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.,
AND ROBERT JOHNSON,
Appellees/Cross-Appellants,

v.

THE HONORABLE GARY LARANCE, AND JOLENE MARSHALL,
Appellants/Cross-Appellees.

Appeal From The United States District Court
For the District of Arizona
Case No. 2:08-CIV-00474-DGC

APPELLANTS' PRINCIPAL BRIEF

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JURISDICTIONAL STATEMENT

Water Wheel Camp Recreational Area, Inc., and Robert Johnson filed this suit on March 11, 2008, seeking declaratory and injunctive relief that the Tribal Court of the Colorado River Indian Tribes ("CRIT") lacked subject matter jurisdiction over a civil action brought by CRIT to evict them as holdover tenants and trespassers from their former leasehold on tribal land on the Colorado River Indian Reservation in the State of California. Defendants are the Chief Judge and Chief Clerk of the CRIT Tribal Court. The asserted basis for the jurisdiction of the U.S. District Court was federal question jurisdiction. 28 U.S.C. § 1331.

This is an appeal from a final Order of the U.S. District Court, over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court Order was entered on September 23, 2009, and Defendants timely filed their Notice of Appeal on October 22, 2009, from that portion of the Order which granted relief to Plaintiff Robert Johnson. On October 23, 2009, Plaintiffs/Appellees/Cross-Appellants filed a Notice of Appeal (the "cross-appeal") from that portion of the District Court's Order which denied relief to Plaintiff Water Wheel Camp Recreational Area, Inc. Both this appeal and the cross-appeal are from a final order of the District Court disposing of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The District Court did not correctly apply the "consensual commercial relationship" test set forth in Montana v. United States for purposes of determining whether the Tribal Court could exercise jurisdiction over Appellee Robert Johnson in the eviction action brought by the Tribe.

2. The District Court erred in its reliance on the Declarations of Robert Johnson filed in federal court, but which were not part of the record of the Tribal Court proceedings, to rebut or override the Findings of Fact made by Tribal Court Judge Gary LaRance in support of its jurisdiction.

3. The District Court's finding that Robert Johnson had no consensual commercial relationship with the Tribe was clearly erroneous.

4. The District Court erred in its determination that the Tribe's inherent power to exclude nonmember trespassers from its reservation is constrained by the framework set forth by the Supreme Court in Montana v. United States, and in its holding that the tribal exclusionary power does not provide a basis for the Tribal Court's exercise of jurisdiction to evict Robert Johnson, a willful trespasser on tribal land.

STATEMENT OF THE CASE

This suit was brought in the U.S. District Court for the District of Arizona in March 2008 by Water Wheel Camp Recreational Area, Inc. ("Water Wheel"), and its principal owner and president, Robert Johnson ("Johnson"), to challenge the jurisdiction of the Tribal Court of the Colorado River Indian Tribes ("CRIT") over an action brought by CRIT on October 1, 2007, to evict Water Wheel and Johnson from tribal land leased by Water Wheel in 1975 on the California side of the Colorado River Indian Reservation. The Lease expired by its terms on July 7, 2007, and Plaintiffs are thus holdover tenants and trespassers. Defendants in the federal court suit are the Honorable Gary LaRance, Chief Judge of the Tribal Court, and the Chief Clerk of the Tribal Court.

Water Wheel and Johnson twice sought Temporary Restraining Orders to put a halt to the Tribal Court proceedings in the spring of 2008, but the U.S. District Court denied both motions, holding that Tribal Court remedies must first be exhausted before the District Court could entertain Plaintiffs' challenge to Tribal Court jurisdiction. ER-278, 282; ER-216. The Tribal Court Judgment was entered on June 13, 2008. ER-107. An appeal was filed, and the Tribal Court of Appeal entered its decision on March 10, 2009, upholding the lower court's jurisdiction and affirming the judgment in most respects. ER-157, 214-215. Thereafter the parties submitted briefs to the U.S. District Court on the merits of

the challenge to Tribal Court jurisdiction. The District Court issued its final Order on September 23, 2009, denying the relief sought by Water Wheel, but holding that the Tribal Court lacked jurisdiction over Johnson, and declaring that the Tribal Court judgment against him is null and void. ER-1, 23. On October 22, 2009, Defendants filed their Notice of Appeal from the ruling that the Tribal Court lacked jurisdiction over Johnson. Counsel for Water Wheel filed another Notice of their Cross-Appeal the next day, challenging the District Court's ruling that the Tribal Court did have jurisdiction over the eviction action filed against Water Wheel, and denying relief to Water Wheel.

It should be noted that the Complaint filed in the U.S. District Court not only challenged the jurisdiction of the Tribal Court, but also averred that the land where the Water Wheel Resort is situated is not tribal land nor part of the Indian Reservation. ER-355-359. Plaintiffs also challenged the authority of the Secretary of the Interior to approve the 1975 Lease. U.S.D.C. Dkt. #50, pp. 5-7. The District Court's final Order states that these contentions were not entertained because the United States and CRIT are indispensable parties to a challenge to the Indian title to the land. ER-3-4. Water Wheel's cross-appeal does not appear to seek review of Judge Campbell's determination that District Court did not have jurisdiction over the claim that the former leasehold is not tribal land or part of the Reservation, as it is not raised as a "Principal Issue" on Water Wheel's Docketing Statement.

STATEMENT OF FACTS

On May 15, 1975, CRIT and Water Wheel entered into a 32-year lease of 26 acres of tribal land on the California side of the Colorado River Indian Reservation for use as a trailer park, recreational center, and marina. ER-221-222. The Lease was approved by the local Superintendent of the Bureau of Indian Affairs (BIA) on July 7, 1975, under the authority of Section 5 of the Act of April 30, 1964, 78 Stat. 188, which incorporates by reference the broad Indian lease approval authority of the Secretary of the Interior in 25 U.S.C. § 415 (generally known as the Indian Long-Term Leasing Act.) ER-227. The Lease was a product of the settlement of litigation, namely a trespass action earlier brought in California federal court by the United States against Bert and Barbara Denham, the original owners of Water Wheel. United States v. Denham, Civil No. 73-495 (C.D. Calif.). ER-7-8; ER-283-286; ER-124-134.

Plaintiff Robert Johnson purchased 50% of Water Wheel's stock in 1981, and the rest in 1985 when he became the president of the corporation. ER-7, n.6; ER-265. For the next 22 years Johnson operated and maintained the Water Wheel Resort. ER-265. He continues to do so, although the Lease expired in 2007. ER-17. Thus, both Water Wheel and Johnson are trespassing on tribal land to this day, paying no rent to the Tribe, but collecting rent payments from sublessees. ER-196.

The 1975 Lease

The provisions of the 1975 Lease between CRIT and Water Wheel are central to many of the issues which were before Tribal Judge LaRance, and later before U.S. District Judge Campbell. Among Plaintiffs' principal contentions in the District Court was that only the Secretary of the Interior possessed the authority to enforce the terms of the tribal Lease, citing paragraph 21 of the Addendum to the Lease which recites actions which the Secretary may take in response to a default by the Lessee. However, Lease Addendum paragraph 22 states that the "Lessor", *i.e.,* CRIT, may be awarded attorney fees if it brings a successful action in unlawful detainer, seeking back rental payments and enforcing the terms of the Lease. ER-247; *see also* the discussion in the final Order of the U.S. District Court. ER-12.

Of particular importance to all of the parties' arguments below is Addendum paragraph 34, which provides that Lessee and all of its employees and agents must abide by tribal laws, regulations, and ordinances, in effect then or in the future. ER-249. A proviso to that Section states "[N]o such future laws, regulations or ordinances shall have the effect of changing or altering the express provisions and conditions of this lease unless consented to in writing by the Lessee." *Id.* The District Court below rejected Water Wheel's argument that this provision required that the Lessee must have formally consented to Tribal Court jurisdiction. ER-14,

n.12. However, the District Court also held that this provision did not constitute Robert Johnson's consent to Tribal Court jurisdiction over the eviction action brought by CRIT against him. ER-18-19.

Because the Lease expired on July 7, 2007, three provisions of the Lease which pertain to holdover tenancies are particularly important. Addendum paragraph 23 provides that the Lessee may not hold over when the Lease has expired, and that the Lessor has the "right" to remove personal property of the Lessee after 30 days written notice. ER-247. Paragraph 29 of the Addendum states: "At the termination or expiration of this lease, Lessee will peaceably and without legal process deliver up possession of the leased premises …." ER-248. Addendum paragraph 6 provides: "The Lessor shall have the right to require the Lessee to remove any or all of the buildings and improvements on the leased premises at the termination of the lease …." ER-232.

Tribal Court Proceedings

On October 1, 2007, CRIT filed a Petition for Eviction and Complaint for Damages against both Water Wheel and Robert Johnson in CRIT Tribal Court. No. CV-CO-2007-0100. ER-300. CRIT's Petition alleged a variety of violations of the Lease, including breach of the prohibition on holdover tenancy, and the failure to pay any rent since October 10, 2005. *Id.* at ¶¶ 20, 21, 26, 28, 31-33, 36, and 41-43. In turn, Water Wheel and Johnson asserted that the land on which the

Water Wheel Resort was situated was not tribal land, and that the Tribal Court otherwise did not have jurisdiction over Water Wheel or Johnson, as they are not tribal members.

By Order of January 15, 2008, Tribal Court Judge LaRance ruled that Water Wheel and Johnson were estopped from challenging tribal title to the land where they had benefited from a tribal lease of that land for many years. ER-290-292. In a March 18, 2008, Order Judge LaRance denied Water Wheel's and Johnson's Motion to Dismiss, ruling on the remaining arguments made by the defense challenging Tribal Court jurisdiction. He held that Johnson's numerous commercial dealings with the Tribe for over 20 years established a sufficient basis for Tribal Court jurisdiction. ER-262. A trial was held on June 4-6, 2008, and Judgment was entered on June 13, 2008, granting the Petition for Eviction, awarding damages jointly and severally against Water Wheel and Johnson for unpaid minimum annual rents, for a percentage of gross receipts, as provided by the Lease, for trespass damages, and for the tort of intentional interference with the Tribe's prospective economic advantage, plus attorney fees and costs. ER-107-123. Water Wheel and Johnson then appealed to the CRIT Court of Appeal, which affirmed Judge LaRance's rulings in most respects—including the bases for Tribal Court jurisdiction—on March 10, 2009. ER-155, 214-215. However, the award of tort damages was vacated by the Court of Appeal and remanded to Judge LaRance.

In the course of the Tribal Court proceedings Water Wheel and Johnson failed to respond to a number of discovery requests made by CRIT; they also failed to comply with Tribal Court orders compelling responses to discovery. ER-118-122. The information and records sought through discovery pertained to the relationship between Water Wheel and Johnson, and whether Johnson was the corporation's alter ego. Judge LaRance sanctioned Water Wheel and Johnson by making findings of fact based on evidence which would have been disclosed had they complied with his discovery orders. Specifically, he made findings that Water Wheel was inadequately capitalized as a corporation, that Water Wheel had made gifts and loans to Johnson since 1999, and vise versa, that Johnson had borrowed corporate funds for his own personal use, that financial records were not separately maintained, that minutes of corporate board meetings had not been kept, that directors had not been elected, and that Johnson had commingled corporate monies which should have been paid to CRIT as rent with his own personal assets. ER-119-120. *See also* the Tribal Court of Appeal Opinion and Order. ER-164, 196.

In federal court, in response to the contention of Water Wheel's counsel that these "corporate veil" findings were clearly erroneous, Judge Campbell commented at oral argument that Judge LaRance was exercising the same kind of sanctioning authority which resides with a federal judge under Rule 37(d). Transcript of oral argument on July 24, 2009. ER-49. In his decision Judge

Campbell rejected only one finding of fact of the Tribal Court as "clearly erroneous": that Johnson was "in fact a party to the Lease." ER-16, n.14; *see* Judge LaRance's Order of March 18, 2008. ER-266. Plaintiffs did not challenge any of the other 27 findings of fact made by Judge LaRance (*id.*) which formed the basis for his determination that the Tribal Court had jurisdiction over both Water Wheel, the corporate lessee and holdover tenant, and Robert Johnson, the owner and manager of the corporation whose continuing operation of the leasehold resort constitutes trespass on tribal land. ER-16.

SUMMARY OF ARGUMENT

The U.S. District Court erred in holding that the Tribal Court did not have jurisdiction over Robert Johnson, a non-member of the Colorado River Indian Tribes, in an eviction action brought by the Tribe after the expiration of a lease of tribal lands. The lower court misapplied the consensual commercial relationship test set out in Montana v. United States, 450 U.S. 544 (1981), ruling that Robert Johnson, who is the principal owner, manager, and agent of Water Wheel, a corporate lessee, and who had engaged in commercial dealings with the Tribe for over 20 years, acknowledging the governmental authority of the Tribe, had not *voluntarily* entered into a commercial relationship with the Tribe and had not consented to the adjudicatory jurisdiction of the Tribe. The lower court also erred in its reliance on a declaration of Johnson filed in Federal Court but never

introduced into evidence in the Tribal Court; such reliance on extra-record evidence cannot be reconciled with the principles underlying the jurisprudential requirement of exhaustion of tribal court remedies. Further, to the extent that the District Court may be understood as having made a factual finding that Johnson did not voluntarily enter into a commercial relationship with CRIT, that finding was clearly erroneous. Finally, the District Court erred when it held that the Tribe's inherent power to exclude nonmembers of the Tribe from the reservation did not provide a basis for the exercise of Tribal Court jurisdiction over Johnson for purposes of evicting him from tribal lands after the expiration of the lease with Water Wheel. Such a ruling renders meaningless the Tribal Court's eviction of the corporate lessee, as no eviction may occur without the parallel eviction of the corporation's principal agent, who continues to trespass on tribal land, collecting rents from residents of the Water Wheel resort but paying nothing to the Tribe.

ARGUMENT

A. The District Court did not correctly apply the "consensual commercial relationship" test set forth in Montana v. United States for purposes of determining whether the Tribal Court could exercise jurisdiction over Appellee Robert Johnson in the eviction action brought by the Tribe.

The question of tribal court jurisdiction is a question of federal law which a Circuit Court of Appeal reviews *de novo*. Smith v. Salish Kootenai College, 434 F.3d 1127, 1130 (9th Cir. 2006), *cert. denied* 547 U.S. 1209 (2006).

In Montana v. United States, 450 U.S. 544 (1981), the Supreme Court held that there are two exceptions to the general rule that an Indian tribe retains no authority to exercise civil or regulatory jurisdiction over non-members of the tribe:

> (1) "A tribe 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. [and (2)] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Id. at 565-66 (internal citations omitted). The Court later referred to Montana as the "pathmarking case" on the subject of tribal civil jurisdiction over nonmembers, Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997); and several decisions of the Court have further delineated the two bases for the exercise of tribal jurisdiction.

Montana itself involved the narrow question of tribal regulatory jurisdiction over nonmember activities on non-Indian fee land within the Tribe's reservation, not the issue of the scope of tribal governmental jurisdiction over tribal lands. In Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987), the Supreme Court held that civil jurisdiction over the activities of non-Indians on tribal lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." But in Nevada v. Hicks, 533 U.S. 353, 360 (2001), the Court held:

> 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 may sometimes be a dispositive factor.

In this case it *is* a dispositive factor. Water Wheel and Johnson are holdover tenants, and are trespassing on tribal land. In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337 (1983), the Supreme Court held, "It is beyond doubt that [a] tribe lawfully exercises substantial control over the land and resources of its reservation …."

Appellant herein, Judge LaRance, found support for the Tribal Court's jurisdiction over Robert Johnson in his over 20 years of commercial dealings with the Tribe as the president and principal owner of Water Wheel, a lessee of tribal land, thus relying on the first prong of the Montana test. The Tribal Court of Appeal, in affirming Judge LaRance's jurisdictional rulings, held that tribal jurisdiction over Water Wheel and Johnson was supported by *both* prongs of the Montana test, and also by the Tribe's inherent authority to exclude nonmembers from its lands (ER-182-184), which is discussed below in Part D.

District Judge Campbell disagreed. He recited the Tribal Court findings that over time Johnson had as many as 100 meetings with tribal officials and many written communications with the Tribe (ER-15-16), noting also that Johnson did not dispute those findings. But it was a lengthy "Second Declaration of Robert Johnson" filed in federal (but not tribal) court which was relied upon for the

proposition that Johnson's contacts with the Tribe were not "consensual." ER-16; ER-146-155. That declaration states that when Johnson purchased the stock of the corporation from the Denhams in 1981, they told him that the Lease was administered by the BIA. The declaration further asserts that the Denhams never mentioned a role for the Tribe, that Johnson began submitting his rent payments to the BIA, as provided in the Lease, but that in 1986 he was advised by a BIA official that rent payments should thereafter be made directly to the Tribe. ER-147, ¶¶ 3-5. Johnson also averred in the declaration that it was his understanding from the terms of the Lease that he would deal with Riverside County on building permits and Southern California Edison on electrical service, but that around 1983 tribal officials began to undertake building inspections, later taking control of electrical service. ER-147-148, ¶¶ 6-10. Judge Campbell ruled that Johnson's assertions in his declaration "provide support for his claim that *he* did not intentionally enter into a consensual relationship with the tribe." ER-16 (emphasis in original). The U.S. District Court Order further states:

> 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 CRIT, 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.

ER-17. This ruling is erroneous for many reasons.

In the next section of this Argument Appellants will demonstrate that it was error for the U.S. District Court to rely on the declarations of Robert Johnson—which were never introduced into evidence in the Tribal Court—to override the findings of fact made by Judge LaRance. In the third section Appellants will demonstrate that the assertions in Robert Johnson's declaration are preposterous and that they provide no credible basis for determining that he did not have a consensual commercial relationship with the Tribe.

In this section Appellants show that the District Court's ruling is based on a manifest misapplication of the "consensual commercial relationship" test, set forth in Montana, to this trespass/eviction case, even assuming for sake of argument that the District Court's reliance on the Johnson declarations was proper. The rulings of this Circuit and the Supreme Court simply do not support the District Court's decision barring the Tribal Court from exercising jurisdiction over Robert Johnson.

Judge LaRance's determination that the Tribal Court had jurisdiction over the eviction of Robert Johnson is a sound one, as it is solidly based on U.S. Supreme Court precedent, and a thorough review of the evidence presented in the Tribal Court. The principal inquiry made by Judge LaRance was whether the Plaintiffs met the first prerequisite for the exercise of tribal regulatory authority over a non-member, as set forth by the Supreme Court in Montana and quoted above, namely whether the parties entered into a "consensual relationship [with the

Tribe] … through commercial dealing …" 450 U.S. at 565. *See* ER-261. The Supreme Court has had several occasions to explain that requirement. In Strate, 520 U.S. at 456-57, the Court held that the exercise of a tribe's adjudicatory jurisdiction must have some nexus with the nonmember defendant's commercial relationship. More specifically, the Court held that a tribal subcontractor could not be sued in tribal court for negligence arising out of a motor vehicle accident on the tribe's reservation, simply because he was engaged in business with the tribe. There the Court pointed to one of the decisions cited in Montana as an example of tribal court jurisdiction arising out of a consensual relationship, specifically, Williams v. Lee, 358 U.S. 217 (1959), which held that an Arizona state court did not have jurisdiction over a suit brought by a non-Indian trader on the Navajo Reservation to enforce a reservation transaction, but that the non-Indian trader *must* file such a suit in Navajo Tribal Court. The Court's opinion states:

> 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. *It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.*

358 U.S. at 223 (emphasis added.)

Several decades later, the Supreme Court addressed the question of Navajo tribal authority to tax a non-Indian trader whose business lay on fee lands within the Navajo Reservation. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

There the Court held that a tribe's inherent taxing authority extends only to trust lands, and that a tribal license to conduct a business on non-Indian fee land within a reservation was not sufficient evidence of the consensual relationship necessary to justify tribal taxation of commercial activities on the fee land. 532 U.S. at 652-53. It contrasted its earlier ruling in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), which upheld a tribal tax on a non-Indian oil company leasing tribal land. The Court's opinion in Atkinson states:

> *Merrion*, however, was careful to note that an Indian tribe's inherent power to tax only extended to "'transactions occurring on *trust lands* and significantly involving a tribe or its members.'" 455 U.S. at 137 (emphasis added) (quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152 (1980).) There are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority than the quoted language above. But *Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling. See *Merrion, supra,* at 142 (*"[A] tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"*). An Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than tribal land.

532 U.S. at 653 (emphasis added, footnotes omitted). Appellants submit that the exercise of Tribal Court jurisdiction over Robert Johnson in this case is completely consistent with the Montana "consensual relationship" test and the Supreme Court's subsequent applications of that test.

But the U.S. District Court barred the Tribal Court from exercising jurisdiction over Johnson based on an exceedingly narrow construction of the

"consensual relationship" test. The Court relied on Johnson's declarations for the proposition that his commercial relationship with CRIT did not constitute his "voluntary" consent to tribal court jurisdiction. In short, the District Court held that a nonmember who has maintained a commercial relationship with the tribe for over 20 years may not be subjected to tribal court jurisdiction in an action pertaining to that commercial relationship unless the tribal court finds that the nonmember has *voluntarily* submitted to a tribe's adjudicatory authority. The District Court inappropriately placed a burden on the Tribal Court to rebut the nonmember's subjective belief that he was not subject to tribal court jurisdiction—notwithstanding that the nonmember is the principal manager of the corporation which holds a tribal lease, that the nonmember has willfully failed to pay rent to the Tribe, and has violated tribal law—and then has remained on tribal land after the expiration of the lease, trespassing and defiantly violating lease provisions which prohibit holdover tenancies. For this incredibly strict application of the "consensual relationship" test the District Court found support in the Supreme Court's 2008 decision in Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. ___, 128 S.Ct. 2709. A careful reading of that decision demonstrates that it provides no support for the District Court's Order.

The Long Family, members of the Cheyenne River Sioux Tribe in South Dakota, owned 51 per cent of a corporation chartered under state law, which held

commercial loans from Plains Commerce Bank to run a ranching business on the Reservation. Fee lands on the Reservation were used to collateralize those loans, and in 1996, to avoid foreclosure, the Longs deeded some of those lands to the Bank, taking back leases to enable them to continue their business. The agreement also included an option for the Longs to repurchase their lands. When a blizzard killed 500 head of their cattle, they were unable to exercise their repurchase option, but they refused to vacate the land when the Bank sold it to others. The Bank then filed eviction actions in both state and tribal court. The Longs responded with a suit against the Bank in tribal court, alleging breach of contract, violations of tribal law, and discrimination, claiming that the Bank offered non-Indians better loan terms. A tribal court jury awarded the Longs both damages and the right to purchase 960 acres of fee land from the Bank on the same terms provided in the original repurchase option, "effectively nullifying the Bank's previous sale of that land to non-Indians." 128 S.Ct. at 2716. As here, the Bank challenged tribal court jurisdiction in federal court. The Eighth Circuit upheld the exercise of tribal court jurisdiction, holding that the discrimination claim arose directly from the pre-existing commercial relationship. Plains Commerce Bank v. Long Family Land and Cattle Co., 491 F.3d 878, 887 (2007).

The Supreme Court reversed, holding that *neither* Montana exception may be applied to support tribal regulatory authority over sales of non-Indian fee lands.

> *Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the "activities of nonmembers" 450 U.S. at 565 …, allowing these to be regulated to the extent necessary "to protect tribal self-government [and] to control internal relations," *id.*, at 564 .... See *Big Horn Cty. Elect. Cooperative, Inc. v. Adams*, 219 F.3d 944, 951 (CA9 2000) "*Montana* does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of the *activities* of nonmembers."

128 S.Ct. at 2721 (emphasis in original.) In other words, the Court held that the "consensual commercial relationship" exception does not apply to transactions in non-Indian fee lands. It held that no matter how clearly consensual the underlying "commercial relationship" may be, it may never provide the basis for tribal regulation of transactions in non-Indian fee lands on the reservation. The Plains Commerce Bank decision thus should not be read to interpret and thereby narrow the first Montana exception, as the Court held that that exception is wholly inapplicable to a tribe's attempt to regulate nonmember transactions in fee land on the reservation. It certainly provides no support for the District Court's decision in this case, barring tribal court jurisdiction over the owner/manager of a corporation which is a holdover tenant, and who is thus trespassing on tribal land.

To justify its novel interpretation of the first Montana exception the U.S. District Court selectively cited language from the Plains Commerce Bank opinion, as follows:

> The question the Court must answer, then, is whether a nonmember's extensive but largely involuntary dealings with a tribe satisfy the consensual relationship exception. The parties have cited no case on point and the Court has found none. The Supreme Court has recently made clear, however, that the *Montana* consensual relationship exception is satisfied only when a nonmember has consented to tribal jurisdiction. As the Court explained in *Plains Commerce Bank*, a nonmember may not be subjected "to tribal regulatory authority without commensurate consent." 128 S.Ct. at 2724. The Court explained that "nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly, or by his actions." *Id.*

ER-17. From these passages in the Opinion in Plains Commerce Bank the District Court then framed the critical question to be whether "Johnson personally chose to enter into a personal relationship with the Tribe" (ER-18), adding that Johnson's own "understanding", evidenced by his declaration, "cannot fairly be characterized as his personal consent to the tribe's jurisdiction." *Id.*

But there is nothing in the Plains Commerce Bank Opinion to suggest that the first Montana exception requires a nonmember's "personal consent" based on his or her "understanding" that he or she is being subjected to tribal jurisdiction. The two quoted passages appear in a single paragraph in the Opinion where Chief Justice Roberts is explaining why the "regulation of fee land [is] beyond the tribe's sovereign powers." 128 S.Ct. at 2724. Nothing in that paragraph, or in the surrounding text, purports to clarify or interpret the first Montana exception. Indeed, the point being made by the Chief Justice in that particular discussion is

that, *even if* "[t]he Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions" in fee land, such transactions are outside the scope of tribal sovereign powers. *Id.* at 2725.

Moreover, the District Court ignored the second passage which it quoted from the Plains Commerce Bank Opinion, namely that a nonmember's consent may be given "expressly, or *by his actions*." (Emphasis added.) Judge Campbell rejected the proposition that over 20 years of Robert Johnson's actions, engaging in commercial relations with the Tribe, were not consensual because the commercial relationship was not "voluntary". Little wonder that the District Court could find no "case on point", as no court has ever construed the "consensual relationship" test in such a narrow and counterintuitive manner. Indeed, because the District Court fashioned a whole new interpretation of that test, Tribal Court Judge LaRance could not have anticipated that he was required to make a jurisdictional finding of "voluntariness" independent of his finding of a consensual commercial relationship. The absence of such a finding on "voluntariness" led the District Court to rule that the Defendants had failed to meet their burden of showing the requisite "consensual relationship." *See* ER-18, n.16 & accompanying text. Judge Campbell called it a "close question." *Id.* It is not. Over two decades of Johnson's commerce on tribal land, and the language of the Water Wheel lease, are

quite sufficient to establish his consent to tribal jurisdiction. The Supreme Court has never required a nonmember's "personal consent" to tribal jurisdiction under the consensual commercial relationship test of Montana. As stated in Plains Commerce Bank, a nonmember's *actions* have been deemed sufficient evidence of such a relationship.

Nor can the District Court's interpretation of the "consensual relationship" test be reconciled with Ninth Circuit precedent on this subject. In Smith, this Court, sitting *en banc*, commented: "Nonmembers of a tribe who choose to affiliate with the Indians or their tribes in this way may anticipate tribal jurisdiction when their contracts affect the tribe or its members." 434 F.3d at 1138. There the Court compared the consensual relationship test with a due process analysis of the contacts necessary to establish a court's personal jurisdiction over a defendant, holding that application of that test is "more flexible" than strict notions of subject matter jurisdiction. *Id.* In this case Robert Johnson has had commercial relations with the Tribe for well over 20 years. Judge LaRance can hardly be accused of using the long arm of tribal law to hoist a stranger into Tribal Court. Johnson has been present on the Reservation, collecting rent from residents of the resort on tribal land, for decades—more recently refusing to pay anything to the Tribe. He is subject to tribal jurisdiction.

Furthermore, paragraph 34 of the Lease Addendum states that Water Wheel's agents and employees "agree to abide by all laws, regulations, and ordinances of the Colorado River Tribes …." ER-249. Robert Johnson is clearly Water Wheel's principal agent, but the District Court Order states: "Nothing in the paragraph suggests, however, that Water Wheel is agreeing that its agents and employees *personally* are subject to Tribal Court jurisdiction." ER-18 (emphasis added). In essence, the District Court is requiring that Johnson must have contractually agreed to the Tribal Court's jurisdiction over him personally. Federal courts have never required such a personal agreement under the "consensual relationship" test.

A clear example may be found in Merrion. There the Supreme Court held that the Tribe had the power to tax its oil and gas lessees even though the tribal power to tax was not mentioned in their leases. The Court's opinion states: "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose." 455 U.S. at 147. The holding in Merrion was reaffirmed by the Court in Plains Commerce Bank, 128 S.Ct. at 2722-23. That rule applies here. The *actions* of Robert Johnson, evincing a two-decade commercial relationship with the Colorado River Indian Tribes, are sufficient to subject him to Tribal Court jurisdiction in an action to evict him from

the Reservation and to collect trespass damages and unpaid rents. The District Court disagreed, requiring nothing less than an explicit agreement on the part of Robert Johnson to subject himself to tribal jurisdiction, and ignoring his repeated *actions* over the course of over two decades which demonstrate the existence of a consensual commercial relationship. No court has imposed such a stringent requirement. The District Court's ousting of Tribal Court jurisdiction over Johnson cannot be reconciled with Supreme Court precedent—especially not with Williams and Merrion.

B. The District Court erred in its reliance on the federal court declarations of Robert Johnson, which were not part of the record of the Tribal Court proceedings, to override the Tribal Court Findings of Fact.

Whether the District Court had a basis for reviewing evidence outside of the record developed in the tribal court is a question of law to which a court of appeal applies a *de novo* standard of review. Cachil Dehe Band of Wintun Indians v. California, 547 F.3d 962, 970 (9th Cir. 2008).

Judge LaRance made 28 findings in his jurisdictional ruling of March 18, 2008, to support his conclusion that Johnson was subject to Tribal Court jurisdiction. ER-262-266. The only finding which the U.S. District Court rejected as "clearly erroneous" was that Robert Johnson was a party to the Water Wheel Lease. ER-16, n.14. Johnson did not dispute any of the other findings of fact, in either federal court (*id.*), or in Tribal Court. *See* Tribal Court of Appeal Opinion at

ER-169.[1] But the District Court relied on the Second Declaration of Robert Johnson (ER-146-155) to find that "*he* did not intentionally enter into a consensual relationship with the Tribe." ER-16 (emphasis in original). Then he placed the burden on the defense to show that "Johnson's contacts with the tribe were voluntary." ER-17. But Johnson's declaration was not placed in evidence in the Tribal Court.

Indeed, Water Wheel and Johnson scorned the Tribal Court's exercise of jurisdiction, failing to comply with discovery rules, filing pointless interlocutory appeals, and refusing to abide by Judge LaRance's orders. ER-119-120; ER-164, 196-200; ER-258-259. It was always their strategy to attack the Tribal Court's jurisdiction in federal court by making an end run around the tribal court proceedings. When they filed their brief on the merits on March 29, 2009, they had not even placed the Tribal Court Judgment in evidence. It was left up to Defendants to place the record of the Tribal Court proceedings before the District Court. ER-107-123. And the Plaintiffs were ultimately successful in their strategy of scorning the tribal court proceedings, and placing new matters in evidence in the federal court when the District Court relied on Johnson's declaration as the

[1] The Court of Appeal Opinion and Order states: "Thus with the single exception of the prior claim, now waived, that the formerly leased property was not owned by the Tribe or located within its Reservation, Defendants/Appellants have not disputed and do not dispute before this Court any of the other underlying *factual* claims that resulted in the Tribal Court finding of personal and subject matter jurisdiction in this proceeding …." ER-170.

evidentiary linchpin for the Order granting him relief. The reliance on that declaration to rebut the findings of the Tribal Court was reversible error.

In National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985), the Supreme Court ruled that whether a tribal court has jurisdiction over a nonmember defendant is a question of federal law over which federal courts have subject matter jurisdiction, adding,

> [T]he 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. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. *Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed*. . . Exhaustion of tribal court remedies, moreover, 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 in such matters in the event of further judicial review.

471 U.S. at 855-57 (emphasis added; footnotes omitted); *see also* Iowa Mutual Ins. Co., 480 U.S. at 16. The Ninth Circuit has implemented these rulings by requiring the reviewing federal court to "show some deference to a tribal court's determination of its own jurisdiction." FMC v. Shoshone-Bannock Tribes, 905

F.2d 1311, 1313 (1990), *cert. denied* 499 U.S. 943 (1991). Further, findings of fact by a tribal court are reversed only for "clear error." Smith, 434 F.3d at 1130; FMC, 905 F.2d at 1313.

Judge Campbell followed these rulings when he denied Water Wheel and Johnson's two TRO motions in 2008. ER-278, 282 and ER-216. But he undermined the fundamental principles underlying the exhaustion requirement by entertaining Johnson's self-serving declaration which had never been produced to the Tribal Court, and then faulting Judge LaRance for not making a "factual finding of voluntariness" (ER-18, n.16), *i.e.,* for not rebutting evidence which he had never seen. If this sort of end run is allowed, then what would stop tribal court litigants from simply failing to appear and taking a default judgment, knowing that they have the opportunity in federal court to present new evidence in opposition to tribal court jurisdiction? The District Court's reliance on the declaration of Robert Johnson was erroneous, as he was offering evidence which could have first been presented in the Tribal Court. For a U.S. District Court to require the tribal judge to rebut evidence which had never been introduced in tribal court undermines the Supreme Court's jurisprudential requirement that litigants challenging tribal court jurisdiction in federal court should first exhaust their tribal remedies by presenting their challenges to the tribal court—not scorn the tribal proceedings, and then

initiate a challenge to tribal court jurisdiction based on a new record developed in federal court.

This error is further evident from the manner in which the District Court employed burdens of persuasion in its analysis. Judge Campbell held that the Montana test places the burden on the proponent of tribal jurisdiction to demonstrate that one of the two exceptions applies. ER-5, 17. For that proposition he relied again on the Supreme Court Opinion in Plains Commerce Bank, 128 S.Ct. at 2720. However, the Chief Justice did not articulate a rule of evidence which pertains here. His Opinion states: "The burden rests on the tribe to establish one of the exceptions to Montana's general rule that would allow an extension of tribal authority *to regulate nonmembers on non-Indian fee land.*" *Id.* (emphasis added.)

Apart from the question of the applicability of that burden, Judge Campbell failed to impose any burden on Robert Johnson to demonstrate the inadequacy of the determination of the Tribal Court. Indeed, the two Declarations proffered by Johnson are dated March 11, and April 22, 2008, prior to the Tribal Court trial. ER-144, 155. The latter Declaration does not take issue with any of the findings made by Judge LaRance in his jurisdictional order of March 18, 2008. Rather, it is broadly critical of what Mr. Johnson believed was an air of unfairness in the tribal

courtroom. Those allegations were offered in support of Plaintiffs' Second Motion for a Temporary Restraining Order in May 2008, which was denied.

The law in this Circuit—and an implicit consequence of the tribal court exhaustion requirement imposed by the Supreme Court in the National Farmers case—is that the U.S. District Court should give deference to the factual findings of the tribal court on the subject of tribal court jurisdiction. What that must mean, at a minimum, is that a determination of the tribal court that there was the requisite consensual commercial relationship will shift the burden to the opponent of tribal jurisdiction to come forward and demonstrate either that the tribal court's findings of fact are clearly erroneous based on the tribal court record, or that the tribal court made errors of law in its application of the Montana test. The District Court paid lip service to this interpretation of the test when it held that "Factual findings made by tribal courts are reviewed for clear error." ER-3. But there is nothing in the District Court's Order of September 23, 2008, showing that there was any such deferential review.

Rather, as explained in the previous section, Judge Campbell imposed an impossible, *post hoc* burden on the CRIT Tribal Court, by requiring that there be a finding of Johnson's *voluntary* "personal consent" to tribal jurisdiction, a requirement not found in federal court jurisprudence. Indeed, even the Plains Commerce Bank decision, on which Judge Campbell relied in support of this

supposed interpretation of the Montana test, was decided 12 days *after* Judge LaRance had entered judgment against Water Wheel and Johnson. At a minimum, Judge Campbell should have weighed the averments in the Johnson declaration (as incredible as they are) against the Tribal Court's findings of fact to ascertain whether Johnson had produced some substantial evidence to rebut the Tribal Court findings. But the averments in the Johnson Declaration do not address any of the Tribal Court findings of fact at all; they pass like ships in the night. Not only was Johnson allowed to scorn the Tribal Court proceedings, he was allowed to avoid the consequences of the Tribal Court findings entirely by introducing a whole new template for measuring his ostensive consent to tribal court jurisdiction.

C. The District Court's finding that Robert Johnson had no consensual relationship with the Tribe was clearly erroneous.

It is first and foremost the Appellants' position that the District Court misapplied the Supreme Court's "consensual relationship" test with respect to Tribal Court jurisdiction over Robert Johnson; and then that the District Court also erred when it relied on Johnson's declaration to override the Tribal Court's findings and conclusion that Johnson did have a consensual commercial relationship with the Tribe. These were errors of law. To the extent that the Circuit Court treats the District Court's determination that Johnson did not have a consensual relationship with the Tribe as a finding of fact, it is also Appellants' position that the District Court's finding was clearly erroneous.

As discussed above, Judge Campbell's ruling centered on Johnson's self-serving Second Declaration. ER-146-155. Paragraph 3 of that declaration avers that Johnson purchased "Water Wheel's lease with the United States" from Mr. and Mrs. Denham on May 1, 1981. That paragraph continues:

> I was told by the Denhams that the Lease was administered by the Bureau of Indian Affairs ("BIA") and that was who I would deal with – the Denhams never mentioned anything about the Colorado River Indian Tribes …

ER-147. One look at the lease document shows that this is not a credible averment. It was not a "lease with the United States". From top to bottom it refers to the Colorado River Indian Tribes as "Lessor", and that the lease was "made … and entered into … by and between the Colorado River Indian Tribes" and Water Wheel. ER-221. It was executed by tribal officials on behalf of the Colorado River Indian Tribes, as Lessor. Nowhere in the lease document is there any hint that the United States was the Lessor. This is all acknowledged in the first part of the District Court's final Order, where it addresses whether Water Wheel is subject to Tribal Court jurisdiction. ER-8.

But in the second part of that decision the District Court concluded that Robert Johnson did not *voluntarily* enter into a commercial relationship with CRIT based on the assertions in his declaration that it was his understanding that that the Water Wheel rent payments would be made to the BIA, and that building supervision would be performed by Riverside County. The District Court viewed

these assertions as having support in the language of the Lease, specifically Section IV and paragraphs 5 and 14 of the addendum. ER-16. However, even if those provisions of the Lease are viewed in isolation from the other provisions, they do not support a finding that Johnson did not have a consensual commercial relationship with the Tribe, much less support his preposterous allegation that he did not know that he would have to deal with the Tribe. Article IV requires that the minimum annual rent be renegotiated *with the Tribe* prior to the 26th year, *i.e.*, prior to 2001. ER-222. Paragraph 5 of the addendum provides that within 180 days after lease approval "the Lessee shall submit *to the Lessor* and the Secretary *for approval* a general plan and design for the complete development of the entire leased premises." ER-232 (emphasis added). Although it is accurate that the Lease provides that, before beginning construction, the Lessee must obtain approval of the specifications from the State of California and Riverside County, it also provides that *the Tribe* must approve the plans, and thus the Tribe plays an integral role in overseeing the commercial development of this tribal property. The Lease contains only one reference to Riverside County, but there are many references to the role of the Tribe as Lessor. Accordingly, Johnson's claimed understanding that the Tribe would play no role in lease management is completely unsupportable.

The District Court also pointed to Johnson's assertion "that he was to obtain power from Southern California Edison," which it said is supported by paragraph 14 of the Lease Addendum which "recognizes that Water Wheel will have the right to enter into power agreements with public utilities such as Southern California Edison." ER-16. But Johnson's declaration simply stated that Southern California Edison (which is not mentioned in the Lease) "suddenly refused to energize new electrical service to Water Wheel without CRIT approval." ER-148, ¶ 10.

Most significantly, Johnson's assertion that he did not voluntarily enter into a commercial relationship with CRIT is simply not supported by a reading of the *entire* lease document, which contains numerous provisions acknowledging the supervisory and governmental role of the Tribe. For example, paragraph 28 of the addendum gives the Lessor (*i.e.,* the Tribe) broad authority to inspect the premises *at any time* (ER-248), belying Johnson's claim of surprise in 1983 when he was told that CRIT officials would thereafter conduct all inspections instead of Riverside County. *See* ¶ 8 of the Declaration. ER-148. The Lessee was also required to obtain the Lessor's approval of subleases (ER-244), and as mentioned above, paragraph 34 of the addendum required that all agents and employees of Lessee "agree to abide" by tribal law. ER-249.

Furthermore, as recognized by the District Court in the first part of its Order, the Lease expressly gives the Lessor the authority to enforce the lease terms, and to

evict a holdover tenant. ER-228-231. Indeed, according to paragraph 6 of the addendum, upon termination of the Lease all the buildings and improvements, except for removable personal property, become the property of the Lessor. ER-232-233. Thus, it is clear that the terms of the Lease placed Johnson on notice when he acquired Water Wheel that he would have to deal with tribal officials—especially when the Lease was due to expire in 2007. So Johnson's preposterous claim that he did not knowingly enter into a consensual commercial relationship with CRIT because he believed that the Tribe was a mere silent third-party beneficiary of Water Wheel's lease with the federal government is completely contradicted by numerous terms of the Lease.

Johnson also asserts that "It is at this time [1983] that Water Wheel began to experience difficulties in developing the Water Wheel Resort …" (¶ 9), and "Over the years CRIT officials threatened and intimidated me …." (¶ 11). ER-148-149. The District Court also cited his assertions that he complained to the BIA, whose officials took no action. ER-17. None of these assertions demonstrate that Johnson had any basis for believing that he stood outside tribal law, or that he could remain on the Reservation after the expiration of the Water Wheel Lease.

At a minimum the District Court was required to weigh Johnson's assertions against the findings of fact of the Tribal Court, which had before it extensive evidence of commercial contacts since 1981. Indeed, as early as 1983 Johnson was

corresponding with tribal officials about improvements to the resort, and in 1986 he was proposing amendments to the Lease. ER-135-139. These letters were but a fraction of the record considered by Judge LaRance. *See* ER-263-266. But the District Court nevertheless concluded that defendants "have not shown that Johnson's contacts with the tribe were voluntary." ER-17. The Court also found that the aforementioned letters are not "inconsistent with Johnson's assertion that *he was forced to deal with the tribe.*" *Id.* n.15 (emphasis added). Such a view is unsupportable from the terms of the Lease and the history of Johnson's dealings with tribal officials. Mr. Johnson knew—as early as 1983, by his own account—that the Tribe was exercising governmental authority over the Water Wheel Lease. Yet, for the next 24 years he enjoyed the benefits of the lease relationship. Johnson knowingly bought a lease of tribal lands, a lease which by its terms recognizes a substantial tribal role as both Lessor and governmental authority. Only in 2008, after the expiration of the 32-year Lease, was he claiming that he did not voluntarily enter into a commercial relationship with the Tribe. The assertions made in his declaration are incredible and illogical, and thus it was clearly erroneous for the District Court to make such a finding in reliance on that declaration.

Finally, none of Johnson's assertions in his latter-day declaration can overcome the fact that the Lease by its terms gives the Tribe broad authority to

take action upon the expiration of the Lease, including seizure of personal property after 30 days written notice. ER-247. Johnson must be charged with knowledge of all of these Lease terms, as he selectively invokes a few of them in his Declarations. The Lease cannot fairly be read to mean that the owner of the corporate Lessee was not on notice that if he caused Water Wheel to remain on tribal property after the expiration of the Lease, *he* would not be evicted by the Tribe. Indeed, how does one evict a corporation if not by removing its managing owner? The District Court's determination that Johnson did not voluntarily enter into a consensual commercial relationship with the Tribe is clearly erroneous.

D. The District Court erred in its determination that the Tribe's inherent power to exclude nonmembers from its reservation is constrained by the framework set forth by the Supreme Court in Montana v. United States, and in its holding that the tribal exclusionary power does not provide a basis for the Tribal Court's exercise of jurisdiction to evict Robert Johnson, a willful trespasser on tribal land.

The District Court acknowledged that Indian tribes have the inherent power to exclude nonmembers from tribal land (ER-19), an oft-stated proposition in Supreme Court opinions. Duro v. Reina, 495 U.S. 676, 696 (1990) superseded by statute on other grounds, as stated in Mousseaux v. U.S. Com'r of Indian Affairs, 806 F.Supp. 1433 (D.S.D 1992). But the District Court held that that power did not provide a basis for Tribal Court jurisdiction over Robert Johnson because Defendants had failed to carry their burden of showing that the exercise of that jurisdiction met the test set forth in Montana v. United States. ER-22. That ruling

is wrong on two counts: One, the Montana test is not applicable to the exercise of tribal exclusionary authority when it involves trespass on tribal lands; and two, the fact that Johnson has been knowingly trespassing on tribal lands since July 2007 subjects him to Tribal Court jurisdiction under both prongs of the Montana test.

The District Court relied primarily on two Supreme Court decisions for the proposition that the exercise of a Tribe's exclusionary authority over nonmembers of the Tribe is subject to the Montana framework: Plains Commerce Bank and Strate. ER-19-20. However, neither of these cases involved nonmember *trespass* on tribal lands. As discussed above, it was the Court's holding in Plains Commerce Bank that tribes have no authority to regulate the alienation of fee lands. Nothing in that opinion should be read to impose restrictions on a tribe's power to exclude trespassers on tribal lands.[2] Strate was a tort action in tribal court involving an accident on a state highway right-of-way across an Indian reservation. There the Court held that North Dakota's acquisition of the right-of-way "renders the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated non-Indian land." 520 U.S. at 454 (footnote omitted). Indeed, Strate cited favorably the language from the Court's decision in Iowa Mutual Ins. Co., quoted

[2] The District Court's view that the Plains Commerce Bank opinion "suggests that a tribe's inherent powers to exclude nonmembers is one of the powers regulated by the *Montana* framework, not a power independent of it" (ER-20) is strained. The references to inherent tribal exclusionary authority in that opinion are simply part of the background discussion of inherent tribal governmental powers.

above in Part A, that tribal court jurisdiction over non-Indian activities on tribal land "presumptively lies in the tribal courts." *Id.* at 451. Thus, neither opinion can be fairly read to impose such a restriction on this inherent tribal power.

It is, of course, counterintuitive to suggest that a tribe may not exercise its inherent authority to exclude nonmember trespassers from tribal land unless the tribe has a consensual commercial relationship with the nonmember. Trespassers on tribal lands do not often have *any* kind of a relationship with the tribe on whose land they are trespassing. Trespassing connotes a purposeful act scornful of landowner permission, which by definition cannot be a consensual relationship. Indeed, Robert Johnson has exhibited plenty of volition in his unlawful presence on tribal land nearly three years after the expiration of the Water Wheel lease. The fact that the Tribe has not consented to his presence on tribal lands cannot be a jurisdictional bar to his eviction. The District Court appears to understand that its logic is flimsy, offering a curious footnote 18:

> The Court concludes only that the tribe's power to exclude nonmembers does not provide a basis for the Tribal Court action. The Court does not address whether or how the tribe might otherwise exercise this power. *Specifically, the Court expresses no view on whether CRIT may exclude Johnson from tribal land.*

ER-21 (emphasis added.) Yet the central issue in the case is whether the Tribe "may exclude Johnson from tribal land" after the expiration of the Lease. Apparently, the court was leaving open the question whether CRIT may exercise

its inherent power in an extrajudicial manner, namely by directing the tribal police to escort Mr. Johnson to the reservation boundary, while firmly advising him not to come back. But that is not how CRIT tribal law works. As Judge LaRance held, the tribal Property Code provides for an orderly eviction action in CRIT Tribal Court, providing a defendant with due process in a court of law. ER-266-267. No explanation is given why the exclusionary power may not be exercised through an orderly adjudication, as opposed to other means—such as police action to forcibly evict a trespasser on tribal lands. The court's ruling is patently illogical.

The District Court did express the concern that the eviction action brought against Water Wheel and Johnson "seeks to do much more" than exclude nonmembers from tribal land, noting that the Court awarded damages and attorney fees against both defendants. ER-21. But—at least since July 7, 2007—Johnson has been trespassing on tribal land, operating the Water Wheel resort, collecting rents from tenants, and paying nothing to the Tribe. ER-121-122. Under such circumstances a landowner would be entitled to trespass damages or mesne profits, which are recoverable at common law in an action for ejectment. 25 Am.Jur.2d Ejectment § 50; Cracchiolo v. State, 706 P.2d 1219, 1227 (Az.App. 1985). Thus, such damages also fall within the scope of a Tribe's inherent exclusionary authority. Otherwise, a trespasser would be rewarded for his misdeeds. The Tribal Court of Appeal recognized this distinction, holding that there was no need for

piercing the corporate veil between Water Wheel and Johnson for purposes of finding Johnson jointly and severally liable "on a direct theory of trespass" after the expiration of the Lease. ER-204.[3] But the District Court ignored these distinctions, instead issuing a sweeping ruling that the Tribal Court had *no* subject matter jurisdiction over Johnson, even for the purpose of evicting him from tribal land where he had no right to be.

The District Court also viewed this Court's decision in Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985), as supporting its view that the exercise of tribal exclusionary authority is encompassed in the Montana framework. ER-20-21. A reading of Hardin demonstrates otherwise. That case involved an effort by the Tribe to exclude from the Reservation a person convicted of concealing property stolen from a federal observatory on the Reservation. He had lived on the Reservation for ten years at that point, as his parents owned a lease on tribal land. The 9th Circuit upheld the Arizona District Court's dismissal of Hardin's suit challenging tribal authority to exclude him from the reservation. In doing so, the Court did not perform a Montana analysis, but cited that decision simply for some general propositions governing the scope of tribal civil authority,

[3] At any rate, the question of piercing the corporate veil goes to the issue of liability not jurisdiction. It was not necessary to pierce the corporate veil to justify Tribal Court jurisdiction over Johnson, and the District Court acknowledged that defendants did "not contend that it provides a basis for jurisdiction over Johnson." ER-19. Nor does the District Court sit as an appellate court reviewing issues of liability.

language which was in turn quoted by the District Court in this case. But it is clear that the Supreme Court decision on which the Hardin decision turned was not Montana but Merrion, which was quoted for the proposition that "A tribe has power 'to place conditions on entry, on continued presence, or on reservation conduct. . . . A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power.'" 779 F.2d at 479. Indeed, the 9th Circuit panel quoted from Montana, as did the District Court in this case, for the proposition that a consensual commercial relationship with a tribe provides a basis for civil jurisdiction over nonmember conduct on *fee lands*, which was not an issue—either in Hardin or here. Nothing in Hardin purports to impose that test on evicting a trespasser from *tribal lands*.

But even if Montana's framework is applicable to the eviction of Robert Johnson, the CRIT Court of Appeal Opinion and Order explains compellingly that a continuing trespass on tribal land necessarily meets *both* tests set forth in Montana. The parties had consented to tribal jurisdiction when they first entered upon tribal land under the auspices of a lease, and their trespass after lease expiration demonstrably affects the Tribe's "economic security", as required under

the second Montana exception.[4] ER-182-184. As the CRIT Court of Appeal persuasively opined:

> 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. If this Court were to sustain the Appellants/Defendants claims no Indian tribe would ever again avail itself of the leasing opportunities provided to the Tribes by federal statute for fear that such leasing might result in the *permanent loss* of control over their own lands notwithstanding subsequent expiration of the Lease, as occurred here.

ER-184. Similarly, in a recent decision of this Circuit in Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009), *cert. denied* 130 S.Ct. 624 (Nov. 16, 2009), this Court held— albeit without a complete tribal court record before it— that it is "plausible" that a tribal court has jurisdiction to hale a trespasser into court in order to protect tribal natural resources. 566 F.3d at 849-50.

The longstanding proposition that a tribe has the inherent authority to exclude nonmembers from tribal lands has not been undone by the Supreme Court in its rulings since Montana in 1981. That is because, as the CRIT Court of Appeal opined, a trespass on tribal lands necessarily threatens the "economic security" of the tribe. The exercise of that authority by Judge LaRance was consistent with federal law.

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[4] The District Court states inaccurately that "Defendants do not contend that the second [Montana] exception applies …." ER-21. It has been Defendants' position that the Tribal Court Record fully demonstrates the indices of tribal court jurisdiction. That includes the Court of Appeal decision cited in the text above.

Indeed, the District Court's decision barring the CRIT Tribal Court from evicting a blatant trespasser offends longstanding federal policies with respect to the independence of Indian tribes and the protection of Indian property. The Supreme Court has long held that tribal beneficial ownership of land held in trust is a title "as sacred as the fee title of the whites." Mitchel v. United States, 34 U.S. 711, 746 (1835). In 1975 Congress passed the Indian Self-Determination Act under which Indian tribes assume the responsibility for numerous programs of the Bureau of Indian Affairs and the Indian Health Service, including the management of Indian realty programs. 25 U.S.C. § 450, *et seq.* Modern BIA regulation of leasing has fused these policy considerations, explicitly recognizing tribal administration of leases and the applicability of tribal laws to leased lands. *See* 25 CFR §§ 162.107(b), 162.109(b). Allowing the District Court decision to stand would undermine both of these important federal policies.

Robert Johnson should not be allowed to continue to trespass on tribal lands, collecting rents from his former "tenants", and paying the Tribe nothing. Under the District Court's ruling he is allowed to flaunt his unlawful presence on the Colorado River Indian Reservation.

CONCLUSION

For the foregoing reasons that portion of the District Court Order of September 23, 2009, which granted the relief sought by plaintiff Robert Johnson, should be reversed and vacated, with directions to the District Court to deny relief sought by Mr. Johnson from the Judgment of the Tribal Court.

Date: May 14, 2010

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to 9th Cir. R. 28-2.6, counsel for Appellants states that he is not aware of any cases pending before the Court of Appeals which are related to this case.

/s/Tim Vollmann
TIM VOLLMANN

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 11,137 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 2003 in 14 point font, Times New Roman.

/s/Tim Vollmann
TIM VOLLMANN

ATTACHMENT RE EXTENSION OF TIME FOR FILING

On April 21, 2010, the Clerk of the 9th Circuit granted Appellants' oral request for a 14-day extension of time for filing this Principal Brief pursuant to 9th Cir. R. 31-2.2(a). Per the Clerk's instructions a copy of counsel's letter to opposing counsel advising of this extension is attached hereto.

/s/Tim Vollmann
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April 22, 2010 (*via* e-mail & U.S. mail)

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Re: Water Wheel Camp Recreational Area, *et al.*, v. LaRance, *et al.*,
Nos. 09-17349 & 17357 in the U.S. Court of Appeals for the 9th Circuit
New Briefing Schedule

Dear Mr. Whittlesey:

I am writing to advise you that the Clerk of the 9th Circuit has granted my telephonic request, made pursuant to 9th Cir. R. 31-2.2(a), for a 14-day extension of time in which to file Appellants' Opening/Principal Brief, as we had discussed on Tuesday, April 20th. The full Briefing Schedule, as set by the Extension Clerk, is now as follows (with reference to the terminology of Fed R. App. R. 28.1(c)):

Appellants' (Defendants') Principal Brief (Brief #1)	May 14, 2010
Appellees' (Plaintiffs'/Cross-Appellants) Principal/Response Brief (Brief #2)	June 14, 2010
Appellants' Reply/Response Brief (Brief #3)	July 14, 2010
Appellees' (optional) Reply Brief (Brief #4)	due 14 days following service of Brief #3

I believe this is consistent with the schedule which we discussed when I notified you of my intention to seek this extension. As per the instructions given me by the Extension Clerk, a copy of this letter will be attached to Appellants' Principal Brief to be filed by May 14, 2010.

Thank you very much for your cooperation.

Sincerely,

/s/
Tim Vollmann
Attorney for Appellants

cc: Michael Frame, Esq.
Eric Shepard, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th of May, 2010, I electronically filed the foregoing Appellants' Principal Brief 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.

/s/Tim Vollmann
TIM VOLLMANN

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