No. 05-16755

United States Court of Appeals
for the Ninth Circuit

CHARLES VAUGHN and
WANDA EASTER,

Defendants-Appellants,

- vs. -

BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY,

Plaintiff-Appellee.

On Appeal from the United States District Court
for the District of Arizona
(The Honorable Earl H. Carroll)

BRIEF OF APPELLEE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY

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March 7, 2006

CORPORATE DISCLOSURE STATEMENT

The Burlington Northern and Santa Fe Railway Company (now known as BNSF Railway Company), a common carrier by railroad, is a wholly owned subsidiary of its parent, Burlington Northern Santa Fe Corporation ("BNSF Corporation"). BNSF Corporation is a Delaware corporation, and it has issued shares and debt securities to the public. There is no publicly held company owning more than 10% of BNSF Corporation.

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Dated: March 7, 2006

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JURISDICTIONAL SUMMARY

Defendants seek review of a nonfinal order: the denial of their motion to dismiss. The district court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2000). This Court lacks jurisdiction over the interlocutory appeal.

This is not a proper case for the collateral order doctrine. Defendants do not explicitly challenge the district court's legal ruling relative to sovereign immunity. They instead seek review over a new, fact-related dispute on the ripeness of the suit – even before the parties have had an opportunity to introduce their facts on this issue into the record. In any event, this Court's appellate jurisdiction does not extend to the other issues raised by defendants. Those issues are not "inextricably intertwined" with the determination of whether defendants are immune from suit.

The district court issued its order on July 21, 2005, and the notice of appeal was filed on August 19, 2005, and refiled to amend deficiencies on August 22, 2005.

STATEMENT OF THE ISSUES

1. Whether this Court lacks appellate jurisdiction to consider this interlocutory appeal?

2. Whether, if this Court decides it has jurisdiction, the district court properly concluded that the tribal officials were not immune from suit?

3. Whether the district court properly found that exhaustion of tribal remedies is not required because plaintiff is a nonmember on fee lands?

4. Whether the district court properly found that plaintiff had stated a claim for relief?

STATEMENT OF THE CASE

This appeal arises from the denial of a motion to dismiss. After receiving repeated demands for payment of taxes on its railroad corridor from the Hualapai Tribe, Burlington Northern & Santa Fe Railway Company (BNSF) filed suit against two tribal officials. BNSF's complaint attached all of the key documents establishing BNSF's fee ownership of the rail corridor. BNSF pointed out that, under Supreme Court precedent, a nonmember on its own fee land has a prima facie case for federal protection from tribal taxation.

Without challenging BNSF's ownership, the defendant-tribal officials moved to dismiss. The district court denied the motion, finding no tribal immunity with respect to a claim for prospective relief, no obligation to exhaust in tribal court, and a properly stated federal claim. The district court did not enter judgment, preclude discovery, or indicate a final determination of the merits. The tribal officials then pursued this interlocutory appeal.

STATEMENT OF FACTS

Because defendants challenge the denial of their motion to dismiss, the only facts available are those alleged in BNSF's complaint. Those allegations must be accepted as true and all inferences are drawn in BNSF's favor. *See Public Util. Dist. No. 1 v. Idacorp, Inc.*, 379 F.3d 641, 646 (9th Cir. 2004).

A. BNSF's Right of Way

BNSF operates a railroad on a right-of-way in Arizona that crosses the Hualapai Indian Reservation for a distance of approximately 10 miles. Compl. ¶ 10, Exs. A & B (Excerpts of Record ("ER") 3, 14-19, 26). BNSF owns the land underlying the right-of-way. Compl. ¶¶ 10-11 (ER 3). BNSF's right-of-way was obtained pursuant to an 1866 Act of Congress which allowed BNSF's predecessor to construct and maintain a railroad line across what is now the Hualapai Indian Reservation. Compl. ¶ 10 (ER 3, 14-19).

BNSF's ownership of the right-of-way was later confirmed by a stipulated agreement between its predecessor company and the Hualapai Tribe. Compl. ¶ 11 (ER 4). That agreement was approved by the Hualapai Tribal Council and confirmed by judgment of the federal district court in 1947. *See id.*; *see also* Exhibit B to Complaint, Judgment (ER 21-29). By virtue of this agreement and the 1947 district court judgment, BNSF owns all title to the right-of-way, free from all claims by the Tribe. Compl. ¶ 12 (ER 5). This Court has previously relied on the

1947 judgment to affirm the dismissal of an action by the Tribe to eject the railroad from the Reservation. (ER 5, 31-32).

B. The Tribe's Possessory Interest Tax

In December 1989, the Hualapai Tribal Council enacted a possessory interest tax ordinance. Compl. ¶ 13 (ER 5-6; 43-54). The ordinance imposes a 7% tax on the value of certain "possessory interests" within the Reservation boundaries, including interests held in fee or pursuant to an easement or right-of-way. Compl. ¶ 13 (ER 5-6; 48). Any taxpayer failing to pay the amount of tax assessed shall pay a penalty. (ER 51). The Tribe has consistently taken the position that BNSF's operations on the rights-of-way are subject to the tax. Compl. ¶ 14 (ER 6); Opening Br. 5.

The Tribe sought to enforce the tax against BNSF's predecessor railroad, and litigation ensued. (ER 40-42). In 1991, BNSF's predecessor sued in federal court to contest the Tribe's authority to apply this tax to the railroad's property interests. Compl. ¶ 15 (ER 6). The parties eventually entered into a settlement agreement pursuant to which the railroad agreed to pay a lump sum amount in lieu of any and all taxes, interest, and penalties that might otherwise have been assessed against it by the Tribe during tax years 1990 through 2001. Compl. ¶ 15 (ER 6).

Upon expiration of the agreement, the Hualapai Tribe again took steps to enforce the possessory tax against BNSF. On July 24, 2002, the tribe's finance director, defendant Wanda Easter, transmitted to BNSF the tax registration forms. Compl. ¶ 16 (ER 6-7). Ms. Easter directed BNSF to complete the forms and return them within 30 days. (*Id.*) According to the tax ordinance, "[a]ny taxpayer failing to file any report or other information required by this Ordinance when due shall be assessed a penalty of five percent (5%) of the amount of tax due, but in no event less than $50.00." (AR 51). In addition, the ordinance requires that assessed taxes must be paid under protest prior to any appeal of the valuation or assessment of the tax to the tribal Tax Protest Panel. (ER 52).

BNSF attempted to resolve this matter without resort to litigation. On August 12, 2002, BNSF notified the Tribe in a letter that it disputed the Tribe's jurisdiction to tax BNSF's operations on the right-of-way. Compl. ¶ 17 (ER 7). In support, BNSF cited numerous decisions – including a 2001 decision of the U.S. Supreme Court – holding that a Tribe cannot tax nonmember activities on fee land. (*Id.*). The parties then engaged in multiple "discussions, including a face-to-face meeting," regarding the applicability of the Tribe's tax. Compl. ¶ 18 (ER 7). The parties were unable to resolve their differences. (*Id.*).

C. The District Court Proceedings

On October 19, 2004, BNSF filed a federal complaint "seeking declaratory and injunctive relief against any and all efforts to enforce or to collect the Hualapai Tribe's Possessory Interest Tax against BNSF." Compl. ¶ 1 (ER 1). BNSF named two tribal officials as defendants – Charles Vaughn, Chairman of the Hualapai Indian Tribe, and Wanda Easter, the Finance Director of the Hualapai Indian Tribe. (ER 1). The Tribe was not named as a defendant.

BNSF alleged the requisite facts to invoke federal court jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981). That case recognized that the inherent powers of an Indian tribe, as an "independent sovereign," are limited to those necessary for tribal self-government. It established a general rule that a tribe does not have authority over the activities of a non-Indian on fee land within a reservation, with two narrow exceptions. BNSF's complaint invoked the rule in *Montana* because BNSF is a non-member operating on fee land. Compl. ¶¶ 19-20 (ER 7-8). BNSF further alleged that "[n]either of the exceptions to *Montana*'s main rule applies in this case." Compl. ¶ 21 (ER 8).

The tribal officials did not answer this complaint, but instead filed a motion to dismiss. The motion raised three separate grounds for dismissal: 1) that the suit is barred by sovereign immunity; 2) that the Possessory Interest Tax does not violate federal law; and 3) that BNSF failed to exhaust tribal remedies. (ER 56).

The tribal officials insisted the tax was "well supported by federal law" and could be lawfully enforced. (ER 58). They attempted to rely upon their own position on the merits to demonstrate that the action should be dismissed, claiming that the tribe had "no intention of enforcing taxation beyond the limits of the second *Montana* exception." (ER 60).

D. The District Court Denies The Motion To Dismiss

The district court denied the motion to dismiss after briefing, but without oral argument. (ER 95-98). First, the district court found that tribal sovereign immunity did not bar BNSF's claims against the tribal officials. (ER 96). The court noted that BNSF had brought its suit for injunctive and declaratory relief against two tribal officers responsible for enforcing and collecting the Tax, and that "suits against tribal officers for prospective relief are not barred by sovereign immunity." (ER 96).

The district court next held that BNSF had properly stated a claim for relief. (ER 96). The tribal officials did not dispute that the Possessory Interest Tax purported to tax BNSF land covered by *Montana*'s main rule. Further, BNSF had properly alleged that *Montana*'s two exceptions did not apply. (ER 96).

Finally, the district court found that there was no requirement that BNSF exhaust tribal court remedies since "exhaustion is not required where . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on

land covered by *Montana's* main rule." (ER 97). The district court noted that BNSF alleged that "[n]o express congressional grant of tribal taxation jurisdiction exists with respect to [BNSF's] land," and that the tribal officials had not argued to the contrary. (*Id.*). Further, the district court found that, by arguing that BNSF's conduct comes within the second *Montana* exception, the tribal officials had admitted that the dispute involved land covered by *Montana*, and that the only disputed issue was the applicability of the second *Montana* exception. *Id.*

The tribal officials filed this appeal on August 22, 2005. On September 28, 2005, BNSF moved this Court for summary affirmance of the portion of the district court's order denying sovereign immunity, and for dismissal of the remainder of the appeal for lack of jurisdiction. This motion was denied by the appellate commissioner without prejudice.

SUMMARY OF ARGUMENT

I. This appeal is in every sense premature. There is no final order to appeal. The legal question that the tribal officials seek to raise concerning their immunity is already settled law in this Circuit, and the factual questions as to enforcement were not properly raised or developed in the district court. Hence, there is no basis for an interlocutory appeal on immunity. The remaining issues as to the exhaustion doctrine and the merits are so distinct that they plainly do not belong before the Court at this time.

II. In any event, there is no merit in the defendants' appeal. The district court properly found that the tribal officials do not enjoy sovereign immunity from this suit, since BNSF seeks only prospective relief for a violation of federal law. Under well-established law, such suits are permitted to proceed against the officers of a tribe. The defendants' argument as to enforcement was not properly raised before the district court. Moreover, the tribal officials have attempted to enforce the challenged tax against BNSF through their words and their deeds, and there can be no dispute that this suit is ripe for determination.

III. The district court also correctly applied the Supreme Court's direction in *Strate v. A-1 Contractors*, and found that exhaustion of tribal remedies is not required where, as here, it is undisputed that the challenged tribal tax is being applied to nonmember operations on fee land and that there is no specific federal grant of tribal jurisdiction. Under *Montana v. U.S.*, there is a presumption against tribal jurisdiction in such cases; thus, no exhaustion requirement applies.

IV. Finally, the district court properly found that BNSF stated a claim for relief by alleging that the Hualapai Tax is invalid under *Montana*'s main rule limiting tribal jurisdiction over nonmember activities on fee lands, and that neither of the two exceptions to that rule apply here. The district court did not purport to reach a final determination on the validity of the tax, but merely permitted BNSF's

suit to proceed. In such circumstances, this Court should not intervene at all, or should summarily affirm the district court's order and permit the suit to proceed.

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction Over The Interlocutory Appeal

A. The Tribal Officials Do Not Meet The Stringent Requirements Of The Collateral Order Doctrine

The tribal officials do not dispute that this Court ordinarily lacks jurisdiction to consider an interlocutory appeal from the denial of a motion to dismiss. *See Credit Suisse v. U.S. Dist. Court,* 130 F.3d 1342, 1345-46 (9th Cir. 1997) ("The district court's denial of the . . . motion to dismiss is not . . . immediately reviewable."). The tribal officials contend nonetheless that this case escapes the general rule because they raise a sovereign immunity challenge that qualifies the appeal for the narrow collateral order exception. (Opening Br. 2-3).

The collateral order exception permits an immediate appeal from an interlocutory order only if the order (1) conclusively determines a disputed question, (2) resolves an important issue completely separate from the merits of an action, and (3) is effectively unreviewable on appeal from a final judgment. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The conditions for meeting the collateral order doctrine are "stringent." *Id.* at 868. This appeal does not satisfy any of these requirements.

The second requirement is not satisfied because the order below resolved no important issue. An issue is "important" under the collateral order exception if it involves a "serious and unsettled question" of law. *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (citation omitted); *In re Kemble*, 776 F.2d 802, 806 (9th Cir. 1985). Here, the district court applied settled precedent. It noted that, consistent with the principle of *Ex parte Young*, 209 U.S. 123 (1908), only tribal officials have been sued. (ER 96). Moreover, BNSF does not seek monetary damages, but relief that is prospective in nature. (ER 1). Sovereign immunity does not bar suits against tribal officials for prospective declaratory and/or injunctive relief.[1]

The tribal officials now seek to add an "enforcement" requirement to *Ex parte Young* – in their view, an actual threat of prosecution under the challenged ordinance must be shown. (Opening Br. 9, 11-14). This Court rejected the same argument in *National Audubon Society, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002). "We decline to read additional 'ripeness' or 'imminence' requirements into the *Ex Parte Young* exception to Eleventh Amendment immunity in actions for declaratory relief beyond those already imposed by a general Article III and prudential ripeness analysis." *Id.* at 847. Other courts have reached the same

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[1] *See Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050 (11th Cir. 1995).

conclusion. *See Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999) (an "imminence requirement would essentially render *Ex parte Young* a nullity"); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 330 (4th Cir. 2001) (*Young* requirement that violation of federal law be ongoing is satisfied even if threat of enforcement is not imminent). Defendants do not create a proper interlocutory appeal by raising an issue of settled immunity law.

Nor can defendants satisfy the requirements of the collateral order doctrine by raising factual issues respecting ripeness or standing. Defendants claim that "there is no actual controversy" because BNSF has "failed entirely to prove that Tribal Officials intend to take [enforcement] action against them in the future." (Opening Br. 12). This kind of "evidence sufficiency" claim is "not appealable." *Johnson v. Jones*, 515 U.S. 304, 313 (1995). The denial of an immunity claim is appealable on an interlocutory basis only "'to the extent that it turns on an issue of law.'" *Id.* at 313-14 (citation omitted). Moreover, the defendants' claims are not separate from the merits but concern the actions of the parties. *See id.* at 314-15. Finally, their claims can be examined in further proceeding in the trial court, and can be subsequently heard on appeal on a better record.

In *Ex parte Young* itself, the Court dealt with the issues of ripeness and sovereign immunity separately. It held that, if the act in question is inconsistent with the Constitution, an officer is "stripped of his official or representative

character and is subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. at 159-60. The Court then considered separately the question of whether it was necessary for the private party to engage in an actual violation of the statute – and for the private party to test its remedy at law – before invoking the Court's equity jurisdiction. *Id.* at 163. In line with this treatment, this Court has treated claims of sovereign immunity and ripeness as raising separate and distinct inquiries. For example, in *National Audubon*, this Court analyzed appellants' claim that there was not sufficiently imminent enforcement action as a justiciability issue, not an *Ex parte Young* issue. 307 F.3d at 847, 849-50.

The danger in accepting the tribal officials' characterization of the issue as one of sovereign immunity rather than ripeness is that it opens the door to interlocutory review of district court decisions every time an official of a sovereign – whether state or tribal – is named as a defendant. It would call a halt to litigation at the outset, while the defendants appeal the issue of whether they have taken enough action to warrant a federal case. Moreover, it would cause those questions to come up on appeal before an appropriate record was made. In light of these concerns, it is not surprising that other circuits have held that a district court's denial of a motion to dismiss on ripeness or standing grounds is not an appealable final order. *See Crymes v. DeKalb County*, 923 F.2d 1482, 1484-85

(11th Cir. 1991); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 829 F.2d 601, 602 (7th Cir. 1987).

In short, defendants do not satisfy any of the requirements to invoke the collateral order doctrine. The law is unambiguously clear in the circumstances presented here that there is no imminence requirement in an *Ex parte Young* action. The factual challenge to ripeness is not properly before the Court. Thus, there is no interlocutory jurisdiction.

B. There Is No Pendent Appellate Jurisdiction

Since there is no basis to consider on appeal even the first of appellants' issues, their remaining issues are clearly outside this Court's jurisdiction as well. But even if this Court were to conclude that it could consider the "continuing violation" question on some theory, it is plain that this Court does not have jurisdiction over the remainder of the tribal officials' appeal. The exception to the finality rule for collateral orders does not give this Court jurisdiction over every claim or defense addressed in the order below. Instead, the Court must be able to exercise jurisdiction over each issue independently. *E.g., Swint v. Chambers County Comm'n*, 514 U.S. 35, 49 (1995); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 670-72 (9th Cir. 2004).

The tribal officials do not provide any basis for this Court's jurisdiction over the district court's ruling on exhaustion and failure to state a claim (Br. 2-3), and

there is none. These rulings are not final orders, nor do they fall under the "collateral order" exception. *E.g., Davis v. Steekstra*, 227 F.3d 759, 762 (7th Cir. 2000) (it is "[s]o clear" that a ruling on exhaustion is not final appealable order, "that, until now, no court of appeals has been required to deal in a published opinion with a contention that rejection of an exhaustion argument is immediately appealable.").

Nor is pendent jurisdiction appropriate here. Pendent jurisdiction permits, but does not require, a court of appeals to exercise jurisdiction to review otherwise non-appealable rulings that are "inextricably intertwined with" or "necessary to ensure meaningful review of" an appealable collateral order. *E.g., Swint*, 514 U.S. at 51. "Rare is the ruling that is 'inextricably intertwined' with or 'necessary to ensure meaningful review of' decisions that are properly before us on interlocutory appeal." *Poulos*, 379 F.3d at 669. *See id.* ("Meeting *Swint*'s requirements for pendent appellate jurisdiction presents a very high bar."); *Cunningham v. Gates*, 229 F.3d 1271, 1284 (2000) ("We have consistently interpreted 'inextricably intertwined' very narrowly."), *aff'd in part and rev'd in part*, 312 F.3d 1148 (9th Cir. 2002).

Claims are "inextricably intertwined" only when either (1) the court must decide the pendent issue in order to review the claims properly raised on interlocutory appeal; or (2) resolution of the issue properly raised on interlocutory

appeal necessarily resolves the pendent issue. *Cunningham*, 229 F.3d at 1285. Here, neither proposition is true. There is no need for this Court to reach the other issues in order to decide the question of "imminence" raised in the tribal officials' immunity argument, nor does resolution of the imminence argument necessarily resolve the other two questions, dealing with the tribal court exhaustion doctrine and whether a claim has been stated. Tribal sovereign immunity is a discrete legal issue, and there is simply no overlap between it and the remaining issues presented in the tribal officials' motion to dismiss. *E.g.*, *Stewart v. Oklahoma*, 292 F.3d 1257, 1260 (10th Cir. 2002); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1190-91 (9th Cir. 2003). In fact, the Tenth Circuit has specifically held that it would not exercise pendent jurisdiction over an exhaustion of tribal remedies claim, since this claim was not "inextricably intertwined" with the immunity claim. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1200 (10th Cir. 2002).

The Supreme Court has warned that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint*, 514 U.S. at 49-50. That concern is particularly compelling here, where the supposed question of immunity on which the interlocutory appeal is predicated is not really a question of immunity at all. In these circumstances, the defendants should not be allowed to bootstrap jurisdiction for otherwise non-appealable issues.

II. The District Court Correctly Determined That Sovereign Immunity Does Not Bar This Suit

The district court correctly determined that the tribal officials are not immune from BNSF's suit. The standard of review is de novo. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989), *overruled in part*, 532 U.S. 411 (2001). However, the Court entertains only those issues preserved in the district court. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546 n.15 (9th Cir. 1991).

Defendants argue for the first time before this Court that they have not taken enforcement action against BNSF. (Opening Br. 9, 12-13). This argument was not properly raised before the district court. It was raised, vaguely at best, only in the reply brief. (ER 85). Defendants gave no written assurances that BNSF would not be taxed. BNSF never had an opportunity to present evidence demonstrating that the tribal officials have taken significant actions to enforce the Tax. The issue is therefore waived. *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995) (appellant not permitted to present burden shifting argument on appeal where it had been raised for the first time in a post-trial motion, thereby depriving appellee of opportunity to meet the proposed burden of proof); *see also Whittaker*

Corp. v. Execuair Corp., 953 F.2d 510, 515 (9th Cir. 1992); *Intercontinental Travel Mktg., Inc. v. FDIC*, 45 F.3d 1278, 1286 (9th Cir. 1994).[2]

In any event, the tribal officials' arguments regarding the applicable legal standard are unsound, as this Circuit's case law permits this suit against the tribal officers. *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000). In *Big Horn County*, as here, plaintiffs sought an injunction prohibiting tribal officials from imposing a tax on a nonmember utility's operations on a right-of-way through the reservation. This Court rejected tribal officials' sovereign immunity claims, since "suits for prospective injunctive relief are permissible against tribal officers under the *Ex [parte] Young* framework." 219 F.3d at 954.

The Supreme Court has emphasized that the standard for applying the *Ex parte Young* framework is simple: "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (citation omitted). Here, it is undisputed that each of these elements is

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[2] In their motion to dismiss, the tribal officials asserted that "the Tribe has no intention of enforcing taxation beyond the limits of the second *Montana* exception." (ER 60). Since it is clear that the parties have differing ideas regarding the application of *Montana*'s second exception, this assurance does nothing to resolve this dispute.

satisfied. BNSF's complaint alleged that the Tax, as applied to BNSF, violates federal law, that defendant Easter required BNSF to submit Tax registration forms, and that the defendants have threatened additional tax collection activities. Compl. ¶¶ 5, 16, 19 (ER 2, 6-7). BNSF seeks only declaratory and injunctive relief. Compl. ¶¶ 23-26 (ER 8-9). The district court considered BNSF's complaint in light of the governing case law and correctly found that sovereign immunity presented no bar to this suit. (ER 96).

The tribal officials' "enforcement" argument thus has no place in the sovereign immunity analysis. Instead, it is a ripeness argument but, even as such, it is meritless. In determining whether a pre-enforcement challenge is justiciable, it is sufficient that the plaintiff allege a "credible threat that the challenged provision will be invoked against" him. *LSO Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). "[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted).

BNSF's complaint clearly shows a credible threat that the challenged tax ordinance will be applied against BNSF. The Tribe sought to enforce the ordinance against BNSF's predecessor railroad. (ER 6). The complaint refers to a subsequent enforcement effort in 2002. (*Id.*) Indeed, as the tribal officials admit in

their brief, "[s]ince the enactment of this Ordinance, the Tribe has maintained that the Railroad's operations and rights-of-way are subject to its taxation provisions." (Opening Br. 5).

Moreover, had this argument been properly raised, BNSF would have had an opportunity to submit additional documents, not presently in the record, that clearly contradict the tribal officials' claims of no enforcement.[3] For example, the tribal officials state (without offering any proof) that they "have never taken any steps to enforce the ordinance," and "have given the Railroad no reason to believe that such action is being considered." (Opening Br. 12-13). To the contrary, as the complaint alleges, defendant Easter sent a set of Possessory Interest Tax registration forms to BNSF on July 24, 2002 seeking a sworn statement regarding BNSF's "possessory interests" on the Hualapai reservation, including a valuation of all property. (ER 6). Ms. Easter's cover letter transmitting these forms states "[t]hese forms are due in our office by August 12, 2002." If the Tribe did not intend to enforce the Possessory Interest Tax, there would be no reason for the collection of this information. Moreover, transmittal of these forms to BNSF upon the expiration of the parties' previous settlement agreement can hardly be

[3] If the Court would like to examine copies of any of these documents, BNSF will lodge them with the clerk.

described as the "innocuous transmittal of generic registration forms." (Opening Br. 13).

The tribal officials' enforcement actions did not stop with the transmittal of these forms. On November 15, 2002, the Tribe's attorney wrote to BNSF asserting that "federal case law clearly upholds the right of the Nation to tax in the circumstances in this case." This letter includes three pages of argument regarding the application of this law, and concludes:

> Because the railway is out of compliance with the tax that has been assessed, penalties and interest are accruing, along with additional assessments for attorney's fees. Please call us at (505) 899-7994 to advise us regarding how the railway would like to pay these assessed taxes, penalties and fees.

Since the exchange of these letters, the tribal officials have repeated their intent to tax BNSF. *See* Compl. ¶¶ 17-18 (ER 7).

The tribal officials' brief also states that "[m]ore than four years have elapsed since the Tribe informed the Railroad of any tax registration and scheduling information." (Opening Br. 13). However, on March 6, 2003, defendant Easter sent 2003 Possessory Interest Tax registration forms, including property valuation requests, to BNSF, stating that the "forms are due back on March 28, 2003." Again, on March 2, 2004, defendant Easter sent BNSF registration forms for 2004, stating that these forms "are due back into our offices by March 19, 2004. Thus, contrary to the tribal officials' assertion, the Tribe

continued to seek tax registration and detailed property information until just months before BNSF filed its complaint.

Thus, even though *Ex parte Young* and its progeny do not require a finding that enforcement was "imminent," the facts here easily satisfy that standard. BNSF properly brought suit against the defendant tribal officials.

III. The District Court Correctly Found That Exhaustion of Tribal Remedies Is Not Required

The district court correctly ruled that exhaustion of tribal remedies is not required in this case. The principle of tribal exhaustion reflects a prudential concern, not a jurisdictional bar. *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). "The decision to abstain 'involves a discretionary exercise of a court's equity powers.'" *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 964 F.2d 912, 917 (9th Cir. 1992) (*en banc*) (citation omitted).[4] The district court's refusal to require tribal exhaustion is therefore reviewed for abuse of discretion. *See id.* at 920.

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[4] Defendants cite *Ford Motor Co. v. Todecheene*, 394 F.3d 1170, 1173-74 (9th Cir. 2005), and *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990), for the proposition that the appropriate standard of review is *de novo*. (Opening Br. 16). These cases involved federal *de novo* review over whether "a tribal court properly exercised its jurisdiction[.]" *Ford Motor*, 394 F.3d at 1173; *see also FMC*, 905 F.2d at 1313. Exhaustion was not even raised in *FMC*. In *Ford Motor*, the Court found that the plaintiff had sufficiently exhausted tribal remedies. *See* 394 F.3d at 1183.

In *Strate*, the Supreme Court clarified some aspects of exhaustion doctrine that had caused confusion in the federal courts. It explained that tribal exhaustion was a principle "based on comity" and "not an unyielding requirement."[5] 520 U.S. at 449 n.7 & 453. Its traditional purpose is to permit the tribal court to give an interpretation when the challenge to tribal jurisdiction implicates *tribal* law or a treaty specific to a tribe. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). It also allows the tribal court to develop an appropriate record when the tribal court's own jurisdiction is at issue. However, when a dispute turns purely on *federal* law, the tribal court's expertise on tribal law is of less value.[6] As even defendants'

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[5] Citing *Burlington N. R.R. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), and *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991), the tribal officials suggest that exhaustion is a "mandatory" requirement. (Opening Br. at 17). However, even the *Crawford* court noted the numerous exceptions to the exhaustion requirement, noting that "the exhaustion requirement, though often described as 'mandatory,' is not in fact absolute . . . ." 947 F.2d at 1408. Moreover, the exhaustion holdings of these cases have been called into question by subsequent Supreme Court rulings emphasizing that exhaustion is a prudential doctrine subject to numerous exceptions. *E.g., Nevada v. Hicks*, 533 U.S. 353, 369 (2001); *Strate*, 520 U.S. at 453; *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 483-87 (1999).

[6] *See Burlington Northern Santa Fe RR. Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767 (9th Cir. 2003) (deciding first *Montana* exception without any tribal court exhaustion); *Clairmont v. Confederated Salish and Kootenai Tribes*, 409 F. Supp. 1161, 1162 (D. Mont. 1976) (in inverse condemnation action, court refused to require exhaustion because a "final judgment reached in the tribal structure which awarded something less than just compensation would not be binding upon a federal court").

cases acknowledge, an issue of federal law decided by a tribal court will be reviewed *de novo*. *See* note 4, *supra*.

Moreover, the Supreme Court has already held that the exhaustion principle does not apply to a dispute that clearly arises on land governed by *Montana*. In *Strate*, even though exhaustion was not at issue, the Court reached out and included a footnote specifically directing that the exhaustion doctrine would not apply to nonmembers who were on fee land or its equivalent within the reservation. 520 U.S. at 459 n.14. Nonmembers are not required to defend in tribal court "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule . . . ." *Id.* The Court has taken a broad view of *Strate*, explicitly applying its reasoning to facts even when no exception to tribal exhaustion was "technically" applicable. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). Here, no such leeway is even necessary, for it is undisputed that BNSF's activities and property are located on land owned by BNSF. Thus, *Strate* removes the exhaustion requirement.

The tribal officials argue that an exhaustion requirement is triggered by any colorable argument that one of the *Montana* exceptions applies. This argument is foreclosed by *Strate*. The *Strate* Court clarified that *Montana*'s main rule, which presumes that "Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation," applies to both the tribe's regulatory and

adjudicatory jurisdiction. 520 U.S. at 446. *Strate* held, in the context of a traffic accident, that a nonmember on *Montana* land could not be forced to litigate in tribal court unless the *Montana* criteria are satisfied. Thus, for nonmembers on their own lands, there is a presumption against compelling them to litigate in tribal court.

This holding in *Strate* also had implications for the exhaustion doctrine. To require nonmembers to go into tribal court to litigate the applicability of *Montana*'s second exception would reverse the presumption against tribal jurisdiction established in *Strate*. The Supreme Court's footnote made this explicit. When a nonmember was on federal land, there was no federal authorization for tribal control over the nonmembers' conduct. As such, the exhaustion requirement "must give way, for it would serve no purpose other than delay." *Strate*, 520 U.S. at 459 n.14. *Strate* thus assures nonmembers who are on their own land that they will not have to go to tribal court to protect their right to be free from tribal governance. To this end, since *Strate*, no court has ever required a plaintiff on *Montana* land to first go to tribal court to determine the applicability of the *Montana* exceptions.[7]

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[7] The tribal officials seek to create a factual issue for adjudication by alleging (in their motion) facts purportedly relevant to the second exception. If that were enough to send non-Indians to tribal court, the general rule in *Montana* and *Strate* would have little meaning. And if the court were to try and resolve these issues just to decide exhaustion, it would effectively be deciding the merits of

This circuit has applied *Strate* on several occasions and has consistently held that exhaustion is not required where nonmembers indisputably on *Montana* land have challenged tribal sovereignty. For example, in *Burlington Northern Railroad v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), a personal injury action was brought against the railroad for an accident occurring on the railroad's right-of-way through the Crow reservation. This court held that "[b]ecause tribal courts plainly do not have jurisdiction over this controversy pursuant to *Montana* and *Strate*, the Railroad was not required to exhaust its tribal remedies before proceeding in federal court." *Id.* at 1066. Exhaustion, the court noted, "would only delay a final judgment." *Id.* at 1065.

In *Montana Department of Transportation v. King*, 191 F.3d 1108, 1115 (9th Cir. 1999), this Court explicitly recognized that *Strate* created an additional exception to the exhaustion requirement. In that case, the tribe invoked the *Montana* exceptions, but this Court found that this did not trigger an exhaustion requirement. "[B]ecause the [tribe] has no regulatory authority to govern the State's conduct on land covered by *Montana*'s main rule, the State was not

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the case in the context of an exhaustion determination. The rule in *Strate* avoids this problem by eliminating the exhaustion requirement for any case involving *Montana*'s main rule unless there is a plain federal grant of tribal jurisdiction. Given that "an Indian tribe's jurisdiction over nonmember conduct on non-Indian fee land is extremely limited," the tribal court is very unlikely to have any jurisdiction over these cases, and an exhaustion requirement would only lead to unnecessary delay. *Big Horn County*, 219 F.3d at 949.

required to exhaust tribal remedies, whether administrative or judicial." *Id.*; *see also County of Lewis v. Allen*, 163 F.3d 509, 516 (9th Cir. 1998) (rejecting the tribe's argument that the tribal court should decide the "question of tribal court jurisdiction" under the *Montana* exceptions); *Boxx v. Long Warrior*, 265 F.3d 771, 777-78 (2001) (exhaustion not required despite tribe's invocation of the *Montana* exceptions), *amended*, 2001 U.S. App LEXIS 24917 (9th Cir. Nov. 20, 2001).

The tribal officials attempt to distinguish some of these cases on the basis that the respective courts considered the facts and found that the *Montana* exceptions did not apply. (Opening Br. 19). However, this argument only underscores the procedural infirmities of this appeal. In both *Red Wolf* and *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994), the district court had ruled on a summary judgment motion or other conclusive motion determining the applicability of the *Montana* exceptions. In contrast, this appeal involves only the allegations in BNSF's complaint, which must be accepted as true. The Hualapai tribal officials have submitted no evidence, nor has the district court had any opportunity to consider the application of the *Montana* exceptions, other than to correctly find that BNSF has properly stated a claim.

To support their argument, the tribal officials primarily rely on *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, *amended*, 197 F.3d 1031 (9th Cir. 1999).

Allstate, however, does not involve a case that was indisputably on land covered by *Montana*'s main rule; thus, the *Strate* exception does not apply. *Allstate* involved a suit against an automobile insurer stemming from a car accident on a tribal road within the Rocky Boy reservation. *Id.* at 1072. The parties disagreed as to whether the lawsuit arose on this tribal land, or at Allstate's off-reservation offices. *Id.* at 1074. This Court also noted that *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), foreclosed any argument that the suit arose wholly from the off-reservation activities. Thus, *Allstate* did not involve the tribe's authority to "govern conduct on land covered by *Montana*'s main rule." Here, by contrast, the tribal officials have not contested that BNSF's operations are on fee land.

The tribal officials also suggest that *Burlington Northern & Santa Fe Railroad v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767 (9th Cir. 2003) (*"Fort Peck"*), supports their exhaustion argument. To the contrary, the *Fort Peck* court ***refused*** to require exhaustion of tribal court remedies based merely on the tribe's assertion that *Montana*'s second exception applied. Instead, the *Fort Peck* court permitted limited discovery to proceed, and indicated that the Tribes could raise the exhaustion argument again with the district court after discovery was concluded. *Id.* at 775.

Duncan Energy, another case relied upon by the tribal officials, was implicitly overruled by *Strate*. 27 F.3d 1294. In *Duncan Energy*, the nonmember

utility argued that the exhaustion requirement does not apply to disputes involving fee lands, and the Eighth Circuit declined to adopt this view. *Id.* at 1300. *Strate* resolved this issue by holding that exhaustion is not required where (as here) the dispute involves nonmember conduct on fee land, absent a specific federal grant of tribal jurisdiction. 520 U.S. at 459 n.14.

The tribal officials attempt to avoid *Strate* by suggesting that they have submitted "copious evidence" that *Montana*'s second exception applies, and thus that the tribe has jurisdiction over BNSF and over this dispute. (Opening Br. 18). As an initial matter, the tribal officials have presented **no** evidence. They have submitted only a motion to dismiss that was devoid of any exhibits, affidavits, or other evidentiary submissions. At most, the tribal officials have made a few unsupported arguments about the effect of the railroad's operations on the reservation – allegations that BNSF disputes.

Under any circumstances, these allegations would not avoid *Strate*'s clear rule: where the dispute involves a nonmember on land governed by *Montana*'s main rule, exhaustion is not required. It is undisputed that the tax on BNSF's right-of-way purports to tax non-tribal land, and there is "no express congressional grant of tribal taxation jurisdiction" with respect to this land. Order at 3 (ER 97); Compl. ¶ 20 (ER 8). BNSF has properly alleged facts demonstrating that the tribal

courts would not have jurisdiction over this matter; thus, exhaustion is not required.

IV. The District Court Properly Found That BNSF Has Stated a Claim That the Hualapai Tax Violates Federal Law

Ignoring the procedural posture of this case, the tribal officials argue (Opening Br. 22, 24) that the district court made a "conclusive finding" that the Tribe does not have jurisdiction to impose the Tax on BNSF. While BNSF believes that this will be the ultimate outcome of this suit, the district court has not yet made any such finding. The district court had before it only the tribal officials' motion to dismiss BNSF's complaint. Applying the proper standard for a motion to dismiss, the district accepted all of the allegations in BNSF's complaint as true and found that BNSF had alleged sufficient facts to state a claim challenging tribal taxation jurisdiction. (ER 96). The district court did not reach any decision on the ultimate merits of BNSF's challenge to the Tax. On interlocutory appeal, this Court also has no cause to do so.

The only case relied upon by the tribal officials, *Fort Peck*, 323 F.3d 767, has no relevance to the denial of a motion to dismiss. (Opening Br. 23-24). In *Fort Peck*, the district court granted BNSF's motion for summary judgment and issued a permanent injunction against a tribal tax without allowing any discovery. 323 F.3d at 769. In reviewing this decision, this Court held that it was an abuse of discretion for the district court to decide the summary judgment motion before

permitting the tribes to develop the record regarding the applicability of *Montana*'s second exception. *Id.* at 774.

The district court's decision here does not run counter to *Fort Peck* in any way. The district court did not grant summary judgment, issue any injunctions, or deny any motion for discovery. The district court simply denied the tribal officials' motion to dismiss, thus permitting BNSF's suit to go forward. The tribal officials' overstatement regarding the finality of the district court's ruling must be disregarded.[8]

Since there is no basis for this Court to exercise its jurisdiction over the district court's nonfinal order, this Court should not reach the merits of the tribal officials' appeal on this issue. However, BNSF did state a claim for relief, as the district court found. BNSF alleged, and the tribal officials do not dispute, that the Tribe seeks to impose a tax on the property of BNSF, a non-Indian, located within its federally granted right-of-way or land owned in fee. Compl. ¶¶ 11-18 (ER 4-7).

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[8] The tribal officials also state that the district court's order "conclusively determined that the Hualapai Tribe 'plainly' cannot have jurisdiction over any aspect of the Railroad's operations across its land." Opening Br. 8. This is a misstatement of the district court's order, which found that exhaustion was not required because "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule." (ER 97, *citing Strate*, 520 U.S. at 459 & n.14). This statement does not address the applicability of the *Montana* exceptions.

Such a tax is "presumptively invalid." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001).

The two exceptions to this general prohibition are narrow. Under the first exception, the Tribe must demonstrate that the regulation in question is directly related to "consensual relationships" between the nonmember and the tribe, "through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. No such consensual relationships exist here, nor have defendants even alleged that this exception applies. *See also Big Horn*, 219 F.3d at 951 (a "tax on the value of property owned by a nonmember . . . [is] a tax that is not included within *Montana*'s first exception"). Second, a tribe may "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." 450 U.S. at 566. This exception is construed narrowly, *see Fort Peck*, 323 F.3d at 773, and does not extend "beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459 (citation omitted); *see also Ford Motor*, 394 F.3d 1170.

Here, BNSF properly alleged that its ownership of the right-of-way running through the reservation posed no threat to the political integrity, economic security, or health and welfare of the Tribe. While the tribal officials may dispute this

allegation, in considering the sufficiency of the complaint under Rule 12(b), all well pled allegations must be accepted as true, and the complaint must be read in the light most favorable to plaintiff BNSF. *Public Util. Dist. No. 1 v. Idacorp, Inc.*, 379 F.3d at 646. Thus, the district court properly held that BNSF had stated a claim for relief. (ER 96).

Moreover, the burden of establishing the applicability of the second *Montana* exception will fall on the tribal officials. *E.g., Atkinson*, 532 U.S. at 653 ("it is incumbent upon the Navajo nation to establish the existence of one of *Montana*'s exceptions"); *Fort Peck*, 323 F.3d at 772 ("The tax can only be permissible, consequently, if the Tribes justify it under one of the two *Montana* exceptions."). They have not submitted any evidence in this case to meet that burden. In their motion to dismiss, the tribal officials made a series of allegations regarding BNSF's purported effects on tribal lands and tribal members, but did not submit any evidence in support of their argument. Thus, the tribal officials cannot possibly have met their burden to show the applicability of the second *Montana* exception.

Indeed, in attempting to justify a tax under the second exception, defendants face a hugely difficult task. They are proceeding directly in the face of a unanimous U.S. Supreme Court decision, rendered only five years ago, holding that an Indian tribe could not tax activities of nonmembers at a hotel on fee land

within the reservation, based on the second *Montana* exception. *Atkinson*, 532 U.S. at 658-59. They also face a decision of this Court holding that a tribe could not tax an extensive right-of-way of a utility carrying high voltage electricity through a reservation. *Big Horn County*, 219 F.3d at 953. This Court there also rejected the second exception as the basis for the tribal tax.

In *Atkinson*, the Supreme Court stressed that, before the conduct of a nonmember on fee land could be subject to a tribal tax, the tribe must demonstrate that the nonmembers' conduct would "endanger the [tribe's] political integrity." *Atkinson*, 532 U.S. at 659. In particular, the Court cautioned that the second exception applies only if the tribe can demonstrate that "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." *Id.* at 657, n.12. In other words, they must show a financial "nexus" between the threats they identify and the financial burden that they seek to impose. *Fort Peck*, 323 F.3d at 774.

The tribal officials here have not attempted to show that activities of BNSF on its own lands would have a budgetary impact sufficient to justify the tax. They have presented no evidence on this point, much less evidence of a severe impact threatening the survival of the Tribe, as the Supreme Court contemplates. Plainly, their empty allegations will not justify dismissal of the complaint.

CONCLUSION

The appeal should be dismissed for lack of appellate jurisdiction, or the district court's denial of the motion to dismiss should be affirmed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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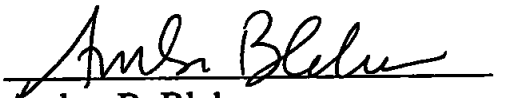
Dated: March 7, 2006

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for BNSF is unaware of any related cases.



Amber B. Blaha

Dated: March 7, 2006

CERTIFICATE OF LENGTH

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the textual portion of the foregoing brief complies with the type-volume limitations set forth in Rule 32 of the Federal Rules of Appellate Procedure, uses a proportionally spaced font (Times New Roman), has a typeface of 14 point, and contains 8,282 words, according to the word processing system used to produce the text.

Amber Blaha

Dated: March 7, 2006

CERTIFICATE OF SERVICE

I, AMBER BLAHA, an attorney for Appellee, hereby certify that on March 7, 2006, I caused two true and correct copies of the forgoing BRIEF OF APPELLEE to be served by overnight delivery upon the following:

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