9th CIRCUIT COURT OF APPEALS NO. 07-15041

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VALINDA JO ELLIOT, Plaintiff/Appellant, vs. WHITE MOUNTAIN APACHE TRIBAL COURT; HONORABLE JOHN DOE TRIBAL JUDGE; AND WHITE MOUNTAIN APACHE TRIBE, Defendant/Appellee.	No. 07-15041 District Court Case No CIV 05-4240-PCT-MHM

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF ARIZONA

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The basis for the District Court's and this Court's subject matter jurisdiction is federal question jurisdiction. *See* 28 U.S.C. § 1331; *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53 (1985); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006). Venue was proper in the Arizona District Court pursuant to 28 U.S.C. § 1391 (e).

On December 7, 2006, United States District Judge Mary H. Marguia, issued an order granting the Defendant/Appellee's Motion to Dismiss the Complaint for lack of jurisdiction, which was a final order pursuant to 28 U.S.C. §§ 1292 and Federal Rule of Civil Procedure 54. (Excerpts of Record (ER)[1] 18, 19.) On December 31, 2006, Plaintiff/Appellant filed a Notice of Appeal, which was timely pursuant to Federal Rule of Appellate Procedure 4. (ER 20.) *See* Circuit Rule 28–2.2.

[1] In accordance with Circuit Rules 28–2.9 and 30–1, every assertion in the Opening Brief regarding matters in the record and necessary to the resolution of this appeal is supported by a reference to the location in the Excerpts of Record where the matter is to be found. The Excerpts of Record are in a format consistent with Circuit Rule 30–1.6 and are organized by date of filing and divided with numbered tabs corresponding to the District Court Clerk's Record Document number. The Clerk's Record is the last Excerpt and is tabbed with a CR.

ISSUE PRESENTED FOR REVIEW

Did Valinda Jo Elliot properly exhaust all available Tribal Court remedies and/or is exhaustion even required in this case where jurisdiction clearly does not exist over Ms. Elliot, a non-consenting non-Indian, in a civil suit initiated by the Tribe and arising out of her actions occurring on tribal trust land, further exhaustion would be futile, and exhaustion would only cause undue delay?

STATEMENT OF THE CASE

Plaintiff/Appellant, Valinda Jo Elliott, is a non-Indian, who has never been a member nor has she ever been eligible to be an enrolled member of any federally recognized Indian Tribe. (ER 1.)

Defendant/Appellee, the White Mountain Apache Tribe, is a federally recognized Indian Tribe and has sovereign authority over trust lands of the White Mountain Apache Tribe as set out in Executive Order. (ER 1, 5.)

The White Mountain Apache Tribal Reservation is entirely within the State of Arizona. (*Id.*) The White Mountain Apache Tribal Court serves the White Mountain Apache Tribe. (*Id.*)

Ms. Elliot is a named Defendant in a Civil Complaint filed in the White Mountain Apache Tribal Court in and for the White Mountain Apache Tribe by Alexander Ritchie, Tribal Prosecutor. (*Id.*)

The Complaint, and its amendments, set out various claims arising from or connected to actions taken by Ms. Elliott while she was lost and stranded in a wooded area of Arizona on Tribal land and during which time she set a signal fire in an effort to alert rescuers to her location and save her own life. (*Id.*) That fire grew and merged with another, ultimately causing substantial damage to property within the boundaries of the White Mountain Apache Tribe reservation as it raged out of control during the months of June and July 2002. (*Id.*)

On June 11, 2003, the White Mountain Apache Tribe, through Chief Ranger Jefferson Cheney, Sr., brought Tribal Civil Action #C-03-97 against Ms. Elliott, alleging various and numerous tribal theories for relief. (ER 5, Exhibit A.) Among the claims are allegations of violations of different Tribal codes as well as violations of the Game and Fish Code and Natural Resources Code. (*Id.*)

Ms. Elliot filed a Motion to Dismiss based on lack of jurisdiction since the Tribal Court clearly did not have civil jurisdiction over her, a non-consenting non-Indian, since neither of the two very limited exceptions contemplated under *Montana v. United States*, 450 U.S. 544, 565–566 (1981), and further discussed in *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) is applicable. (ER 1, 18.)

On December 18, 2003, the Tribal Court issued a ruling that denied Ms. Elliot's Motion to Dismiss. (ER 5, Exhibit B.) In the ruling, the Tribal Court, stated that *Montana* and *Nevada*, were satisfied and jurisdiction was proper. (*Id.*) The ruling indicated that Ms. Elliot's "conduct" on "*Nn'dee Bi-Kee Yuh*" land was sufficient to establish Tribal jurisdiction. (*Id.*) The court also relied on the fact that the "conduct" violated White Mountain Apache Law, and the Apache standard of "*C'hinl-seeh Hoz-unh*," thus supporting jurisdiction. These findings explicitly establish that the Tribal Court has based its determination of jurisdiction on a presumption that Ms. Elliot's conduct violated Tribal laws and beliefs.

Ms. Elliot immediately filed an appeal, in the White Mountain Apache Court of Appeals, which was pending for over a year. (ER 1, 5.) Then, in May of 2005, the appeal was dismissed. (ER 5, Exhibit C.) The appellate court accepted jurisdiction to review the Petition, but found that, under Tribal law, no "interlocutory appeals with regard to motions to dismiss for lack of jurisdiction" are allowed. (*Id.*) The court then noted the differences between Tribal law and the law of other jurisdictions, like Arizona, and found that the court lacked jurisdiction under Tribal law to consider the denial of the Motion to Dismiss. (*Id.*) The court, therefore, returned the matter to the Tribal Court, and lower court pre-trial proceedings continued with discovery through the Fall of 2005.

On December 27, 2005, Ms. Elliot filed a Complaint in the United States District Court for the District of Arizona seeking declaratory and injunctive relief against the Tribe in the form of an injunction against any further prosecution of the civil action in the Tribal Court due to the Tribal Court's complete lack of jurisdiction. (ER 1.) Appellee filed a Motion to Dismiss arguing that Ms. Elliot did not properly exhaust her Tribal remedies prior to initiating action in the federal court and that the Tribe clearly has jurisdiction over Ms. Elliot pursuant to *Montana v. United States*, 450 U.S. 544 (1981). (ER 5.) Ms. Elliot filed a Reply (ER 15), and on December 4, 2006, the District Court held a hearing and heard extensive oral arguments on the issues. (ER 25.)

On December 7, 2006, United States District Judge Mary H. Marguia, issued an order granting the Motion to Dismiss. (ER 18.) The Clerk's Judgment was entered that same day. (ER 19.) On December 31, 2006, Ms. Elliot filed a timely Notice of Appeal. (ER 20.)

The White Mountain Apache Tribal Court is in position to force this matter to trial, thereby threatening irreparable injury to Ms. Elliot by causing her to appear and defend at great personal and financial expense in a tribunal unknown to her and which is governed by Tribal rules and Apache "beliefs" she cannot possibly understand or defend against given her status as a non-consenting non-Indian.

There exists an actual controversy between Ms. Elliot and the Tribe within the jurisdiction of this Court, and involving the authority of Tribal Courts to exercise jurisdiction over non-consenting non-Indians for actions occurring on tribal trust lands, which controversy must be determined by a judgment of this Court. This action is Plaintiff's only means for securing timely and necessary relief from an unlawful and burdensome prosecution in an unfamiliar court.

STATEMENT OF THE FACTS

On two separate occasions, on or about June 18, 2002, Leonard Gregg an enrolled member of the White Mountain Apache Tribe and part-time firefighter, in an effort to acquire money, purposefully and criminally[2] set two forest fires. The second of the fires he set spread out of control and became known as the Rodeo fire.

In the meantime, on June 18, 2002, Ms. Elliott, with her employer, Ransford Olmstead, were driving in an unpopulated area of Arizona within the exterior boundaries of the White Mountain Apache Tribe's reservation. (ER 1, 5, 18.) Mr. Olmstead got lost and eventually ran out of fuel. (*Id.*) In an effort to attract aid, and discern their location, the two unadvisedly split up. (*Id.*) Mr. Olmstead, after being lost for one day, was discovered by Forest Rangers and taken to safety. (*Id.*) Ms. Elliott spent three days wandering lost, and without any food, water, or proper clothing to protect her from the elements. (*Id.*) Ms. Elliot was able to see a large fire (the Rodeo fire) from her location, but did not know which way to proceed to

[2] Mr. Gregg was later convicted in the United States Federal Court, District of Arizona, CR 02-00661-001-PHX-JAT, pursuant to Title 18 U.S.C. § 1855, Setting Timber Afire, a Class D Felony offense, on March 9, 2004. Mr. Gregg was sentenced to a term of one hundred and twenty (120) months in the Bureau of Prisons (sixty (60) months on Count 1 and sixty (60) months on Count 2, said counts to run consecutively with credit for time served) and three (3) years of supervised release. Mr. Gregg was ordered to pay restitution in the amount of $27,882,502.00.

safety. (*Id.*) Ms. Elliott finally spotted a local news helicopter flying in the distance. (*Id.*) Desperate to be saved, she started a small signal fire. (*Id.*) Fortunately, the helicopter pilot and passenger saw the smoke from her signal fire and descended to investigate. (*Id.*) The pilot spotted Ms. Elliott and she was rescued. (*Id.*)

During the rescue, Ms. Elliot was told that fire officials had been alerted to the presence of the signal fire. (*Id.*) However, for reasons beyond Ms. Elliott's control, the signal fire smoldered and grew out of control. The fire was labeled the Chediski fire.

The fire eventually merged with the fire set by Gregg, and the two fire's together became known as the Rodeo-Chediski fire, unarguably one of the largest and most damaging fires in Arizona history. Over the course of several weeks, the Rodeo-Chediski fire continued to burn and destroyed hundreds of thousands of acres, including large quantities of land within the boundaries of the White Mountain Apache Tribal Reservation.

SUMMARY OF THE ARGUMENT

The Federal District Court for the District of Arizona reversibly erred when it denied Ms. Elliot's request for injunctive relief. The White Mountain Apache Tribe clearly has no jurisdiction over any civil claims against Ms. Elliot, a non-consenting non-Indian, who entered tribal lands without authority and caused damage thereto. Ms. Elliot has exhausted her Tribal remedies and/or, to the extent she has not exhausted those remedies, exhaustion is not required due to the clear lack of Tribal jurisdiction under *Montana v. United States* and *Nevada v. Hicks*, and because further exhaustion would be futile and would serve only to cause undue delay. Ms. Elliot is simply not subject to civil Tribal authority absent two limited exceptions under *Montana,* and neither of those exceptions is applicable here.

Any further proceedings against Ms. Elliot in Tribal Court are contrary to law, since the White Mountain Apache Tribal Court lacks jurisdiction to hear or decide the civil case filed against Ms. Elliott. This Court must therefore reverse the District Court's order dismissing the Complaint and issue a ruling in Ms. Elliot's favor, permanently enjoining the White Mountain Apache Tribe from any further action against Ms. Elliot due to the Tribe's clear lack of jurisdiction.

ARGUMENT

Valinda Jo Elliot properly exhausted her jurisdictional claim by raising it in the Tribal Court and the appellate court, and exhaustion is not even required in this case since jurisdiction clearly does not exist and mandates that the federal courts grant her requested relief, and since exhaustion would be futile, and would only cause undue delay.

The District Court reversibly erred when it ordered Ms. Elliot's Complaint dismissed based on failure to exhaust in the Tribal Court. (ER 18.) Ms. Elliot did in fact exhaust her claim of lack of jurisdiction in the Tribal Court and she attempted to exhaust it in the appellate court. Moreover, because jurisdiction is clearly lacking in the Tribal Court, exhaustion is unnecessary and in fact contrary to the law, and any further attempt to exhaust would also be futile and only create undue delay.

This Court reviews findings of fact for clear error. *See Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006). The question of tribal jurisdiction is a federal question of law, however, that this Court reviews *de novo*. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53 (1985); *Smith*, 434 F.3d at 1130.

First, despite the District Court's ruling to the contrary, Ms. Elliot did exhaust her Tribal Court remedies (to the extent they were available) by raising the jurisdictional issue in the Tribal Court in a Motion to Dismiss and then filing an

appeal challenging the denial of that Motion. (ER 1, 5, 18.) The Tribal Court has already determined that it has jurisdiction. (ER 5, Exhibit B.) And, the two page ruling from the Tribal Court, rejecting Ms. Elliot's jurisdictional argument, establishes that all the facts the Tribal Court needed to make its jurisdictional decision were before it. (*Id.*) The court explicitly indicated that Tribal jurisdiction was appropriate based on its reading of United State's Supreme Court precedent and due to Ms. Elliot's mere "conduct" of entering the reservation "*Nn'dee Bi-Kee Yuh,*" and setting a signal fire thereon, thereby violating Tribal law and the Apache standard for personal conduct of "*C'hinl-seeh Hoz-unh.*" (ER 5, Exhibit B.) Thus, not only was the motion denied, but the Tribal Court inserted language indicating that liability was a foregone conclusion. (ER 5, Exhibit B.) Ms. Elliott then sought an interlocutory appeal, but the Tribe's code does not provide for an interlocutory appeal and the appellate court was unwilling to provide for any common law equivalent to a special action to decide the appeal. (ER 5, Exhibit C.) Thus, the tribe has had the *initial "first bite"* at the apple in determining whether or not jurisdiction under *Montana* lies with the Tribal Court.

In cases such as *Ford Motor Co. v. Todecheene,* 394 F.3d 1170, 1174 (9th Cir. 2005), where an appeal was required for exhaustion purposes, there was an interlocutory appeal available. Conversely, here, the White Mountain Apache Tribe, knowing that it is not a general jurisdiction court and despite the general rule

that it does not have jurisdiction over a non-consenting non-Indian, chose not to afford litigants like Ms. Elliot the ability to take an interlocutory appeal, based on its own set of Tribal rules. A litigant for whom jurisdiction plainly does not lie, however, should not bear the burden of the suffering under the Tribal Court's rules requiring her to defend on the merits before appealing, when, under federal law, the Tribe has no authority over her in the first instance.

Citing to *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987), and *Stock West Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (en banc), the District Court determined that "the Tribal appellate courts must be given the opportunity to entertain the merits of the jurisdiction issue." (ER 18.) This ruling goes beyond the language in *Taylor*, however, which asserts only that a tribal court is permitted to determine in the first instance whether or not it has jurisdiction. *Id.*; *see Reservation Tel. Co-op. v. Three Affiliated Tribes*, 76 F.3d 181, 184 (8th Cir. 1996) (citing *Iowa Mutual* at 15-16). Here, the Tribal Court had that first opportunity to rule on the jurisdictional issue and did in fact issue a decision explaining its understanding of Supreme Court precedent and its belief that jurisdiction was appropriate given the applicable facts. (ER 5, Exhibit B.) Tribal law dictates that any named litigant should be forced to endure a costly and time-

consuming trial[3] and then along with various other appellate issues re-litigate the issue of jurisdiction, but this type of exhaustion is not required under *Iowa Mutual.* All that is required under *Iowa Mutual* is that the Tribe be permitted the first opportunity to determine jurisdiction. *National Farmers Union,* 471 U.S. at 856. Such opportunity has been permitted in this case and the exhaustion doctrine is satisfied. *National Farmers,* 471 U.S. at 856.

Second, it is important to remember, that tribal exhaustion is first and foremost a prudential nonjurisdictional rule and not a jurisdictional requirement. *Strate v. A-1 Contractors,* 520 U.S. 438, 453 (1997); *Iowa Mutual,* 480 U.S. at 20, n. 14. This stems from the nature of the Tribal Court, and a quasi-comity concern. *National Farmers,* 471 U.S. at 856. Tribal Courts are not foreign countries nor are they even the equivalent of states providing sister states an opportunity to exercise jurisdiction. *Nevada,* 533 U.S. at 367. The Tribal Court here even hinted at that distinction in its ruling. (ER 5, Exhibit B.) Moreover, Tribal Courts are not courts of general jurisdiction. *Nevada,* 533 U.S. at 367–68; *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980). Instead, since Indians are allowed to make their own laws and be governed by them, *United States v. Wheeler,* 435 U.S. 313,

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[3] Any such trial would be very suspect. The tribal court has already inserted heretofore unknown and secret legal concepts that all but conclude Plaintiff's liability and any jury would be comprised of the membership of the very small White Mountain Apache tribe which was devastated by the fire.

323, federal courts should, *not must*, as a matter of comity, afford tribal courts the first opportunity to determine whether or not jurisdiction lies. In fact, in *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 2315 (2001), the Supreme Court explicitly disposed of an assertion that petitioners were required to bring their jurisdictional claims in Tribal Court before bringing them in Federal District Court. Thus, to the extent Ms. Elliot did not exhaust her remedies, exhaustion is unnecessary for these as well as several of the following reasons.

The Supreme Court has repeatedly explicitly discussed exceptions to the exhaustion requirement including, where (1) "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;" (2) "where the action is patently violative of express jurisdictional prohibitions;" (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction;" or (4) where "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule," so the exhaustion requirement "would serve no purpose other than delay." *National Farmers*, 471 U.S. at 856–57, n. 21; *Strate*, 520 U.S. at 459–60, n. 14. Here, at least three of the exceptions certainly apply and render any further exhaustion unnecessary.

First and foremost, the assertion of tribal jurisdiction over Ms. Elliot is "patently violative of express jurisdictional prohibitions" and/or "it is plain that no

federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule,[4]" as established in a long line of United States Supreme Court authority.[5] *See Nevada*, 533 U.S. 353, 358, n. 2; *National Farmers Union*, 471 U.S. 845, 855–57; *Montana*, 450 U.S. at 566; *Strate*, 520 U.S. 438, 459–60, n. 14.; *see also Smith*, 434 F.3d at 1132 (noting that the Court has never held that a tribe has jurisdiction over a non-member defendant in a civil case, regardless of whether the claims arose on Indian land). Because jurisdiction plainly does not lie with the Tribal Court, exhaustion is unnecessary.

In *Oliphant v. Suquamish Tribe*, 435 U.S. 191, (1978), the Court held that tribes lack criminal jurisdiction over non-Indians. *See also Duro v. Reina*, 495 U.S. 676, 684–85 (1990) (no criminal jurisdiction over non-member Indians). The reason this is so turns on an analysis of tribal "status" and also encompasses the fact that tribes are discrete or sovereign communities within states but outside state

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[4] It should be noted that Indian reservations are federal enclaves and that many federal laws apply there including some that do not apply elsewhere, see Indian Country Crimes Act, 18 U.S.C. § 1152. Tribal criminal jurisdiction never lies over non-Indians but rather with state or federal courts, so it is in that circumstance that a non-Indian could 'choose' to do something and be assured that they would not see the inside of a tribal court. See *Oliphant v. Suquamish*, 435 U.S. 191 (1978). Of course they could be prosecuted in state or federal court.

[5] Additionally, an act of Congress that specifically grants jurisdiction over non-Indians would suffice, but the Tribe has not alleged any federal laws that would provide such authority.

law, so that their laws do not necessarily provide adequate protections to non-Indians.

Thereafter, in *National Farmers Union Ins. Cos. v. Crow*, the Court noted that the decision in *Oliphant* relied largely on federal preemption (which does not necessarily exist in civil situations), causing differences between the determination of criminal jurisdiction and civil jurisdiction. 471 U.S. 845, 854. The Court concluded:

> ...that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of Oliphant would require. Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers, 471 U.S. at 855–56 (footnotes omitted).

Then, in *Montana*, the Court determined that tribes do not have authority "independently to determine their external relations." *Montana*, 450 U.S. at 564. The Court further held that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. The powers retained by tribes involve self-government and relations among tribe members. *Montana*, 450 U.S. at 564. Thus, the Court found that tribes do

not have civil jurisdiction over non-Indians absent two very limited circumstances. *Id.*

The first exception allows that a tribe may exercise civil jurisdiction over a non-Indian who has entered a consensual business relationship with the tribe. *Nevada*, 533 U.S. at 371. The second exception is that a tribe may exercise civil jurisdiction over a non-Indian where the conduct of the non-member non-Indian threatens or has some direct effect on the political integrity, economic security or health or welfare of the tribe. *Id.* And in discussing the two limited exceptions to *Montana's* general rule of non-jurisdiction, the Court noted that "[w]here nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependant status of the tribes, and so cannot survive without express congressional delegation.'" *Id.*; *Nevada*, 533 U.S. at 359. In fact, in *Nevada*, the Court recognized that with one exception, it has "never held that a tribal court had jurisdiction over a nonmember defendant." 533 U.S. at 358, n. 2; *see also Smith*, 434 F.3d at 1132 (noting that the Court has never held that a tribe has jurisdiction over a non-member defendant in a civil case, regardless of whether the claims arose on Indian land).

And, in *Strate v. A-1 Contractors*, the Court noted that its precedent establishes that "absent express authorization by federal statute or treaty tribal

jurisdiction over the conduct of non-memebers exists only in limited circumstances." 520 U.S. at 445.

Thus, after *Montana* and its progeny, it is clear that the presumption is that tribes do not have jurisdiction over non-Indians unless one of the two specific exceptions contemplated by *Montana* is established. *Strate*, 520 U.S. at 456; *Nevada*, 533 U.S. at 376 (Souter, J., concurring). It is also clear that these two exceptions exist only within the context of the tribe's ability to self-govern and/or to control internal relations. *Id.* Otherwise, if the analysis is taken out of the context of the realm of self-government and management of internal relations, any activity could be broadly construed to "impact" the "economy" or "welfare" of the tribe.

Here, there has never been a consensual business relationship between Ms. Elliot and the Tribe, nor has one ever been alleged. (ER 1, 5.) Thus, as the District Court determined, the first exception to *Montana* is inapplicable. (ER 18.)

The Tribe asserts, however, that the basis of its jurisdiction is found within the second exception and involves the Tribe's inherent sovereignty. (ER 5, Exhibit B.) In truth, the Tribe is attempting to expand the *Montana* exception and create a new broader law of general civil jurisdiction in favor of the Tribe when there is not a colorable or plausible claim of jurisdiction as the law stands at this point.

The Supreme Court has provided numerous examples of what acts fall within the ambit of the second exception. The examples include adoption, *Fisher v. District Court*, 96 S.Ct. 943 (1976), suits by non-Indians against an Indian in a state court when the incident took place on a reservation, *Williams v. Lee,* 79 S.Ct. 269 (1959), and taxation, *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906) and *Thomas v. Gay* 18 S.Ct. 340 (1898). The Court has also discussed the fact that self-government implicitly means involvement in the political process. *See Williams v. Lee,* 79 S.Ct. 269 (1959). The second exception was also explicitly discussed in *Strate*, where the Court recognized that the cases referenced in *Montana* itself regarding the second exception, involved only those issues of a "question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government." 520 U.S. at 457–58. Such is clearly not at issue in this case. As discussed in *Strate*, "[u]ndoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule."

The cases cited by *Montana* as establishing this exception each raised the question whether a state or territory's exercise of authority would trench unduly on tribal self-government. This insight clarifies the second prong greatly as it is extremely unlikely that an individual non-Indian's activities could ever directly

affect the purely internal activities of a tribe with regard to self-government, because that non-Indian could not order an Indian to state court or tax the tribe in the manner a state could. No matter how much damage a trespassing non-Indian causes to the land, that action in no way touches on Tribal self-government. The second prong must be read accordingly. None of these types of issues are present in this case.

Tribal self-government is the crux of the second exception and since Ms. Elliot's case does not involve either a consensual contractual business transaction on the reservation nor Elliott's attempt to involve or disrupt membership, inheritance, adoption, government generally or taxation, jurisdiction is not established. Ms. Elliot's actions of wandering onto Tribal land and starting a signal fire form the total basis of the Tribal Court's finding of jurisdiction. (ER 5, Exhibit B.) This conduct simply cannot logically support a finding of the type of "impact" to the self-government and internal relations of the Tribe as discussed by *Montana* and its progeny. The amount of damages has no application to the analysis. There are numerous cases with facts that are arguably more severe or significant than this case that have not resulted in tribal civil jurisdiction lying over a non-Indian.[6] This Court must look instead to the cases cited in *Montana* as they

[6] See *Strate v A-1 Contractors*, 117 S.Ct. 1404 (1997) accident tort, *Wilson v. Marchington*, 127 F.3d 805, 9th Cir. (1997) accident tort, *UNC Resources v. Bennally*,

"indicate the character of the tribal interest the Court envisioned." 520 U.S. at 457–58, 117 S.Ct. at 1415. There is simply no question here that jurisdiction is appropriate. It clearly is not.

The Tribal Court looking at the mere conduct of starting a fire on reservation land, decided that such was enough to satisfy the jurisdictional requirements pursuant to *Montana*. (ER 5, Exhibit B.) The Tribal Court also recognized that *Nevada v. Hicks* was applicable, but that there were distinctions present in this case that were not present in *Nevada*. (*Id.*) Those distinctions involved the fact that Ms. Elliot's conduct "was in violation of a White Mountain Apache Tribal Law," and "*C'hinl-seeh Hoz-unh*" an Apache "standard" of "personal conduct." (*Id.*) Aside from the obvious problem of finding jurisdiction appropriate based on the fact of a violation of Tribal law and Apache standards of conduct, the court also made another incorrect step in logic. The United States Supreme Court has stated that "[t]he ownership status of land...is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Nevada*, 533 U.S. at 360. Here,

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14 F. Supp. 358 Dist. N.M. 1981) spilling of hazardous uranium waste, *Burlington Railroad v. Crow tribe*, 196 F.3d 1059, 9th Cir. (2000) train accident, *Louis v. United States*, 967 F.Supp. 456, Dist. N.M. (1997) medical negligence resulting in death in a hospital on reservation, *County of Lewis v. Allen*, 163 F.3d 509, 9th Cir. (1998) tort action involving a law enforcement officer, *Boxx v. Warrior*, 265 F.3d 771, 9th Cir. (2001) accident tort.

the Tribal Court treated that status as dispositive, when it certainly is not. In fact, the Court recognized in *Strate*, that there was a flaw in that exact argument and pointed out that the Court read its "precedent differently." 520 U.S. at 448. As the Supreme Court has noted, "[r]ead in isolation, the *Montana* rule's second exception can be misperceived." *Strate*, 520 U.S. at 459.

Precedent establishes instead that the analysis turns on Ms Elliot's status as *the defendant* in a civil action in Tribal court and *as a non-Indian* who has *not consented* to jurisdiction in that court. *See Smith*, 434 F.3d at 1131. As Justice Souter observed in his concurrence in *Nevada*, "[i]t is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact." 533 U.S. at 382 (Souter, J., concurring); *Smith*, 434 F.3d at 1131.

The Tribe asserts that, because of the damages to the land and timber, the second *Montana* exception is met as Ms. Elliot has harmed the economic security and future health and welfare of the White Mountain Apache Tribe. (ER 5, Exhibit B.) The District Court erred when it agreed with this argument and found that there was a question of jurisdiction, based on nothing more than the involvement of Tribal land. (ER 18.) The District Court distinguished *Todecheene*, based only on the "timber which the White Mountain Apache Tribe clearly have an interest in," being "at the heart of this litigation." *Id.* That significant portions of land were

damaged, however, does not alter the jurisdictional analysis. Resulting damages to tribal property alone, no matter how high, can *never* establish the second exception to *Montana* and thereby provide the Tribe with jurisdiction.

This Court has previously noted that the Supreme Court has never recognized tribal jurisdiction over a non-Indian defendant in a civil suit regardless of whether the claims arise out of activities on reservation land, but this Court has gone on to note that *its* cases "suggest that whether tribal courts may exercise jurisdiction over a nonmember defendant *may turn* on how the claims are related to tribal lands." *See Smith*, 434 F.3d at 1132 (emphasis added). Such an analysis is similar to what the Tribal Court utilized here to find jurisdiction, and is therefore inappropriate to the extent it suggests that the relationship to the land *with nothing more* could ever be dispositive, when Supreme Court precedent, as already discussed, is to the contrary.

The Supreme Court's concern has always been that non-Indians not be forced to defend themselves in unfamiliar courts for what would otherwise be an ordinary claim. *Strate*, 520 U.S. at 459; *Smith*, 434 F.3d at 1131. This is exactly the problem in this case. How can a non-Indian such as Ms. Elliot, ever defend, for example, against the unknown Apache concept of "*C'hinl-seeh Hoz-unh*" in an unfamiliar forum, and in front of a jury made up only of members of the Tribe that she has caused so much damage to? The answer is quite simply that she cannot

defend in such a forum. Added to that is the problem that the Tribal Court has apparently already presumed her liability for the civil allegations against her (based on the Apache code of conduct), and in such a court Ms. Elliot has no constitutional due process protections from these presumptions.

The Tribe seeks to unilaterally expand Supreme Court precedent and obliterate the very limited exception that would allow it to assert jurisdiction over a non-Indian. (ER 5.) But while the Tribe certainly can exclude Ms. Elliot from Tribal land (escort her off the reservation), the Tribe clearly has neither regulatory nor adjudicatory jurisdiction over Ms. Elliot. *See Williams v. Lee*, 358 U.S. at 220; *United States v. Mazurie*, 419 U.S. 544, 557 (1975). *Oliphant* and all the cases that follow explain that the Tribes cannot exercise any powers inconsistent with their status. *See Montana*, 450 U.S. at 556; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982); *Oliphant*, 435 U.S. at 191. In other words, the Tribe can make laws and rules, such as "*C'hinl-seeh Hoz-unh*" for itself and its members, but it cannot assert those laws over non-Indians, such as Ms. Elliot in a civil suit in Tribal court.

Here, it is clear that neither of the *Montana* exceptions has been met as there has never been a consensual business relationship nor did Plaintiff ever conduct an activity related to those activities set out in *Montana* which would meet the second exception and establish Tribal jurisdiction. Finally, no federal court to date has

found any additional circumstances beyond what the Supreme Court has outlined that meet the second exception to *Montana's* general rule, so the Tribal Court's assertion of jurisdiction based on not only on its interpretation of Supreme Court law, but also its assertion of Tribal law, is patently incorrect. Jurisdiction plainly does not lie with the Tribal court. This Court must grant Ms. Elliot's requested injunctive relief.

> Returning to the exhaustion doctrine, another exception to the requirement of exhaustion of tribal remedies occurs when any further attempt at exhaustion "would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union*, 471 U.S. 845, 856–57, n. 21; *Strate*, 520 U.S. 438, 459–60, n. 14. As previously discussed, Ms. Elliot tried to exhaust, but the Tribe does not recognize any interlocutory appeal right, thereby foreclosing exhaustion. In cases where there were tribal appeals, or exhaustion by tribal appeal was required, there was a mechanism in place for such an appeal. *See Todecheene*, 474 F.3d at 1183. And, where the matter involves the problem that the Tribe does not even have jurisdiction in the first place, a Tribal rule that prevents someone from questioning that jurisdiction until after enduring an entire lengthy civil proceeding at great expense, personal pain and anguish, and (given the very high profile nature of this case in Arizona)

humiliation, is completely unjustified and only serves to unduly delay. *See Strate*, 520 U.S. at 449; *Nevada*, 533 U.S. at 374.

Similarly, the last exception to the exhaustion doctrine also applies in this case. Strict adherence to the exhaustion doctrine "would serve no purpose other than delay." *National Farmers*, 471 U.S. 845, 856–57, n. 21; *Strate*, 520 U.S. 438, 459–60, n. 14. One of the purposes behind the prudential rule of tribal exhaustion is the development of the record. *Id.* The facts are not at issue, however, nor is there any need for further development of the record for purposes of deciding the jurisdictional issue. *Id.* The parties are in agreement that Ms. Elliot did in fact enter Tribal land and start the fire. Further exhaustion would only result in undue delay and waste of time and expense. As in *Nevada*, here, "adherence to the tribal exhaustion requirement...'would serve no purposes other than delay,' and is therefore unnecessary." 533 U.S. at 374.

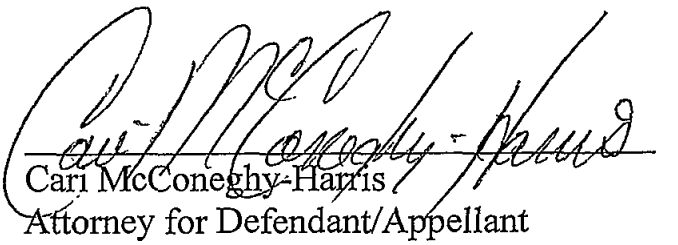
The Supreme Court has addressed exhaustion and its purpose to allow the tribal court the first opportunity to decide jurisdiction, but where the case meets even one of the exceptions discussed above, trial on the merits is not necessary. *National Farmers*, 471 U.S. 845, 856–57, n. 21; *Strate*, 520 U.S. 438, 459–60, n. 14. Here, Ms. Elliot's case meets numerous of the exhaustion exceptions, first and foremost being that the Tribe clearly has no

authority whatsoever to exercise jurisdiction over her. Accordingly, this Court must reverse the District Court order, and grant Ms. Elliot's request for injunctive relief. *See Strate*, 520 U.S. at 449 (suggesting intervention is appropriate where cause for immediate federal court action exists).

CONCLUSION

Ms. Elliot has met the exhaustion requirement to the extent it applies, and has also met at least three of the exceptions to the exhaustion requirement, all of which demands this Court reverse the District Court's ruling to the contrary. Moreover, because Tribal civil jurisdiction over Ms. Elliot clearly does not lie pursuant to *Montana* and its progeny, this Court must grant Ms. Elliot's request for permanent injunctive relief against the Tribe.

Respectfully Submitted this 14th day of January, 2008,



Cari McConeghy-Harris
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

PURSUANT TO FED.R.APP.R. 32(a)(7)(C) AND

CIRCUIT RULE 32-1 FOR CASE NUMBER 07-15041

I certify that Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionally spaced, has a typeface of 14 points or more and contains 6,127 words.

Dated: 1-14-08

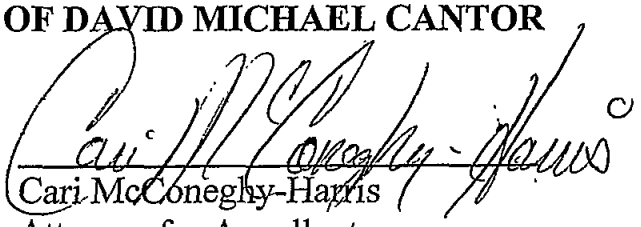
LAW OFFICES OF DAVID MICHAEL CANTOR

Cari McConeghy-Harris
Attorney for Appellant

CERTIFICATE OF MAILING

On January 14, 2008, the original and 15 copies of Appellant's Opening Brief were sent by Federal Express to the Clerk at the United States Court of Appeals, Post Office Box 193939, San Francisco, California 94119-3939. In addition, on that same date, two copies of Appellant's Opening Brief were sent by Federal Express to Alexander P. Ritchie, the Tribal Attorney assigned to this case, at his office address.

LAW OFFICES OF DAVID MICHAEL CANTOR



Cari McConeghy-Harris
Attorney for Appellant

STATEMENT OF RELATED CASES AFFIDAVIT

PURSUANT TO CIRCUIT RULE 28-2.6

I certify that in accordance with Circuit Rule 28–2.6, there are no known related cases pending in this Court.

Dated: 1/14/08

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