No. 05-16755

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES VAUGHN, Chairman of the Hualapai Indian Tribe, a federally recognized Indian Tribe; et al., Defendants-Appellants vs. BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY Plaintiff-Appellee	No. 05-16755 (U.S. District Court No. CV-04-02227-EHC)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DEFENDANT/APPELLANTS REPLY BRIEF

Susan M. Williams
Sarah S. Works
Williams & Works, P.A.
P.O. Box 1483
Corrales, New Mexico 87048
Tel. (505) 899-7994
Fax. (505) 899-7972
Attorneys for Defendant -Appellant

No. 05-16755

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES VAUGHN, Chairman of the Hualapai Indian Tribe, a federally recognized Indian Tribe; et al., Defendants-Appellants vs. BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY Plaintiff-Appellee	No. 05-16755 (U.S. District Court No. CV-04-02227-EHC)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DEFENDANT/APPELLANTS REPLY BRIEF

Susan M. Williams
Sarah S. Works
Williams & Works, P.A.
P.O. Box 1483
Corrales, New Mexico 87048
Tel. (505) 899-7994
Fax. (505) 899-7972
Attorneys for Defendant -Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The issues raised by the Appellants ("Tribal Officials") on this interlocutory appeal clearly are reviewable, contrary to the Appellee's ("Railroad") assertions. The District Court's order constitutes a final determination that no sovereign immunity can exist in this case because the Hualapai Tribe cannot possibly possess jurisdiction over the defendant Railroad. The District Court incorrectly denied the Tribe's Motion to Dismiss by requiring an express federal statute to recognize tribal jurisdiction to tax under *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*). The Tribal Officials thus improperly were subjected to suit. Instead, the District Court should have at least conducted fair discovery before ruling on the Tribal Officials' Motion to Dismiss. The very real possibility of tribal jurisdiction under *Montana's* second exception and the Tribe's judicially - mandated right to have its forums exhausted in these circumstances was ignored completely below.

The court below erred in the foundation for its ruling, that is – that the Hualapai Tribe lacks even a "colorable" basis for jurisdiction over the railroad. The Court mistakenly ignored substantial allegations and facts which could justify the Tribe's authority under *Montana*. Circumstances such as disruption of governmental services and community events, environmental and cultural resource destruction, and the need to maintain emergency and medical services in this

remote area in the event of a railroad catastrophe were pled by the Tribe and furnished a viable basis for tribal jurisdiction under applicable case law.

The District Court mistakenly disregarded these factors in premature holding that the Tribe *per se* is barred from exercising jurisdiction over the Railroad and thus the Tribal Officials are not immune from suit here. Where, as here, a colorable claim to tribal jurisdiction exists, the District Court must stay its proceedings while Hualapai tribal remedies are properly exhausted by the Railroad. In this way, the tribal forums are given the opportunity to rule first on the Tribe's jurisdiction under federal law as required by *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (*National Farmers)*. No federal statute or decision excuses the Railroad from the obligation to present its case against the tribal tax in the tribal forums provided under tribal laws and regulations. The Railroad's turn to the federal court is unwarranted, premature and should be rejected.

ARGUMENT

I. THE TRIAL COURT'S RULINGS ON SOVEREIGN IMMUNITY, TRIBAL JURISDICTION AND EXHAUSTION ARE APPEALABLE UNDER THE COLLATERAL ORDER AND PENDENT APPELLATE JURISDICTION DOCTRINES

A. Clear Authority Establishes That the Denial of a Tribal Sovereign Immunity Claim Is An Immediately Appealable Collateral Order

The collateral order doctrine permits appeal from a small category of trial court decisions that do not end underlying litigation, but which nonetheless must be considered final. A ruling constitutes a collateral order when: (1) it conclusively determines a disputed question; (2) resolves an important issue which is separate from the merits of the case, and; (3) cannot be effectively reviewed on appeal from a final judgment. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995)(*citing Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Trial court denials of a sovereign immunity defense – even at initial pleading stages – have been found to satisfy these criteria.

The United States Supreme Court categorizes the judicial rejection of absolute or qualified immunity claims as a reviewable collateral order. In *Nixon v. Fitzgerald*, the Court declared that "orders denying claims of absolute immunity are appealable." 457 U.S. 731 (1982). Similarly, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court reasoned that preclusion of a qualified immunity defense is reviewable as a collateral order because all species of immunity (qualified or absolute) share an essential attribute of protection which is for practical purposes lost without instant appellate review: "The entitlement is an immunity from suit rather than a mere defense to liability; like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." This conclusion reflects the stolidly held juridical principle that immunity must be correctly decided prior to,

and separate from, the underlying merits of an action in order to accord the protection any legitimacy. *Id.* 526. *See also Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-144 (1993).

The Ninth Circuit consistently echoes the Supreme Court's formulation of immunity review, treating denials of such status as immediately appealable collateral orders. It finds immediate scrutiny necessary "because the central benefit of immunity, the right not to stand trial in the first instance, is effectively lost if a case is erroneously permitted to proceed to trial." *Sofamor Danek Group v Brown*, 124 F. 3d 1179, 1182 n.2 (9th Cir. 1997).

The tribal sovereign immunity claimed and enjoyed by the Hualapai Nation and its officials is indisputably a legal guarantee against the requirement to stand trial. *Krystal Energy Company v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004), *See also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756-75 (1998).

Federal courts have found that the rejection of tribal sovereign immunity from suit warrants immediate review as a collateral order, since its primary advantage will otherwise be irretrievably lost. *See Tamiami Partners, Ltd. By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 177 F. 3d 1212, (11th Cir. 1999); *Osage Tribal Council v. United States DOL*, 187 F. 3d 1174, 1179 (10th Cir. 1999) ("Following the Supreme Court's guidance in Mitchell, we join

the Eleventh Circuit in holding that the denial of tribal immunity is an immediately appealable collateral order"). Consequently, a denial of tribal sovereign immunity is a collaterally appealable order.

B. The Trial Court's Order Conclusively Rejected Hualapai Tribal Officials' Sovereign Immunity and Is Therefore Reviewable As a Collateral Order

The trial court's order from which the present appeal arises essentially held that Hualapai Tribal Officials *have no possible claim to sovereign immunity*. This order, therefore, is entitled to collateral review.

The order declared that the Tribal Officials were incapable of adducing even a "colorable" argument that the Hualapai Tribe possesses legal jurisdiction to tax the Railroad's operations. "Plaintiff's allegation that the Tax does not constitute regulation of non-member conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe is sufficient to state a claim". (Excerpts of Record "ER"at 96). Indeed, in extreme language (which was apparently intended to obviate any potential of tribal remedy exhaustion) the District Court essentially held that tribal jurisdiction was totally out of the question. "Exhaustion is not required in this case 'because 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'". (ER 97).

The effect of this jurisdictional conclusion was to preclude with subtle finality the existence of any sovereign immunity protection in this litigation. These Tribal Officials should not be brought before the federal court to answer questions of their authority where, as here, what the Tribe is doing does not *per se* violate federal law. Federal law commands respect for tribal government and the exhaustion of tribal remedies so tribes fairly can determine their own jurisdiction first. Failure to require exhaustion here will render the tribal forums meaningless even if the Tribe in the end is determined to have jurisdiction in this case. Exhaustion under circumstances such as those in this case is precisely what is proscribed by the Supreme Court in *National Farmers*.

The Railroad's appellate submission attempts to avoid this legal flaw by positing that the underlying order does nothing but uphold the viability of the *Ex Parte Young* doctrine where a possible violation of federal law has been alleged. (Response Brief at 19). The Railroad's error is that even if federal law ultimately is determined to be violated by the tribal tax ordinance, based on the facts relevant to *Montana's* second exception presented thus far, that determination must be made first in tribal forums. Until this occurs in this case, the Tribal Officials are warranted the benefit of sovereign immunity.

C. The Trial Court's Final Determinations on Hualapai Tribal Jurisdiction and Exhaustion of Tribal Remedies Are Appealable Under Principles of Pendant Appellate Jurisdiction

Because of their intimate interrelation with the reviewable question of sovereign immunity, the trial court's final determinations on Hualapai tribal jurisdiction and exhaustion of remedies are subject to pendent jurisdiction. Pendent appellate jurisdiction refers to "the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but may be reviewed... if raised in conjunction with other issues properly before the court." *Meredith v. Oregon,* No. 01-35869, 2003 U.S. App. LEXIS 7310. The Ninth Circuit permits the effectuation of such review when otherwise non-appealable rulings are "inextricably intertwined with," or "necessary to ensure meaningful review of" an order appropriately ripe for appellate scrutiny. *Meredith v. Oregon* at *9, *10.

Questions are "inextricably intertwined" if the legal theories on which they turn:

> (a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.

Id. *14.

As articulated, *supra*, the trial court's denial of Hualapai Tribal Officials' sovereign immunity – an appealable order – and the contemporaneous refutation of any possible tribal jurisdiction over railroad operations are fundamentally linked. In the context of this controversy, the two concepts cannot even operate independently. One effectively resolves the other. The trial court's determination

that no tribal jurisdiction could colorably be advanced inescapably implicates the appealable question of sovereign immunity. Hence it is beyond dispute that the trial court's erroneous rejection of Hualapai jurisdiction may be reviewed pursuant to pendent jurisdiction.

II. THE TRIBAL OFFICIALS ARE IMMUNE FROM SUIT HERE. THE PROPER FORUM FOR CHALLENGING THE TRIBAL TAX IS IN THE TRIBAL FORUMS.

In declaring exhaustion of tribal remedies unnecessary, the trial court incorrectly relied on the ostensible justification that no "colorable" basis for tribal jurisdiction could be adduced. (ER 97). Federal law does make tribal remedy exhaustion contingent on a prima facie assertion of tribal jurisdiction. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F. 3d 21, 31 (1st Cir. 2000) ("The tribal exhaustion doctrine holds that when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims"). *See also Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) ("Congress is committed to a policy of supporting tribal self-government ... [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."). The Court below should have required exhaustion of tribal

remedies to permit full and fair discovery in the tribal system, before consideration of whether the Tribal Officials are subject to suit in the federal system because they have violated federal law.

Hualapai Tribal Officials indisputably pled the existence of jurisdiction over the Railroad based on the second *Montana* exception. (ER 58). The Officials supported their assertion with numerous factual allegations of the truly deleterious effects on tribal life which the railroad's operations generate: (i) disruption of vital social and emergency services to tribal members; (ii) environmental destruction; (iii) societal infrastructure degradation; (iv) devastation of cultural and religious resources, and even; (v) death of tribal members. (ER 59)[1]. These contentions straightforwardly establish, at a minimum, a prima facie "colorable" claim to tribal jurisdiction. The trial court's failure to consider carefully these important facts – and the real possibility of tribal jurisdiction to tax here, flies in the face of federal law and represents reversible error.

---

[1] As one example of this type of proof, Hualapai investigations in the context of yet another suit filed against it by the Railroad have revealed that the railroad runs approximately 80 high-speed trains through the tribe's most densely populated centers on a daily basis. This equates to a freight train passing along houses, schools, churches, government facilities and other institutions *once every eighteen minutes, continuously, day and night.*

Exhaustion and tribal immunity from suit must be effectuated whenever there is a facially colorable reason to believe that tribal jurisdiction over a particular matter or dispute may exist. The policy underlying this principle is profound and important in the federal system. Exhaustion strictures are based on respect for Indian nations as pre-existing sovereigns, as well as an opportunity, like other governments, for tribal governments to participate in determining the rightful bounds of their own authority within the federal legal system. Exhaustion also aids in fostering governmental cooperation, and the better definition of often complex interactions between Indian tribes and non-members. For fundamental purposes of judicial economy, federal courts should not be burdened where tribal courts are proper and available to decide disputes such as the one in this case in the first instance.

The Railroad erroneously argues under *Strate* that a colorable argument of jurisdiction under *Montana* does not trigger an exhaustion requirement. (Response Brief at 24). This argument is completely at odds with the Ninth Circuit's decision in *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1076 (9th Cir. 1999), where the Ninth Circuit held there is a colorable issue as to jurisdiction under *Montana's* first exception and ordered the district court to stay the action pending exhaustion. The case at bar is indistinguishable. Exhaustion of tribal remedies should have been ordered here because colorable *Montana* second exception claims were made by

Tribal Officials. The Ninth Circuit in *Burlington Northern Santa Fe Railroad v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F. 3d 767 (9th Cir. 2003) (*Ft. Peck)* recognized the colorability under *Montana* of the claims which exist here. Judge Gould in his concurring opinion in *Ft. Peck* stated:

> "Since *Montana* was declared the law of the land by the Supreme Court in 1981, Indian nations, non-Indians who live or do business on Indian lands, and others who interact with Indian nations have struggled to define the bounds for the consent and tribal integrity exceptions to *Montana*'s general rule restricting Indian nations' jurisdiction over non-Indians. We are not dealing with a frivolous position by the tribes, but with the line between Indian sovereignty and freedom of action of those whose lives cross Indian territory. I agree with our ruling on discovery on the second *Montana* exception, for if the trains crossing a tribe's reservation carry toxic or dangerous chemicals, nuclear waste, biological dangers, or other threats to the reservation, then the tribe has a right to know what company it keeps, and then to assess whether any taxing strategy could fairly cover the tribe's protective costs. Only on a full record can it fairly be decided whether *Montana*'s second exception can be satisfied"

Id at 776.

Because the assertion of tribal jurisdiction here is at least "plausible" federal court abstention should be required in favor of tribal forums. *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1075 (9th Cir. 1999).

The recent decision in *Progressive Northwestern Insurance Company v. Nielsen*, No. A3-01-91, 2002 U.S. Dist. LEXIS 923, is instructive regarding the exhaustion requirement after *Strate.* In an action for declaratory relief regarding tribal court jurisdiction, the court found the first question it must determine is if the defendant has made a "colorable claim" of tribal jurisdiction. *Id* at *4,*5. The *Progressive* court held that the *Strate* "exception" to exhaustion was not a new

exception but merely an extension of the first general exception to the *National Farmers* exhaustion requirement. *Id* at *13. Where several courts already have made jurisdictional rulings regarding tribal jurisdiction, as occurred in *Strate*, exhaustion would serve only to delay proceedings. *Id.* Here, it certainly is not "plain" that the Tribe lacks jurisdiction here to tax the railroad pursuant to *Montana's* second exception. It is not the case that several courts have ruled adversely to the Tribe on the jurisdictional issues relevant here, as was the case in *Strate*. No reason exists to ignore the paramount prudential and comity considerations which form the foundation of the doctrine of tribal exhaustion.

Hualapai jurisdiction over the Railroad must be explored factually and fairly; inquiry properly must begin within the tribal forums whose input is called for by federal mandate. The sovereign status of an Indian nation in our federal system must be examined in a deliberative and respectful fashion and must include the important views of the tribal courts themselves.

CONCLUSION

For all of the foregoing reasons and authority, this Court should grant the Hualapai Tribal Officials' appeal and reverse the lower court's order on sovereign immunity and remedy exhaustion. The cause then should be remanded with instructions to stay proceedings in the underlying action while relief and remedy first are pursued in the tribunals of the Hualapai Nation.

DATED: April 7, 2006

Respectfully submitted,

Susan M. Williams
Sarah S. Works

By: Susan M. Williams

Susan M. Williams
Attorneys for Defendants - Appellants

STATEMENT OF RELATED CASES

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

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief has been prepared using proportionally double-spaced 14 point typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2,967 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on

Susan M. Williams
Sarah S. Works

By: Susan M. Williams

Susan M. Williams
Attorneys for Defendants - Appellants