CORPORATE DISCLOSURE STATEMENT

The two appellees in this appeal are the Puyallup Tribe of Indians, a federally-recognized Indian tribal government, and a Tribal official. Neither is a corporation; neither has a parent corporation. As a result, there is no "stock" to be held in any amount by any publicly held corporation. This brief will refer to both appellees as "the Tribe."

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JURISDICTIONAL STATEMENT

The Tribe offers the following modification to the Jurisdictional Statement in Lanphere and Matheson's Opening Brief of Appellants (hereafter, "Opening Brief"). Although it is not an issue on this appeal, the district court did not reach the issue of its own jurisdiction, dismissing the case instead for Lanphere and Matheson's failure to exhaust their remedies in Puyallup Tribal Court, a basis that is "prudential" rather than "jurisdictional." ER 36-37. In the absence of such a determination, the Tribe does not agree that Lanphere and Matheson have established a basis for jurisdiction in the district court.

ISSUE PRESENTED FOR REVIEW

The only issue appropriate for review in this appeal is whether the district court appropriately dismissed the case for failure to exhaust remedies in Puyallup Tribal Court. This issue subsumes items numbered 1 and 2 in the Statement of Issues in the Opening Brief. Items 3, 4, and 5 on that list are not before this Court for reasons the Tribe will discuss in its Argument, below.

STATEMENT OF THE CASE

Amber Lanphere and Paul Matheson have appealed the district court's dismissal of their action for failure to exhaust their remedies in Puyallup Tribal Court.

Tribal Court – *Matheson v. Wright.* Lanphere and Matheson in 2006 filed suit in Puyallup Tribal Court against the Puyallup Tribe and its Cigarette Tax Administrator. ER 133. They asked the Court to invalidate a Cigarette Tax Agreement adopted in 2005 by the Tribe and the State of Washington and to rule that the Tribe cannot impose its cigarette tax on the non-Indian customer. ER 186-190. The trial level of the Tribal Court dismissed the case based on the Tribe's sovereign immunity. ER 127-129. Lanphere and Matheson appealed. The parties completed their briefing but the Tribal Court of Appeals stayed the case shortly before the scheduled oral argument. ER 130.

Federal Court – *Lanphere v. Wright.* The Tribal Court stayed their appeal because Lanphere and Matheson filed the instant case in the district court, also against the Tribe and its Cigarette Tax Administrator. ER 39. They asked the district court to invalidate the Cigarette Tax Agreement between the Tribe and the State and to rule that the Tribe cannot impose its cigarette tax on the non-Indian customer. ER 119-124. The pendency of the Tribal Court case led the district court to dismiss this case for failure to complete the Tribal Court action.

> Because there is still a pending matter before the Tribal Court of Appeals, and the Plaintiffs have failed to establish any applicable exception to requiring exhaustion of tribal remedies, the Court grants Defendants' motion to dismiss and requires Plaintiffs to exhaust their tribal remedies before proceeding in federal district court.

Order Granting Defendants' Motion to Dismiss, ER 37. 2009 WL 3617752. Lanphere and Matheson filed this appeal.

STATEMENT OF FACTS

In the Tribe's view, some of the matters set forth in the Statement of Facts in the Opening Brief are neither relevant nor germane to this appeal. The relevant facts are as follows. As noted in the Opening Brief, Paul Matheson (hereafter "Matheson" or "retailer") is the owner of a retail cigarette business licensed by the Tribe and located on trust land on the Puyallup Indian Reservation. He is an enrolled member of the Puyallup Tribe. Amber Lanphere (hereafter "Lanphere" or "customer") is a non-Indian who knowingly and intentionally came onto the Puyallup Indian Reservation in order to purchase cigarettes from Matheson's retail business.

Although not directly relevant to this appeal, it is worth noting that the two lawsuits were preceded by another nearly identical action that Matheson filed and pursued to completion in Washington state courts. *Matheson v. Gregoire*,139 Wn.App. 624, 161 P.3d 486 (2007), *review denied*, 163 Wn.2d 1020, 180 P.3d 1292 (2008), *cert. denied*, ___ U.S. ____, 129 S.Ct. 197, 172 L.Ed.2d 140 (2008).

SUMMARY OF ARGUMENT

A party challenging a tribe's or a tribal court's jurisdiction in federal court is required first to litigate the issue completely in tribal court. There are narrow exceptions to the exhaustion requirement, including cases where the challenger can show that the tribal court plainly lacks jurisdiction.

The retailer and customer fall far short of that exception because they cannot demonstrate an absence of jurisdiction. The Puyallup Tribal Court has jurisdiction because Lanphere and Matheson filed the case in that Court – they are plaintiffs in the case. As well, the Tribe has jurisdiction to impose its cigarette tax because the non-Indian customer made a knowing and intentional decision to purchase cigarettes from a Tribal member retailer's business on trust land within the Puyallup Indian Reservation. That choice constitutes a consensual relationship between the customer and a Tribal member, and the tax has a direct connection with that consensual relationship.

Although not the controlling factor in litigation, allowing appellants to avoid the exhaustion requirement in these circumstances would be inconsistent with the law as well as untenable from a policy point of view. A party would then be free to test the water in tribal courts to assess its chances of success but then, if things do not seem to be going their way, abandon that case and start over again in federal court. That approach flies directly in the face of conservation of judicial resources

as well as the policy recognized by the Supreme Court of bolstering tribal self-governance and promoting development of tribal court systems.

ARGUMENT

I. The District Court Correctly Dismissed the Case for Failure to Exhaust Tribal Court Remedies

A. Exhaustion Is Required Before a Federal Court Will Consider a Challenge to a Tribal Court's Jurisdiction

The district court followed the consistent holdings of the United States Supreme Court and of this Court when it ruled that Lanphere and Matheson are required to exhaust their remedies in Tribal Court before proceeding in federal court.[1] *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 17, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-857, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 624 (2009); *Atwood v. Fort Peck Tribal Court*, 513 F.3d 943, 948 (9th Cir. 2008); *Boozer v. Wilder*, 381 F.3d 931, 935-37 (9th Cir. 2004). A district court "has no discretion to relieve a litigant from the duty to exhaust tribal

[1] The Tribe agrees that this Court reviews de novo the issue of whether exhaustion of tribal court remedies is required before an action can be brought in federal court. *Atwood v. Fort Peck Tribal Court*, 513 F.3d 943, 946 (9th Cir. 2008).

remedies prior to proceeding in federal court." *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999), *amended*, 197 F.3d 1031 (9th Cir. 1999).

The United States Supreme Court established the exhaustion policy to bolster tribal self-governance and promote the development of tribal court systems. *Iowa Mutual, supra*, 480 U.S. at 16-17. Even when a tribe has allegedly waived its sovereign immunity, "the tribal court must have the first opportunity to address all issues within its jurisdiction ..." *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 921 (9th Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 2379, 173 L.Ed.2d 1292 (2009). Requiring exhaustion is especially important when a case "involves activities undertaken by [a] tribal government within reservation lands." *Gaming World International, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 851 (8th Cir. 2003).

The exhaustion requirement includes completion of appellate review in the tribal court of appeals; it is not satisfied merely by a ruling at the trial court level.

> At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.

Iowa Mutual Insurance Co., supra, 480 U.S. at 17; *National Farmers Union Insurance Co., supra*, 471 U.S. at 856-857.

> Under the doctrine of exhaustion of tribal court remedies, relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete.

Atwood, supra, 513 F.3d at 948; *Boozer, supra*, 381 F.3d at 935.

The rule controls here because, as the district court noted, "the same parties have presented the same issues before the Tribal Court of Appeals and that action remains unresolved in the tribal court system." ER 34. The principle applies with added vigor in this case because the retailer and the customer are plaintiffs in Puyallup Tribal Court. They were not dragged unwillingly into Tribal Court; they filed the case. They proceeded through the trial court and into the appellate court until shortly before oral argument in the Court of Appeals when they filed the instant case. Since the exhaustion requirement applies even if there is not yet pending an action in Tribal Court, *Marceau, supra*, 540 F.3d at 921, and cases there cited, it applies *a fortiori* in our circumstances: there is a case pending in Tribal Court that the retailer and customer filed then abandoned only after taking a test run through one and a half levels of that Court.

B. This Case Does Not Fall Within Any Exception to the Exhaustion Requirement

The Supreme Court has established four limited exceptions to the exhaustion requirement.[2] Lanphere and Matheson indicate that they are pursuing what they characterize as the "newer" fourth item on the list, applicable "when it is 'plain' that tribal court jurisdiction is lacking, so that the exhaustion requirement 'would serve no purpose other than delay.' " *Elliott, supra*, 566 F.3d at 847. Since that is not the case here, they do not qualify for the exception.

They rely for their argument on the test announced in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), creating a rebuttable presumption that tribes do not have jurisdiction over non-Indians. As Lanphere and Matheson acknowledge, however, that case recognized two exceptions to the presumption, the first of which is:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

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[2] Those are:

> (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay.

Elliott, supra, 566 F.3d at 847, citing *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

450 U.S. at 566. That exception applies here to establish both the Tribal Court's jurisdiction over Lanphere and Matheson's lawsuit as well as the Tribe's legislative authority to impose its cigarette tax on non-Indian customers of a Tribal member's retail business. An exception to the exhaustion requirement therefore is not available.

1. The Tribal Court Has Jurisdiction to Hear Appellants' Case

> A tribal court has jurisdiction over non-Indians who file a case in that court.
>
> The first *Montana* exception recognizes that tribes may exercise jurisdiction over nonmembers of the tribe who enter into "consensual relationships" with the tribe or its members…. We hold that a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a "consensual relationship" with the tribe within the meaning of *Montana*.

Smith v. Salish Kootenai College, 434 F.3d 1127, 1138, 1140 (9th Cir. 2006) (en banc), *cert. denied*, 547 U.S. 1209, 126 S.Ct. 2893, 165 L.Ed.2d 922 (2006).

Contrary to Lanphere and Matheson's contention, Opening Brief, pp. 27-28, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, ___ U.S. ___, 128 S.Ct 2709, 2720, 171 L.Ed.2d 459 (2008), does not hold otherwise. The Supreme Court there held that a non-Indian party does not submit to the jurisdiction of a tribal court merely by applying to that court for assistance with service of process in a separate state court lawsuit.

> Seeking the Tribal Court's aid in serving process on tribal members for a pending state-court action does not, we think, constitute consent to future litigation in the Tribal Court.

128 S.Ct. at 2727. Application for a tribal court's assistance with a routine procedural step does not constitute consent to jurisdiction for a separate, future lawsuit.

What Lanphere did here, however, was not a mere procedural step in a separate lawsuit. She filed in Puyallup Tribal Court the very lawsuit for which she now seeks to undercut that Court's jurisdiction. She did not ask the Tribal Court to assist with service of process in a separate case filed elsewhere. *Plains Commerce Bank* therefore gives her no help. This Court's holding in *Smith v. Salish Kootenai College*, *supra,* controls.

2. The Tribe Has Jurisdiction to Require Collection of its Tax

Lanphere and Matheson put heavy emphasis on their argument that the Tribe does not have authority to require collection of its cigarette tax on sales made to non-Indians. That argument fails, however, because the United States Supreme Court confirmed in 1980 and recently reaffirmed that a tribe has authority to apply precisely that tax. The very cases upon which the retailer and the customer rely underline that conclusion.

The Supreme Court addressed precisely this issue – whether tribes can assess a cigarette tax on purchases made by non-Indian customers – in *Washington*

v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 137, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

> [T]he State argues that the … Tribes have no power to impose their cigarette taxes on nontribal purchasers. We disagree. The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain ….

Id. at 152 (subject to two exceptions not relevant here). The Court reiterated in two subsequent cases that tribes have authority to tax transactions with non-Indians that take place on trust land on Indian reservations. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985).

It is true, however, that *Colville* was decided before *Montana*. It is therefore fair to ask whether *Montana* changed the principle established in *Colville*. The answer is that it did not. Lanphere's purchase of cigarettes from a business owned by a Tribal member on trust land within the Puyallup Indian Reservation is precisely the kind of commercial dealing that establishes a consensual relationship under the first *Montana* exception.

Appellants protest that there does not exist, between Lanphere and the Tribe, the direct relationship required by the Supreme Court to come within the first *Montana* exception. Opening Brief, pp. 15-16. That argument misperceives the Supreme Court's requirement and ignores controlling case law. "*Montana's* consensual relationship exception requires that the tax or regulation imposed by the

Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001). What is required, in other words, is a connection between the asserted jurisdiction and the commercial dealing the customer had with the Tribe or a Tribal member. In this case the connection is direct and straightforward – the Tribe taxes the very transaction the customer voluntarily entered into with a business owned and operated by an enrolled Tribal member.

The Supreme Court in fact has even more directly dispelled any doubt on that score. *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), points out that, "*Montana's* list of cases fitting within the first exception … indicates the type of activities the Court had in mind …" *Id*. at 457. The Court then summarized the four examples it had given in *Montana*.[3] All four are tax cases; two involve retail sales by or to non-Indians. Most telling, one of the

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[3] *Montana*'s list of cases fitting within the first exception, see 450 U.S., at 565-566, 101 S.Ct., at 1258-1259, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (C.A.8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority ... to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville*, 447 U.S., at 152-154, 100 S.Ct., at 2080-2082 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

520 U.S. at 457.

examples is *Colville*, which of course involved the very tax Lanphere and Matheson resist here. The Court summarized *Colville* by noting that,

> tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status".

Strate, *supra*, 520 U.S. at 457; see footnote 3, above.

In short, the Supreme Court made clear that the purchase of cigarettes by a non-Indian customer of a tribe or tribal member is one example of a commercial dealing that brings tribal authority within the first *Montana* exception. This Court noted the continuing validity of that analysis in *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001), *cert. denied*, 535 U.S. 1034, 122 S.Ct. 1790, 152 L.Ed.2d 649 (2002).

Lanphere and Matheson are incorrect when they assert that *Atkinson* changes the law or extinguishes the Tribe's jurisdiction. Opening Brief, pp. 24-27. That case did hold that the tribal tax involved there could not be assessed against non-Indian patrons of a hotel owned by non-Indians on fee land. The Court held that the tax was not authorized by the first *Montana* exception because the hotel guests, upon whom the tax fell, had no commercial dealings, and therefore no consensual relationship, with the Tribe; their only dealings were with the non-Indian owner of the hotel. Because "the generalized availability of tribal services" is not sufficient

to constitute a consensual relationship, the Court found the situation to be outside the first *Montana* exception. 532 U.S. at 654-655.

The Court noted the difference between the facts in *Merrion* and those in *Atkinson*.

> *Merrion*, however, was careful to note that an Indian tribe's inherent power to tax only extended to " 'transactions occurring on *trust lands* and significantly involving a tribe or its members.' " 455 U.S., at 137, 102 S.Ct. 894 (emphasis added) (quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)).

Id. at 653. That language underlines two important points. One, *Atkinson* does not change *Merrion's* holding that tribes do have authority to tax non-Indians who conduct business with tribes or tribal members on trust land. Two, *Atkinson* once again underlines the continuing validity of *Colville*, from which the Court took the language explaining tribes' authority to tax transactions on trust land. *Atkinson* as well noted the language in *Montana* quoted above giving examples of the first exception. *Id*. at 653, n.4.

Because Lanphere's purchases here took place on trust land from the business owned by Matheson, a Puyallup Tribal member, they come within the first *Montana* exception and are controlled by *Merrion* and *Colville*, not by *Atkinson*. The key difference, from the point of view of the *Montana* analysis, between *Merrion*, *Colville*, and our case on one hand versus *Atkinson* on the other is that Lanphere had commercial dealings and therefore a consensual relationship

with a Tribal member's business on trust land, whereas the hotel patrons in *Atkinson* did not. Since the first *Montana* exception includes consensual relationships with tribal members as well as those with tribes,[4] the Puyallup Tribe's cigarette tax can be collected from Lanphere. *Colville*, *Strate, Atkinson*, and *Boxx*, as well as *Montana,* all uphold that conclusion.

It is of no consequence that Lanphere and Matheson have never met or that Matheson was not behind the cash register when Lanphere shopped at his store, Opening Brief, p. 24. What establishes a consensual relationship is not personal acquaintance or presence during a transaction but "commercial dealings," the customer's voluntary act of making a purchase from a Tribal member's business. *Montana*, 450 U.S. at 565. The required nexus is not between two people but rather between "the tax or regulation imposed by the Indian tribe" and the transaction. *Atkinson*, 532 U.S. at 656.[5]

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[4] "A tribe may regulate … the activities of nonmembers who enter consensual relationships with the tribe **or its members** …" 450 U.S. at 565 (emphasis added).

[5] Contrary to appellants' assertion, Opening Brief, p. 24-25, the District Court did not simply assume that a consensual relationship existed. The Court looked at the transaction involved and reached that legal conclusion based on the undisputed facts set out in appellants' Complaint and the Tribe's response. ER 36. On the other side of that coin, the Court did not, as appellants assert, Opening Brief, p.30-31, dismiss the case "on a Fed.R.Civ.P. 12(b)(6) motion that the Complaint did not state facts sufficient to survive the motion." The Motion to Dismiss was filed instead under Rule 12(b)(1), and the dismissal was based on the failure to exhaust. But even if the Court were required to assume the truth of allegations in the Complaint, as appellants argue, the Court would not be required to adopt their proffered legal conclusion concerning the absence of a consensual relationship, as they seem to desire. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

Lanphere and Matheson's reliance on this Court's ruling in *Philip Morris USA, Inc. v. King Mountain Tobacco Co, Inc.*, 569 F.3d 932 (9th Cir. 2009) is misplaced. As they quote, this Court observed 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.

Id. at 942. As noted above, Lanphere's 'commercial contact' was with a Tribal member. That satisfies the test for a consensual relationship under *Montana* even if she had no dealings with the Tribe. Further, and as the district court described, not only are the facts in *Philip Morris* distinguishable from the instant case, a dramatic and controlling difference is that the party trying to avoid the exhaustion requirement in *Philip Morris* was the unconsenting, non-Indian party. Here the opposite is true: Lanphere, the non-Indian party, and her co-plaintiff Matheson resist exhausting their tribal court remedies but they are not the unconsenting parties; rather, they filed the lawsuit, intentionally availing themselves of the Tribal Court's jurisdiction. ER 35-36. As the district court concluded, *Philip Morris* provides no help to the plaintiffs.

C. Appellants Mischaracterize the 'Jurisdiction' Exception to the Exhaustion Requirement

Lanphere and Matheson insist in several places that all they need to show, in order to avoid the exhaustion requirement, is the presence of a jurisdiction issue.

Opening Brief, pp. 11, 12, 16, 17, 18. The Supreme Court has made very clear, however, that the exception requires quite a bit more than that. The exception is available only if it is "plain" that jurisdiction is lacking or that jurisdiction is "patently violative of an express … prohibition." *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001); *Elliott, supra*, 566 F.3d at 847. The requirement to exhaust remedies in tribal court is not eliminated simply by raising a jurisdiction issue; the resisting party must demonstrate the required level of certainty.

Footnote 14 in *Strate* does not support Lanphere and Matheson's argument. Opening Brief, pp. 11-13. Read in isolation, the language they quote sounds convincing.

> Therefore, when tribal court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement … must give way…

520 U.S. at 459, n.14. In fact, however, the Court was talking about a much more limited category of cases. The Court's language "…an action such as this one…" refers to cases where it is "plain" that neither "tribal governance" nor "adjudicatory authority" exists, as indicated by the first sentence of the footnote. (The footnote is set forth in full below.[6]) *Strate* therefore is consistent with the rule that a case

[6] FN14. When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in

escapes the exhaustion requirement only if the absence of tribal jurisdiction is "plain."

Lanphere and Matheson's interpretation of footnote 14 would overrule all the other Supreme Court cases on the subject including *Iowa Mutual*, *National Farmers*, and *Nevada v. Hicks*, something the Court explicitly did not intend to do in *Strate* as evidenced by its confirmation of those cases. Exhaustion was not an issue in *Strate*; the Court mentioned the subject only to note that *Iowa Mutual* and *National Farmers* dealt with exhaustion but did not change the underlying jurisdictional rule set forth in *Montana*. 520 U.S. at 448. *Strate* left the exhaustion cases, including the limited scope of the exceptions to that requirement, in place.

Lanphere and Matheson look unsuccessfully to several other cases for support. *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir 2006), *cert. denied*, 549 U.S. 1167, 127 S.Ct. 1132, 166 L.Ed.2d 893 (2007), Opening Brief, p. 17, did not rule on exhaustion: the party challenging the tribal court's jurisdiction had already pursued the case in that forum to conclusion. Rather, the issue was whether the

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criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 854, 105 S.Ct. 2447, 2452-2453, 85 L.Ed.2d 818 (1985). 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. Cf. *National Farmers*, 471 U.S., at 856, n. 21, 105 S.Ct., at 2454, n. 21; *supra*, at 1411, n. 7.

tribal court's order should be enforced in federal court as a matter of comity. *Id.* at 1167.

In each of the other cases appellants cite for this argument the federal court determined that it was "plain" the tribal court lacked jurisdiction, bringing the matter within the exception to the exhaustion requirement. *Boxx, supra*, 265 F.3d at 778; *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065-1066 (9th Cir. 2000), *cert. denied*, 529 U.S. 1110, 120 S.Ct. 1964, 146 L.Ed.2d 795 (2000); *Martinez v. Martinez*, ___ F.Supp.2d ____, 2008 WL 5262793 (W.D.Wash. 2008). That determination distinguishes those cases from the instant case.[7]

II. Appellants' Remaining Issues and Arguments Are Not Before the Court

A. This Case Does Not Involve Enforcement of a Tribal Court Order in Federal Court

The retailer and customer seek comfort from a number of cases holding that in some circumstances, enforcement of a tribal court order in federal court is not appropriate. That, however, was not an issue before the district court and is not an issue on this appeal. No one is seeking to enforce an order of the Puyallup Tribal Court in this case.

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[7] Neither is *Dolgen Corp v. Mississippi Band of Choctaw Indians*, ___ F.Supp.2d ___, 2008 WL 5381906 (S.D.Miss. 2008), Opening Brief, p. 34, persuasive here. A federal district court in Mississippi ruled that one of two non-Indian parties had a consensual relationship with the tribe supporting tribal court jurisdiction. One, but not the other, was therefore required to exhaust its remedy in tribal court. The case was a tort action and the non-Indian parties were defendants in tribal court, both characteristics in sharp contrast to Lanphere's case and circumstances.

Neither *Bird v. Glacier Electric Cooperative,* 255 F.3d 1136 (9th Cir. 2001), *Water Wheel Camp Recreational Area v. LaRance,* 2009 WL 3089216 (D.Ariz. 2009), nor *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074, 118 S.Ct. 1516, 140 L.Ed.2d 669 (1998) dealt with exhaustion. Each involved tribal court proceedings that had already been completed. Those cases therefore did not require or involve any ruling on the issue of exhaustion.

In each case the prevailing party sought enforcement of the tribal court order in federal court. In both *Bird* and *Wilson*, this Court ruled against such enforcement, in *Bird* because the proceedings violated the due process clause, 255 F.3d at 1152, and in *Wilson* because the tribal court did not have jurisdiction, 127 F.3d at 815. In *Water Wheel*, a district court held that enforcement of a tribal court order was appropriate as to one party, not as to another.

Wilson and *Water Wheel* did address the issue of whether a tribal court had jurisdiction under *Montana*. *Wilson* involved a tort action and therefore lacked the consensual relationship present in a commercial transaction. The district court ruling in *Water Wheel* found a consensual relationship with one non-Indian party but none as to a second party. Those cases are of no persuasive value in the instant case with its very direct relationship between the tax of which Lanphere complains and her intentional commercial dealing with a Tribal member-owned business. *Bird,* discussed below, did not involve any jurisdiction issue.

B. Alleged Due Process Violations Do Not Provide an Exception to the Exhaustion Requirement

The due process violations alleged by the retailer and the customer, Opening Brief, pp. 19-22, even if demonstrated would not provide an exception to the exhaustion requirement. They were not addressed by the district court and are not issues on this appeal. Neither of the cases upon which they rely, *Burrell v. Armijo*, *supra*, and *Bird v. Glacier Electric Cooperative*, *supra*, involved the issue of exhaustion. As indicated above, and as the retailer and customer note, Opening Brief, pp. 20 and 21, those cases dealt with the issue of whether a judgment of a tribal court should be enforced by a federal court. That is not a step or an issue present in the instant case.

Burlington Northern Santa Fe R.R. Co. v. Assiniboine and Sioux Tribes, 323 F.3d 767 (9th Cir. 2003), Opening Brief, pp. 19-20, does not help Lanphere and Matheson. This Court there remanded to the district court to allow the tribe an opportunity for discovery on the issue of whether it could establish jurisdiction under *Montana*. *Id*. at 774-775. Here, Lanphere and Matheson's own pleadings established the consensual relationship needed for jurisdiction; discovery, even had they requested it, could not have changed that conclusion.

C. Several Issues Listed in the Opening Brief of Appellants Are Not Before this Court

The items numbered 3, 4, and 5 in the Appellants' Statement of Issues, Opening Brief, p. 3, are not issues on this appeal. The district court did not deal with the issue of sovereign immunity or waiver thereof. **(Issue Nos. 3 and 5)** It is not clear what the Appellants mean by their **Issue No. 4.** ("Whether or not federal court jurisdiction in this case establishes denial of fundamental fairness in tribal court.")

CONCLUSION

Lanphere and Matheson have not demonstrated any basis for evading the requirement that they complete their own lawsuit in Tribal Court. The Tribe therefore respectfully requests that this appeal be rejected.

DATED this 18th day of March, 2010.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Tribe does not know of any related case pending in this Court as that term is used in Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 5379 words excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count in the word processing program with which this brief was compiled.

CERTIFICATE OF SERVICE

I certify that on March 18, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the Robert E. Kovacevich, attorney for the Appellants in this case.

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