09-36035

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMBER LANPHERE, Individually and on behalf of others similarly situated, and PAUL MATHESON;

Plaintiffs-Appellants,

v.

CHAD WRIGHT, Puyallup Tribal Tax Department and THE PUYALLUP INDIAN TRIBE;

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NO. 09-cv-05462-BHS
THE HONORABLE BENJAMIN H. SETTLE
UNITED STATES DISTRICT COURT JUDGE

OPENING BRIEF OF APPELLANTS

ROBERT E. KOVACEVICH
Attorney for Appellants
818 W. Riverside Avenue
Suite 525
Spokane, Washington 99201
(509) 747-2104

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INTRODUCTION

This case is dependent on whether or not the general rule set forth in *Montana v. United States*, 450 U.S. 544 (1981), or its exceptions, apply to tribal jurisdiction of non-members.

Lanphere and Matheson assert this Court must apply *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001) as interpreted by *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. _____, 128 S.Ct 2709, 171 L.Ed.2d 457 (2008) and thereby reversing the District Court's ruling in this matter.

STATEMENT OF JURISDICTION

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1738, 1331, 1362 and Article III § 2 of the U.S. Constitution. Adjudicative authority over non-members by an Indian tribe is a federal question. *See e.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. ___,128 S.Ct 2709, 2716 (2008). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered an Order dismissing Plaintiff-Appellants' Complaint on October 29, 2009. A timely appeal from the Order was filed on November 19, 2009. On December 17, 2009, the Court entered a judgment of dismissal. An amended appeal was made from the judgment on January 4, 2010. The Appellants' brief was due December 30, 2009. Appellants obtained

an extension pursuant to Ninth Circuit Rule 31-2.2. Appellants' opening brief is due February 12, 2010.

STATEMENT OF ISSUES

1. Whether or not the doctrine of exhaustion of remedies required dismissal of the Amended Complaint.

2. Whether or not the exhaustion of remedies doctrine applies when the only issue is Indian tribal court personal jurisdiction of a non-tribal member.

3. Until tribal jurisdiction of a non-tribal member is established, the doctrine of sovereign immunity of an Indian tribe cannot be adjudicated.

4. Whether or not federal court jurisdiction in this case establishes denial of fundamental fairness in tribal court.

5. By entering into a cigarette tax agreement in which the State of Washington shares 30% of the tribal tax and which also calls for mediation, the Puyallup Tribe waived its sovereign immunity.

STATEMENT OF THE CASE

The Purchaser and Retailer Sought Relief from the Tribal Cigarette Tax.

Plaintiffs/Appellants, Lanphere and Matheson, sought relief against the Puyallup Tribe's cigarette tax in the Puyallup Tribal Court on October 2, 2006, Case Number PUY-CV-06-974. They contend in their Amended Complaint in the District Court that they did not receive due process or fundamental fairness in the tribal court. Amended Complaint, pages 56-58 (Excerpts of Record, hereafter "ER" 115-117). Amber Lanphere, Co-Plaintiff and Co-Appellant in this appeal asserts she has no consensual or any other legal or actual relationship with the Puyallup Tribe of Indians at page 2, 3, 4, 19, 27 and 48. The Amended Complaint, page 48, (ER 107), also alleges that the Puyallup Tribe:

> " . . .cannot tax Amber Lanphere and other non-Indian purchasers from Paul Matheson's retail store and those similarly situated as the Puyallup Tribe has no consensual relationship with Plaintiff Paul Matheson's purchasers . . .Since the incidence of tax is on the purchaser, the Puyallup Tribe has no authority to tax non-tribal enrolled Indians who do not live on the Puyallup reservation."

Procedural History in Tribal Court

The Puyallup Tribal Court Clerk's Order set motions to be heard in open court on January 28, 2009. Plaintiffs, on January 12, 2009, sent the Court a Motion in Limine to request that a special judge be assigned. Express mail tracking indicated that the motion arrived at the Court on January 13, 2009. (ER 193). It was never heard for the reason that Tribal Court Judge Francis X. Lame Bull on January 16, 2009, without contacting Lanphere and Matheson in any way, entered an Order of Dismissal based upon tribal sovereign immunity. (ER 127). Matheson and Lanphere filed a Motion for Reconsideration that was received by the clerk on January 26, 2009. It was filed on January 28, 2009. Judge Lame Bull denied the motion on February 20, 2009.

In addition to the Motion in Limine, also pending were the Tribe's Request for Hearing and Motion to Stay Discovery filed December 3, 2008, and Matheson and Lanphere's Motion to Compel Discovery filed December 11, 2008. No mention has ever been made of the Motion in Limine or the additional motions in

Judge Lame Bull's Order. Apparently, they are still pending as they have never been ruled upon. No judgment, as required by Puyallup Tribal Code 4.02.410, (Addendum A-1) was ever issued in this case. The open court notice procedure of Tribal Civil Procedure Code 4.02.180 (Addendum A-2) was not followed. Puyallup Tribal Resolution 050195 A dated January 5, 1995, (Addendum A-3) enacted a provision to ". . .add a recusal provision setting out a procedure for removing a judge for bias or prejudice." Appellants, pursuant to Tribal Judicial Code 4.03.285 (Addendum A-4) questioned impartiality but it was never ruled on.

The Tribal Court of Appeals, without notice or opportunity allowing Plaintiffs to be heard, declared in the scheduling order dated April 26, 2009, that they refused to hear all the issues raised in the Complaint and limited the argument to sovereign immunity. (ER 131). An additional issue, timely filing, was eliminated by Plaintiffs' proof of timeliness by Express Mail tracking. (ER 193).

Plaintiffs moved to recuse the appellate panel by motion filed May 28, 2009. This Motion was denied on June 29, 2009.

Plaintiffs filed their Complaint in United States Federal Court on July 29, 2009. (ER 39). It sought relief against the Tribal Court of Appeals. After this suit was filed in the United States District Court of Appeals, the action was stayed by the Tribal Court on August 6, 2009. (ER 130).

On August 13, 2009, Plaintiff filed its Amended Complaint dropping members of the Tribal Court of Appeals as parties. The Amended Complaint (ER 60) alleges that the United States District Court, citing *Burrell v. Armijo,* 456 F.3d 1159 (10th Cir. 2006) should not give comity could not be given the tribal court proceedings as due process was violated, including lack of fundamental fairness.

In a prior state court proceeding, Paul Matheson, the only Plaintiff, tried to get the Puyallup Tribe into state court to litigate his cigarette tax collection requirement but was denied. *Matheson v. Gregoire,* 139 Wash.App. 624, 161 P.3d 486 (Div. II 2007). Lanphere was not a party in the state court suit.

STATEMENT OF FACTS

Amber Lanphere, a non-Indian, non-resident of the Puyallup Indian Reservation, drove her car on public streets onto the Puyallup Indian Reservation. She bought a carton of commercially manufactured cigarettes with cash from Paul Matheson's employees at his drive through convenience store at Milton, Washington. She is not related to, and has never met, Co-Plaintiff Paul Matheson. She has never had any contact of any kind with the Puyallup Tribe or its members. She works and lived in Tacoma, Washington. After purchase, she immediately left the Puyallup Reservation.

Lanphere, the retail purchaser, was forced to pay the Puyallup tribe cigarette tax and also about four dollars more added by the wholesaler or others up the chain of distribution to pay into the Washington State Master Settlement Escrow Fund. The Fund is a result of a 1998 master settlement (MSA) by major tobacco manufacturers with 46 states including Washington. No Indian tribes were parties to the settlement. Lanphere seeks to recover

the Tribe's cigarette tax and MSA amounts she paid and also act as a putative class action plaintiff. Paul Matheson, the retailer, requests that he and his similarly situated retailers be relieved of his burden of collecting the cigarette tax and the MSA payments to the State of Washington escrow. No class action has yet been certified.

ARGUMENT

A. Standard of Review.

The District Court's Order on exhaustion of remedies is reviewed de novo. *Philip Morris USA v. King Mountain Tobacco Co.*, 569 F.3d 932, 938, fn.1 (9th Cir. 2009); *Boxx v. Long Warrior*, 265 F.3d 771, 774 (2001).

The burden of establishing tribal court jurisdiction is on the Indian tribe. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. ___, 128 S.Ct 2709, 2720 (2008).

Subject matter jurisdiction based on waiver of immunity is also reviewed de novo. *Tucson Airport Authority v. General Dynamics Corporation*, 136 F.3d 641, 644 (9th Cir. 1998); *Shnabel*

v. Lui, 302 F.3d 1023, 1029 (9th Cir. 2002).

Lack of personal jurisdiction is reviewed de novo. *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002). Rulings based on affidavits and pleadings, when jurisdiction is the issue, are construed in the light most favorable to appellants. *Metro Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064, fn. 1 (9th Cir. 1990).

B. The Exhaustion of Remedies Doctrine does not Apply to this Case.

1. The Trial Court Erred in Requiring Exhaustion when Tribal Court Jurisdiction is the Only Issue.

On the written opinion in the Scheduling Order dated April 26, 2009, (ER 131) the Puyallup Tribal Court of Appeals stated, ". . .because the trial court dismissed the Complaint based on sovereign immunity and did not hear the underlying claims, it would not be appropriate for this Court to review all issues raised in the Complaint and this Court has no intention of doing so." The Court, without allowing Matheson and Lanphere to be heard, ruled in advance of any opportunity for anyone to argue the issue in

open court. The Plaintiffs-Appellants filed a motion proving timely submissions and to argue other issues, but the motion was not ruled on. All other remedies were denied to Plaintiffs-Appellants. The only issue not ruled on in tribal court was tribal court jurisdiction based on sovereign immunity. Jurisdiction is not within the exhaustion rule. *Boxx v. Long Warrior*, 265 F.3d 771, 778 (9th Cir. 2001) holds that tribal exhaustion is not required stating, "because we conclude that the tribal court lacks jurisdiction over this claim, exhaustion is not required."

In its Order at page 4, (ER 34), the trial court stated, "Tribal authority over the activities on non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana*, *Id.* at 565-566. . ." At the same page, the Court quoted *Boozer v. Wilder*, 381 F.3d 931, 935-37 (9th Cir. 2004) the Court held, "a federal court must give the tribal court full opportunity to determine its own jurisdiction."

In its Order at pages 6 and 7 (ER 36-7), the trial court reviewed the applicable law but failed to correctly apply the case

it cited, *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). In *Strate*, *supra*, at footnote 14, the Supreme Court created an exception to exhaustion holding that the issue of tribal court jurisdiction is an exception to the exhaustion requirement. The court stated, "Therefore, when tribal court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, see *supra*, at 1410-1411, must give way, for it would serve no purpose other than delay." The Supreme Court's back reference to pages 1410-1411 underscores the now famous lines, "As to non-members, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 520 U.S. at 453. The first principle is whether the non-member has a consensual relationship with the Indian tribe. *Phillip Morris USA v. King Mountain Tobacco Co.*, 569 F.3d 932, 935 (9th Cir. 2009).

Nevada v. Hicks, 533 U.S. 353 (2001), adopts the reasoning that if the *Montana* jurisdiction is the issue, exhaustion is unnecessary. The *Hicks* Court, 533 U.S. at 369 quoted the broad

exception in *Strate*, 520 U.S. at 459-60, that non-member's conduct covered by the *Montana* rule is an exception to tribal exhaustion. *Phillip Morris v. King Mountain Tobacco Co.*, 369 F.3d 932, 941 (9th Cir. 2009) follows *Hicks* stating that the *Montana* analysis is controlling regardless of party alignment, especially when the nonmember does not consent to jurisdiction.

The court also held, *Strate*, 520 U.S. at 451-2, " . . .the *Montana* rule does not bear on tribal court adjudicatory authority in cases involving non-member defendants." The conclusion is logical. If a tribe has no jurisdiction, the non-tribal, non-resident litigant does not need to file in tribal court. Since *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. ____,128 S.Ct. 2709, 2720 (2008) a tribe has the burden of proving jurisdiction over the non-member. The tribal Defendant, if the case is exclusively in tribal court, can obtain a dismissal if there is no jurisdiction of the non-member. In *Plains Commerce*, tribal jurisdiction was raised for the first time n the U.S. Supreme Court. The court held at 128 S.Ct 2717, "If the tribal court is found to

lack such jurisdiction, any judgment as to the non-member is null and void."

Plains Commerce was repeatedly cited in Lanphere's legal authorities submitted in all three courts. The Amended Complaint, (ER 60) states:

> Civil authority over non-members, including Plaintiff Amber Lanphere is beyond the Tribe's sovereign power unless there is a specific direct consensual relationship with the person or entity who bears the burden of the tax. . . Like the non-member Indian entity in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct 2709, 2720, 171 L.Ed.2d 457 (2009). The Tribe has no regulatory or adjudicative power over Lanphere.

Montana v. United States, 450 U.S. 544 (1981) itself rejects any application of tribal sovereignty over non-members where exceptions do not exist. *Montana*, 450 U.S. at 565. The district court in this case, (ER 31) did not recognize that the tribal court could not have any pending matters when all the tribal court's rulings were void for lack of jurisdiction over Lanphere. After *Plains Commerce*, *supra*, a tribal court can have jurisdiction over one party if there is a consensual relationship but not on another

non-member if there is no tribal consensual relationship. The order of the tribal court is null and void against the non-consensual, non-member. *Water Wheel Camp Recreational Area v. LaRance*, 2009 WL 3089216 (D.Ariz 2009).

The *Montana* rule the court mentioned refers to *Montana v. United States*, 450 U.S. 554(1981) promulgated the presumption that as a general rule Indian tribes lack authority over the conduct of non-members. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. ____,128 S.Ct 2709 (2008) narrowed jurisdiction of Indian tribes even further by empathizing the liberty interests of non-members. 128 S.Ct at 2727. The Court also held that a consensual relationship, even if established by dealings, must be the direct link on nexus for jurisdiction. Consensual relationship must be the reason for jurisdiction. Occurrence in the course of the commercial transaction will not carry over to establish jurisdiction. It must be the nexus of the issue. *Plains Commerce,* 128 S.Ct at 2725. Lanphere never had any dealing with the tribe, therefore, since the Tribe had no nexus to tax, the Tribe

has no personal or subject matter jurisdiction.

Burlington Northern v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir. 2000) follows *Strate*, *supra* and clearly states the exception to the exhaustion rule that applies in the Ninth Circuit and in this case. The sole issue in *Red Wolf*, like this case, was tribal court jurisdiction. This Court initially applied the exhaustion rule in *Burlington Northern Railroad Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997). However, the case was vacated in light of *Strate, supra*. *Red Wolf*, 196 F.3d at 1062. The *Red Wolf* court reviewed the exceptions to exhaustion of remedies in tribal matters and imposed the fourth exception:

> or (4) it is plain that no federal grant provides for tribal governance of non-members' conduct on land covered by *Montana*'s main rule. See *Strate*, 520 U.S. at 459, n. 14, 117 S.Ct 1404. . . .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.

The district court in the matter before this appellate court did nt acknowledge, understand and properly apply this newer exception

to the exhaustion requirement. When properly applied, this exception mandates that there was NO requirement of exhaustion in this matter.

Phillip Morris USA v. King Mountain Tobacco Co., 569 F.3d 932, 945 (9th Cir. 2009) also holds that if a tribal court has no jurisdiction, exhaustion of remedies in tribal court serves no useful purpose and is inappropriate.

In the tribal court complaint, (ER 133), Lanphere asserted, "Lanphere has no contractual or any other type of relationship with the Puyallup Tribe of Indians." At pages 42-43 (ER 174-5), the Fifth Claim alleges that the Tribe cannot tax the non-Indian purchaser as no consensual relationship exists. The assertions contained in these paragraphs deny the *Montana* exceptions to jurisdiction.

Other circuits also follow the principle that exhaustion of remedies is not required where personal jurisdiction and the *Montana* factors are to be determined. *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006).

The Puyallup Tribal Court erred by assuming jurisdiction and dismissing on the sovereignty issue. The lower court in this case erred by relying on exhaustion when the tribal court clearly had no jurisdiction. Whether or not there is jurisdiction can be addressed at anytime. The reliance by the trial court on *Boozer v. Wilder*, 381 F.3d 931 (9th Cir. 2004) was improper, as the jurisdiction in tribal court in *Boozer*, *supra*, was conferred by the Indian Child Welfare Act, 25 U.S.C. § 1911(a) that gives exclusive jurisdiction to the tribal court. The case was improperly applied in this matter. Three Supreme Court cases, *Strate, Hicks,* and *Plains Commerce* reject tribal exhaustion when the issue was the *Montana* general rule or exceptions. The Ninth Circuit in *Red Wolf* follows the Supreme Court opinions.

C. This Court is Bound by the Ninth Circuit Court *Red Wolf* Decision.

The first case in this circuit binds all subsequent three judge panels. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) holds, "[A] later three judge panel considering a case that is

controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier adopted rule." This rule was followed in *DeMercado v. Mukasey*, 566 F.3d 810, 816 (9th Cir. 2009).

The *Strate*, *supra*, exception requires reversal here because the Puyallup Tribal Appellate Court has ruled on all other issues. Both the trial court and the appellate court refused to rule or ignored pending motions to compel the Tribe to answer interrogatories, recusal, Plaintiffs' Motion in Limine and never allowed oral arguments on anything even though the court set schedules. After limiting the issue on appeal to sovereignty, the appellate court entered a stay order in the case.

Accordingly, this Court must reverse the trial court order granting the dismissal in this matter.

D. This Appeal is also Based on the Alternate Ground of Lack of Fundamental Fairness.

Burlington Northern v. Assiniboine and Sioux Tribe of the Fort Peck Reservation, 323 F.3d 767, 770 (9th Cir. 2003), a tribal tax

case, reversed a case where failure to grant a motion to compel discovery was reversible error. It is directly applicable to this appeal.

The Ninth Circuit case of *Bird v. Glacier Electric Co-Op, Inc.*, 255 F.3d 1136, 1147 (9th Cir. 2006), denied tribal court comity where due process, and fundamental fairness were violated stating:

> We are not triers of fact. That role was assigned to the tribal court jury. But the jury's verdict was to have been rendered in a fair proceeding. In view of the closing argument, the tribal court proceeding was not fair. There is no reasoned way now to assess the competing facts presented at trial by the parties.

Id. at 1147. The Tenth Circuit in *Burrell v. Armijo*, 456 F.3d 1159, 1172 (10th Cir. 2006) held that a tribal court's failure to rule on motions and also indicating a close relationship between the tribal court and the tribe, required that the tribal court decision was not entitled to recognition.

In *Burrell*, *supra*, the non-member filed in both the tribal and United States District Court. In tribal court they filed motions to

compel discovery and motions for evidentiary hearings that were never ruled on. The complaint also alleged bias of the tribal judge in favor of the tribe who paid the judge's salary. The tribal judge did not rule on the other motions but dismissed the case on sovereign immunity of the tribe. *Burrell*, *supra*, closely parallels this case and also relies on the Ninth Circuit precedent. When the holding of *Burrell*, *supra*, is applied to the facts of this case reversal is mandatory.

All the other remedies sought by Matheson and Lanphere were ruled on by both the trial court and the Tribal Appellate Court. The Amended Complaint in this case, (ER 60) raises the issue of denial of due process in tribal court proceedings. *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997) allows a federal court appeal on denial of due process by a tribal court. The Decision denied comity because the tribal court lacked subject matter jurisdiction.

The tribal court due process cases were also cited to the trial court. A district court must follow Ninth Circuit opinions whether

it likes them or not. *Hart v. Massanari,* 266 F.3d 1155, 1170 (9th Cir. 2001). Accordingly, this Court should apply the Ninth Circuit's holdings to this case and conclude that a reversal is required.

E. The Court Erred in Finding that Amber Lanphere, a Non-Member, Non-Tribal Reservation Resident, for Purposes of Determining Tribal Jurisdiction, had Established a Consensual Relationship with the Tribe. She had Never Met Matheson and Never had any Contact in any way with the Tribe.

In its Order dismissing the Complaint, the trial court concluded:

> Further, Ms. Lanphere entered into a consensual relationship with the Tribe, or its members, in at least two ways. First, by voluntarily purchasing cigarettes from Mr. Matheson's store, she engaged in a consensual relationship with a tribal member on tribal lands. See *Strate*, 520 U.S. at 446 (setting out the "consensual relationship" exception to Montana). Second, by knowingly availing herself of the tribal court system, Ms. Lanphere, a non-member, has entered into a consensual relationship with the Tribe and is subject to the exhaustion rule.

Plaintiffs' Amended Complaint, pages 3-4, 8-9, 11-12, 13-14, 27, (ER 62-3, 67-8, 70-1, 72-3, 86) alleges facts that for purposes of this appeal are to be taken as true. The allegation of facts are

that Lanphere is a purchaser of cigarettes from a store on the Puyallup Reservation. She is a non-Puyallup Indian, non-member, non-reservation resident and has no dealings at all of any kind with the Puyallup Tribe. She has no relationship with the Tribe.

The Court also concluded that the use of the Tribal Court system established jurisdiction. The State-Tribal Compact (ER 194) states at page 2, number 4: "Agreement does not Create Third Party Beneficiaries. No Third Party Shall have any Rights or Obligations under this Agreement."

Paul Matheson, a tribal member, tried to obtain state court jurisdiction. The Tribe was dismissed. Res judicata cannot apply unless the parties are in privity of the same and there is a final judgment on the merits. *Burlington Northern Santa Fe Railroad v. Assiniboine and Sioux Tribes*, 323 F.3d 767, 770 (9th Cir. 2003). The Tribe never obtained a final decision against anyone in the state court as it was dismissed. Here, Lanphere has been dismissed by the federal court.

The *Plains Commerce* Court also noted that the tribe has no authority to regulate sales of Indian fee land. 128 S.Ct at 2721. Here the Tribe attempts to tax a non-member on commercially pre-packaged cigarettes brought onto the reservation for retail sale. Lanphere had no sales contract nor anything else with the Tribe. A sale is not a consensual relationship with Matheson because he personally never sold the goods. She gave Matheson's employee the money in cash and got the cigarettes. *Plains Commerce*, *supra*, holds that the consensual relationship between a non-member and a tribal member cannot extend to other transactions, even if they arise out of commercial dealings. 128 S.Ct at 2724. *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001) as interpreted by the Ninth Circuit case of *Philip Morris USA v. King Mountain Tobacco Co.*, 569 F.3d 932 (9th Cir. 2009) also requires that the consensual relationship be directly connected to the legal issue that must be decided.

The trial court distinguished *Philip Morris, supra,* on the basis that Ms. Lanphere entered into a consensual relationship with

Paul Matheson when she bought cigarettes. How and why the trial court made these assumptions is beyond reason and cannot be explained. Lanphere had no relationship with the Tribe who seeks to tax her. The incidence of cigarette tax is on the purchaser. *Keweenaw Bay v. Rising*, 477 F.3d 881, 890 (6th Cir. 2007). Also, filing in tribal court is not conclusive. *Philip Morris*, 569 F.3d at 943 held:

> King Mountain's argument that both Philip Morris's contacts with the tribe and the conduct complained of involve the sale of cigarettes is not unlike the tribe's argument in *Atkinson*. There, the tribe took the view that it could force a hotel owner to collect a tax, because he had a license to operate a hotel and the tax involved hotel guests. While the subject matter was loosely the same, the required relationship between the two scenarios was missing.

Phillip Morris, 569 F.3d at 942 held:

> In extending the *Montana* framework to the question of a tribal court's adjudicative jurisdiction, we hold that a tribal court has jurisdiction over a nonmember only where the claim has a nexus to the consensual relationship between the nonmember and the disputed commercial contacts with the tribe.

In *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001), the suit was brought in tribal court by the non-member hotel owner to enjoin the requirement of the tribe to collect the tax on the hotel guests. The court stated, "a non-member's consensual relationship in one area thus does not trigger tribal civil authority in another." Id. at 656. This is exactly the position of Paul Matheson in this case. The *Atkinson* Court held that the tribal court had no jurisdiction. The reason was that "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Id.* at 656. The later case of *Nevada v. Hicks*, 533 U.S. 353 (2001) quotes *Atkinson*, 533 U.S. at 360 and holds that *Montana* applies to both Indian and non-Indian land within a reservation.

Philip Morris, 569 F.3d at 942, quotes the *Atkinson* statement and also analyzes the *Atkinson* holding stating:

> In *Atkinson*, the Navajo Tribe sought to collect a hotel tax from all guests at hotels within the reservation boundaries. Although the tax would be imposed

> directly on guests, hotel owners and operators were charged with collecting it. Atkinson, a nonmember proprietor of a hotel located within the boundaries of the reservation put him in a consensual commercial relationship with the tribe. Nevertheless, this relationship was not enough to support tribal jurisdiction under the first Montana exception, because the tribe did not seek to impose the tax on activities arising out of that relationship. (Underlining Added).

When these cases are applied to the facts, there is no nexus or consensual relationship between Lanphere and the Tribe that seeks to tax her. The lack of the requisite relationship denies the Tribe the right to tax Lanphere, a peripatetic purchaser, from a non-tribal store located on the reservation. Accordingly, the district court ruling must be reversed.

F. Party Status in Litigation Does Not Supercede the *Montana* Factors.

Lanphere had exhausted her remedies. The Tribe forced her into court by mandating that Matheson charge her the tax. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct 2709, 2727 (2008) holds that applying to the tribal court for service of notice to quit is not enough consent. A notice to quit or pay rent

is a substantial lawsuit. The court also noted that the jurisdictional argument was immediately raised. Here, Lanphere raised the issue at the start of all the litigation. (ER 135).

Furthermore, Paul Matheson, a tribal member, had to bring suit in tribal court as he also was stymied in obtaining tribal jurisdiction in state court. Requiring Matheson to litigate in tribal court and Lanphere in state or federal court makes no sense and probably would have resulted in removal.

The party status is based on Justice Souter's concurrence in *Nevada v. Hicks*, 533 U.S. 353, 382 (2001). Justice Souter is no longer on the court. Lanphere never wanted to go into tribal court but had to go where the party was that tried to tax her. Even under Justice Souter's analysis, she was a non-consenting party.

In *Atkinson Trading Inc. v. Shirley*, 532 U.S. 645 (2001), the non-Indian was Plaintiff in tribal court. Justice Souter concurred but did not raise the issue of party status in tribal court. *Atkinson Trading*, 532 U.S. 645, 659 (2001). The reason is that the Indian trader license the non-member had with the Tribe was still

sufficient because the incidence of tax was on the hotel guests. The tribe was a stranger to the transaction. The court held at fn. 6, 532 U.S. at 655 as follows:

> Because the legal incidence of the tax falls directly upon the guests, not petitioner, it is unclear whether the Tribe's relationship with petitioner is at all relevant. We need not, however, decide this issue since the hotel occupancy tax exceeds the Tribe's authority even considering petitioner's contacts with the Navajo Nation.

In *Plains Commerce*, 128 S.Ct at 2729 Justice Ginsberg noted that the bank and filed a counterclaim and summary judgment motion claiming tribal court jurisdiction and "regularly filed suit in that forum." Justice Souter joined the Justice Ginsberg's concurrence in part, dissenting in part, on jurisdiction on the basis that a consensual relationship occurred. 128 S.Ct at 2727-8.

Nevada v. Hicks, 533 U.S. 353, 358, n. 2,(2001) states that *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), "without distinguishing between non-member plaintiffs and non-member defendants."

Plains Commerce, 128 S.Ct 2727 indicates that filing in tribal court is not an issue when the non-member raises the jurisdictional issue at the outset of the case.

Phillip Morris USA v. King Mountain Tobacco Co., 569 F.3d 932, 941 (9th Cir. 2009), holds that if the Plaintiff is a non-member, the *Montana* factors of jurisdiction still apply. "Notwithstanding the presence of a member defendant and non-member plaintiff, we applied *Montana*." Accordingly, the district court's order must be reversed.

G. The Trial Court Assumed Facts Contrary to the Complaint.

This case was dismissed on a Fed.R.Civ.P 12(b)(6) motion that the Complaint did not state facts sufficient to survive the motion. In construing the Complaint, the court must assume that all the factual allegations of Plaintiffs are true. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007).

The standard is whether or not the claimant is entitled to offer evidence to prove the claims. The trial court assumed a

consensual relationship contrary to the allegations of the Complaint and also assumed that the sale took place on tribal lands, a fact not yet established. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002), states that a complaint, in order to survive a motion to dismiss, only has to give "fair notice."

The trial court indicated that *Philip Morris USA v. King Mountain Tobacco Co.*, 569 F.3d 932, 941 (9th Cir. 2009) did not help Plaintiffs-Appellants, but it does. The reason is that the court in *King Mountain*, 569 F.3d at 941 states, "nor has Phillip Morris otherwise consented to tribal jurisdiction by choosing to file its infringement claims against a tribal member in tribal court." The case followed *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001), which held that a tribe's sovereign powers do not extend to taxation of a non-member merely visiting the reservation. The tax must be directly related for the tribal court to have jurisdiction.

The lack of consensual relationship is resolved in Lanphere's favor by the Supreme Court case of *Atkinson Trading Co. v. Shirley*, 532 U.S. at 656 (2001). The Supreme Court held that a non-

Indian hotel owner, who had a consensual relationship with his hotel guests nevertheless did not allow a tribal tax on the non-member guest. The reason was that the incidence of tax was on the guest. The case holds:

> *Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. . . . A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another-it is not "in for a penny, in for a Pound." E. Ravenscroft, the Canterbury Guests; Or a Bargain Broken, act v., sc. 1. The hotel occupancy tax at issue here is grounded in petitioner's relationship with its nonmember hotel guests, who can reach the Cameron Trading Post on United States Highway 89 and Arizona Highway 64, non-Indian public rights-of-way. Petitioner cannot be said to have consented to such a tax by virtue of its status as an "Indian trader.

The court in a footnote questioned whether the business owner's relationship with the Tribe was relevant since the legal incidence of the tax fell upon the patron of the hotel. *Id.* at 654, fn. 6.

Here, the cigarette tax incidence falls on Lanphere. What is crystal clear is that a patron who pays a store owner has no consensual relationship with a tribe requiring payment of a tribal

tax where the incidence is on the patron. Therefore, the tribal tax is invalid.

Cossey v. Cherokee Nation Enterprises, LLC, 212 P.3d 447, 460 (Okla 2009) applies. The case holds that entering a casino as a customer does not establish a consensual relationship with an Indian tribe casino owner. The court noted that even though the tribe had a compact with the state regarding the casino, the patron, Cossey, was not a party to it. The court held:

> Cossey entered into no consensual relationship with the Tribe "through commercial dealing, contracts, leases, or other arrangements" by entering the casino as a customer. The Compact represents a consensual relationship between the Tribe and the State, but Cossey was not a party to it. Moreover, his presence at the casino on reservation lands was not conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." See *Montana*, 450 U.S. at 566, 101 S.Ct at 1258. Neither *Montana* exception helps the Tribe in this case.

Martinez v. Martinez, 2008 WL 5262793 (W.D.Wa 2008) a district court case in Tacoma rejects exhaustion of remedies in tribal court where jurisdiction is the issue. The plaintiff was a

non-member who had brought suit before in tribal court. The court held that party status did not prevent application of the *Montana* factors.

Similarly, a tribe has no consensual relationship with a store manager of a store operated on the reservation who allegedly assaulted a trainee placed at the store by the tribe. *Dolgen Corp. Inc. v. The Mississippi Band of Chucktaw Indians*, 2008 WL 5381906 (S.D.Miss 2008).

Conclusion.

All the other remedies Matheson and Lanphere alleged in the Complaint were ruled on and therefore exhausted in the tribal forums. The sovereignty issue is an exception to exhaustion. The Trial Court's decision must be reversed and the case returned for trial.

DATED this 5th day of February 2010.

Respectfully Submitted,

s/ *Robert E. Kovacevich*
Robert E. Kovacevich
Attorney for Appellants
818 W. Riverside Avenue, Ste 525
Spokane, Washington 99201
(509) 747-2104

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel hereby certifies that, to the best of his knowledge and belief, there are no cases pending in his Court involving closely related issues.

DATED this 5th day of February 2010.

s/ *Robert E. Kovacevich*
Robert E. Kovacevich
Attorney for Appellants
818 W. Riverside Avenue, Ste 525
Spokane, Washington 99201
(509) 747-2104

BRIEF FORMAT CERTIFICATION PURSUANT TO CIRCUIT RULE 32(a)(7)

Pursuant to Fed.R.App.P. 32(a)(7), I hereby certify that the OPENING BRIEF OF APPELLANTS is: proportionateley spaced, has a typeface of 14 point or more, contains fewer than 14,000 words (opening and answering briefs).

DATED this 5th day of February, 2010.

s/ *Robert E. Kovacevich*

ROBERT E. KOVACEVICH
Attorney for Appellants
818 W. Riverside Ave, Ste 525
Spokane, Washington 99201
(509) 747-2104

CERTIFICATE OF SERVICE

I certify that two copies of Appellants' Opening Brief and Excerpts were served on Counsel for Appellee, by mailing the same by regular mail on February 5th, 2010, in a postage-paid envelope addressed as follows:

John Bell
Director of Legal Department
Puyallup Indian Tribe
3009 E. Portland Ave
Tacoma, WA 98404

Dated this 5th day of February, 2010.

s/ *Robert E. Kovacevich*
ROBERT E. KOVACEVICH
Attorney for Appellants
818 W. Riverside Avenue, Ste 525
Spokane, Washington 99201
(509) 747-2104

09-36035

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMBER LANPHERE, Individually and on behalf of others similarly situated, and PAUL MATHESON;

Plaintiffs-Appellants,

v.

CHAD WRIGHT, Puyallup Tribal Tax Department and The PUYALLUP INDIAN TRIBE;

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NO. 09-cv-05462-BHS
THE HONORABLE BENJAMIN H. SETTLE
UNITED STATES DISTRICT COURT JUDGE

ADDENDUM

4.02.340 Subpoenas

A Tribal Court Judge or the Court Clerk may issue a subpoena to compel the attendance at trial of witnesses to give testimony or to command the person to whom it is directed to produce evidence.

The Court may quash or modify a subpoena, at any time before the time specified on is face for compliance, for good cause shown and the court may condition the issuance of a subpoena upon payment of a reasonable bond to offset the affected party's costs of producing the evidence sought.

Subpoenas shall be served in the same manner as a summons and complaint or petition, except that no subpoena shall be served by publication.

Failure to comply with a subpoena may be punishable as contempt of court.

SUBCHAPTER 4. JUDGMENTS

4.02.410 Judgments

The Judge in a civil action shall issue a judgment either orally or later in writing after completion of the trial and announce the basis of the decision. The judgment shall state any relief granted to the prevailing party. It shall be reduced to writing and become final when entered in the record by the Court Clerk.

4.02.420 Default Judgment

When a party against whom a judgment is sought fails to appear, plead, or otherwise defend within the time allowed, and that is shown to the Court by a motion and affidavit or testimony, the Court may enter an order of default and, without further notice to the party in default, enter a judgment granting the relief sought in the complaint.

4.02.430 Reconsideration

No later than ten days after a judgment is final, a party may ask the judge to reconsider the judgment. The matter may be decided based upon writings without a hearing. The judge may grant reconsideration and change the judgment if one of the following is found to be true:

(1) The original judgment was reached as a result of fraud or mistake;

A-1

No service needs to be made on parties in default for failure to appear.

Every pleading, motion, or paper shall be signed by a party or his or her attorney or representative.

4.02.180 Motions

Questions regarding procedure or issues of law regarding the rights of the parties which are raised during a lawsuit and which are neither covered by this ordinance nor settled by agreement of the parties may be presented to the court in a motion.

Motions shall be made in writing or presented orally in open court. All motions which might eliminate the need for trial on all or some of the issues involved in a case shall be made at least ten days before trial.

A moving party shall serve notice to other parties of any pre-trial motions at least ten days before presenting it in Court, or such other time as the Court feels is necessary to provide the opposing party a fair opportunity to respond. When a motion is supported by a memorandum or affidavit, they shall be served on the other party with the motion.

Motions to dismiss the civil action because the Court lacks subject matter jurisdiction or because the plaintiff has not stated a basis for relief may be made at any stage of the proceedings.

4.02.190 Preliminary Relief

(1) Temporary Restraining Order:

A Judge may issue a Temporary Restraining Order prohibiting or requiring a particular action by another party without prior notice where the party seeking he order shows the Court orally or by affidavit that he or she will suffer immediate loss or potential injury unless temporary relief is granted. A temporary restraining order shall be good for not more than thirty days after notice of it is given to the party restrained unless the court orders otherwise and may be renewed for the same or a lesser period of time not more than once.

(2) Preliminary Injunction:

Following notice to all parties and an opportunity to be heard in court or through affidavits, the Court may consider entering a Preliminary Injunction, which shall remain in effect until final judgment in the case, requiring a party or parties to take or refrain from taking certain action while the case is pending. The request for a Preliminary Injunction may be granted

Puyallup Tribe of Indians

PUYALLUP TRIBAL COUNCIL
RESOLUTION NO. 050195A

WHEREAS, the Puyallup Tribe has existed since creation as the aboriginal people who are the owners and guardians of their lands and waters; and

WHEREAS, the Puyallup Tribe is an independent sovereign nation, having historically negotiated with several foreign nations, including the United States in the Medicine Creek Treaty; and

WHEREAS, the Puyallup Tribal Council is the governing body of the Puyallup Tribe in accordance with the authority of its sovereign rights as the aboriginal owners and guardians of their lands and waters, reaffirmed in the Medicine Creek Treaty, and their Constitution and By-Laws, as amended; and

WHEREAS, the Puyallup Tribal Council has the authority under Article VI, Section 1(k) of the Puyallup Tribal Constitution to provide for the administration of justice by establishing a reservation court and defining its duties and powers; and

NOW THEREFORE LET IT BE RESOLVED THAT the Puyallup Tribal Council of the Puyallup Tribe hereby approves the following amendments to the Puyallup Tribal Judicial Code:

(1) Delete Tribal elder requirement for eligibility on Judicial Administration Committee;

(2) Increase size of Judicial Administration Committee to five members with one alternate;

(3) Add staggered term appointments for Judicial Committee members;

(4) Add reasons for removal of Judicial Administration Committee members;

(5) Delete scheduling of cases and hearings from the duties of the Judicial Administration Committee;

(6) Add approval of list of persons eligible to serve as judges pro tempore to duties of the Judicial Administration Committee;

(7) Add that the Chief Judge may appoint judges pro tempore from a list of eligible persons approved by the Judicial Administration Committee;

PUYALLUP TRIBAL COUNCIL
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Page 2

(8) Add a recusal provision setting out a procedure for removing a judge for bias or prejudice;

(9) Add Rules of Appellate Procedure.

C E R T I F I C A T I O N

I, Sherry Richardson hereby certify that the above resolution was duly enacted by the Puyallup Tribal Council on the 5 day of January, 1995; a quorum being present with a vote of 4 for, 0 against, 0 abstaining.

Sherry Richardson
Tribal Council Secretary
Puyallup Tribe of Indians

ATTEST:

Roleen L. Hargrove, Chairwoman
Puyallup Tribe of Indians

4.03.270 Judges - Removal

The Tribal Council may remove a judge from her/his appointment only in cases of:

(1) Conviction of a crime involving dishonesty or moral turpitude;

(2) Disability that renders her/him unfit to serve; or

(3) Malfeasance in the conduct of judicial duties.

A judge may be removed only pursuant to the procedures set forth in section 4.03.280, below.

4.03.280 Procedure to Consider Removal of Judge

The Tribal Council shall determine whether a judge should be removed from her/his position only after the following procedures have been afforded:

(1) The judge shall be provided with a detailed written description of the charges made against her/him as the grounds of his/her proposed removal;

(2) The Judicial Administration Committee shall conduct a hearing at which it considers the charges; the Committee shall, in its discretion, giving persons with knowledge of the alleged impropriety an opportunity to present relevant information, and shall give the judge an opportunity to respond to the charges. During such response, the judge shall have a right to confront her/his accusers and other witnesses, to present witnesses, and to be represented by a spokesperson at his/her own expense;

(3) The Committee shall, after conducting the hearing, submit a written report to the Council detailing the information presented at the hearing and, by majority vote of the Committee, recommending whether the judge should be removed from her/his position;

(4) The Tribal Council, after consideration of the Committee's report, shall determine whether to remove the judge from his/her position. A judge shall be removed only upon the affirmative vote of five (5) members of the Tribal Council.

4.03.285 Bias or Prejudice of Judge

(1) Any Puyallup Tribal Court Judge shall disqualify him-

self or herself in any proceeding in which he or she has a personal bias or prejudice concerning a party, or his or her impartiality might reasonably be questioned.

(2) Whenever a party to any proceeding in Puyallup Tribal Court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or her, or in favor of any adverse party, or if his or her impartiality might reasonably be questioned, then such judge shall pass on the adequacy of the affidavit of prejudice and enter the appropriate order, either hearing the case or reassigning it to another judge.

(3) The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not more than twenty (20) days following service of the complaint in a civil action, and not more than seven (7) days following arraignment in a criminal action, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record or by the individual party if pro se, stating that it is made in good faith.

Adopted Res. #050105A (01/05/95)

4.03.290 Vacancies

In case of a vacancy in the position of Chief Judge for any reason, including but not limited to removal, resignation, death, or disability, the Tribal Council shall appoint a person to fill the position for a full six (6) year term. The Tribal Council shall make an appointment only after consideration of recommendations made by the Judicial Administration Committee.

4.03.300 Judges - Duties

Judges of the Tribal Court shall have the duty and authority to:

(1) Try cases, to the court and to a jury;

(2) Determine the meaning, interpretation, and application of the Tribal Constitution and laws and, where appropriate, other authorities;

(3) Issue subpoenas compelling the attendance of witnesses at proceedings;

(4) Issue warrants to apprehend and search warrants pursuant to the Tribe's rules governing criminal procedure;

(5) Determine the amount of bail to be posted; and