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' RESPONSE TO CROSS-APPELLANT'S PRINCIPAL BRIEF AND REPLY TO APPELLEE'S RESPONSE BRIEF

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JURISDICTIONAL STATEMENT

Appellants/Cross-Appellees, Chief Judge and Chief Clerk of the Tribal Court of the Colorado River Indian Tribes (CRIT) (hereafter the "Tribal Court Parties", a short-hand reference also used by Cross-Appellant), are dissatisfied with representations made in the first paragraph of the Jurisdictional Statement of Cross-Appellant, Water Wheel Camp Recreational Area, Inc. (hereafter "Water Wheel"), but agree that this Court has jurisdiction to entertain the cross-appeal pursuant to 28 U.S.C. § 1291. In all other respects the Tribal Court Parties re-state and adopt herein the Jurisdictional Statement in their Principal Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

[Note: Does not correspond to the issues as stated by Cross-Appellant.]

1. The District Court ruled correctly that the CRIT Tribal Court had jurisdiction to entertain an eviction action brought by the Tribe against a holdover lessee, and nothing in the Water Wheel Lease with the Tribe or in the leasing regulations of the Bureau of Indian Affairs limits civil actions to enforce the terms of the Lease or to evict a holdover tenant to lawsuits brought on behalf of the Secretary of the Interior.

2. The CRIT Tribal Court had jurisdiction over the Tribe's action to evict Robert Johnson due to the inherent power of the Tribe to exclude non-member trespassers from tribal reservation lands.

3. The CRIT Tribal Court had jurisdiction to entertain the eviction action brought against Robert Johnson, the president and principal owner/agent of the lessee corporation, under either prong of the test set forth in Montana v. United States.

4. The District Court erred when it considered the Declarations of Robert Johnson for purposes of determining whether the Tribal Court had jurisdiction over the eviction action brought against Johnson, because the principal averments made in those Declarations were not in evidence in the CRIT Tribal Court.

STATEMENT OF THE CASE

The Tribal Court Parties are dissatisfied with representations made in Cross-Appellant's/Appellee's Statement of the Case, and adopt herein the Statement of the Case appearing in their Principal Brief. In particular, the Tribal Court Parties disagree with the characterizations of the issues on appeal which appear in Water Wheel's and Robert Johnson's Statement of the Case, including assertions (1) that this is a simple case of lease interpretation; (2) that the case turns on the factual question whether either Water Wheel or Johnson consented to the exercise of CRIT Tribal Court jurisdiction over them; (3) that it matters whether Johnson was acting in his personal or corporate capacity during his 25-year commercial relationship with CRIT; and (4) that the alleged pendency of an administrative appeal at the U.S. Department of the Interior has the effect of restricting the remedies available to CRIT to evict holdover tenants and trespassers. Nevertheless, we also view this as a "simple case" in the sense that it involves an Indian tribe's inherent power to exclude trespassers from tribal land.

The Response Brief contained no Statement of Facts, and the Tribal Court Parties will continue to rely on the Statement of Facts in their Principal Brief.

SUMMARY OF ARGUMENT

Response to Water Wheel's Cross-Appeal: The District Court properly denied relief to Water Wheel, upholding Tribal Court jurisdiction over this holdover lessee occupying tribal lands. Tribal Court Judge LaRance ruled correctly that the Lease established a consensual commercial relationship between Water Wheel and the Tribe sufficient to establish a basis for Tribal Court jurisdiction under Montana v. United States, 450 U.S. 544 (1981). Water Wheel's contentions that the Lease and BIA regulations do not permit tribal enforcement of the Lease have no merit, and nothing therein is a bar Tribal Court jurisdiction over Water Wheel, as there is no forum selection clause in the Lease. Further, as noted by the District Court, BIA leasing regulations encourage the exercise of tribal governmental authority over tribal leased land. Water Wheel's claim that the pendency of its purported 2001 appeal to the BIA prevents its eviction from tribal land also has no merit, as the BIA has no authority to act on behalf of a lessee of tribal lands to resolve a dispute with a tribal lessor.

Reply to Robert Johnson's Response: Appellee offered no argument to rebut the Tribal Court Parties' assertion that an Indian tribe's inherent authority to exclude nonmembers from tribal lands is a sufficient basis for Tribal Court eviction of Mr. Johnson as a trespasser without regard to the

two-pronged test in Montana. Language of the Supreme Court's opinions in Montana and Plains Commerce Bank v. Long Family Land and Cattle Co., 544 U.S. ___, 128 S.Ct. 2709 (2008), among others, support the proposition that Indian tribes have plenary jurisdiction over activities on tribal land.

Similarly, Supreme Court and Ninth Circuit precedent do not support Mr. Johnson's argument that he did not consent to Tribal Court jurisdiction, or otherwise have a consensual commercial relationship with the Tribe, on the ground that at all times he was acting on behalf of Water Wheel in his capacity as a corporate official. As a general matter, courts often exercise jurisdiction over corporate officers to insure corporate compliance with judicial rulings. Further, no corporate veil can shield Johnson from liability as a trespasser after Water Wheel's Lease expired, much less Tribal Court jurisdiction. Indeed, his continuing expropriation of revenues from tribal land after the expiration of the Lease is substantial evidence that the second prong of the Montana test has been met, namely that Johnson's conduct is a threat to tribal economic security, as held by the CRIT Court of Appeal.

Contrary to Johnson's assertion that Appellants' failed to preserve their argument regarding the District Court's impermissible reliance on his declarations, which were not placed in evidence in Tribal Court, it has consistently been the central position of the Tribal Court Parties in the

federal court proceedings that the role of the U.S. District Court is to review the Tribal Court Record while according deference to that court's determination of its own jurisdiction. Further, Johnson's averments in his Declaration of April 22, 2008, that he was told by the Denhams, from whom he purchased Water Wheel in 1981, that he would have to deal only with the BIA officials, and with Riverside County "on all building matters", were not placed in evidence in the Tribal Court. Moreover, these averments are incredible, as the Water Wheel Lease contains many provisions recognizing the role and authority of the Tribe as lessor, including Article 28 which authorized tribal inspections of the leasehold "at any reasonable times."

ARGUMENT

RESPONSE TO CROSS-APPEAL

A. The District Court ruled correctly that the CRIT Tribal Court had jurisdiction to entertain an eviction action brought by the Tribe against a holdover lessee.

The Tribal Court Parties agree with Water Wheel that whether the Tribal Court had jurisdiction over an eviction action brought by the Tribe against Water Wheel, a holdover lessee of tribal land, is a matter of federal law, and that this Court should perform a *de novo* review of the District Court's ruling. *See* Response Brief of Appellee and Cross-Appellant's Principal Brief (hereafter "Resp. Brf."), p. 52. Thereafter our positions diverge. The Tribal Court Parties seek affirmance of that portion of the District Court's decision which upheld Tribal Court jurisdiction over Water Wheel in an action to evict a holdover tenant and to enforce the terms of an expired lease of tribal lands. Excerpts of Record (hereinafter "ER") at 15.

It is important to note by way of background that a District Court's jurisdiction to review the Tribal Court's decision is limited to a determination whether the tribal court has exceeded the limits of its jurisdiction under federal law. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 853 (1985). It does not act as an appellate court

charged with reviewing the merits of a tribal court decision. AT&T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 903-04 (9th Cir. 2002).

In Montana v. United States, 450 U.S. 544, 565 (1981), the Supreme Court held: "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." The District Court saw "Water Wheel's 32-year lease of tribal land and its lengthy hold-over tenancy on that land" as the "most compelling facts" demonstrating tribal court jurisdiction. ER-6. It is clear that the CRIT Tribal Court's exercise of jurisdiction over Water Wheel falls squarely within the rule of Montana, quoted above. The Lease reflects a consensual commercial relationship providing the basis for the exercise of Tribal Court jurisdiction.

In this cross-appeal Water Wheel is no longer asserting, as it did below, that its 1975 Lease was not with CRIT but was with the United States or the Secretary of the Interior. ER-3, SER-14. Of course, no reading of the Lease could have supported that construction. Water Wheel is now arguing (1) that tribal enforcement of the Lease in Tribal Court would be contrary to the terms of the Lease; (2) that Tribal Court jurisdiction would violate BIA regulations; and (3) that the pendency of an administrative appeal filed by

Water Wheel at the Department of the Interior deprives the CRIT Tribal Court of jurisdiction over any action to enforce the Lease. These arguments have no merit whatsoever.

1. Tribal enforcement of the Water Wheel Lease in Tribal Court is not contrary to the terms of the Lease.

Parties to a lease may, of course, negotiate and agree on an appropriate forum for dispute resolution. However, as noted by the District Court, "a tribal waiver of a sovereign power should not be inferred lightly." ER-10. The Court quoted from Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982), that tribal sovereign power "will remain intact unless surrendered in unmistakable terms." *Id.* At any rate, no reasonable reading of Water Wheel's Lease with CRIT will reveal any kind of a waiver. In fact, there is no forum-selection clause to be found anywhere in the Lease. Water Wheel's lease arguments lack any support in the language of its Lease with CRIT.

Water Wheel's principal argument hinges on its interpretation of Article 34 of the Addendum to the Lease. Because Water Wheel's brief contains only fragmentary, elliptical quotes from Article 34, it is quoted here in its entirety:

> The Lessee, Lessee's employees, agents, and sublessees and their employees and agents agree to abide by all laws, regulations, and

> ordinances of the Colorado River Tribes now in force and effect, *or that may be hereafter in force and effect*; provided, that no 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.

ER-249 (emphasis added). Water Wheel asserts:

> Water Wheel has never consented, in writing or otherwise, to be subject to CRIT's Property Code or Eviction Ordinance. Therefore, pursuant to Section 34 of the Lease Addendum, the tribal ordinances cannot be applicable to Water Wheel (or Johnson).

Resp. Brf., p. 55. This alleged lack of consent is said to be Water Wheel's "bottom line". *Id.*, p. 60. But nowhere in its Brief does Water Wheel identify the "express provisions and conditions" in the Lease which were allegedly changed or altered by latter-day tribal laws. Rather, it focuses on the 2006 enactment of the Tribe's Eviction Ordinance, calling it an "*ex post facto* tribal law[] rewriting the Lease to include provisions to which Water Wheel never agreed." Resp. Brf., p. 56. However, Article 34 itself constituted Water Wheel's consent to all tribal laws and ordinances in force and effect at the time of the execution of the Lease, or "hereafter in force and effect"—a phrase from Article 34 which is never quoted in Water Wheel's Cross-Appeal Brief. Indeed, Judge LaRance ruled on January 15, 2008, that section 101(c) of the Tribal Law and Order Code, which was enacted in 1974—*before* the execution of the Water Wheel Lease, gave the

Tribal Court jurisdiction over "any person who owns, uses or possesses any property within the Reservation, for any civil cause of action." ER-295. Under Article 34 Water Wheel agreed to be subject to that tribal law, but its Cross-Appeal brief never addresses that Tribal Court ruling.

Instead, Water Wheel invokes the proviso in Article 34, claiming that it never consented to the 2006 Eviction Ordinance. But the proviso's requirement of the Lessee's written consent to latter-day tribal laws comes into play only when a tribal law changes or alters the provisions or conditions of the Lease. Water Wheel utterly fails to explain what provision or condition of the Lease is changed or altered by the Tribe's 2006 Eviction Ordinance, or how the 2006 enactment of that Ordinance altered its bargain with the Tribe. The Ordinance is attached as an Addendum to Water Wheel's Response Brief, but the only provision of the Ordinance cited in the Brief is § 1-304, after Water Wheel's assertion that "[t]hese tribal ordinances … provide that Lease and property disputes *must be* adjudicated in the CRIT Tribal Court." Resp. Brf., pp. 54-55 (emphasis in original). That is not what the cited section of the Ordinance states; rather, it states that "the landlord *may* commence an action in the Tribal Court for eviction …." Resp. Brf. Addendum, p. 27 (emphasis added.) And again, no Lease provision is cited as in conflict with that Ordinance. The District Court disposed of the Article

34 argument in a footnote. ER-14, note 12. It provides no basis for determining that Water Wheel is not subject to the 2006 Eviction Ordinance. And it certainly does not bar the exercise of Tribal Court jurisdiction.

The District Court viewed Water Wheel's "strongest" lease argument (ER-11) to be found in Article 21 of the Addendum, governing "Default" (ER-243), which gives the Secretary of the Interior the authority to take enforcement action against the Lessee. Nonetheless, the Court recited multiple reasons why it was no bar to the exercise of Tribal Court jurisdiction over Water Wheel. Article 21 provides that, after the Secretary has provided written notice of default, and after Lessee's opportunities to cure the default have expired, "the Secretary may either:

> "A. Proceed by suit or otherwise to enforce collection or to enforce any other provision of this lease; or
> "B. Re-enter the premises and remove all persons and property therefrom …."

ER-244, *quoted by the District Court*, E-11. While the initial part of this lengthy Lease provision refers only to the enforcement authority of the Secretary, subsequent clauses refer to the role of the "Lessor", namely the Tribe. For example, the next clause authorizes the Secretary to re-let the premises without terminating the Lease, and "without invalidating any right of Lessor" which includes "the right to alter and repair the premises", and to

receive any deficiency payments. The Lessor is also given "discretion" in the matter of re-letting the premises. The next clause provides:

> Any action taken or suffered by the Lessee as a debtor under any insolvency or bankruptcy act shall constitute a breach of this lease. In such event the Lessor and Secretary shall have the options set forth in sub-Articles A and B, above.

ER-244. Water Wheel asserts that Article 21 "is the **only section** of the Lease authorizing enforcement and legal action against Water Wheel for breaches of the Lease, and it specifically reserves the right to pursue any legal action to the Secretary." Resp. Brf., pp. 58-59 (emphasis in original). This assertion is inaccurate on many levels. The District Court spelled out five reasons why Water Wheel's argument must fail, including the fact that there is nothing in Article 21, or anywhere else in the Lease, that prohibits CRIT from suing for breach of the Lease. ER- 12-13. All five reasons are persuasive, but the Tribal Court Parties will focus on the second and fifth reasons: that the Lease expressly recognizes a tribal role in addressing holdover tenancies. The District Court observed that Article 23 of the Lease (ER-247) recognizes the Tribe's power to remove property from the leasehold premises after the termination date of the Lease. ER-13. And Article 22 provides that the Lessor will be awarded attorney fees "[i]f action be brought by Lessor in unlawful detainer." ER-12. Hence, not only should

Article 21 *not* be read as prohibiting tribal enforcement of leases; Article 22 is an explicit recognition of the Tribe's authority to evict a holdover tenant—the precise action which was filed by CRIT in October 2007.

Water Wheel devotes a separate section of its Brief (pp. 62-65) to its alternate argument that the only enforcement action which CRIT may take against Water Wheel would be as a creditor in a bankruptcy proceeding, invoking the "insolvency" clause from Article 21 quoted on the previous page. The District Court made short shrift of that argument. ER-12. The Court also noted that Article 22's recognition of CRIT's right to file an action in unlawful detainer is distinguishable from an action to enforce the Lease terms, and thus is not restricted by the language of Article 21—even if that provision could read as restricting CRIT's authority to sue for breach, which it doesn't. Water Wheel argues that the suit which the Tribe may bring in unlawful detainer pursuant to Article 22 "is a derivation of CRIT's participation in legal action which CRIT *otherwise can prosecute*." Resp. Brf., p. 63 (emphasis in original.) But there is no language in Article 22 which qualifies tribal authority to prosecute such actions, and the interpretation which Water Wheel advocates is strained, if not absurd—that the Tribe could only sue in unlawful detainer after the tenant becomes subject to a bankruptcy filing. The Lease may not be a model of clarity, but

Water Wheel's constructions are illogical, and find no support in the language of the Lease.

But the problem with all of these arguments offered by Water Wheel is that Article 21 has nothing whatever to do with Tribal Court jurisdiction, as it is not a forum-selection clause. Nor is there any other provision of the Lease which speaks to the issue of the appropriate forum. Article 21 speaks to enforcement mechanisms, a substantive matter of lease interpretation, but it sheds no light on the only federal question which was before the District Court, namely whether the Tribal Court had jurisdiction over the Tribe's eviction action.

Finally, we note that Water Wheel's argument for reversal of the District Court's ruling that the Tribal Court lawfully exercised jurisdiction over Water Wheel ends with the following statement:

> … CRIT may have some legal standing to pursue eviction of a holdover tenant, but such action is not cognizable in Tribal Court unless the first exception to *Montana* is satisfied. And here it is not.

Id., p. 65. But Part II of the Response Brief, the portion in support of Water Wheel's cross-appeal, contains no discussion whatsoever of the applicability or application of the rule of law set forth in Montana v. United States. The concluding statement thus stands alone, without a shred of argument. Nor can we find anything in Part I of the Response Brief—seeking affirmance of

the District Court's ruling that the CRIT Tribal Court had no jurisdiction to evict Robert Johnson—to support a Montana-based argument for denying Tribal Court jurisdiction over Water Wheel. Indeed, the Response Brief presses the argument that Johnson acted purely as an agent of Water Wheel, and that such actions are not evidence of a personal consensual relationship with the Tribe. *Id.,* pp. 25-28. Whatever the merits of that argument (discussed below in Part C), it is not available to the Lessee, Water Wheel.

2. There is nothing in BIA regulations which bars tribal enforcement of the Water Wheel Lease in CRIT Tribal Court.

Water Wheel's Lease-based arguments are interwoven with assertions that only the Secretary of the Interior may enforce the Lease. Agency regulations old and new are said to be inconsistent with tribal lease enforcement in Tribal Court. The District Court correctly concluded that there is nothing in the regulations which "expressly limit what the tribe can do." ER-14. This argument suffers from the same deficiencies as the Lease-based argument, namely that the regulations don't say what Water Wheel says they mean. The Court also held that the BIA regulations "recognize that Indian tribes may invoke 'remedies available to them under the lease,'" quoting 25 CFR § 162.619(a)(3); and ruled that Article 22 of the Lease, referring to the Lessor's right to bring an action in "unlawful detainer", was

a remedy available to CRIT. ER-15. Thus, the Court concluded that the regulations did not "preclude the tribe from initiating an action in Tribal Court." *Id.*

Water Wheel does not address the District Court's reliance on the language of the applicable regulation. Rather, it asserts broadly—and blindly—that the exercise of Tribal Court jurisdiction under the 2006 Eviction Ordinance "is in direct conflict with 25 CFR Part 162 (as well as its predecessor, 25 C.F.R. Part 131.)"[1] Resp. Brf., p. 54. But it cites no specific regulation to demonstrate the alleged conflict. Rather, it cites a 1980 decision of the Interior Board of Indian Appeals (IBIA), Marlin D. Kuykendall v. Phoenix Area Director, 8 IBIA 76 (1980), which ruled that a tribal court did not have jurisdiction to *cancel* a tribal business lease for material breach because the then existing BIA regulation "vested [the Department] with final cancellation authority over business leases of trust land." 8 IBIA at 88. That agency decision did not, however, speak to the issue of tribal eviction of a holdover tenant.

[1] The District Court noted that none of the parties below contended that the current BIA leasing regulations, promulgated in 2001, were not applicable to the 1975 Water Wheel Lease. ER-15, note 13.

The Kuykendall decision was ultimately upheld by this Circuit in Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983). The Court held that the then-applicable regulation, 25 CFR § 162.14, reflected "the Secretary's present choice with respect to the proper balance between enhanced tribal power and increased risks of improvidence …." 707 F.2d at 1075. But the Court recognized that "the Secretary could abandon his position by changing the regulation to recognize to the extent desired the unilateral power of a tribe to terminate a commercial lease." *Id.* The regulation was indeed changed in 2001 to allow "Indian landowners … to invoke any remedies available to them under the lease" to cure a violation of a lease. 25 CFR § 162.619(a)(3).

Whatever the current force of this Court's decision in Yavapai-Prescott, which interpreted a now defunct BIA regulation, it did not speak to the issue of tribal enforcement of lease terms against holdover tenants. This case does not involve a tribal attempt to cancel a business lease. CRIT simply sought to evict the holdover tenants, and to obtain an award of back rents and damages. *See* ER-302-308. Lease cancellation is not an issue here.[2]

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[2] Water Wheel makes much of counsel's statement at oral argument that federal agency action to evict a holdover tenant involved a "ponderous"

3. There is no administrative appeal pending with the U.S. Department of the Interior which would bar tribal lease enforcement in CRIT Tribal Court.

Water Wheel's principal regulatory argument is that it has a 2001 administrative appeal pending at the Department of the Interior (it doesn't), that such an appeal represents an exclusive remedy for dispute resolution and lease enforcement (it isn't), and that the pendency of that appeal operates to bar the exercise of Tribal Court jurisdiction (it can't).

Water Wheel does not cite a single provision of the Lease or regulations which states that the Department of the Interior appeal procedures are to be used for dispute resolution, because there are none. The Response Brief simply cites the preamble of the Lease, which contains standard language that the Lease was made pursuant to the BIA regulations at 25 CFR Part 131 (now Part 162) "which by reference are made a part thereof." ER-221. Water Wheel asserts (at 56-57): "That regulation (and its successor) establishes a process through which Water Wheel could appeal

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process. Response Brief, pp. 59-60. That statement was made in response to a written question posed by District Judge Campbell prior to argument: "Does CRIT have reason to believe that the Secretary is unable or unwilling to take enforcement actions as provided in paragraph 21 of the lease and 25 CFR § 162.108 and 25 CFR § 162.623?" Order, July 21, 2009, U.S.D.C. Doc. #73, p. 3. Counsel for the Defendant Tribal Court Parties explained the lengthy administrative appeal process which could follow a BIA eviction order, and the possible need to request an "overloaded" U.S. Attorney's Office to file a "garden-variety eviction" action in federal court. ER- 66-67.

to the Secretary to contest actions or inactions of the Department of the Interior employees concerning the Lease." Not true. Nothing in those regulations, then or now, provides a Lessee with a remedy at the Department or the BIA. The BIA administrative appeal regulations (25 CFR Part 2, Resp. Brf. Addendum, pp. 2-4), which were invoked by Water Wheel's attorney in 2001 (SER-26), pertain to actions by agency officials, not tribal officials; and nothing therein pertains to lease dispute resolution.

Indeed, the 2001 petition was not an "appeal" at all, but a "Notice of Request for Action," alleging tribal "harassment." SER-27. BIA officials never took any action, because it is not their responsibility to protect lessees of tribal land from alleged wrongdoing by a tribal official. The Interior Board of Indian Appeals ruled in 1985 that the BIA "has no statutory or regulatory authority to take action against an Indian lessor." Hawley Lake Homeowners Assn. v. Deputy Assistant Secretary, 13 IBIA 276, 289 (1985).

Water Wheel's counsel sought to bootstrap his client into agency processes by invoking a provision of the BIA appeal regulations which provides for relief from the inaction of a BIA official, allowing the filing of an appeal after the expiration of certain amount of time. SER-26. The

applicable regulation is at 25 CFR § 2.8, although Water Wheel counsel did not cite the correct regulation in his "Request for Action".[3]

However, even if an appeal had been perfected, it would have been unsuccessful because the Department has ruled consistently that "BIA is not an arbiter of disputes … between Indian lessors and lessees …. BIA's duty, as trustee of [tribal] trust lands, flows to the landowner … not to lessees …." Tafoya v. Acting Southwest Regional Director, 46 IBIA 197, 202-03 (2008). Indeed, Water Wheel's attorney (Mr. Moore) pursued just such a bootstrap administrative appeal (46 IBIA at 217, note 2) on behalf of another lessee of CRIT tribal lands, and the Interior Board commented:

> [W]e address a general claim raised by appellants in the context of several specific issues—that BIA has a duty to enforce the Lease on behalf of the lessee, and that BIA's failure to force the Tribe to comply with the Lease is a violation of that duty. Appellants describe this as either a fiduciary duty owed to them, or as an obligation under the Lease …. We disagree with Appellants that BIA has a responsibility to enforce the Lease against the Tribe or owes them any such obligation under the Lease.

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[3] The record does not indicate any follow-up to perfect an appeal, and there has never been any appeal pending before the Interior Board of Indian Appeals, as apparently asserted by litigation counsel in a December 4, 2007, letter to the agency. Water Wheel points to the January 31, 2008, response (SER-68) from the Assistant Secretary for Indian Affairs as evidence "acknowledging Water Wheel's 25 CFR appeal." Resp. Brf., p. 58. But, as U.S. District Judge Campbell recognized, the letter simply repeated back to Mr. Whittlesey what was stated in his letter to the agency. *See* pp. 20-21 of the Oral Argument transcript. ER- 43-44.

Tuttle v. Acting Western Regional Director, 46 IBIA 216, 230 (2008). Thus, the alleged pendency of a futile request to BIA to intervene in a dispute between Water Wheel and CRIT is no bar to Tribal Court jurisdiction over an eviction action against a holdover tenant. That portion of the District Court's decision denying relief to Water Wheel should be affirmed.

REPLY TO ROBERT JOHNSON'S RESPONSE TO APPELLANTS' PRINCIPAL BRIEF

B. The CRIT Tribal Court had jurisdiction over the Tribe's action to evict Robert Johnson due to the inherent power of the Tribe to exclude non-member trespassers from tribal reservation lands.

Water Wheel is a California corporation which was a lessee of tribal land for 32 years. It remained on the property when its lease expired, and thereby became a holdover tenant. Appellee Robert Johnson is the principal owner and chief executive officer of Water Wheel. He never personally had a lease with the Tribe, but since his company's lease expired in July 2007, he has continued to collect rents from Water Wheel's tenants and has remained on the tribal land. ER-110. Thus, whether or not he has been acting as an agent of Water Wheel, Mr. Johnson has now been trespassing on tribal land for three years. Tribal Court jurisdiction to evict him from the Reservation is simply an exercise of an Indian Tribe's inherent power to exclude nonmembers, a power often recognized by the U.S. Supreme Court.

The District Court Order granting Mr. Johnson relief from the Tribal Court judgment was legal error, and this Court should perform a *de novo* review of that decision.

Only three pages of the Response Brief purport to address the question of the Tribe's inherent exclusionary authority. Appellee is evidently content to rest on the District Court's view that the framework of the test set forth by the U.S. Supreme Court in Montana v. United States, 450 U.S. 544 (1981), is applicable to tribal eviction of trespassers. Like the District Court, the Response Brief cites Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. ___, 128 S.Ct. 2709 (2008), for the proposition that the Montana test applies to the exercise of a Tribe's power to exclude nonmembers from tribal lands. Not only do the facts and the disposition of Plains Commerce Bank run counter to the idea that the Supreme Court was expressing a view on tribal exclusionary power (*see* Appellants' Principal Brief, p. 38), but the language of the decision cannot possibly be reconciled with that view.

For example, the Supreme Court's opinion included an overview of tribal powers recognized under federal law, and that discussion quotes favorably from a concurring opinion of Justice O'Connor in Nevada v. Hicks, 533 U.S. 353, 392 (2001): "[T]ribes retain sovereign interests in

activities that occur on land owned and controlled by the tribe." Plains Commerce Bank, 128 S.Ct. at 2718. Later the opinion states: "By virtue of their incorporation into the United States, the sovereign interests are now confined to managing tribal land …." *Id.*, at 2723. Further, the opinion contains a recitation of a tribe's "limited sovereign interests", followed by the statement: "The tribe's 'traditional and undisputed power to exclude persons' from tribal land, *Duro* [*v. Reina*], 495 U.S., at 696, for example, gives it the power to set conditions on entry to that land …." *Id.* Indeed, the Court's disposition of the case was a product of the proposition that "once tribal land is converted into fee simple, the tribe loses *plenary jurisdiction* over it." *Id.*, at 2719 (emphasis added.) And, when the Court recited the Montana test, it used the language of that "pathmarking case" to describe the second prong of the test as permitting a tribe to "exercise 'civil authority *over the conduct of non-Indians on fee lands within the reservation* when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.'" *Id.*, at 2720 (emphasis added.).

Consequently, the Supreme Court's decision in Plains Commerce Bank cannot be read to require application of the Montana test to the exercise of a tribe's "plenary jurisdiction" over trespassers, as that decision

recites distinctions which clearly separate tribal exercise of jurisdiction over its own tribal lands from other, limited exercises of tribal authority. Other Supreme Court decisions also make this distinction; between the Court's decision in Montana in 1981 and National Farmer's Insurance v Crow Tribe in 1985, the Court decided New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), where it unanimously upheld the denial of state regulatory authority over elk hunting on the Reservation, commenting that "It is beyond doubt that [a] tribe lawfully exercises substantial control over the land and resources of its reservation." 462 U.S. at 337.

Indeed, an application of Montana to tribal eviction of trespassers simply makes no sense. The idea that there must be a consensual commercial relationship with a trespasser is absurd. And the second prong of Montana, permitting the exercise of tribal power to safeguard "political integrity" and "economic security", only has meaning in the context of non-member activities on fee lands, because the activities of trespassers on tribal lands present a *prima facie* threat to a tribe's political integrity and economic security.

Mr. Johnson's Brief implies that the inherent tribal exclusionary authority has been invoked "because [the Tribal Court Parties] view Johnson as a trespasser on the leasehold ...." Resp. Brf., p. 49. This appears to be a

hint that the Tribal Court findings of fact that he is a trespasser, ER-110, 117-118, are erroneous. But the proposition that Water Wheel is a holdover tenant has never been denied (Oral Argument Transcript, p. 29, ER-52), and as the District Court observed, Johnson did not dispute the Tribal Court's findings of fact.[4] Furthermore, tribal exclusionary authority applies to nonmembers generally, not merely to trespassing nonmembers. In Merrion v. Jicarilla Apache Tribe, the Supreme Court elaborated on this proposition:

> Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct … When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.… A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power.

455 U.S. at 144-45. In short, Mr. Johnson has not demonstrated that he is exempt from such an exercise of inherent tribal power. He certainly assumed that risk when he remained on tribal lands after the Lease had expired.

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[4] The Response Brief's Statement of Case states: "The Lease ostensibly expired, although Water Wheel's long-pending 25 *C.F.R.* appeal (which has, to date, been wholly-ignored by the United States) has asserted otherwise." Resp. Brf., p. 5. The futility and frivolity of that argument are discussed above, in Part A.3.

Finally, Appellee suggests that a footnote in this Court's opinion in Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009), invites the argument that tribal exclusionary power does not extend to a tribe's adjudicatory authority; this was said to be "an open question." Resp. Brf., p. 52, note 9. However, no argument is offered on this point. Whatever may have triggered this question in Elliott, we submit that this case does not lend itself to making a distinction between tribal regulatory and adjudicatory power. Water Wheel and Johnson have offered no argument in support of that distinction; and the CRIT Tribal Court provides a meaningful venue for any dispute, consistent with federal law and policy, including the Indian Civil Rights Act, 25 U.S.C. § 1302, and the Indian Tribal Justice Act, 25 U.S.C. § 3601, *et seq.*[5] While Water Wheel and Johnson have not been hesitant to heap scorn on CRIT Tribal Court processes, there is nothing in the record to show that Judge LaRance did anything other than to apply the law to the facts of this case. The CRIT Eviction Code provides an orderly process for dealing with holdover tenants. The Tribe's exclusionary authority was exercised appropriately.

[5] 25 U.S.C. § 3601(6), states: "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudications of disputes affecting personal and property rights."

C. The CRIT Tribal Court had jurisdiction to entertain the eviction action brought against Robert Johnson, the president and principal owner/agent of the lessee corporation, under either prong of the test set forth in Montana v. United States.

The Tribal Court parties agree with Appellee Robert Johnson that the question whether a tribal court has jurisdiction over a nonmember under Montana v. United States is a federal legal question subject to review *de novo*. Resp. Brf., p. 9. However, Johnson then asserts that "this court must begin its analysis with the presumption that CRIT does not have jurisdiction over Johnson …." *Id.*, pp. 9-10. Clearly, Appellee is borrowing from the District Court's erroneous view that "Defendants have the burden of proof with respect to *Montana*'s consensual relationship exception," *citing* Plains Commerce Bank.[6] ER-17. As explained in Appellants' Principal Brief (at pp. 29-31), the District Court had no basis in Supreme Court precedent for applying a burden of proof in this manner, and this application of the Montana test is also contrary to established Ninth Circuit precedent, which provides that a tribal court's determination of its own jurisdiction is entitled

6 The opinion in Plains Commerce Bank 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.*" 128 S.Ct. at 2720 (emphasis added).

to "some deference." FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990), *cert. denied* 499 U.S. 943 (1991).

1. Judge LaRance correctly held that Robert Johnson was subject to Tribal Court jurisdiction due to his consensual commercial relationship with CRIT.

Appellee's primary legal argument in support of the District Court's determination that there was no "voluntary" consensual relationship between Robert Johnson and CRIT is that Johnson was always acting within the scope of his duties as a corporate agent for Water Wheel, and that, even though Johnson has been Water Wheel's principal agent for over 25 years, Water Wheel's consensual relationship with CRIT cannot also operate as Johnson's consent to Tribal Court jurisdiction. Resp. Brf., pp. 12-13, *passim.* This distinction—between a person's actions as a corporate agent, and actions taken in his personal capacity—is also one which was made by the District Court when it held that the provision in Article 34 of the Lease, whereby agents and employees of the Lessee "agree to abide" by tribal law, did not "personally" subject Johnson to Tribal Court jurisdiction. ER- 18-19.[7] However, an examination of the Supreme Court's "consensual

[7] Indeed, for Robert Johnson to assert that he never agreed to abide by tribal law when he bought a lease which expressly states that the agents and employees of the lessee agree to do so is certainly disingenuous, if not

relationship" test in Montana demonstrates that this corporate distinction does not immunize Johnson from Tribal Court jurisdiction.

In Montana the Supreme Court held that a tribe may regulate "the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. This statement of the rule does not require that the nonmember must have actually entered into an agreement with the tribe or any of its members, as "contracts" and "leases" are simply listed as two examples of the requisite "consensual relationship". The Supreme Court was necessarily referring to "commercial dealing" in a broader sense, noting that "other arrangements" might provide a sufficient basis for tribal regulatory authority over a nonmember based on evidence of a consensual commercial relationship.[8] As the Supreme Court later pointed out, there was

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unbelievable. He is not a mere employee or minority shareholder. He owns the corporation.

[8] Johnson cites a footnote from Nevada v. Hicks, 533 U.S. at 359, note 3, for the proposition that "other arrangements" must mean a "private consensual relationship." Resp. Brf., p. 21. We do not disagree, as the footnote was simply the Supreme Court's explanation why an "official action", such as a deputy sheriff's application for a search warrant from the tribal court, did not constitute a "consensual relationship" within the meaning of the first Montana test.

a precedential basis for viewing "consensual relationship" in broader terms than a tribal contract.

In Strate v. A-1 Contractors, 520 U.S. 438 (1998), the Court observed that one of the decisions it had relied on in Montana was Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980), where the Court had held that tribal sovereign powers extended to the taxation of "non-Indians entering the reservation to engage in economic activity." Strate, 520 U.S. at 452 (citing Colville, 447 U.S. at 153). Indeed, the Court also commented in Colville that tribes could exercise sovereign power "so far as such nonmembers may accept privileges of trade, residence, etc." Colville, 447 U.S. at 153. More recently, in Plains Commerce Bank, cited often by both Appellee and the District Court, the Supreme Court said that a nonmember's consent may be shown "either expressly, *or by his actions*." Plains Commerce Bank, 128 S.Ct. at 2724 (emphasis added). Nothing the Court said in Montana, or since, about the exercise of tribal authority over nonmembers suggests that it was requiring that the nonmember must have had a contractual relationship with the tribe in order to establish tribal authority over the activities of that nonmember.

Accordingly, there is nothing to support the wooden corporate distinction advocated by Johnson. His over 25 years of commercial dealing

with the Tribe, as evidenced by approximately 100 communications between him and tribal officials (ER-15-16), is sufficient "economic activity" or "actions" to subject him to tribal authority under Montana and its progeny. When Mr. Johnson purchased Water Wheel in 1981, he accepted the privilege of doing business on tribal lands. He purchased a Lease which provided that agents of the Lessee "agree to abide by all [tribal] laws." ER-249. Nothing in Supreme Court precedent suggests that just because Johnson was acting as an agent of the corporation, should he be insulated from Tribal Court jurisdiction. He may not be liable for every tort or contractual violation committed by the corporation, under basic principles of corporation law. But liability and jurisdiction are two different issues. The District Court elevated form over substance in this jurisdictional inquiry.

Johnson wants this Court to view this as a "simple" case, where an Indian tribe is dragging him into tribal court against his will, and is attempting to impose liability on him personally when "Johnson was involved solely in his capacity as a Water Wheel corporate official." Resp. Brf., p. 4. He adds that Judge LaRance's decision "is the product of a novel, unprecedented and unsupported notion that a corporate official can be **personally** sued in a tribal court for actions exclusively taken as an executive or agent of the corporation." *Id.*, p. 14 (emphasis in original). But

there is nothing particularly novel about such an exercise of jurisdiction. If this were not an Indian case, no one would question a landlord's efforts to seek relief from a non-resident corporate agent who remains on the premises after the expiration of the corporate tenant's lease, and who is collecting rents from sublessees but paying nothing to the landlord. A strict longarm statute would hardly be necessary to make such a non-resident miscreant accountable in the local court. And few courts would have difficulty imposing personal liability for trespass and mesne profits against a non-resident trespasser, notwithstanding his donning of the corporate veil. This Court has held:

> A corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf

Coastal Abstract Service, Inc. v. First American Title Ins. Co., 173 F.3d 725, 734 (9th Cir. 1999). Thus, after a corporate lease expires, the non-resident officer is no longer regarded simply as an agent of the corporation; he is also a tortious trespasser.[9] There are many instances in corporate litigation when

[9] Appellee Johnson recites from the District Court transcript of the oral argument dialogue over the Peabody Coal hypothetical. Resp. Brf., pp. 12-14. That simply illustrates that lease enforcement against a corporate lessee may sometimes require joinder of a corporate officer.

an officer may be joined as a party, and even be held in contempt, to enforce the relief awarded against the corporation. *See* Fed. R. Civ. P. 65(d)(2)(B). This case is one example.

Johnson also quotes from Black's Law Dictionary to support the District Court's determination that the Tribal Court Parties "have not shown that Johnson's contacts with the tribe were voluntary" (ER-17), and therefore "have not met their burden of showing that *Montana*'s consensual relationship exception applies to Robert Johnson." ER-17-18. But the dictionary definition of "consent" states that it is an "agreement … given voluntarily." Resp. Brf., p. 23. This simply shows that a "consensual relationship" is necessarily "voluntary", and that Judge Campbell's parsing of the "commercial consensual relationship" requirement to require that the Tribal Court should have made an additional finding that Johnson entered into a consensual commercial relationship with CRIT *voluntarily* makes no sense.

Indeed, this is not a close case; it is certainly not a hard case. It involves important questions regarding the scope of tribal authority over tribal lands. In Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987), the Supreme Court cited its decision in Montana for the proposition that "Tribal authority over the activities of non-Indians on reservation lands is an

important part of tribal sovereignty." Affirming the District Court's ruling exempting Robert Johnson from tribal jurisdiction would severely diminish that sovereignty. Allowing him to hide behind a corporate veil after his corporation's lease has expired will invite other corporate agents to shun tribal authority on tribal lands. *See generally* Amicus Curiae Brief of Indian Tribes and National Congress of American Indians, Dkt. #15-2, at pp. 8-10 (Motion for Leave to File *pending*.)

2. The exercise of Tribal Court jurisdiction to evict Robert Johnson from tribal land is permissible under the second prong of the *Montana* test because his presence undermines the political integrity and economic security of the Tribe.

Contrary to Johnson's assertion (Resp. Brf., p. 29), the Tribal Court Parties never waived the argument that the exercise of Tribal Court jurisdiction meets the second prong of the Montana test. The appellees can hardly claim to be surprised by it. The Tribal Court Parties' brief on the merits in the District Court stated:

> 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*.

U.S.D.C. Doc. #59, p. 17 of 35. The brief did not elaborate on the second prong of the test; nor did Judge LaRance, in his Orders in Tribal Court. But,

as noted in Appellants' Principal Brief (at p. 43, note 4), the opinion of the CRIT Court of Appeal—part of the Tribal Court Record which we have been defending—discussed in detail the impact on the Tribe's "economic security" caused by the continued presence of a holdover tenant in the person of the principal corporate agent, Robert Johnson. ER- 183-84. This is not a new issue, and Johnson's assertion that he "would be subjected to extreme prejudice if the Tribal Court Parties are permitted to raise *Montana*'s 'second exception' at this time…" (Resp. Brf., p. 31) lacks any support. The Court of Appeal's discussion is also far more than a "single sentence", as twice claimed by Appellee. *Id.*, pp. 30, 34.

The Tribal Court of Appeal pointed out what should be obvious: That a lack of tribal authority over the corporate agent of a holdover corporate tenant threatens the Tribe's economic security. Revenue from the former leasehold is spirited away, with no accountability to the tribal landlord. The Court of Appeal opinion states:

> Thus, in addition to satisfying the consensual relationship prong of the *Montana* test, the Tribe also carried its burden in demonstrating this case also satisfied the "economic security" part of the last sentence of the test since the failure of the Defendants/Appellants to both pay rents due under the Lease and to return peaceable possession to the Tribe without the need for legal process as expressly required by the Lease clearly interfered with a significant revenue stream that the Tribe was due *from its own land.* 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 (emphasis in original.)

Appellee's assertion (Resp. Brf., p. 33) that the Supreme Court's opinion in Plains Commerce Bank holds that the second exception of Montana requires that the nonmember's activities must "imperil the subsistence of the tribal community … necessary to avert catastrophic consequences" (128 S.Ct. at 2726) is extremely misleading. The origin of the "imperil" clause is the following statement in Montana: "The complaint in the District Court did not allege that non-Indian hunting and fishing **on fee lands** imperil the subsistence or welfare of the Tribe." 450 U.S. at 566 (emphasis added). The "catastrophic consequences" suggestion was an editorial comment in a footnote in the 2005 edition of Cohen's Handbook of Federal Indian Law regarding language in a footnote in Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657-658, n. 12 (2001), which states:

> [U]nless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually "imperils" the political integrity of the Indian tribe, there can be no assertion of civil authority **beyond tribal lands**.

(Emphasis added.) Thus, the clear context for all of the borrowed discussion in Plains Commerce Bank was the level of justification a tribe must show to regulate nonmember activities on non-Indian fee lands.

Johnson's brief (Resp. Brf., p. 33) also quotes from this Court's decision in Wilson v. Marchington, 127 F.3d 805, 815 (9th Cir. 1997), for the proposition that the second Montana exception is met only when the impact of the nonmember's activities are "demonstrably serious". That case involved an attempt to enforce in federal court a tribal court tort judgment entered against nonmembers for negligence arising out of an auto accident on a state highway right-of-way on an Indian Reservation in Montana. The decision presaged the Supreme Court's decision in Strate the following year, where the Court treated a state highway right-of-way as the equivalent of non-Indian fee land. Thus, the decision in Wilson does not inform this Court on the question of Tribal Court jurisdiction over Robert Johnson's conduct on tribal lands.[10]

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[10] Similarly, on page 34 the Response Brief elliptically quotes from this Court's decision in County of Lewis v. Allen, 163 F.3d 509, 516 (9th Cir. 1998), as stating "a suit in tribal court is not necessary to protect Indian tribes or members who may pursue their causes of action in state or federal court." The beginning of that sentence in County of Lewis, which was omitted from Johnson's brief, states: "Surely subjecting county law enforcement officers to suit in tribal court is not necessary to protect Indian tribes or members who may ..." This decision presaged the Supreme Court's

D. The District Court erred when it considered the Declarations of Robert Johnson for purposes of determining whether the Tribal Court had jurisdiction over the eviction action brought against Johnson, because the principal averments made in those Declarations were not in evidence in the CRIT Tribal Court.

As stated in the Tribal Court Parties' Principal Brief and in the preceding sections of this Reply, the District Court erred in its interpretation of the applicability and application of the Montana test for determining whether the Tribal Court had jurisdiction over Robert Johnson, a trespasser on tribal lands. Further, the District Court's reliance on Johnson's self-serving declarations to reach its decision on whether there was a consensual commercial relationship between Johnson and the Tribe was also erroneous, as such reliance completely skews the standard of federal court review of an exercise of tribal court jurisdiction.

Johnson's Response begins by asserting that the Tribal Court Parties did not preserve for appeal their objection to the District Court's consideration of his declarations. That assertion has no merit whatsoever. As Johnson concedes (Resp. Brf., p. 36), the Tribal Court Parties' brief on the merits below expressly objected to any consideration of the declarations

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decision in Nevada v. Hicks three years later. Again, the facts of this case are extremely different, and Johnson's abbreviated quotes from judicial precedent are calculated to mislead.

because they were outside the Tribal Court Record—precisely the argument being made here. Johnson contends that the defense should have moved to strike the declarations. But that would have been an inappropriate use of a motion to strike. Local Rule 7.2(m) of the U.S. District Court (12/1/2008) stated:

> (m) Motions to Strike.
>
> (1) Generally. Unless made at trial, a motion to strike may be filed only if it is authorized by statute or rule, such as Federal Rules of Civil Procedure 12(f), 26(g)(2) or 37(b)(2)(C), or if it seeks to strike any part of a filing or submission on the ground that it is prohibited (or not authorized) by a statute, rule, or court order.
>
> (2) Objections to Admission of Evidence on Written Motions. **An objection to the admission of evidence offered in support of or opposition to a motion must be presented in the objecting party's responsive or reply memorandum** (or, if the underlying motion is a motion for summary judgment, in the party's response to another party's separate statement of material facts) **and not in a separate motion to strike** or other separate filing. Any response to the objection must be included in the responding party's reply memorandum for the underlying motion and may not be presented in a separate responsive memorandum.

(Emphasis added.) There was no trial in the District Court, and the defense complied with Rule 7.2(m)(2) by presenting the objection in the responsive

memorandum on the merits. That alone was sufficient to preserve the issue on appeal.[11] A motion to strike would have violated the Rule.

The additional assertion (Resp. Brf., p. 37) that the Tribal Court Parties "consciously elected to do nothing" with respect to the proffer of the declarations is false. The defense consistently insisted throughout the proceedings below that the District

> Court's role is limited to a review of the Tribal Court Record, and then only for purposes of determining whether the Tribal Courts retain any jurisdiction to adjudicate the matters before them as a matter of federal law.

Rule 26(f) Case Management Report, April 21, 2008, U.S.D.C. Doc. #23, pp. 4-5. So, after those declarations were proffered, Defendants' Response Memorandum on the merits cited Ninth Circuit precedent to support the proposition that the court's role was limited to review of the Tribal Court Record. U.S.D.C. Doc. #59, p. 2. That Memorandum focuses almost all of its argument on defending the Tribal Court Record, citing lengthy Exhibit 1 called "Tribal Court Record (TCR)". U.S.D.C. Doc. #59-1.

[11] Johnson's reference to the defense's "curious footnote" regarding a possible surreply is irrelevant. The point being made in the footnote was that plaintiffs' initial brief on the merits had failed even to place the Tribal Court Record into evidence for District Court review, as required by Ninth Circuit precedent; and that, if plaintiffs' reply memorandum were to proffer additional extra-record evidence, the defense would want an opportunity to address that evidence with a surreply brief. U.S.D.C. Doc. #59, p. 3.

Finally, Johnson's statement (Resp. Brf., p. 38) that the Tribal Court Parties failed to comply with 9th Cir. R. 28-2.5 is also false, as the Principal Brief (at pp. 25-26) contains numerous page references to the District Court's erroneous reliance on the Johnson declarations. As pointed out in Johnson's Response, District Judge Campbell did not explicitly rule on the defense's objection to the declarations; so the citations to the Court's reliance on them comply with the 9th Circuit Rule.

Next, Johnson contends that the District Court's reliance on his two declarations should be reviewed for abuse of discretion. That is incorrect, and misses the point of the Tribal Court Parties' argument. This is not a garden-variety evidentiary issue. As pointed out in Appellants' Principal Brief (pp. 27-31), and also by the *amicus curiae* brief filed by the National American Indian Court Judges Association (Dkt. #18-2, motion for leave *pending*), if challengers to tribal court jurisdiction are allowed to present evidence from outside of the tribal court record without any justification for doing so, the purpose of the Supreme Court-imposed requirement of exhaustion of tribal court remedies would be completely undermined. There would be no reason for a potential challenger to place evidence before the tribal court if it could later perform an end-run with a federal court

challenge to tribal court jurisdiction based on evidence not put before the tribal court. The Supreme Court ruled in National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 (1985), that "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." What good then is a "full record" if a tribal court judgment can be collaterally attacked with evidence never submitted to the tribal court?

Indeed, not only did the District Court consider the declarations, it placed the burden on the Tribal Court to rebut Johnson's statements therein, rather than the other way around. This Circuit has long required that the findings of fact which underlie a tribal court determination of its own jurisdiction be reviewed for "clear error." *See* Smith v. Salish Kootenai College, 434 F.3d 1127, 1130 (9th Cir. 2006); FMC, 905 F.2d at 1313. Two other circuits subsequently adopted this Circuit's standard of review. *See* Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996). In Duncan Energy v Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994), the Court ruled:

> [O]n review, the district court must first examine the Tribal Court's determination of its own jurisdiction. This determination is a question of federal law that must be reviewed *de novo*. *See* *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). However, in making its analysis, the district court should review the Tribal Court's findings of fact under a deferential, clearly erroneous standard. *Id.* The Tribal Court's determinations of federal law should be reviewed *de novo* while determinations of Tribal law should be accorded more deference. *Id.*

Never, however, has this Circuit required District Courts to uphold tribal jurisdiction when it can be shown that there has been a denial of fundamental due process by the tribal court. *See* Bird v. Glacier Electric Coop., 255 F.3d 1136, 1141 (9th Cir. 2001). No such showing was made here.

Johnson also asserts that "it is disingenuous for the Tribal Court Parties to claim that the Tribal Court Judge was unaware of the general content of the Johnson Declarations in light of the extensive evidence supporting Johnson's assertions which was presented to the Tribal Court." Resp. Brf., p. 41. Little evidence is presented to support that assertion, however. Indeed, Johnson admits that his Declarations were not placed in evidence before the Tribal Court. *Id.,* p. 42.

The District Court relied primarily on three averments from Johnson's Declaration of April 22, 2008 (ER-146-155), to "provide support for Johnson's claim that *he* did not intentionally enter into a consensual

relationship with the tribe." ER-16 (emphasis in original). These were that the previous owners, the Denhams, advised him that: (1) Rent would be paid to BIA; (2) All building supervision "would be performed by the County of Riverside inspectors"; and (3) Electrical power would come from Southern California Edison. *Id.* Nothing in the Tribal Court Record mentions any such dialogue between Johnson and the Denhams. And these extra-record assertions provide no basis for the District Court's determination that Johnson "did not intentionally enter into a consensual relationship with the tribe."[12] *Id.*

Instead, much of the discussion in Johnson's Response Brief is presented to demonstrate that his assertions in his declaration that the Tribe had breached the lease were in fact placed in the Tribal Court Record. Resp. Brf., p. 42. However, his allegations of breach are no evidence in support of his absurd claims that he didn't know he was entering into a tribal lease, and

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[12] Footnote 7 on page 41 of the Response Brief contains numerous citations to the Excerpts from the Record, all of which demonstrate Robert Johnson's longstanding commercial relationship with the Tribe. For example, ER- 136 is a letter he wrote to CRIT in 1983 asking that a tribal ordinance be revised to enable him to more fully develop the Water Wheel property. This is hardly evidence of an "involuntary" commercial relationship. Apparently, the principal point of the footnote and accompanying text is that Johnson's use of a Water Wheel letterhead shows that all Johnson's actions were taken as a corporate agent of Water Wheel, and did not constitute his "personal consent" to tribal jurisdiction. That argument is addressed in Section C.1.

that he had no idea that the Tribe had any basis for its exercise of governmental authority. Any fair reading of the terms of the Lease document will reveal that CRIT is the Lessor, and that it retains substantial authority and responsibility both as a landlord and as a local governmental entity. When Johnson purchased the Lease from the Denhams, he must have read the Lease (as he selectively cites from it in his Declarations), and surely he knew that the Tribe played a critical supervisory role in the development of the resort.

As troublesome as the District Court's reliance on the Johnson declarations is—as a jurisprudential matter, potentially skewing future federal court review of tribal court actions—they provide absolutely no basis for the Court's determination that Johnson was an "involuntary" actor. To the extent that the District Court relied upon the April 22, 2008, Johnson Declaration to support its determination that Johnson believed that he would not be dealing with the Tribe, such a determination was clearly erroneous. For example, Article 28 of the Lease Addendum, "Inspection", provides that the Secretary and the Lessor "shall have the right, at any reasonable times during the term of this lease, to enter upon the leased premises, or any part thereof, to inspect the same and all buildings and other improvements erected and placed thereon." ER-248. So the proposition that Johnson

believed that only inspectors from the County of Riverside would be involved "on all building matters" is rebutted by the clear and express language of the Lease he purchased from the Denhams.

Finally, Johnson faults the Tribal Court Parties' offer of a "theoretical question" suggesting that the District Court's reliance on the Johnson declarations would invite tribal court litigants to subject themselves to default judgments, knowing they could make their evidentiary case later in a federal court challenge. Resp. Brf., p. 46. He denies the relevance of that "theoretical question" by offering examples of his alleged cooperation in the Tribal Court process, agreeing to be deposed, testifying at trial, and pursuing an appeal—but only after the U.S. District Court denied two TRO motions requiring him to exhaust his tribal court remedies. His version also ignores his refusal to comply with other discovery requests and discovery orders. Clearly, these examples are quite beside the point made by Appellants about the risk of default judgments, and fail to demonstrate that federal court consideration of extra-record evidence is not a threat to the tribal remedy exhaustion requirement imposed by the Supreme Court.

Instead, Johnson offers his own "countervailing theoretical question": What if a tribal court rejects a proffer of favorable evidence? Would that foreclose future federal court review of such evidence? *Id.,* p. 47. The

answer is No. The Ninth Circuit has already ruled that federal courts need not recognize a tribal court judgment in a case in which "the defendant was not afforded due process of law." Wilson v. Marchington, 127 F.3d at 810.

CONCLUSION

For the foregoing reasons, the District Court's Order holding that the CRIT Tribal Court lacks subject matter jurisdiction over Robert Johnson should be reversed, and its directive to the Tribal Court to vacate its judgment against Johnson should itself be vacated. The District Court's denial of relief to Water Wheel should be affirmed.

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Respectfully submitted,

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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 10,886 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.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 28, 2010.

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

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

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