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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

WATER WHEEL CAMP RECREATIONAL AREA, INC., and ROBERT JOHNSON, Plaintiffs, v. The Honorable GARY LARANCE, and JOLENE MARSHALL, Defendants.	)	No. 2:08-CV-474-PHX-DGC DEFENDANTS' RESPONSE MEMORANDUM IN OPPOSITION TO PLAINTIFFS' BRIEF "CONCERNING THE LACK OF TRIBAL COURT JURISDICTION PURSUANT TO THE RULE OF *MONTANA v. UNITED STATES"*

This memorandum is filed pursuant to Paragraph 2 of this Court's Order of March 25, 2009, responding to the arguments made by Plaintiffs in their Merits Brief of March 27, 2009, seeking declaratory and injunctive relief to prevent Defendant, Judge Gary LaRance, Chief Judge of the Tribal Court of the Colorado River Indian Tribes, from exercising jurisdiction over Plaintiffs, who are the defendants in an eviction action brought by the Colorado River Indian Tribes ("CRIT", or "the Tribe") on October 1, 2007, in a case styled, Colorado River Indian Tribes v. Water Wheel Camp Recreational Area, *et al.*, No. CV-CO-2007-0100.

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I. INTRODUCTION

Plaintiffs Water Wheel Camp Recreational Area, Inc. [Water Wheel] and its President, Robert Johnson, are defendants in an eviction action brought in CRIT Tribal Court; they seek declaratory and injunctive relief to establish that the Tribal Court may not exercise jurisdiction over them. Water Wheel entered into a 32-year lease with CRIT in 1975. The Tribal Court eviction action was brought pursuant to the terms of the lease to evict holdover tenants.

Although Plaintiffs' Merits Brief is replete with references questioning the western boundary of the CRIT Reservation, and arguments that the land from which they would be evicted is neither tribally-owned land nor part of the Reservation, Plaintiffs assert nonetheless that they "are not here contesting the reservation status of the leasehold." P's Brief at page 2. This Court's Scheduling Order of March 25, 2009, states that Plaintiffs "will not be asking this Court to address the Indian title or the reservation status of the land in question," and when the Court denied Defendants' Emergency Motion to Strike Plaintiffs' Merits Brief on April 7, 2009, it commented that "this Court is not being asked to decide the Indian title or reservation status of the land in question." That order of denial also stated that the Court would "adhere to that limitation."

Accordingly, this Response Brief presents the argument in support of Tribal Court jurisdiction *as a matter arising on tribal trust land within the boundaries of the CRIT Reservation*—a position the U.S. Department of the Interior has taken for forty years. In view of the arguments made in Plaintiffs' Brief, Defendants anticipate that Plaintiffs'

Reply Brief will contest the jurisdictional locus of the exercise of Tribal Court jurisdiction. Therefore, Defendants reiterate that it has been their position throughout this litigation that this Court has no jurisdiction to adjudicate Indian title or reservation status, because (1) the Quiet Title Act, 28 U.S.C. § 2409a(a), states expressly that the United States' consent to quiet title actions "does not apply to trust or restricted Indian lands;" and (2) the United States and CRIT are indispensable parties to any adjudication of Indian title held in trust by the United States. Thus, if the Court intends to address those issues, it should first permit Defendants to file a Motion to Dismiss.

II. STANDARD OF REVIEW.

The question of tribal court jurisdiction is a federal question of law, which a U.S. District Court reviews *de novo.* Salish & Kootenai Tribes v. Smith, 434 F.3d 1127, 1130 (9th Cir. 2004). However, federal courts are expected to "show some deference to a tribal court's determination of its own jurisdiction." FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990), *cert. denied* 499 U.S. 943 (1991). Thus, the findings of fact made by a tribal court are reviewed "for clear error." Salish & Kootenai Tribes, 434 F.3d at 1130; FMC, 905 F.2d at 1314. To aid this court's review Defendants have assembled a Tribal Court Record containing the major rulings of Judge LaRance in this case, the Court of Appeals decision, and salient evidence from the Record which was relied upon by the Tribal Court.

III. FACTUAL BACKGROUND.

The following narrative of the material facts in this matter is based exclusively on the factual record developed in the Tribal Court proceeding. The record of the proceedings before the CRIT trial court, which was presented by the parties to the CRIT Court of Appeal, is quite voluminous, and Defendants necessarily have had to be selective in their compilation of documents to be included in the record being presented to this Court for its review. It is appended to this Brief as Exhibit 1.[1] References to the Tribal Court Record herein will be cited as "TCR- ___."

In light of the rule that federal court review of tribal court findings are based on the "clearly erroneous" standard, Salish & Kootenai, *supra*, 434 F.3d at 1130, we note that Plaintiffs' recitation in their Brief of what they regard to be the central facts of the case is largely dependent upon the self-serving Declarations of Plaintiff Robert Johnson and other documents which are not a matter of record in the Tribal Court proceeding, and

[1] Plaintiffs' counsel initially opposed the attachment of the Tribal Court Judgment of June 13, 2008, to the March 17, 2009, Joint Status Report to this Court, and has not treated portions of the record of the Tribal Court proceedings as meriting inclusion in any record before this court. Nevertheless, Defendants hereby invite Plaintiffs to review the attached record, and to recommend the addition to that record of any other documents from the tribal court docket. However, Defendants also reserve the right to oppose the addition of particular documents which Plaintiffs propose to be added to the record in this case, and to reserve the opportunity to file a motion and/or memorandum such as a sur-reply to address the appropriateness of the Court's consideration of any particular piece of evidence.

thus should not be relied upon by this Court, unless and until Plaintiffs can demonstrate that the Tribal Court's findings are "clearly erroneous."

CRIT Tribal Court proceedings

The Tribal Court action is a landlord-tenant dispute involving an expired lease and a hold-over tenancy. Petition for Eviction, TCR-1. Defendant LaRance entered Judgment in favor of the Tribes on June 13, 2008. TCR-2. The Tribal Court of Appeal affirmed the Judgment in favor of the Tribes in all respects but one on March 10, 2009.[2] TCR-3. In a January 15, 2008, ruling the trial court found sufficient evidence of a binding Lease agreement, and of Plaintiffs' express consent to be bound by "the Tribe's laws, including provisions providing for Tribal Court Jurisdiction ...." TCR-4, Order Denying Motions to Dismiss for Lack of Jurisdiction, pp. 7-8; *see also* Court of Appeal Opinion, TCR-3, p. 37.

Lease History

CRIT's Lease with Water Wheel (TCR-5) was signed by Bert T. Denham, the majority shareholder and corporation President, and Barbara I. Denham, corporation Secretary, on June 17, 1975. Tribal officials executed it on July 1, 1975, and it was approved by the BIA Superintendent on July 7, 1975. TCR-5, pp. V-VII. The Lease was a product of a settlement of a trespass suit filed against the Denhams by the United States

[2] The Tribal Court of Appeal ruled that the trial court's judgment on one portion of the damages calculation was incorrect, and remanded for recalculation of only that part of the damages awarded for Intentional Interference with Prospective Business Advantage. TCR- 3, p. 2.

on March 7, 1973. TCR- 6, United States v. Bert Thomas Denham and Barbara I. Denham, Civil No. 73-495-ALS, Judgment, C.D.Cal., March 5, 1975 ("Denham Judgment"). Attorneys for the Denhams proposed the framework for the stipulated judgment and began negotiations for the Lease in 1973, two years before the Judgment was entered. TCR-7, Letter from Jack D. Holt, Keller and Holt, to Bryan N. Freeman, Assistant U.S. Attorney, dated May 30, 1973. Although the proposed Lease was not referenced in the Denham Judgment itself, it is clear from contemporary correspondence introduced as evidence in the CRIT Tribal Court that the Lease was a central element of that settlement. TCR- 8, Letter from William D. Keller, U.S. Attorney, to Wallace H. Johnson, Asst. Atty. Gen., Land and Natural Resources Div., U.S. Dept. of Justice (Oct. 1, 1974) at p. 2; TCR-9, Memo from the Acting Riverside Field Solicitor, U.S. Dept. of the Interior (April 2, 1975). *See also* TCR-11, Judge LaRance's Order of February 21, 2008, at p. 3.

The Denham Judgment "ordered, adjudged, and decreed" that 50.86 acres of real property, specifically, Lots 5 and 6, in Section 14, Township 3 South, Range 23 East, San Bernardino Meridian, California, is owned by the United States of America, and held in trust for the Colorado River Indian Tribes. TCR-6, p. 2, ¶ 2. As proposed by their attorney, the Denhams agreed to relinquish any claim of title to the subject property, and the Tribes agreed to relinquish their second cause of action – a claim for damages for trespass on tribal lands, which was dismissed with prejudice. *Id.*, at p. 2, ¶ 9. Twenty-six

of those acres were then set aside for what is now the Water Wheel Lease. *Compare* the legal description in Paragraph 1 of the Lease. TCR-5, p. I.

Plaintiff Robert Johnson and his wife, Christine Johnson acquired the Denhams' interest in Water Wheel in 1981. TCR-12, p. 5. The Johnsons are now sole owners and shareholders of Water Wheel Camp Recreational Area, Inc. Water Wheel has occupied the property since 1975, and continues to do so at the present time, without a valid lease, and without the permission of the Tribes. TCR-2, at p. 2, ¶¶ 6-7. Robert Johnson, who purchased 50% of the Water Wheel stock in 1981, and the other 50% in 1985, has operated and managed the entire property as President of Water Wheel since 1985. He has also occupied the premises since the expiration of the Lease on July 7, 2007, without a valid lease or the permission of the Tribes. TCR-12, p. 5.

Tribal Court Rulings on Jurisdiction

Water Wheel and Johnson filed a Motion to Dismiss the Tribal Court Action, arguing variously that the Water Wheel Camp premises are not within the Reservation because the Reservation does not extend into the State of California, that the Reservation boundary has never been fixed in the area of Water Wheel Camp, that the Lease is invalid for lack of leasing authority of the Secretary of the Interior, and that the Lease is not with the Tribes, but rather is a lease with the Department of the Interior, and, finally, that if the Lease *is* with the Tribes, CRIT still may not exercise jurisdiction over the Defendants because, under the doctrines developed by the *Montana* line of cases, there has been no showing of express consent to Tribal Court jurisdiction, or of a consensual relationship

between the parties, or any health, welfare, economic, or safety impact on Tribal affairs to support the imposition of Tribal Court jurisdiction.

Judge LaRance entered a partial ruling on the question of Tribal Court Jurisdiction on January 15, 2008 (TCR-4), after briefing and oral argument by the parties. Three doctrines provided the framework for that ruling: equitable estoppel, collateral estoppel, and waiver. He found that, as tenants in peaceful possession for more than three decades, Plaintiffs herein were equitably estopped from now contesting the Tribes' title in an ejectment action. TCR- 4, pp. 2-4. He also held that Plaintiffs were collaterally estopped from relitigating the issue of title or Reservation status because they are in contractual privity with the Denhams, and are thus bound by the Denham Judgment. *Id.*, pp. 4-6.

Finally, citing Paragraph 34 of the Lease, Judge LaRance held that "the Defendants have consented to Tribal Court jurisdiction by agreeing to abide by all of the Tribe's laws, including provisions providing for Tribal Court Jurisdiction over disputes involving tribal lands." *Id.* p. 7. In support of this conclusion, Judge LaRance noted that the Tribal Law & Order Code, Art. 1, § 101(c), which was enacted in 1974 prior to the signing of the Lease, extends Tribal Court jurisdiction to "[a]ny person who owns, uses or possesses any property within the Reservation for any civil cause of action ... arising from such ownership, use, or possession." TCR- 4, at p. 8.

Then, after a hearing on March 14, 2008, and in an Order dated March 18, 2008, Judge LaRance found that the Tribes had established the adjudicatory authority of the Tribal Court based on substantial evidence of the 32-year long business relationship

between the Tribes and Water Wheel, including numerous documents evincing the regular communication of Water Wheel with CRIT, as well as the testimony of Plaintiff Robert Johnson. TCR-12.

Judge LaRance also found sufficient evidence to support the exercise of such jurisdiction over Robert Johnson. Citing Mr. Johnson's own testimony, Judge LaRance noted that Johnson had engaged in nearly one hundred business-related meetings with Tribal officials or agency representatives, many of these occurring in Tribal offices or facilities, and still others, not related to Water Wheel, Inc., but rather involving additional enterprises Johnson wished to pursue elsewhere on Tribal lands. TCR-12, pp. 4-6. Three exhibits which were appended to the deposition of Robert Johnson, taken on February 29, 2008, and introduced into evidence, are attached as TC-10. They show that Mr. Johnson was actively engaged in business with the Colorado River Indian Tribes on the Reservation, and that he recognized their governmental authority over the Reservation.

IV. [ONLY] ISSUE PRESENTED

Whether the Defendants' exercise of CRIT Tribal Court jurisdiction over Plaintiffs in the tribal eviction action is authorized under federal law.

V. ARGUMENT.

A. THE COLORADO RIVER INDIAN TRIBES HAVE INHERENT AUTHORITY TO EXCLUDE PERSONS FROM THEIR LANDS.

All three branches of the federal government, including the U.S. Supreme Court, have long recognized that one of the fundamental aspects of the inherent sovereign authority of Indian tribes is the power to exclude non-members from tribal territory. Duro v. Reina, 495 U.S. 676, 696-97 (1990); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 136-42 (1982), and *dissenting opinion*, 455 U.S. at 160; Cohen's Handbook on Federal Indian Law (2005 ed.), § 4.01[2][e] (attached as Appendix 1). Indeed, the Supreme Court's discussion of the scope of tribal authority over non-Indians in Montana v. United States, 450 U.S. 544 (1981), proceeded from its threshold ruling that the Crow Tribe's exclusionary power did not extend to non-Indian fee lands within the reservation. 450 U.S. at 554.

The central purpose of CRIT's lawsuit in the Tribal Court was to evict Plaintiffs from tribal lands. *See* Petition for Eviction, TCR-1 (also attached as Exhibit A to Plaintiffs' Complaint herein.) Thus, the exercise of CRIT Tribal Court jurisdiction was simply a modern, adjudicatory exercise of CRIT's fundamental power to exclude non-members. The exercise of that judicial jurisdiction did not purport to broaden the scope of the Tribe's inherent exclusionary power. It merely implemented procedures set forth in the Tribe's eviction ordinance, providing an orderly process for the exercise of that

inherent tribal power, consistent with the due process protections required by federal law, namely the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8).

Of course, the lawfulness of the exercise of CRIT's inherent exclusionary power was necessarily constrained by the terms of the 1975 CRIT Lease with Water Wheel—which has been the *sole basis* of any claim of right by the Plaintiffs to occupy these tribal reservation lands. Court of Appeal decision, TCR-3, p. 6, note 1. The Tribal Court found, reasonably, that Water Wheel's lease had expired by its terms. TCR-2. But the Court's responsibility in this case is not to review the merits of the Tribal Court rulings; it is simply to determine whether the CRIT Tribal Court possessed jurisdiction over the Plaintiffs. CRIT's inherent tribal exclusionary power, recognized throughout American history and jurisprudence, provides a solid basis for the exercise of that jurisdiction.

The first two causes of action in the Tribal Court Petition for Eviction/Complaint pertain to CRIT's claim of unlawful possession of tribal land, including enforcement of the "Holding Over" provision found in Section 23 of the Addendum to the Lease. TCR-1, ¶ 11. The third cause of action involved the enforcement of other terms of the Lease, including the lessee's obligation to pay rent. Since the Lease was a self-imposed limitation on CRIT's inherent power to exclude non-members from tribal land, the authority to enforce this condition in Tribal Court was simply an extension of that inherent power. Accordingly, Tribal Court jurisdiction over Plaintiffs herein was an exercise of CRIT's inherent power to exclude non-members from tribal land, and there is

no need to apply the *Montana* test of the lawfulness of a tribal exercise of jurisdiction over non-members on non-Indian fee lands in this case.

Plaintiffs cite last year's Supreme Court decision in Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. ___, 128 S.Ct. 2709 (2008), for the proposition that a general rule that Indian tribes do not have inherent sovereign authority over non-members is applicable to *any* lands within a reservation, including *tribal* lands. However, as quoted by Plaintiffs (Merits Brief at p. 3), the Court's opinion states only that "This general rule restricts tribal power over non-member activities taking place on the reservation, and *is particularly strong* when the nonmember's activity occurs on land owned in fee simple by non-Indians." 128 S.Ct. at 2719 (emphasis added). Thus, the strength of the general rule is necessarily less when the non-member activity is on tribal land. Defendants submit that the Supreme Court has not—in any of its decisions since and including Montana v. United States—modified the established rule that Indian tribes posses the inherent power to exclude non-members from their own lands.[3]

Nor has the Ninth Circuit addressed whether modern Supreme Court precedent has modified the Court's longtime recognition of inherent tribal exclusionary power. The

[3] The only decision cited by Plaintiffs to suggest that the Supreme Court's "general rule" applies equally to tribal and non-Indian fee land alike is Nevada v. Hicks, 533 U.S. 353 (2001), cited on page 5 of their Brief. That decision involved tribal court action to restrain the activities of state law enforcement officers exercising duties on tribal lands; it may be seen as following from longstanding Supreme Court precedent holding that states have law enforcement jurisdiction over non-Indians in Indian country. *E.g.*, United States v. McBratney, 104 U.S. 621 (1882). Nevada v. Hicks certainly says nothing about tribal exclusionary power over trespassers on tribal lands.

two cases cited in Plaintiffs' Brief do not so much as touch upon that issue. Smith v. Salish and Kootenai Tribes, 434 F.3d 1127 (9th Cir. *en banc* 2006), *cert. denied* 547 U.S. 1209, involved a tribal court lawsuit brought by a non-member, and the Ninth Circuit upheld tribal court jurisdiction.[4] Phillip Morris U.S.A. v. King Mountain Tobacco Co., 552 F.3d 1098 (9th Cir. 2009), involved a tribal court suit filed in an attempt to prevent a non-Indian company from enforcing the Lanham Act in federal court where it had alleged that a tribal company had infringed the non-Indian company's trademark when it advertised on the Internet.

B. ASSUMING *ARGUENDO* THAT THE RULE OF *MONTANA* APPLIES TO THIS CASE, THE EXERCISE OF CRIT TRIBAL COURT JURISDICTION FALLS WITHIN THE EXCEPTIONS TO THAT RULE.

We begin by quoting directly from oft-cited "rule" of Montana v. United States, 450 U.S. 540, 565-66 (1981):

> [Certain principles found in various decisions of the Court] support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [citations] A tribe may also retain

[4] Smith is cited for the proposition that "the Supreme Court has consistently rejected claims of tribal jurisdiction over nonmembers even when the activity at issue occurred on tribal lands." P's Brief at p. 5. That is not what the Ninth Circuit said. The opinion states:

> The Court has drawn an important observation from this history. It has "never held that a tribal court had jurisdiction over a nonmember defendant." Hicks, 533 U.S. at 358, n. 2. Nevertheless, it has "left open the question of tribal-court jurisdiction over nonmember defendants in general." *Id*.

> 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.

Defendants contend that the exercise of Tribal Court jurisdiction in this case falls squarely within the two examples of "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations", which are often referred to as the "two exceptions" to the rule of *Montana*. Plains Commerce Bank, 128 S.Ct. at 2719.

CRIT and Water Wheel clearly entered into a consensual relationship through commercial dealing with the 1975 Lease of CRIT tribal lands.[5] Indeed, that consensual relationship was born in the settlement of United States v. Denham in the U.S. District Court for the Central District of California. *See* Factual Background, above at pp. 4-5. Such a lease is the classic manifestation of the "consensual relationship" that the Supreme Court was referring to in its *Montana* opinion, as the Court referred to several earlier Supreme Court decisions upholding tribal governmental jurisdiction over non-Indian lessees. One of them, 105 years ago, recognized "the right of that tribe to control

[5] Plaintiffs' persistent assertion that the Water Wheel Lease was with the Department of the Interior, not CRIT, is rebutted by a cursory examination of the Lease document itself, which refers throughout to CRIT as the "Lessor". TCR-5. And a glance at the signature page where "the parties hereto have hereunto set their hands", reveals the signatures of tribal and Water Wheel corporate officials. TCR-5 at p. V. The Acknowledgement of Lessee on the following page VI states that the Water Wheel corporate officials executed the Lease on June 17, 1975 "as the free and voluntary act of such corporation." The Supreme Court has held that leases with Indian tribes are not considered to be contractual agreements with the United States. United States v. Algoma Lumber Co., 305 U.S. 415 422-23 (1939).

the presence *within the territory assigned to it* of persons who otherwise might be regarded as intruders…." Morris v. Hitchcock, 194 U.S. 384, 389 (1904) emphasis added.

Plaintiffs argue that their consent must be manifested in a statement expressly consenting to CRIT Tribal Court jurisdiction over them. P's Brief at 9. But no federal court has construed the "consensual relationship" test in such rigid terms. Here the Lease states in Section 34 of the Addendum (at p. 21):

> 34. RESERVATION LAWS AND ORDINANCES.
>
> The Lessee, Lessee's agents, employees and sublessees and their employees and agents agree to abide by all laws, regulations, and ordinances of the Colorado River Indian Tribes now in force and effect, *or that may be hereafter in force and effect*: provided that no future laws, regulations or ordinances shall have the effect of *changing or altering the express conditions and provisions* of this lease unless consented to in writing by the Lessee.

(Emphasis added.) There could hardly be a consent more clear, and it expressly includes tribal laws "hereafter in force and effect."[6] Nonetheless, Plaintiffs claim that the prohibition in the proviso is applicable because the later-enacted eviction ordinance is "at odds with the Lease terms." P's Brief at 9, 11-12. But Plaintiffs do not cite a single lease term said to be contrary to tribal law, much less any "express conditions [or] provisions of this lease" which the eviction ordinance has had "the effect of changing or altering", as stated in the proviso. That is because *there is no lease condition or provision* which is changed or altered by the application of the CRIT eviction ordinance.

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[6] Note also that Judge LaRance found that the provision in the CRIT Law and Order Code regarding the jurisdiction of the Tribal Court over persons who use or possess tribal property on the Reservation was enacted in 1974, prior to the execution and approval of the Water Wheel Lease. Factual Background, supra, at page 7.

Instead, Plaintiffs argue that the eviction ordinance is in "direct conflict" with the BIA regulatory scheme in 25 CFR Part 162 (formerly Part 131.) P's Brief at 13. Those regulations are referenced in the preamble of the Lease,[7] and they "all … by reference are made a part hereof." But here again Plaintiffs fail to quote from a single BIA leasing regulation to show that it is in conflict with the CRIT eviction ordinance. Rather, they cite the decision in Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983), as demonstrating that tribal courts cannot adjudicate Indian leases which have been approved pursuant to federal law. Close examination of Yavapai shows that it does not stand for the broad proposition claimed by Plaintiffs.

The lease in Yavapai was for an automobile dealership. The term of the lease was for 25 years, with an option to extend for an additional 25 years. In the 10th year of the lease the Tribe determined that the lessee, Mr. Kuykendall, had breached the lease terms. The Tribe then acted unilaterally to cancel the lease for breach, and Mr. Kuykendall sought relief from the BIA, which affirmed the Tribe's authority to cancel. The BIA decision was then reversed by the Interior Board of Indian Appeals, an agency appellate board. The Tribe sued the Interior Department, and the U.S. District Court reversed the Interior Board's decision, upholding the Tribe's power to cancel the lease. The Court of Appeals reversed again in a carefully narrow opinion, holding that a "cautious approach"

[7] The Lease document refers to these regulations as governing "business leases on restricted Indian lands." By now it should be apparent that Plaintiffs' reliance on these regulations hopelessly contradicts its central argument that the Secretary had no authority to approve the CRIT lease in the first place, or that the Lease must be viewed as one between Water Wheel and the Secretary of the Interior, rather than a lease of "Indian lands." Both arguments cannot be correct. Neither is.

led the court to the conclusion that the Secretary (or BIA) must concur in the cancellation decision because the Secretary had approved the lease in the first instance.

As stated, Yavapai involved a decision to *cancel* a lease, which was otherwise in force and effect. The 32-year Water Wheel lease expired by its terms in 2007, as found by Defendant Judge LaRance. TCR-2, p. 2. Thus, it was not the Judgment of the Tribal Court which terminated a Lease which was otherwise still in effect; the Tribal Court simply made a finding that the Lease had expired by operation of law. Further, nothing in the terse but cautious Ninth Circuit decision suggests that tribal courts do not have jurisdiction over non-Indian lessees, and Yavapai has never been cited for that proposition. Plaintiffs cite the case for more than what it actually says. The regulation, 25 U.S.C. § 162.14, discussed in Yavapai, dealt only with the Secretary's authority to *cancel* an Indian lease. Neither the BIA regulations nor anything else cited by Plaintiffs addresses the issue of lease enforcement by an Indian tribe. There thus is no conflict between the BIA regulations and the 1975 lease which would give rise to operation of the proviso in Section 34 of the Lease.

Moreover, there is nothing in the past or present BIA leasing regulations which makes the BIA an arbiter of disputes between a tribal lessor and a nonmember lessee. Plaintiffs make regular reference to the fact that in 2001 they "appealed" to the BIA an alleged tribal breach of the lease, invoking such an "appeal" to assert that its "pendency" somehow keeps the 32-year lease alive past its 2007 expiration date. Plaintiffs have served up a red herring. BIA has not acted on that "appeal" because it has no authority to

act on it. The BIA appeals process in 25 CFR Part 2, which is cited in Plaintiffs' Brief (at p. 14), does not contemplate appeals *from tribal actions*. That administrative appellate process is available only to persons who are aggrieved by the decisions of *BIA officials*. 25 CFR § 2.3(a).

That is in contrast to the leasing regulations in 25 CFR Part 162 which authorize the BIA as trustee over Indian lands to enforce Indian leases on behalf of Indian lessors. Nothing in those regulations provide any basis for a lessee to file an appeal to the BIA complaining of tribal violations of the terms of the lease.[8] Indeed, the current regulations in Part 162 *authorize* the application of tribal laws to tribal leases. 25 CFR § 162.109(b). So it is clear that the CRIT eviction ordinance does not conflict with those regulations, as argued by Plaintiffs.

Finally, Plaintiffs assert that there was no consensual relationship between CRIT and individual Plaintiff Robert Johnson, the owner of Water Wheel. They offer the self-serving Declarations of Mr. Johnson that he had no business with CRIT since 1981 when he purchased Water Wheel from Mr. Denham. But in fact there was substantial evidence

[8] One might ask what remedy is available to a lessee of tribal lands since Indian tribes possess sovereign immunity from suit. This was the subject of a public policy debate ten years ago after the U.S. Supreme Court held in Kiowa Tribe v. Manufacturing Technologies, 523 U.S. 751 (1998), that tribes are immune from suit even for contracts entered into outside of Indian reservations. In response Congress enacted the Indian Tribal Economic Development and Contract Encouragement Act of March 14, 2000, 25 U.S.C. § 81, which in effect requires tribes to disclose their sovereign immunity. Modern contracts between Indian tribes and non-Indian entrepreneurs now routinely provide for a limited tribal waiver of sovereign immunity, and some agreement on the forum for dispute resolution, whether it may be an arbitration panel or a particular state, tribal or federal court—but never the BIA. *Cf.*, C & L Enterprises v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001).

offered in the Tribal Court proceeding of Mr. Johnson's relationship with CRIT, and the Tribal Court made many findings of fact on March 18, 2008, that there was a consensual business relationship. TCR-12, pp. 4-6. Indeed, Mr. Johnson acknowledged the governmental role of the Tribes and the applicability of their laws in a letter he and his business partner wrote in 1983, asking that a tribal ordinance be revised to allow him to operate a boat ramp. TC-10, Exh. 25. Further, the language of Section 34 of the Lease, quoted above, states that not only Water Wheel, as corporate lessee, but also its agents and employees would be bound by CRIT tribal laws now or "hereafter" in force. There is little doubt that Mr. Johnson was an agent of his corporation.

Mr. Johnson offers no credible evidence to demonstrate that the Tribal Court findings were "clearly erroneous". FMC v. Shoshone-Bannock Tribes, *supra*, 905 F.2d 1311 (9th Cir. 1991). Little wonder that such evidence is not forthcoming, as Mr. Johnson failed to respond to discovery requests made in the course of the Tribal Court proceedings, and even refused to abide by Tribal Court orders to respond. TCR-2, p. 11. Those discovery requests for documents, admissions, and answers to interrogatories might have revealed further evidence of his commercial relationship with CRIT over the course of over 25 years—or not. But Mr. Johnson cannot now come to federal court and assert that Defendants have not met their burden of demonstrating the existence of Tribal Court jurisdiction, since he made no effort to abide by Tribal Court orders and thus did not fully exhaust the Tribal Court remedies available to him. After all, the purpose of the tribal court exhaustion rule, according to the Supreme Court, is to serve "the orderly

administration of justice" in federal courts. National Farmers Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 (1985). Consequently, Plaintiffs should not be rewarded for their failure to abide by Tribal Court orders.

C. PLAINTIFFS' CONTENTION THAT THE SECRETARY OF THE INTERIOR LACKED THE AUTHORITY TO APPROVE THE 1975 WATER WHEEL LEASE IS IMPROPER, UNTIMELY, IRRELEVANT, AND WRONG, AND THE UNITED STATES AND CRIT MUST BE PARTIES TO ANY ADJUDICATION OF THAT ISSUE.

The central argument found throughout Plaintiffs' Merits Brief is their contention that under a 1964 Act of Congress the Secretary of the Interior had no authority to lease the CRIT tribal lands in question to Water Wheel 34 years ago. P's Brief, pp. 5-7. This argument is clearly interwoven with Plaintiffs' argument—and many assertions in their Brief—that these lands are neither tribal nor reservation lands, issues which this Court will not be addressing. The gist of Plaintiffs' contention is that the Secretary of the Interior failed to comply with the letter of a 1964 Act of Congress, Section 5 of which expressly authorizes the Secretary "to approve leases of lands on the Colorado River Indian Reservation, Arizona and California", but which states in the proviso

> *Provided, however*, That the authorization herein granted to the Secretary of the Interior shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian in California, and shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation: *Provided further*, That any of the described lands in California shall be subject to the provisions of this Act *when and if determined to be within the reservation.*

78 Stat. 188 (1964) (emphasis added). The BIA approved the CRIT lease with Water Wheel pursuant to the authority in Section 5, in reliance on a 1969 Secretarial Order (Plaintiffs' Exhibit G) which "determined" (*see* the first paragraph) the western boundary of the Colorado River Indian Reservation pursuant to the Secretary's survey authority in 25 U.S.C. § 176, and which included the lands leased to Water Wheel, which are "south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian in California." Plaintiffs' contention appears to be that the *determination* required by the last part of the proviso must be a judicial determination, not an executive determination. P's Brief, pp. 18-23. It is clear from the language of the statute that the argument that the Secretary did not have the authority to approve the Water Wheel lease is inseparable from the issue of whether the subject lands are part of the Reservation, a matter which is outside this Court' jurisdiction. It is also Defendants' position that this argument has no merit, as discussed below in Section IV.4 of this memorandum. But there are other, equally persuasive reasons for rejecting this argument.

1. PLAINTIFFS ARE ESTOPPED FROM CONTESTING THE VALIDITY OF THE WATER WHEEL LEASE.

If there was never any authority for Water Wheel's Lease with CRIT, an observer might ask, What basis did Water Wheel have for occupying that land in the first place? Indeed, Plaintiffs' counsel admitted in oral argument before the CRIT Court of Appeal that his clients had no legal claim to possession of that land apart from the Lease. TRC-3, p. 6, note 2. Now, after decades of reaping the benefits of the Lease, and refusing to vacate the premises after its expiration, Plaintiffs claim there is no lease because there

was no authority for the Secretarial approval of it. They are clearly estopped from raising this issue 34 years after the Lease was executed and approved. Callanan Road Improvement Co. v. United States, 345 U.S. 507, 513 (1953). Further, an agency decision may not be collaterally attacked by a party who was the beneficiary of the decision. Callanan, *supra*, 345 U.S. at 512.

The January 15, 2008, Order of Judge LaRance (TRC-4, pp. 4-7) and the opinion of the CRIT Court of Appeal (TRC-3, pp. 13-18) carefully explain how Plaintiffs are collaterally estopped by the Consent Judgment in U.S. v. Denham from challenging tribal title to the leased lands. The same argument applies to Plaintiffs' challenge to the validity of their own Lease. Further, as cogently explained by both Judge LaRance (TCR-4, pp. 2-4) and the Court of Appeal (TCR-3, pp. 19-22), Plaintiffs are also equitably estopped from challenging the Lease which benefited them during its long life.

2. THE UNITED STATES AND CRIT ARE INDISPENSABLE PARTIES UNDER RULE 19, F.R.Civ.P. NEITHER HAS WAIVED ITS SOVEREIGN IMMUNITY FROM SUIT, and THE DOCTRINE OF *Ex Parte Young* DOES NOT APPLY TO THE RELIEF SOUGHT BY PLAINTIFFS.

When Plaintiffs decided to challenge the underlying statutory authority for the very lease which provided them with a basis for lawful occupation of tribal lands, they crossed the line from simply seeking relief from the allegedly *ultra vires* actions of the CRIT Tribal Court, and launched an attack on the sovereignty of the Tribes. In Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978), the Supreme Court permitted the

naming of tribal officials as defendants in a suit challenging the lawfulness of their actions, invoking the fiction applied in Ex Parte Young, 209 U.S. 123 (1908), thus holding that tribal sovereign immunity would not be a bar to such a suit. But Plaintiffs herein are not now simply challenging the actions of Judge LaRance; they are seeking to invalidate *federal* actions approving a lease on CRIT tribal lands. And if they are successful, they would throw into doubt the validity of scores of additional leases approved by BIA officials between CRIT and other lessees on the West Bank of the Reservation, and would stymie any future leasing, a process which BIA has overseen for 40 years. It was not Judge LaRance who executed or approved that Lease pursuant to the 1964 Act. CRIT entered into that Lease with Water Wheel, who now challenges it; and it was the BIA Superintendent who approved the Lease as a lease of Indian tribal lands in reliance on the 1969 Secretarial Order as the necessary determination under the 1964 Act.[9] Both the United States and CRIT are indispensable parties to such an adjudication under Rule 19, F.R.Civ.P.

Ninth Circuit precedent supports that conclusion. In Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975), a tribal member sought to invalidate a Hopi tribal coal lease in a lawsuit against the Secretary of the Interior, but which did not include the Hopi Tribe as a defendant. The court held "[N]o procedural principle is more deeply embedded in the common law than that, in an action to set aside a lease or contract, all

[9] If there is any remaining doubt that this was an agreement between CRIT and Water Wheel, to be approved by BIA, a look at the contemporary memorandum of the Interior Department's Field Solicitor should put that issue to rest. *See* TC-9.

parties who may be affected by the determination of the action are indispensable." 520 F.2d at 1325. That rule was more recently followed in Dawavendewa v. Salt River Project, 276 F.3d 1150, 1156-57 (9th Cir. 2002), *cert. denied* 537 U.S. 820. There the court added: "Undermining the [Navajo] Nations's ability to negotiate contracts also undermines the Nation's ability to govern the reservation effectively." *Id.*, at 1157. Water Wheel and Johnson are similarly trying to thwart CRIT's ability to lease lands on the West Bank portion of the Reservation.

Here, not only is CRIT absent from this suit, but no representative of the Secretary of the Interior is present to defend the 1969 Solicitor's Opinion, the Secretarial Order, and the longstanding leasing program on the West Bank lands.[10] As now pursued by Plaintiffs, this suit is not simply one where a tribal judge's exercise of judicial jurisdiction triggers federal court review. It is a wholesale challenge to a longstanding federal program which has benefited both CRIT and many lessees—including Plaintiffs themselves. *See also* Quileute Tribe v. Babbitt, 18 F.3d 1456, 1460 (9th Cir. 1994); Wilbur v. Locke, 423 F.3d 1101 (9th Cir. 2005); American Greyhound Racing v. Hull, 305 F.3d 1015, 1024 (9th Cir. 2002). Plaintiffs' challenge to the BIA leasing program of CRIT lands on the West Bank may have a potentially devastating impact on the "legally protected interest" of CRIT in those lands, and the Ninth Circuit has held that a tribe is an

[10] Ironically, for the reasons explained above in Part IV.C.1 regarding estoppel, and in the Tribal Court decisions themselves, if Plaintiffs had sought Administrative Procedure Act (APA) judicial review of the BIA decisions approving the Water Wheel Lease, they would have had no standing to do so since they were not aggrieved by the agency action approving their lease with CRIT.

indispensable party under such circumstances. Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir. 1992).

3. THE VALIDITY OF THE 1975 LEASE IS IRRELEVANT TO THE ISSUE OF TRIBAL COURT JURISDICTION.

As best we can parse Plaintiffs' argument regarding the validity of the Water Wheel Lease, we understand Plaintiffs to be saying that the consensual relationship which the Tribal Courts found to have existed between Plaintiffs and CRIT, based on the relationship of Lessor/Lessee under the subject Lease, does not exist if the Lease is void. But that does not follow from the rule of *Montana*. Indeed, it is counterintuitive.

Even assuming for sake of argument that Plaintiffs may now petition this Court to declare the 32-year Water Wheel Lease with CRIT void 34 years after its inception, and assuming that Plaintiffs can demonstrate that the BIA did not have the requisite authority to approve the Lease, such a conclusion does not detract from the indisputable fact that Water Wheel and CRIT maintained a consensual commercial relationship with respect to the leased lands for 32 years! In addition, the commercial relationship which the Tribal Court found that CRIT had maintained with Plaintiff Robert Johnson dates back to 1981.

It is important to recognize that the Supreme Court's ruling in *Montana* on the scope of tribal governmental authority over non-members did not fashion some rigid rule out of whole cloth for determining whether an Indian tribe could exercise governmental authority over non-members. As stated in a subsequent Supreme Court opinion, the existence and extent of a tribal court's jurisdiction requires 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. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 (1985). The two "exceptions" in *Montana* are an acknowledgement that the Supreme Court had previously ruled that tribal governments necessarily have a fundamental interest in the use of tribal lands and natural resources, even when the use of those resources is by non-Indians. And the decision cites prior rulings recognizing tribal authority to impose taxes on non-Indian permittees and lessees within their lands, Merrion v. Jicarilla Apache Tribe, 455 U.S. (1982); recognizing tribal authority to issue hunting and fishing licenses to non-Indians, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); and the authority to impose tribal taxes on non-Indians purchasing cigarettes from reservation retailers on trust lands. Washington v. Confederated Colville Tribes, 447 U.S. 134, 152 (1980).[11]

Pertinent language from *Montana* states that 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 health or welfare of the Tribe." 450 U.S. at 566. For non-Indian use of *tribal lands* no rule or exception needed to be stated because it is self-evident. Thus, Plaintiffs' strained arguments regarding the underlying validity of the 1975 lease are quite beside the point which the Supreme Court was making in *Montana* when it identified the "two exceptions" to the general rule that Indian tribes may not exercise governmental authority

[11] Incidentally, none of those decisions required an express consent on the part of the non-Indian lessees to the imposition of tribal taxes on their activities.

over non-members on non-Indian fee lands within the Reservation. The "exception" for consensual commercial relationships on tribal lands was based on longstanding precedent recognizing tribal authority in such circumstances. Judge LaRance made findings that Water Wheel and Robert Johnson had had a longstanding commercial relationship with CRIT. A latter-day challenge to the validity of their now-expired Lease is irrelevant.

4. THE 1975 LEASE WAS VALID.

Plaintiffs' challenge to the validity of their own Lease is multi-faceted. They begin with the argument that an 1864 statute prohibited the extension of the CRIT Reservation into California. P's Brief, pp. 16-18. This contention has no merit whatsoever, as Section 2(b) of the 1964 Act of Congress authorizing the Water Wheel Lease superseded the 100-year old statute, even if the old statute were applicable to the CRIT Reservation in the first place (which it was not.) The 1964 Act is attached as Appendix 2. Section 2(b) of the Act defines the "Colorado River Reservation" as including lands which were set aside for the Reservation by the Executive Order of November 16, 1874. That Executive Order, attached as Appendix 3 to this Brief, signed by President Ulysses S. Grant, expressly refers to the western boundary of the Reservation as encompassing lands within the State of California. It draws a line "in a north westerly direction across the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California …." So even if President Grant violated the 1864 Act of Congress

when he signed that Executive Order, Section 2(b) of the 1964 legislation defined the Colorado River Reservation to include California lands, which President Grant added to the 1865 Reservation. The language of the 1874 Executive Order also demonstrates the weakness of Plaintiffs' second argument that the 1865 statute created a Reservation in Arizona only, since the 1874 Order signed by President Grant simply added California lands to the 1865 statutory reservation.

Most telling is Plaintiffs' dogged reliance on rulings of the Supreme Court in the decades-long *Arizona v. California* adjudication of the waters of the Lower Colorado River to support the proposition that the Reservation does not extend into California. That reliance is unhelpful because the Supreme Court awarded CRIT over 50,000 acre-feet of water rights per year for use on the California side of the Reservation in 1963. Arizona v. California, 547 U.S. 150, 174 (2006).[12]

Plaintiffs' efforts to cobble together an argument challenging the Secretary's leasing authority under the 1964 Act are primarily based on the proposition, stated above on page 19, that Section 5 of the 1964 Act requires a judicial determination of the West

[12] The 2006 Consolidated Decree incorporates over 40 years of prior decrees issued by the Supreme Court in Arizona v. California, adjudicating water rights on the Lower Colorado River, including the 1963 provision for CRIT water rights in both Arizona and California. 376 U.S. 340, 344-45. That provision had previously appeared in an unpublished Appendix to the earlier decree. *See* 547 U.S. at 151. The 1963 decree also refers to the November 16, 1874, Executive Order which expressly identifies Reservation lands in California. Plaintiffs focus on certain later rulings in this adjudication in response to the United States' attempt to persuade the Court and the Special Master to *increase* the amount of water rights adjudicated to CRIT in California based on the re-survey of the Reservation ordered by the Secretary of the Interior in 1969. That attempt was unsuccessful, but those rulings in no way reduced the 1963 award of over 50,000 acre-feet of water rights for use on the California side of the Reservation.

Bank boundary. In support of that argument they cite a 1959 Solicitor's Opinion for that proposition. P's Brief at 20. Their quote from that Opinion refers to an earlier Act of Congress as follows:

> Until the provisions of the special leasing act, now expired, are in effect reinstated by further legislation, or the beneficial ownership of the reservation judicially determined, it is our opinion that no leasing authority exists concerning the unassigned lands of the Colorado River Reservation.

This effort to impeach the 1969 Solicitor's Opinion with the language of the 1959 Opinion must fail because of the intervening enactment of the 1964 Act. If, as argued by Plaintiffs, the Secretary's leasing authority under the Act still required a judicial determination, then the Section 5 authorization accomplished nothing. Members of Congress were already on notice of the 1959 Solicitor's Opinion. Plaintiffs' interpretation of Section 5 would render it meaningless.[13] They also claim that the legislative history of the 1964 Act supports the proposition that Section 5 requires a judicial determination of the boundary. But the language which Plaintiffs quote from a House Report (P's Brief at 22, note 16) doesn't say that. It states: "Under this bill the leasing authorities will become effective with respect to this area when the exact boundary has been determined. *This will eliminate the need for further legislation at a later date.*" (Emphasis added.) But Plaintiffs assert that this means the exact opposite of what the Secretary did: that "the

[13] Plaintiffs also cite a 1965 memo from the Solicitor to the Commissioner of Indian Affairs reporting that the Justice Department was not prepared to litigate the issue of the Reservation's western boundary without more evidence. P's Brief at 21. That report says nothing about the proper interpretation of Section 5 of the 1964 Act. And it otherwise has no bearing on the issue today because the Justice Department later *did* agree to pursue litigation to adjudicate the western boundary of the Reservation, including the 1973 *Denham* lawsuit that gave birth to the Water Wheel lease!

Secretary was directed to await the determination (*by Congress* or the courts) before he/she could lease the West Bank land …." P's Brief at 23 (emphasis added). Section 5 doesn't say that, and the legislative history doesn't say that.

Then Plaintiffs offer what they call the "historical context" of the 1964 Act by quoting from the proceedings in Arizona v. California. Their principal assertion is that the Supreme Court "rejected" the 1969 Secretarial Order. This argument is made in one brief paragraph (P's Brief at 23-24) citing a footnote from the 1983 Supreme Court decision completely out of context. That footnote does state that the 1969 Secretarial Order does not constitute a "determination" of the Reservation boundary, but it is not referring the leasing authority in Section 5 of the 1964 Act (or any other provision in the 1964 Act of Congress); it is referring to the phrase, "'finally determined' within the meaning of Article II(D)(5) of our 1964 decree." 460 U.S. at 636. Accordingly, the Court said that CRIT's increase in its allotment of water rights would have to await another determination of the Reservation's western boundary. It said nothing about leasing lands under the authority of the 1964 Act.

Plaintiffs then proceed to argue that the Secretary violated the Administrative Procedure Act (APA) back in 1969 when he made his determination. Of course, the Secretary is not able to defend the 40-year old Order because he is not a party to this lawsuit, and if Plaintiffs were to file an APA challenge to the validity of the 1969 Order, they would be barred by the 6-year statute of limitations applicable to civil actions against the United States. 28 U.S.C. § 2401. But the argument is inherently weak

anyway. It is premised on the fact that the 1965 Indian leasing regulations at 25 CFR Part 131 restate verbatim the restriction in Section 5 of the 1964 Act. Plaintiffs then contend that the fact that that particular regulation remained in the Code of Federal Regulations for many years after the 1969 Secretarial Order must mean that the Secretary violated his own regulation. A close look at the regulation shows the absurdity of this argument. By its terms it did not prohibit the Secretary from making a determination of reservation boundaries. It simply quoted the statute which required a "determination". After 1969, when that determination had been made, the regulation became moot. The necessary regulatory housekeeping did not occur until 2001. The fact that it remained on the books for years following the 1969 Order simply demonstrates bureaucratic intertia. A regulatory restatement of an Act of Congress does not breathe new life into the legislation, or constrain executive decision-makers any more than the legislation did in the first place. It adds nothing to this inquiry.

VI. CONCLUSION

For the foregoing reasons this Court should rule that the CRIT Tribal Courts had the authority to adjudicate the lease dispute between CRIT and Water Wheel.

Respectfully submitted,

Dated: April 24, 2009

/s/

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CERTIFICATE OF SERVICE

I, Tim Vollmann, hereby certify that on April 24, 2009, I electronically filed the foregoing Defendants' Response in Opposition to Plaintiffs' Brief "Concerning the Lack of Tribal Court Jurisdiction Pursuant to the Rule of *Montana v. United States*", using the CM/ECF system, which sent copies of the filing automatically to the following counsel for Plaintiffs:

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