necessitating the Joint Motion for Leave filed herewith.

[1] All "ER" citations are to the Excerpts of Record filed by Appellants/ Cross-Appellees on May 14, 2010.

STATEMENT OF *AMICUS CURIAE* INTEREST IN CASE

Amici Tribes are federally-recognized sovereign Indian tribes located within the states of Idaho, Washington, Oregon, Montana and Nevada. The *Amici* Tribes all share certain common governmental attributes and interests affected by the outcome of this case, as illustrated by the following two *Amici* Tribes.

The Nez Perce Tribe is a federally-recognized sovereign Indian tribe with approximately 3363 enrolled tribal members. The Tribe's governmental offices are located in Lapwai, Idaho. Tribal affairs are governed by the Nez Perce Tribal Executive Committee pursuant to the Constitution and By-Laws of the Nez Perce Tribe. The Tribe's aboriginal territory stretched over 13 million acres; today, the land ownership of the Tribe's reservation, located in North Central Idaho, created initially by the Treaty of June 11, 1855, 12 Stat. 957, and modified by the Treaty of June 9, 1863, 14 Stat. 647, is a patchwork of land held in trust for the Tribe by the United States, Indian fee-land, non-Indian fee land, and other land ownership such as Forest Service and National Park land. As of 2006, the Tribe owned 13.1 percent of reservation lands, with the remainder held by nonmembers. Of the tribally-owned properties, 43%, or over 43,000 acres, were held in trust. There are 459 active agricultural leases on the Tribe's reservation, all but ten of which are with nonmembers. In addition, there are twenty commercial leases for various

businesses, including a hatchery, cement plant, and grocery store, sixteen of which are between the Tribe and nonmembers.

The Stillaguamish Tribe of Indians is a federally-recognized sovereign Indian tribe with approximately 200 enrolled tribal members. The Tribe's governmental offices are located in Arlington, Washington. The Tribe is a signatory to the 1855 Treaty of Point Elliot, 12 Stat. 927. Tribal affairs are governed by the elected Board of Directors pursuant to the Constitution of the Stillaguamish Tribe of Indians of Washington State. The land ownership of the Tribe is divided between non-contiguous parcels of land held in trust for the Tribe by the United States as well as approximately forty parcels of Tribal fee land. The Tribe has leased its trust land to nonmember businesses for commercial development.

All *Amici* Tribes exercise the inherent powers of a sovereign government, including leasing tribal lands, regulating the conduct of nonmembers residing upon or doing business on tribal lands, and exercising the power to exclude nonmembers from tribal lands to protect the integrity and order of tribal lands and the welfare of tribal members.

Amicus curiae NCAI is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944. While

variations exist among these tribes, all its member tribes seek to preserve tribal authority to regulate and adjudicate civil matters involving members and nonmembers on their reservations.

The District Court's Order would, if affirmed, upset the settled business expectations of Indian tribes and nonmember lessees in this Circuit. *Amici* Tribes and NCAI offer this brief to provide the Court with context underscoring the harm that would be caused should the jurisdiction and exclusion aspects of the District Court's Order not be reversed. The issue of jurisdiction before the Court affects Indian tribes throughout the states in the Circuit. An undue narrowing of tribal jurisdiction over nonmembers who enter into consensual relationships with Indian tribes on tribal lands could improperly erode the authority of Indian tribes to regulate commercial leasing and related business activities, and imperil tribal self-sufficiency by shifting more burden back onto the United States to enforce the regulation of activities on tribal lands.

Accordingly, *Amici* have a strong interest in ensuring that the Court reaffirms the full and appropriate scope of tribal civil jurisdiction and the inherent power to exclude in order to promote the broad federal policy in favor of tribal self-sufficiency and tribal economic development. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

ARGUMENT

Tribal governmental authority and economic development efforts would be severely constrained if the District Court's cramped reading of the scope of an Indian tribe's civil adjudicatory jurisdiction were to stand. Tribal jurisdiction must extend to both a corporate lessee and its principal owner, manager, and agent, and the District Court's misunderstanding of tribal inherent sovereign exclusion power must be remedied.

I. TRIBAL COURTS MUST EXERCISE CIVIL ADJUDICATORY JURISDICTION OVER PERSONS OPERATING BUSINESSES ON TRIBAL LANDS

The business environment on tribal lands is complex. Indian tribes and nonmember businesses must already navigate legal and practical impediments that suppress tribal economic development without the latest wrinkle added by the District Court. The District Court erred when it applied the *Montana* consensual relationship rule to this eviction from tribal lands, and failed to find that CRIT's jurisdiction also reached Robert Johnson, the sole principal of the California State Corporation Water Wheel, despite his twenty years of voluntary contacts with CRIT.[2] ER 15-18. The arbitrary and novel distinction between the owner's

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[2] The District Court focused on the so-called first *Montana* exception that tribes may "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" on non-Indian land. ER 5; *Montana*, 450 U.S. at 565 (citing *Morris v. Hitchcock*, 194 U.S.

"personal consent" and his corporation's 32-year lease of tribal land and its three-year trespass creates a untenable variation on a legal fiction with potential sweeping adverse consequences on Indian reservations. ER 18.

A. The District Court's Reasoning Chills Tribal Economic Development

To attract and retain investment and encourage entrepreneurial activity, Indian tribes require certainty in commercial leases and business dealings. The danger of the District Court's conclusion that CRIT lacks a consensual relationship with the owner of a corporation is highlighted by the following factual scenarios.

First, the District Court's reasoning is inconsistent with Federal policy as reflected in 25 U.S.C. § 415, adopted in 1955, and the Bureau of Indian Affairs implementing regulations at 25 C.F.R. pt. 162, most recently amended in 2001. Section 415, commonly known as the Indian Long-Term Leasing Act, authorizes long term leases of tribal lands for commercial purposes of either a 25-year duration (with a 25-year renewal) and, for certain other Indian tribes, a 99-year duration. 25 U.S.C. § 415(a). The purpose of long-term leasing was to facilitate economic development on tribal lands, recognizing that because business

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384 (1904) (cattle leasing dispute)). However, the conduct of Water Wheel and Johnson support a finding that CRIT could also exercise jurisdiction under the second *Montana* exception based on "conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." ER 182-84; *Montana*, 450 U.S. at 566; *see also Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849-50 (9th Cir. 2009) (finding "plausible" tribal court jurisdiction over trespasser); *but see* ER 21.

opportunities and economic considerations change over time, longer term leases were desired. *See* H.R. REP. NO. 1093, 84th Cong., 1st Sess. 1 (1955) ("Because of existing limitations upon the duration of leases many Indian lands which could be profitably developed under long-term leases are idle, and the Indians are deprived of much needed income."); *id.* at 3 ("The absence of authority for long-term leases discriminates against Indians who own restricted lands that are suitable for the location of business establishments . . . that require a substantial outlay of capital by the prospective lessee."). Such leasing has served as a cornerstone of reservation economic development by conveying land for a term to nonmembers as an inducement to invest capital and to bring industries, jobs or services to the reservation. These leases bring millions of dollars in revenue to tribal communities. Importantly, the United States anticipates that disputes arising out of such leases may "be resolved in tribal court." 25 C.F.R. § 162.612(c); *see also id.* § 162.107(b) (recognizing the "governing authority of the tribe . . . over the land to be leased" and promising to "promote tribal control and self-determination" through lease approvals).

The District Court ignores the policy for tribal primacy over leasing decisions and threatens to insert uncertainty into these long term leases. Without question, during the course of a 25-year or 99-year lease between a tribe and a corporate lessee, the identity of the owners will change due to sale of the business

or death of the original owner. If the District Court's ruling stands, for every long term lease where ownership has changed since the date of lease execution, the Indian tribe lessor would no longer have control over the use of these tribal lands. This would upset settled business expectations and discourage other long term leases, which are often required because of the substantial initial investment required by a business relocating on tribal lands. This is not what Congress intended when it sought to encourage capital development on Indian reservations.

Second, the District Court's conclusion, if allowed to stand, would, in some circumstances, wreak havoc on the ability of a tribe to enforce a tribal court judgment. Under the District Court's reasoning, because it has a consensual relationship with CRIT, Water Wheel, as a legal person, can be held responsible for damages resulting from lease violations. However, a corporation is only liable for its debts to the extent of its assets. The District Court invites an owner to intentionally under-capitalize (or not capitalize at all) the business entity while retaining substantial profit in his own name that remains outside the reach of a tribal creditor because the owner would be deemed, somehow, to not have a consensual relationship with the tribe. This would make tribes less likely to lease given the lack of remedy if the District Court's view were to stand. While there might be some scenarios involving silent stockholders in a large, publically-traded

company who might not have the necessary consensual relationship with the tribe for the exercise of tribal civil regulatory jurisdiction, this is not such a case.

Third, the District Court's strained analysis would allow the owner of a corporation with no legal right to remain on tribal land to maintain a physical presence free from the tribe's inherent exclusion power. The ability to evict a legal fiction through a judicial process is no remedy at all. If allowed to stand, such reasoning would both prevent tribes from protecting their rights to use and occupy their own land and unlawfully transfer the right to exercise dominion over tribal land from Congress to nonmember owners of corporations. *United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346-54 (1941).

The specter that scores of arrangements between a business owner and a tribe might not bind both the corporation and its sole owner to tribal law will have a chilling effect on tribal economic development decisions. That a tribe would need both a formal consensual relationship with the commercial lessee and a separate "voluntary" consensual relationship with the corporation's owner in order to exercise jurisdiction is burdensome and unrealistic.[3] ER 18. Does the District

[3] Commercial transactions are but one of the ways in which a nonmember may consent to tribal jurisdiction. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1137 n.4 (9th Cir. 2006) (en banc) ("To the extent our opinion in *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001), states that *Montana*'s first exception is limited to 'commercial dealing, contracts, leases, or other arrangements' and that 'such [other] arrangements also must be of a commercial

Court really expect a tribe to be able to execute a commercial lease with both Wal-Mart and a companion personal lease with its owners? The jurisdictional void and loss of control over activities on tribal land removes incentives for tribes to lease tribal land to nonmember business entities.

Fourth, the District Court's strained conclusion run counter to the policies underlying a host of Federal statutes enacted to protect Indian tribes. *See, e.g.,* Indian Trader Statutes, 25 U.S.C. §§ 323-325; Non-Intercourse Act, 25 U.S.C. § 177. These statutes, which together express a Congressional desire to comprehensively regulate nonmember businesses selling goods to reservation Indians, acknowledge the importance of certainty in business dealings between tribes and nonmembers. *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 1 (1965). This certainty is all but removed by the District Court. The result is a frustration of tribal economic development plans by chilling the desire to venture with or otherwise engage nonmember businesses, especially if the result will be that the tribe effectively loses control over tribal lands because it cannot evict a trespasser.

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nature,' we disapprove the statement. We think the Court's list in *Montana* is illustrative rather than exclusive").

B. Tribal Courts Are the Appropriate Venue to Entertain Commercial Disputes Arising on Tribal Lands

The CRIT Tribal Court's exercise of jurisdiction to adjudicate a commercial dispute between an Indian tribe and a nonmember business entity and its nonmember owner is not an aberration. Given the growth of commercial leases on tribal lands, tribal courts are accustomed to hearing disputes arising out of commercial dealings on tribal lands involving nonmember business entities.

In 1959, the U.S. Supreme Court acknowledged in *Williams v. Lee*, 358 U.S. 217 (1959), that principles underscoring tribal self-government required commercial disputes arising on tribal lands to be adjudicated in tribal courts. The decision arose from what are still today common facts: a nonmember business sought to collect on goods sold on credit to tribal members by filing in state court. The U.S. Supreme Court reversed lower court decisions in favor of state court jurisdiction, holding that tribal self-governance prohibited such an incursion into the authority of the tribal court: "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves." *Id.* at 222.

Neither *Williams v. Lee* nor the CRIT Tribal Court's exercise of jurisdiction in the instant matter are isolated incidents. Going to tribal court to resolve commercial disputes on tribal lands is how business is often done in Indian

Country. *See, e.g., Lande v. Schwend,* 1999 Crow 1 (Crow 1999) (dispute arising from the competition for a competent agricultural lease on Crow trust land); *Tulalip Tribes v. Duhon,* 4 NICS App. 58, 60-62 (Tulalip 1996) (appeal affirming unlawful detainer award against non-Indian lessee of home on tribal land); *Cavenham Forest Products, Inc. v. Colville Confederated Tribes*, 1 CCAR 39 (Colville Confederated 1991) (dispute between Washington tribe and Delaware Corporation over regulation of wood products mill on reservation). For instance, the Stillaguamish Tribal Court is presently presiding over a dispute between the Tribe and a nonmember Washington State Corporation and its nonmember owners and operators, for violations of tribal law arising out of a lease for use of tribal trust land. *Stillaguamish Tribe of Indians v. Standard Biodiesel USA, Inc., et al.*, STI-CIV-2009-06-069 (Stil. Tr. Ct.).

The District Court appears to recognize, in part, the problem with its limitation on the reach of tribal court jurisdiction in the commercial leasing context in footnote 18, where Judge Campbell opines that, in the absence of tribal court jurisdiction, "[t]he Court does not address whether or how [CRIT] might otherwise exercise [the power to exclude]. Specifically the Court expresses no view on whether CRIT may exclude Johnson from tribal land." ER 21. The District Court would seem to prefer that CRIT had used its physical powers to remove Johnson rather than provide him due process through their court. This perplexing footnote

is inconsistent with the reality of doing business on tribal lands, and would frustrate existing business relationships.

This Court should be guided by the recognition of former U.S. Supreme Court Justice Sandra Day O'Connor: "Each of the three sovereigns [federal, state and tribal] has its own judicial system, and each plays an important role in the administration of justice in this country." O'Connor, J., *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997). To do so, tribal courts must be able to exercise civil adjudicatory jurisdiction over both corporate lessees and their owners doing business on tribal lands.

II. TRIBAL INHERENT POWER TO EXCLUDE EXISTS SEPARATE AND APART FROM THE *MONTANA* FRAMEWORK

The District Court has turned tribal inherent power to exclude nonmembers from tribal lands on its head and, in addition to ignoring years of jurisprudence to the contrary, would fundamentally alter the nature of relations between tribes and nonmembers conducting activities on tribal lands. ER 19-21.

The power to exclude nonmembers from Indian lands has been recognized since 1832 as necessary to a tribe's ability to protect the integrity and order of tribal lands and the welfare of tribal members. *Worcester v. Georgia*, 31 U.S. 515, 516 (1832) (finding that persons are allowed to enter tribal territory "with the assent of the Cherokee themselves"); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 590, 593 (9th Cir. 1983) (upholding tribal ordinance that permitted

exclusion of a nonmember who violated automobile repossession regulations and finding that when non-Indians "enter tribal lands . . . . [b]y so doing, they have entered the Tribe's jurisdiction."). As recently as 1990, the U.S. Supreme Court affirmed that even where tribes lacked criminal jurisdiction over nonmembers, tribes still "possess their traditional and undisputed power to exclude persons who they deem to be undesirable from tribal lands...." *Duro v. Reina*, 495 U.S. 676, 696 (1990).

The inherent power to exclude does not flow from or depend upon an Indian tribe's consensual relationships with a nonmember. Rather, as it must, inherent exclusion power operates separate and apart from the exercise of other aspects of tribal jurisdiction subject to *Montana*. This is especially true in this action to evict a nonmember from tribal land.[4] The District Court's error was conflating two different legal concepts: the power to exclude trespassers from tribal land with the idea that the power to exclude provides the source for authority to regulate other nonmember conduct. ER 21.

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[4] Under the facts of this eviction action, the tribal ownership of the land should be dispositive—as to both Water Wheel and Mr. Johnson—with respect to tribal court jurisdiction. *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987) (holding that civil jurisdiction over the activities of non-Indians on tribal lands "presumptively lies in the tribal courts . . .."); *but see Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (concluding "The ownership of land . . . is only one factor to consider in determining whether regulation of the activities of non-members is 'necessary to protect tribal self-government or to control internal tribal relations.' It sometimes may be a dispositive factor."); *c.f. McDonald v. Means*, 309 F.3d 530, 540 n.9 (9th Cir. 2002) (*as amended*) (limiting application of *Hicks*).

The distinction was first clearly drawn by the U.S. Supreme Court in *Merrion*, where the Court emphasized the tribe's "role as sovereign." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-46 (1982) ("Nonmembers who lawfully enter tribal lands 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, such as a tax on business activities conducted on the reservation.") (emphasis added). Most recently, the U.S. Supreme Court recognized and affirmed the nature of the power to exclude in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. __, 128 S. Ct. 2709 (2008):

> The regulations we have approved under *Montana* all flow directly from these limited sovereign interests. The tribe's 'traditional and undisputed power to exclude persons' from tribal land, *Duro*, 495 U. S., at 696, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations.

Id. at 2723. In other words, on the one hand there is the power to exclude trespassers which flows from and is exercised using inherent sovereignty. On the other hand are specific instances of tribal regulation which are based on the power to exclude, but must be supported by *Montana*. For example, the power to tax flows from the power to exclude, but must still follow *Montana* when applied to nonmembers. *See, e.g., Atkinson Trading Post v. Shirley*, 532 U.S. 645 (2001); *Merrion*, 455 U.S. at 141 ("a hallmark of Indian sovereignty is the power to

exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax"). Other powers are "[i]ncident to this basic power to exclude." *Id.* at 159 (Stevens, J., dissenting). The power to exclude is the source of these other powers and, therefore, is not constrained by *Montana.*

The implications of the District Court's error in thinking are far flung, as illustrated by the following hypothetical. A nonmember working for a nonmember business on tribal land begins harassing tribal members until the conduct escalates to physical violence. Under the District Court's thinking, the tribe would only be able to exclude this nonmember if the tribe otherwise previously established jurisdiction under one of the *Montana* exceptions. However, the tribe would have no such "consensual relationship" with the nonmember under these unfortunately all-too-common facts because it has no "commercial dealing, contracts, leases, or other arrangements" with the nonmember. Given that, the District Court would find that the tribe could not exclude this dangerous nonmember. This result turns inherent powers inside-out.

Tribal power to exclude undesirable persons from their lands is unquestioned. The issue of trespass and other illegal conduct on tribal lands, such as drug use and sales, is especially prevalent in urban areas, such as the situation faced by *amicus curiae* Stillaguamish Tribe of Indians, whose tribal lands are less than 19 miles from Everett, Washington. To make tribal inherent government

power conditional on some pre-existing "voluntary personal" relationship—to the exclusion of consideration of the land or conduct at issue—would permit dangerous persons to avoid facing any recourse for their actions and infringes on the right of tribes to govern themselves.

CONCLUSION

For the foregoing reasons, *Amici* Tribes and NCAI respectfully request that the Court rule in favor of Appellants/ Cross-Appellees The Honorable Gary LaRance and Jolene Marshall and reverse and vacate that portion of the District Court's Order of September 23, 2009 that granted the relief sought by Robert Johnson.

DATED this 21st day of May, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit R. 32-1, the attached *amicus curiae* brief is proportionately spaced, has a type face of 14 points, and contains 3914 words.

May 21, 2010 — Date

/s Rob Roy Smith — Rob Roy Smith

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2010, I electronically filed the foregoing 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 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 prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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