No. 10-35090

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH LAPLANTE,

Defendant-Appellant,

v.

TOWN PUMP, INC. &
MAJOR BRANDS DISTRIBUTING IMPORTS, INC.,

Plaintiffs-Appellees.

Appeal from the United States District Court for the District of Montana,
No. 4:09-cv-00054-SEH, The Hon. Sam Haddon, presiding.

BRIEF OF APPELLEES TOWN PUMP, INC. & MAJOR BRANDS DISTRIBUTING IMPORTS, INC.

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CORPORATE DISCLOSURE STATEMENT

Town Pump, Inc. & Major Brands Distributing Imports, Inc. are corporations organized under the laws of the State of Montana. Neither has a parent corporation and no publicly held corporation owns 10% or more of the stock of either corporation.

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JURISDICTIONAL STATEMENT

Plaintiffs Town Pump, Inc. ("Town Pump") and Major Brands Distributing Imports, Inc. ("Major Brands"), non-Indian defendants in a tribal court action filed by tribal member Judith LaPlante, filed suit in the U.S. District Court for the District of Montana, challenging the Blackfeet Tribal Court's exercise of jurisdiction over LaPlante's personal injury tort claims against them. The District Court had jurisdiction over plaintiffs' claims for declaratory and injunctive relief under 28 U.S.C. § 1331 (2006). *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2717 (2008) ("[W]hether a tribal court has adjudicative authority over nonmembers is a federal question.") (citations omitted).

This Court has jurisdiction under 28 U.S.C. § 1291 (2006) over the district court's final order, dated January 22, 2010, granting summary judgment for plaintiffs, denying summary judgment for the defendant, and entering permanent injunctive relief against the exercise of tribal court jurisdiction in this case. LaPlante's appeal of that order was timely.

ISSUE PRESENTED

Whether the district court properly concluded that the courts of the Blackfeet Indian Tribe lack jurisdiction over a tribal member's personal injury tort claim against non-members arising from the non-members' allegedly negligent conduct on non-Indian land.

STATEMENT OF THE CASE

This case raises the question of whether an Indian tribe may exercise adjudicative jurisdiction over personal injury tort claims against non-members of the tribe. Applying the familiar presumption that a tribe lacks civil authority over the activities of non-members, *see Montana v. United States*, 450 U.S. 544 (1981), the district court held that that the Blackfeet Indian Tribe (the "Tribe") lacked jurisdiction to adjudicate personal injury tort claims against non-members Town Pump and Major Brands.

Since 1977, Town Pump and Major Brands have owned and operated a service station on their own fee land located within the exterior boundaries of the Blackfeet Indian Reservation in Browning, Montana. Neither Town Pump nor Major Brands are members of the Blackfeet Tribe.

Tribal court plaintiff Judith LaPlante, an enrolled member of the Tribe, was an employee of the Blackfeet Community College during the 1980s and 1990s. She filed a personal injury tort action against Town Pump and Major Brands in tribal court. She alleged that she was injured by exposure to petroleum products released over a period of decades as a result of the negligent maintenance and operation of fuel storage tanks located at the service station.

Town Pump and Major Brands moved to dismiss LaPlante's tort claims for lack of tribal court jurisdiction. The tribal court denied the motion. They then

appealed to the Blackfeet Tribal Court of Appeals, which affirmed the decision and held that the tribal courts could exercise jurisdiction over LaPlante's tort claims.

Having exhausted their tribal court remedies, Town Pump and Major Brands filed an action against LaPlante in the U.S. District Court for the District of Montana, seeking a declaration that the Blackfeet Tribal Courts lacked jurisdiction over LaPlante's claims and an injunction against further prosecution of those claims. The parties filed cross-motions for summary judgment.

In an order dated January 22, 2010, the district court (Haddon, J.) concluded that the tribal courts lacked jurisdiction over LaPlante's tort claims under the rule of *Montana*. The court concluded that neither of the two limited exceptions to *Montana's* general presumption against the exercise of tribal civil authority over non-members applied. First, LaPlante's claims do not arise from a "consensual relationship" between LaPlante and non-members Town Pump and Major Brands. Second, LaPlante's tort claims do not implicate the Tribe's ability to govern itself. The District Court thus denied LaPlante's summary judgment motion, granted the motion filed by Town Pump and Major Brands, and enjoined further prosecution of LaPlante's claim before the tribal courts. This appeal followed.

STATEMENT OF FACTS

The facts relevant to this dispute are relatively few and are undisputed. They were set forth in the parties' statement of stipulated facts and were properly summarized by the district court in its opinion.[1]

I. Town Pump and Major Brands

Town Pump and Major Brands are non-Indian businesses incorporated under Montana law.[2] They own and operate a convenience store and retail gas service station located off of U.S. Highway 89 in Browning, Montana. E.R. 9 (Parties' Joint Statement of Stipulated Facts ¶¶ A-B ("Stip.")). The property on which the service station is located lies within the exterior boundaries of the Blackfeet Reservation, but Major Brands owns the land in fee simple, having purchased it in 1977 from Exxon Corporation (predecessor to Exxon Mobil Corporation ("ExxonMobil")). *Id.* at 9 (Stip. ¶¶ B-C). Exxon owned and operated the service station from 1958 through 1977. *See* E.R. 232, 236.

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[1] The district court also relied in part on the undisputed facts in *Exxon Mobil Corp. v. LaPlante*, 4:03-CV-00027-SEH (D. Mont. Aug. 25, 2004), a related case stemming from ExxonMobil's earlier jurisdictional challenge to LaPlante's claims against it. *See* Excerpts of Record at 241-45 ("E.R."). The case arose from the same operative facts as this suit. *See* discussion *infra*, at 5.

[2] For the sake of convenience, when referring to Town Pump and Major Brands collectively, this brief will refer only to "Town Pump."

The land adjacent to the service station was owned by third parties in fee simple from 1958 through 1986. E.R. 3 (Dist. Ct. Op. at 3). It was purchased by the Blackfeet Community College ("BCC") in varying lots in 1987 and 1989. *Id.* In 1994, hydrocarbon-contaminated soil was found on that land at the BCC.

II. Judith LaPlante

Judith LaPlante is an enrolled member of the Blackfeet Nation, residing in Browning, Montana. E.R. 9-10 (Stip. ¶ E). In September 1996, she filed suit in Blackfeet Tribal Court against Town Pump and Major Brands. E.R. 10 (Stip. ¶ E).

In her Tribal Court complaint, she alleged that, while working at the BCC, she suffered personal injuries from exposure to the petroleum products discharged from underground storage tanks located at the service station. E.R. 209-10 (Tribal Court First Amended Complaint ¶ V) ("Tribal Compl."). She asserted that Town Pump "carelessly and negligently permitted multiple discharges or large quantities of petroleum products or other hazardous or deleterious substances to escape the confines of their property and allowed these to come on to the contiguous premises of [LaPlante's] work place, Blackfeet Community College, and cause her serious permanent health damage." *Id.*

LaPlante alleged she suffered various physical and emotional injuries, which were "directly and proximately caused and/or aggravated by the exposure to the toxic contaminates emitted from the property where the Town Pump gas station is

located." E.R. 210-11 (Tribal Compl. ¶¶ VII-VIII). She asserted common law tort claims of negligence, gross negligence, negligence *per se*, strict liability and negligent infliction of emotional distress. E.R. 208-14.

III. ExxonMobil's Jurisdictional Challenge

LaPlante's original complaint named Town Pump and Major Brands as the sole defendants. In October 1998, she amended her complaint to add ExxonMobil as the "predecessor-in-interest to the Browning Town Pump site." E.R. 209.

In August 1999, ExxonMobil moved to dismiss the Complaint on the grounds that the Blackfeet Tribal Court lacked both subject matter and personal jurisdiction over it. E.R. 10, ¶ F. The Blackfeet Tribal Court granted the motion to dismiss, and LaPlante appealed. The Blackfeet Court of Appeals reversed, concluding it could exercise both personal and subject matter jurisdiction over LaPlante's claims against ExxonMobil. E.R. 136-39.

ExxonMobil subsequently filed a complaint in the U.S. District Court for the District of Montana challenging the Tribal Court's jurisdiction and moved for summary judgment. The district court granted the motion and permanently enjoined LaPlante from prosecuting her claims against ExxonMobil in Blackfeet Tribal Courts. E.R. 241-47. LaPlante appealed that decision to this Court but abandoned her appeal after settling with ExxonMobil.

IV. The Present Jurisdictional Dispute

In March 2008, Town Pump filed a motion in Tribal Court to dismiss LaPlante's action for lack of subject matter jurisdiction. Like ExxonMobil before it, Town Pump argued that, under *Montana*, the Tribal Court lacked civil adjudicatory authority over LaPlante's claims. The trial court denied the motion. E.R. 27. Town Pump appealed.

The Tribal Court of Appeals affirmed, holding that jurisdiction could be exercised under both *Montana* exceptions. E.R. 217-26. With respect to *Montana*'s first exception permitting a tribe to exercise civil authority over non-members who enter "consensual relationships" with a tribe or its members, the Tribal Court of Appeals reasoned that Town Pump had consented to tribal jurisdiction in this case because it raised its jurisdictional objection after the case had been pending several years in tribal court and because it had previously invoked the jurisdiction of the court in separate litigation. E.R. 223.

The Tribal Court of Appeals also found *Montana's* second exception satisfied, reasoning that the Tribe is harmed whenever one of its members is injured: "Our tribe has been a single entity for as long as it has existed; regardless of artificially created geographic boundaries. The people, members of the Blackfeet Tribe, are all one. This means where one of us is affected; all of us as members are affected." E.R. 224.

V. The District Court Proceedings

Following the Tribal Court of Appeals' decision, Town Pump promptly filed this action in the U.S. District Court for the District of Montana. It sought declaratory and injunctive relief against the exercise of tribal court jurisdiction over it with respect to LaPlante's personal injury tort claims. The parties cross-moved for summary judgment on stipulated facts. The district court granted Town Pump's motion and denied LaPlante's cross-motion.

The district court first noted that Town Pump's appeal to the Tribal Court of Appeals exhausted available tribal court remedies and thus permitted a federal court to reach the question of tribal court jurisdiction. E.R. 2. Turning to that question, the court applied the rule of *Montana*, "the 'path-marking case' addressing a tribal court's subject matter jurisdiction over activities by non-Indians within the exterior boundaries of an Indian reservation." E.R. 4 (citations omitted). "The rule of *Montana*," reasoned the district court, "is that tribal courts do not have jurisdiction over the activities of non-Indians within a reservation, subject to two exceptions." *Id.* (citation omitted).

Rejecting the rationale of the tribal appellate court, the district court concluded that neither *Montana* exception applies to this dispute. First, "[t]he claims against Town Pump do not arise from a consensual relationship between Town Pump and the Blackfeet Tribe or a tribal member." E.R. 5. No relevant

contractual relationship exists between Town Pump and either the Tribe or LaPlante. *Id.* And "[t]he fact that Town Pump invoked tribal jurisdiction as a plaintiff, in other litigation, cannot be leveraged into a conclusion that such action equates with a consensual relationship supporting tribal jurisdiction in this case." E.R. 5-6.

Turning to *Montana*'s second "self-governance" exception, the district court also rejected the tribal appellate court's reliance on its "declaration of the tribe as a single entity and that members 'are all one' who are affected when one member is affected . . . ." E.R. 6. Because the Tribe is not a party to this case and the tort claims at issue are "that of LaPlante's alone," the Tribe's inherent authority to govern itself is not implicated by this case. *Id.*

The district court permanently enjoined LaPlante from prosecuting her claims against Town Pump and Major Brands in tribal court. LaPlante appealed.

SUMMARY OF ARGUMENT

The Blackfeet Tribal Courts lack jurisdiction over the on-reservation activities of non-members Town Pump and Major Brands. Generally speaking, Indian tribes lack jurisdiction over the activities of non-members on the reservation. *Montana*, 450 U.S. at 565. This general rule is applicable to conduct occurring on both tribal land and non-member fee land. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1135 (9th Cir.

2006) (*en banc*). Here, the alleged non-member conduct – the negligent maintenance and operation of underground fuel storage tanks – occurred entirely on Major Brands' fee land. In these circumstances, *Montana*'s presumption against tribal jurisdiction applies with special force.

LaPlante's reliance on this Court's decision in *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002), is misplaced. *McDonald*, which held *Montana*'s general rule inapplicable to disputes arising on tribal land, is no longer good law. After this Court's *en banc* decision in *Smith*, it is clear that the general rule of *Montana* governs *all* non-member conduct on the reservation, regardless of the status of the land underlying that conduct.

Under *Montana*, tribes may exercise civil authority over the conduct of non-members in only two narrow circumstances, neither of which is implicated here. First, Town Pump does not have a consensual relationship with the Tribe or its members. LaPlante contends that the Tribe may exercise jurisdiction over Town Pump because it waited until 2008 to challenge the Tribe's jurisdiction and because Town Pump had invoked the Tribe's jurisdiction on prior occasions. Neither argument has merit. Tribal court jurisdiction is a question of subject matter jurisdiction; as such, it cannot be waived by failure to object to jurisdiction at the outset of a case. This Court has held that an objection to tribal jurisdiction may be raised at any time. *See Smith*, 434 F.3d at 1137; *Yellowstone County v.*

Pease, 96 F.3d 1169, 1171 (9th Cir. 1996). Here, Town Pump moved to dismiss when intervening Supreme Court and 9th Circuit decisions made clear that the Tribe lacked jurisdiction over LaPlante's claims. Town Pump never consented to the jurisdiction of the tribal courts in this case.

Nor did Town Pump consent to tribal jurisdiction by the mere fact that, in a separate action, it sued its insurance carrier in Blackfeet Tribal Court. Such an approach to determining consent has been expressly rejected by the Supreme Court. *See Plains Commerce Bank*, 128 S. Ct. at 2727.

Tribal court jurisdiction is also not supported by *Montana*'s second exception for non-member conduct that imperils a tribe's ability to govern itself. Courts have consistently rejected the argument that an injury to an individual tribal member necessarily implicates the sovereign interests of the tribe. *See, e.g.*, *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999).

The exercise of tribal jurisdiction is not supported by LaPlante's claim that her injury occurred on tribal land. As an initial matter, the District Court properly noted that the land on which LaPlante was allegedly injured was not even tribally owned for much of the time at issue in this case. And the non-member *conduct* at issue – the focus of *Montana*'s second exception – took place entirely on Town Pump's own non-Indian fee land. Moreover, this is not a case in which the Tribe itself seeks to remedy damage to tribal land. It is a personal injury tort claim.

LaPlante cannot credibly claim that tribal sovereignty would be imperiled if she were required to file her claims in state court.

Finally, LaPlante argues that Town Pump should be estopped from challenging tribal court jurisdiction as a result of arguments made in its prior case against its insurer. But estoppel would be inappropriate here. Town Pump's prior arguments, though made in good faith at the time, were subsequently rendered obsolete by numerous decisions of the Supreme Court and this Court. Nor are they inconsistent with the position espoused here, given the differences in the two disputes. In any event, Town Pump's earlier jurisdictional arguments did not ultimately prevail, thus foreclosing application of judicial estoppel.

Affirmance of the district court's decision enjoining the exercise of tribal court jurisdiction will not leave LaPlante without a remedy. She can re-file her suit in Montana state court, where she has a plain, speedy and effective remedy. But forcing Town Pump to litigate against its will in the courts of an Indian tribe in which it is neither a member nor democratically represented is not necessary to preserve the sovereign integrity of the Blackfeet Tribe.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision on cross-motions for summary judgment. *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 989 (9th Cir. 2005). Affirmance of the district court's grant of summary judgment is thus appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

As the final arbiters of the federal question of tribal jurisdiction, federal courts review *de novo* a tribal court's legal determination that it may exercise jurisdiction over non-Indian defendants. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990); *Smith*, 434 F.3d at 1130.

II. THE BLACKFEET TRIBAL COURT LACKS JURISDICTION OVER LAPLANTE'S CLAIMS

A. Tribes Generally Lack Civil Authority Over The Activities Of Non-Members On The Reservation

The Blackfeet Tribal Courts seek to exercise jurisdiction over tort claims brought by a tribal member against two non-Indian companies. This dispute is thus governed by the familiar framework for analyzing tribal civil authority over non-members announced in *Montana v. United States* and explained in numerous cases applying its rule. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 446

(1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649-50 (2001); *Hicks*, 533 U.S. at 359; *Plains Commerce Bank.*, 128 S. Ct. at 2717.

Generally speaking, "[t]ribal jurisdiction is limited: For powers not expressly conferred [upon] them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty." *Atkinson Trading*, 532 U.S. at 649-50. That inherent sovereignty does not generally extend to regulation of a tribe's relationships with non-members: "Where 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 dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Hicks*, 533 U.S. at 359 (citation omitted).

Montana thus announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565; *see also Strate*, 520 U.S. at 445-46. Under this general rule, "efforts by a tribe to regulate nonmembers . . . are 'presumptively invalid.'" *Plains Commerce Bank*, 128 S. Ct. at 2720 (citation omitted).

Montana established two "limited" exceptions that permit the exercise of tribal jurisdiction over non-member reservation conduct. *Plains Commerce Bank*, 128 S. Ct. at 2720. To meet the burden of proving tribal jurisdiction over a non-member, "it is incumbent upon the [tribal member plaintiff] to establish the

existence of one of *Montana*'s exceptions." *Atkinson Trading*, 532 U.S. at 654; *Plains Commerce Bank*, 128 S. Ct. at 2720.

First, a tribe may regulate certain "consensual relationships" between a non-member and a tribe or its members: "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." *Montana*, 450 U.S. at 565.

Second, a tribe may exercise civil authority over the conduct of non-members on the reservation where that conduct poses a substantial threat to the tribe's ability to govern itself. *Id.* at 566 (tribe may regulate non-Indian conduct on the reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"); *see also Plains Commerce Bank*, 128 S. Ct. at 2726-27.

Applied here, *Montana* requires affirmance of the district court's decision. The Tribe generally lacks authority over the activities of non-member Town Pump, especially with respect to claims of negligent conduct on Town Pump's own land, and neither *Montana* exception is satisfied.

B. Town Pump's Alleged Misconduct On Non-Indian Land Triggers *Montana's* General Presumption Against Tribal Jurisdiction

Montana's general rule against tribal jurisdiction applies to LaPlante's tort claims relating to non-member Town Pump's alleged negligent activities.

Montana presumes that a tribe cannot exercise jurisdiction over non-member conduct wherever it arises on the reservation – whether on tribal land or non-member land owned in fee. *See Hicks*, 533 U.S. at 360 ("[T]he general rule of *Montana* applies to both Indian and non-Indian land."); *Smith*, 434 F.3d at 1135. *Montana* "looks first to human relationships, not land records, and it should make no difference *per se* whether acts committed on a reservation occurred on tribal land or on land owned by a nonmember individual in fee." *Hicks*, 533 U.S. at 381-82 (Souter, J., concurring).

The presumption against tribal jurisdiction applies with particular force in this case, where the non-member activity over which the Tribe seeks to exercise its authority arises on Town Pump's own land. *Plains Commerce Bank*, 128 S. Ct at 2719. LaPlante claims she was injured as a result of Town Pump's negligent operation and maintenance of fuel tanks located on Town Pump's fee-owned land. *See, e.g.*, E.R. 213 (alleging "storage and sale of gasoline and petroleum products . . . from the property where the Town Pump gas station is located"). *Montana*'s presumption against tribal jurisdiction is "virtually conclusive" with respect to alleged non-member misconduct arising on non-member fee land. *Hicks*, 533 U.S. at 360

LaPlante nevertheless argues that the *Montana* analysis "has questionable application to the facts of this case" because her *injury* was suffered on "tribal"

land. Brief of Appellant at 16. She contends that because the petroleum products at issue migrated from Town Pump's fee land onto land owned, at least as of 1987, by the Blackfeet Community College and caused her injury there, *Montana*'s general rule should not apply. Her argument is mistaken in several respects.

First, as noted above, the Supreme Court and this Court have flatly rejected the notion that *Montana*'s general rule does not apply to injuries occurring on tribal land. *See Hicks*, 533 U.S. at 360; *Smith*, 434 F.3d at 1135. The status of the land is not the principal determinative factor in applying *Montana*; rather, the tribal membership status of the defendant "counts as the primary jurisdictional fact." *Smith*, 434 F.3d at 1131 (citation omitted); *see also Phillip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 940 (9th Cir. 2009).

LaPlante bases her contrary position on *McDonald*, 309 F.3d 530, but that decision has been wholly discredited by subsequent decisions. *McDonald* involved a tort claim by a tribal member against a non-member Indian for injuries suffered when the member's car struck a horse that had wandered off the non-member's land and onto a Bureau of Indian Affairs road on the reservation. The divided panel's holding that the tribal court could exercise jurisdiction in those circumstances was based on the now-discredited notion that *Montana* is

inapplicable to disputes arising on tribal land. *See id.* at 540 n.9 ("Montana itself limited its holding to nonmember conduct on non-Indian fee land.").[3]

This limitation on the scope of *Montana* was subsequently rejected by both the Supreme Court and this Court, sitting *en banc*. *See Smith*, 434 F.3d at 1135; *Plains Commerce Bank*, 128 S. Ct. 2719-20. In *Smith*, the *en banc* Ninth Circuit followed the rule, adopted in *Hicks*, that "'*Montana* applies to both Indian and non-Indian land.'" 434 F.3d at 1135 (citing *Hicks*, 533 U.S. at 360).[4] It brushed aside the notion, embraced by the *McDonald* panel majority, that the relationship between the plaintiff's claims and Indian lands is "dispositive" of tribal jurisdiction. *Id.* *Smith* applied *Montana*'s general presumption against tribal jurisdiction to a claim that "arose out of activities conducted or controlled by a tribal entity on tribal lands." *Id*.

[3] *McDonald* cannot be read to hold that the *Montana* exceptions were satisfied by the accident at issue there. The *McDonald* court expressly reasoned that neither *Montana* exception was applicable under the circumstances of the case. 309 F.3d at 536 n.2. Instead, the decision was based on a determination that the *Montana* analysis is categorically inapplicable to accidents occurring on tribal land, a proposition which *Smith* subsequently rejected.

[4] *McDonald*, by contrast, misread the rule announced in *Hicks* – that *Montana* applies to both tribal and non-member fee land – as limited to the unique factual context of that case, which examined tribal court jurisdiction over state officers enforcing state law. *See McDonald*, 309 F.3d at 540 ("The limited nature of *Hicks's* holding renders it inapplicable to the present case.").

After *Smith*, then, the rule of this Circuit is that *Montana*'s general presumption against tribal court jurisdiction over non-members applies to all disputes arising on tribal lands, subject only to its two limited exceptions. *See also Phillip Morris*, 569 F.3d at 941 ("Thus, in this circuit, the *Montana* analysis is controlling in tribal jurisdiction cases, with party alignment in the tribal court action as the most important factor to be weighed in determining the application of *Montana*'s rule and exceptions to the case at hand."). The Supreme Court's subsequent decision in *Plains Commerce Bank* follows the same approach. There, the Court reasoned that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" 128 S. Ct. at 2720 (citation omitted). *Montana*'s general rule thus applies to all non-member reservation activities. *Id.* at 2719.

McDonald's limitation on the applicability of *Montana*'s general rule to disputes arising on non-member land has clearly been superseded by this Court *en banc* and the Supreme Court. It cannot bear the weight placed on it by LaPlante and the Blackfeet Tribal Courts. [5]

[5] *McDonald* itself sought to limit the scope of its ruling to disputes between Indians. It reasoned that "[a]s an Ogalala Sioux, McDonald is also subject to the criminal jurisdiction of the Northern Cheyenne Tribal Court." 309 F.3d at 540 n.10. Thus, "the tribal court in this case is merely exercising civil jurisdiction over a defendant whom it could prosecute criminally." *Id.* *Smith* also rejects this distinction, reasoning that a tribal defendant who was a member of another tribe (continued)

Second, LaPlante is mistaken in placing undue emphasis on the status of the land where the injury allegedly occurred. *Plains Commerce Bank* instructs that it is the land on which "the nonmember's *activity* occurs" that is relevant to the jurisdictional inquiry. 128 S. Ct. at 2719 (emphasis added).[6] Here, the non-member activity – maintenance of underground fuel storage tanks – allegedly took place on non-Indian land underlying Town Pump's station.

Employing tort concepts, LaPlante argues that her tort claim did not "arise" until she was injured on tribal land. *See* Brief of Appellant at 14. In her view, it is the location of the *injury* that governs the applicability of *Montana*'s general rule. She cites for this proposition the panel decision in *Smith v. Salish Kootenai College*, 378 F.3d 1048 (2004), *vacated*, 407 F.3d 1265 (2005), *rev'd*, 434 F.3d 1127 (9th Cir. 2006) (*en banc*). Because that panel decision was vacated and

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must be considered a non-member "for purposes of determining . . . tribal civil jurisdiction . . . ." 434 F.3d at 1133. Nevertheless, the fact that the *McDonald* panel itself thought it significant that the tribal defendant was a member of another Indian tribe demonstrates that, even were it still good law, *McDonald* was not intended to have the reach attributed to it by LaPlante.

[6] The status of the land underlying the non-member conduct may, in some instances inapplicable here, be relevant to determining how the *Montana* exceptions apply. *See Plains Commerce Bank*, 128 S. Ct. at 2720 ("The status of the land is relevant 'insofar as it bears on the application of . . . *Montana*'s exceptions to [this] case.") (alterations in original; citations omitted); *see also Hicks*, 533 U.S. at 382 n. 4 ("Land status . . . might well have an impact under one (or perhaps both) of the *Montana* exceptions.") (Souter, J., concurring). But it does not govern whether the *Montana* analysis applies in the first instance.

reversed, however, it has no jurisprudential value. Indeed, the particular passage that LaPlante cites – which reasoned that a "tort does not 'arise' until all elements of the cause of action exist" (*see* Brief of Appellant at 14) – was specifically rejected by the *en banc* court, which held that the *Montana* "inquiry is not limited to deciding precisely when and where the claim *arose*, a concept more appropriate to determining when the statute of limitations runs or to choice-of-law analysis." *Smith*, 434 F.3d at 1135 (emphasis added).[7]

Smith ultimately looked to where the negligent *conduct* at issue occurred. The court reasoned that the negligent conduct alleged – the improper maintenance of a tribal college's truck – "implicated [the tribe's] actions on the [tribal] college campus . . . ." *Id.* at 1135. Thus, the court held that the plaintiff "alleged negligence occurring on the reservation, on lands and in the shop controlled by a tribal entity . . . ." *Id.* Here, by contrast, the negligence at issue – improper maintenance and operation of Town Pump's underground storage tanks – allegedly took place entirely on *non-member* land. In those circumstances, *Smith* and *Plains Commerce Bank* counsel that the *Montana* presumption applies with special force.

[7] The decisions cited by LaPlante concerning the accrual of a cause of action for purposes of determining the statutory limitations periods are thus inapposite. *See, e.g.*, *Arcade Water Dist. v. United States*, 940 F.2d 1265 (9th Cir. 1991); *Hoery v. United States*, 324 F.3d 1220 (10th Cir. 2003).

Third, even if the Court were to take account of the nature of the land on which LaPlante alleges she was injured, it would not change the applicability of *Montana's* general rule. As the district court properly observed, the land adjacent to the property was not even owned by the Blackfeet Community College until 1987. Instead, the "adjacent property was owned by third parties in fee simple from 1958 through 1986." E.R. 3. It was not purchased by the Community College until 1987 and 1989. *Id.; see also* Brief of Appellant at 12 ("The Blackfeet Community College . . . was chartered by the Blackfeet Tribe and has been occupying tribally owned 'Indian land' since at least 1987."); E.R. 138 (releases "contaminated what has been since 1987 tribally-owned land"); E.R. 238. In short, for much of the time relevant to this dispute, the land was not tribal land.

The Supreme Court's tribal sovereignty cases "have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Plains Commerce Bank*, 128 S. Ct. at 2719. Once tribal land is sold in fee, it is "alienated from the tribal trust" and "cease[s] to *be* tribal land." *Id.* at 2723. Thus, for instance, the Tribe may no longer rely on inherent tribal sovereignty to prevent state taxation of reservation fee land. *Id.* at 2719 (citing, *inter alia*, *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 267-68 (1992)).

LaPlante alleges negligent maintenance and operation of the underground storage tanks since before Major Brands acquired its property in 1977 – asserting that both Town Pump and ExxonMobil (the preceding owner) failed to use due care in the operation of the service station "[a]t all times since the beginning of their usage of such property . . . ." E.R. 211 (Tribal Compl. ¶¶ IX-X). A jurisdictional inquiry predicated on the effect of non-members' alleged negligence on adjacent properties (and persons working on those properties) would necessarily have to consider that those adjacent properties were not tribally owned during much of the time that the negligent conduct allegedly occurred.[8] The Tribe's sovereign interest in adjudicating claims relating to those lands is necessarily diminished. *See Plains Commerce Bank*, 128 S. Ct. at 2723-24; *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999) (conveyance of

[8] Justice Souter explained in his *Hicks* concurrence that the fact that reservation lands constantly changes hands is a further reason that tribal ownership cannot be dispositive in applying the *Montana* rule:

> [T]ying tribes' authority to land status in the first instance would produce an unstable jurisdictional crazy quilt. Because land on Indian reservations constantly changes hands (from tribes to nonmembers, from nonmembers to tribal members, and so on), a jurisdictional rule under which land status was dispositive would prove extraordinarily difficult to administer and would provide little notice to nonmembers, whose susceptibility to tribal-court jurisdiction would turn on the most recent property conveyances.

Hicks, 533 U.S. at 383 (Souter, J., concurring).

property rights from tribes to non-member parties "defease[s] tribal jurisdiction to the extent its purposes require").

The Tribe's later reacquisition of this adjoining property for use as a community college does not re-establish the Tribe's original sovereignty over the land for jurisdictional purposes. Indeed, the same Supreme Court cases that permit state taxation of non-member fee land within the reservation hold that a tribe's reacquisition of those fee lands does not render them nontaxable by state authorities. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) ("The subsequent repurchase of reservation land by a tribe does not manifest any congressional intent to reassume federal protection of that land and to oust state taxing authority. . . ."); *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005) ("Tribe cannot [by open market purchases from current titleholders] unilaterally revive its ancient sovereignty, in whole or in part, over the parcels" alienated long ago to non-Indians). This principle also applies to tribal attempts to oust established state regulatory jurisdiction over once-alienated lands. *See Sherrill*, 544 U.S. at 220 ("If [a tribe] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.").

In sum, *Montana*'s general rule against tribal jurisdiction over non-members is fully applicable to LaPlante's personal injury tort claims against Town Pump. The tribe cannot exercise jurisdiction over those claims, then, unless LaPlante can meet her burden of satisfying one of the two *Montana* exceptions. *Atkinson Trading Co.*, 532 U.S. at 654; *Plains Commerce Bank*, 128 S. Ct. at 2720.

C. This Suit Does Not Relate To Any Qualifying Consensual Relationship Between Town Pump And The Tribe Or Its Members

LaPlante cannot satisfy *Montana*'s first exception for "consensual relationships." To satisfy that exception, the tribal plaintiff must establish some consensual relationship "stem[ming] from 'commercial dealing, contracts, leases, or other arrangements'" between the non-Indian defendant and the tribe or its members. *Atkinson*, 532 U.S. at 655 (citation omitted); *see also Hicks*, 533 U.S. at 359 n.3. Equally important, the tribal assertion of authority must "have a nexus to the consensual relationship itself." *Atkinson*, 532 U.S. at 656.

Here, there is no qualifying consensual relationship sufficient to support the exercise of tribal adjudicatory jurisdiction over LaPlante's tort claims. *See* E.R. 5. LaPlante has not alleged any relationship between herself and Town Pump. Nor are her alleged injuries linked to any commercial relationship between Town Pump and the Tribe. *See Atkinson*, 532 U.S. at 655 ("generalized availability of tribal services" insufficient to satisfy consensual relationships exception). There is no

commercial dealing or other similar relationship relevant to the Tribe's exercise of judicial authority here.

LaPlante nevertheless argues that a consensual relationship was created by Town Pump's delay in challenging tribal court jurisdiction over LaPlante's claims, and also by a separate lawsuit filed by Town Pump in 1995 against its insurer. Her argument would extend the "consensual relationship" exception beyond anything previously recognized by governing law and is based on a misreading of the Ninth Circuit's *en banc* ruling in *Smith*. There, the court held that a non-member's consent to tribal jurisdiction can be inferred where the non-member files a lawsuit in tribal court as a *plaintiff*, loses on the merits, and then tries to overturn the adverse judgment by challenging the tribal court's jurisdiction. *See* 434 F.3d at 1137 ("Smith comes to this proceeding as the plaintiff, in full control of the forum in which he prosecutes his claims against [the tribal community college]").

Unlike the non-member in *Smith*, Town Pump is not a voluntary plaintiff here. *See Phillip Morris*, 569 F.3d at 941 (describing *Smith* as case in which "nonmember consented to tribal jurisdiction by choosing to file his claims against a tribal member in tribal court"). Instead, it has been "haled into tribal court against [its] will." *Id.* at 940; *see also id*. at 941 (*Smith* inapplicable where non-member "haled into tribal court only as an unconsenting" defendant – "de facto plaintiff" – in declaratory relief action). Town Pump was sued as the *defendant* in

LaPlante's tribal court proceedings. It has not consented to tribal court jurisdiction by virtue of being sued there.

Nor does *Smith* permit the finding of a consensual relationship as a result of a non-member defendant's delay in raising a jurisdictional objection. Tribal jurisdiction is a question of subject matter jurisdiction. *See Hicks*, 533 U.S. at 367 & n.8 ("*Strate*'s limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the actions at issue . . . are regulable by the tribe."). Thus, it can be raised at any time during litigation – and the mere failure to object to the exercise of jurisdiction does not amount to consent. *See Hicks*, 533 U.S. at 373 (defenses to tribal court jurisdiction "would presumably be nonwaivable"). Indeed, *Smith* holds that a non-member can challenge the jurisdiction of the tribal court on appeal even where that non-member originally invoked that jurisdiction. 434 F.3d at 1137 ("even though Smith invoked the jurisdiction of the tribal courts, he may still challenge the court's subject matter jurisdiction on appeal"); *see also Pease*, 96 F.3d at 1171 (tribal court lacked jurisdiction over county even where county failed to challenge tribal jurisdiction before filing its reply brief on appeal in the tribal court).

Here, Town Pump objected to the jurisdiction of the tribal court after certain watershed federal decisions definitively foreclosed tribal judicial jurisdiction over a tort claim against a non-member in these circumstances. It did not consent to

jurisdiction by waiting until the Supreme Court and this Court resolved certain issues of tribal jurisdiction law before raising its jurisdictional objection.[9]

Nor does the fact that Town Pump filed suit against its insurer in Blackfeet Tribal Court more than a decade ago in a separate case establish the existence of a consensual relationship with respect to LaPlante now.[10] The Supreme Court has held, a "nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" *Atkinson*, 532 U.S. at 656 (citation omitted). Rather, the exercise of jurisdiction by the tribal court must "have a nexus to the consensual relationship itself." *Id.* Town Pump's prior invocation of tribal court jurisdiction with respect to other parties and

[9] While LaPlante complains that this case has been pending for many years in the Blackfeet Tribal Court, much of the delay was of her own making. The original 1998 trial date was vacated when she moved to add ExxonMobil as a defendant. That led to several years of litigation regarding the tribe's jurisdiction over ExxonMobil. More recently, plaintiff's medical expert has been unavailable since 2002 due to purported complications from back surgery. As a result, she has successfully sought three trial continuances in tribal court – the first in February 2006, the most recent in October 2007.

[10] LaPlante also points to Town Pump's third-party claim against the Tribe in a prior case in which Town Pump had been sued in tribal court. Brief of Appellant at 9-10. As a tribal court defendant, Town Pump had little choice but to bring a third-party claim in the same forum. Further, any such claims would have been barred by the doctrine of tribal sovereign immunity in state or federal court. *See Turner v. United States*, 248 U.S. 354, 358 (1919); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). To the extent that Town Pump had any cause of action against the Tribe, the only place where it could sue was in tribal court.

other issues is not grounds for concluding that it has consented to jurisdiction over LaPlante's separate and distinct personal injury claims. *See* E.R. 5-6.[11]

Indeed, *Plains Commerce Bank* rejected a nearly identical argument, concluding that a prior invocation of tribal court jurisdiction with respect to a matter related to the dispute at issue there did not constitute general consent to tribal jurisdiction. *See Plains Commerce Bank*, 128 S. Ct. at 2727. There, the non-member bank sought the assistance of a tribal court in appointing a process server to serve a notice to quit on tribal members with respect to state court eviction proceedings. The tribal members later argued, based on this Court's decision in *Smith*, that the non-member's invocation of tribal court jurisdiction with respect to service of process in the eviction proceedings constituted consent to tribal court jurisdiction over the tribal member's related discrimination claim arising from the same transactions. *Id.; see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, No. 07-411, Brief for Respondents at 45 (U.S. filed Mar. 12, 2008). The Court disagreed, reasoning that the invocation of tribal court jurisdiction with respect to the eviction action "does not, we think, constitute consent to future litigation in the Tribal Court." *Id.*

[11] In any event, as a result of subsequent Supreme Court decisions in *Strate*, *Hicks*, *Atkinson*, and *Plains Commerce Bank*, it is now clear that Town Pump's tribal claims against its non-Indian insurer were jurisdictionally ill-founded. *See* discussion, *infra*, at 36-37.

The same is true here. Town Pump never consented to be sued in Blackfeet 0Tribal Court and never admitted the jurisdiction of the Tribal Court to decide LaPlante's personal injury claims. Its prior tribal court claims did not involve LaPlante or her injuries and cannot serve as the basis for finding blanket consent to the jurisdiction of the Blackfeet Tribal Courts with respect to this suit.[12]

D. LaPlante's Personal Injury Tort Claims Do Not Implicate The Tribe's Ability To Govern Itself

Montana's second exception is not satisfied by personal injury claims of an individual tribal member. While framed in broad terms, the exception is exceedingly narrow. *See County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (*en banc*); *Big Horn Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000). The "[k]ey to its proper application" is *Montana*'s observation that:

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[12] LaPlante cites this Court's tribal exhaustion decision in *Atwood v. Fort Peck Tribal Court Assiniboine & Sioux Tribes*, 513 F.3d 943 (9th Cir. 2008), without any discussion of its relevance to this case. That decision – which decided only that there was a "colorable" enough basis for jurisdiction there to require exhaustion (*id*. at 948) – is not relevant. *Atwood* involved a "custody dispute concerning an Indian child." *Id.* at 945. The non-member father there expressly stipulated to the exercise of tribal court jurisdiction in a custody agreement with the child's mother, a tribal member. *Id.* at 948. The claims at issue in *Atwood* were merely a continuation of the earlier custody dispute that resulted in that stipulation. *Id.* at 945, 948 (treating case as same "matter" under custody agreement). In any event, the domestic relationships of a tribe, especially custody of a tribal member, certainly implicate a tribe's "internal relations" to a much greater degree than a personal injury tort claim. *See Montana*, 450 U.S. at 564; *see also Atwood*, 513 F.3d at 948.

> Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . . But a [tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.

Strate, 520 U.S. at 459 (citation omitted; alterations in original).

Montana's second exception thus "authorizes the tribe to exercise civil jurisdiction when non-Indians' 'conduct' *menaces*" the tribe's ability to govern itself. *Plains Commerce Bank*, 128 S. Ct. at 2726 (emphasis added). The non-member conduct at issue "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Id.* (citation omitted); *see also Philip Morris*, 569 F.3d at 943. In short, the "elevated threshold" for applying *Montana*'s second exception requires that the exercise of "tribal power must be necessary to avert *catastrophic consequences*." *Plains Commerce Bank*, 128 S. Ct. at 2726 (emphasis added).

1. Tribal Self-Government Is Not Implicated By An Individual Tribal Member's Personal Injury Claims

Here, LaPlante does not identify any catastrophic threat would arise from forbidding the exercise of tribal court jurisdiction over her tort claims. Nor could she. The Supreme Court has repeatedly held that tribal *adjudicatory* jurisdiction over non-member defendants is not "necessary" to protect a tribe's ability to

govern itself. Indeed, to date, the Supreme Court has "never held that a tribal court had jurisdiction over a nonmember defendant." *Hicks*, 533 U.S. at 358 n.2.

Strate governs tort claims against a non-member defendant brought in tribal court. There, the Court held that *Montana*'s self-government exception does not support the exercise of tribal court jurisdiction with respect to a tort claim against a non-member defendant arising from an automobile accident on the reservation. Instead, the tribal court plaintiff could

> pursue her case against [non-member defendants] in the state forum open to all who sustain injuries on [a state] highway. Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring [non-member defendants] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to "the political integrity, the economic security, or the health or welfare of the Three Affiliated Tribes."

520 U.S. at 459 (footnotes and citation omitted; internal brackets omitted).[13]

Notwithstanding *Strate*, the Tribal Court of Appeals held that it could exercise jurisdiction over LaPlante's tort claims on the theory that "[t]he people,

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[13] Though *Strate* involved a non-member plaintiff, the same rule applies to claims brought by a tribal member plaintiff. *See Hicks*, 533 U.S. at 374 (non-member defendants "are properly held accountable for tortious conduct and civil rights violations" against a tribal member "in either state or federal court, but not in tribal court"); *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997) ("It is difficult to argue that these important interests will be diminished, much less jeopardized, if [the tribal member plaintiff] must present her individual tort claims in state or federal court, where she has plain, speedy, and adequate remedies."); *Red Wolf*, 196 F.3d at 1065.

members of the Blackfeet Tribe, are all one." E.R. 224. It reasoned that "where one of us is affected; all of us as members are affected." *Id.* But *Strate* clearly forecloses reliance on such generalized threats to tribal well-being under *Montana*'s second exception. *Strate* held that the mere reckless behavior of non-members on the reservation cannot satisfy that exception: "Undoubtedly, 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." *Strate*, 520 U.S. at 457-58.

Consequently, this Court has expressly rejected the identical argument that harm to individual tribal members necessarily satisfies *Montana*'s self-government exception. In *Red Wolf*, the court rejected the argument that the death of tribal members as a result of the alleged negligence of a non-member "causes damage to the [tribal] community" that justifies the exercise of tribal court jurisdiction:

> We do not doubt the truth of John Donne's observation that "[n]o man is an island." This adage applies with special force in the close, inter-connected tribal culture. However, the Supreme Court has declined to employ this logic in conjunction with the second *Montana* exception. Indeed, it has specifically rejected it.

196 F.3d at 1065 (citations omitted).[14]

The absence of tribal jurisdiction here does not leave LaPlante "without redress for nonmembers' alleged wrongs. Tribal plaintiffs may find a forum in either state court or federal courts, as appropriate." *Red Wolf*, 196 F.3d at 1065. Montana courts are open to tribal members to bring claims against non-members for injuries arising out of on-reservation conduct. *See Lambert v. Ryozik*, 268 Mont. 219, 221, 886 P.2d 378, 380 (1994). But forcing non-members to answer for their alleged misconduct in a tribal court is not necessary to control the tribe's *internal* relations. *Hicks*, 533 U.S. at 371; *Wilson*, 127 F.3d at 815 ("It is difficult to argue that these important interests will be diminished, much less jeopardized, if [tribal member plaintiff] must present her individual tort claims in state or federal court . . . ."). *Montana*'s second exception is not implicated here.

[14] *See also Phillip Morris*, 569 F.3d at 943 ("generalized threat that torts by or against its members pose for any society is not what the second *Montana* exception is intended to capture") (citation omitted); *County of Lewis*, 163 F.3d at 515 ("Nor is it sufficient to argue, as the tribe does, that the [second *Montana*] exception applies because the tribe has an interest in the safety of its members."); *Nord v. Kelly*, 520 F.3d 848, 856 (8th Cir. 2008) ("The Court in *Strate* expressly cautioned against reading the second *Montana* exception in isolation to apply to the personal health and welfare of a few individual members.").

2. The Fact That LaPlante Was Injured On What Is Now Tribally Owned Land Does Not Change The Calculus

The status of the land where LaPlante alleges she was injured is irrelevant to this dispute. This is not a case about the effect of non-member conduct on the "tribal land" itself. LaPlante does not (and cannot) seek to remedy any alleged harm to that land. The Tribe itself is also not suing to remedy some injury to tribal land or other tribal interests. Indeed, it is not a party to the case at all. Tribal sovereignty interests are not as significant in cases where the tribe "is not itself a party." *See Phillip Morris*, 569 F.3d at 943.[15]

Instead, LaPlante seeks only to remedy her personal injuries. *See* E.R. 215 (Tribal Compl. at 8 (asserting personal injury damages claims)). While "[t]o some extent, it can be argued that torts committed by or against Indians on Indian land

[15] This case does not implicate the *regulatory* authority of the Tribe to remedy damage to tribal resources. *See Hicks*, 533 U.S. at 358 (leaving "open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction"). The Tribe has no regulations addressing leaking underground storage tanks. Instead, the federal Environmental Protection Agency administers and enforces comprehensive underground storage tank regulations in Indian country. *See* 40 C.F.R. pt. 280 (2009); 40 C.F.R. § 281.12(a)(2) (2009). Montana's Department of Environmental Quality has also played a central role in remediating environmental issues at the Browning site under a state underground storage tank leak prevention program. *See* Mont. Code Ann. §§ 75-11-201 *et seq*. Town Pump has cooperated extensively with those authorities in remediating environmental issues at the station. The Tribe cannot ground the exercise of its civil authority on the second exception where, as here, it "has traditionally accommodated itself" to "'near exclusive' regulation" by State or federal authorities. *See Montana*, 450 U.S. at 566.

always" threaten the health and welfare of a tribe, this "generalized threat" is not what *Montana*'s second exception is intended to reach. *Phillip Morris*, 569 F.3d at 943. In this context, and for the reasons already stated (*see discussion*, *supra* at 19-23), LaPlante's personal injury tort claims are unconnected to tribal land for purposes of applying *Montana*.

III. THE DOCTRINE OF JUDICIAL ESTOPPEL IS INAPPLICABLE

LaPlante contends that Town Pump should be estopped from challenging the jurisdiction of the tribal court as a result of allegedly inconsistent positions taken in Town Pump's prior litigation against its insurer, Travelers. LaPlante's argument fundamentally misapplies the equitable doctrine of judicial estoppel.[16]

This Court generally considers three factors in determining whether a party should be estopped from making an argument as a result of an inconsistent position previously asserted to a court: 1) whether a party's later position is clearly inconsistent with its earlier position; 2) whether the party achieved success in the prior proceeding; and 3) whether the party asserting an inconsistent position would achieve an unfair advantage if not estopped. *United Steelworkers of America v.*

[16] Many of the allegedly inconsistent positions cited by LaPlante are non-controversial statements of fact or relate to legal issues not before this Court. *See, e.g.*, Brief of Appellant at 8 (noting Blackfeet Tribal Constitution does not prohibit exercise of jurisdiction over non-members); *id.* at 9 (petroleum releases took place within the exterior reservation boundaries).

Retirement Income Plan For Hourly-Rated Employees of ASARCO, Inc., 512 F.3d 555, 563 (9th Cir. 2008). Applied here, none of these factors favors application of preclusion.

As an initial matter, Town Pump's current position cannot be viewed as inconsistent with its prior litigation arguments against Travelers in 1995-96 because of intervening changes in the law of tribal jurisdiction. *See Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984) (declining to apply judicial estoppel where class of plaintiffs "alter[e]d its theory of recovery in response . . . to the change of law brought about by" intervening Supreme Court decision); *Longaberger Co. v. Kolt*, 586 F.3d 459, 470 (6th Cir. 2009) ("judicial estoppel 'is inappropriate when a party is merely changing its position in response to a change in the law'") (collecting cases) (citations omitted).

Since Town Pump's litigation against Travelers in 1995-96, the federal law of tribal jurisdiction has undergone a sea change. While tribal exhaustion decisions such as *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), could be read at the time to establish a general presumption *in favor* of tribal adjudicatory authority over non-members, *Strate* subsequently concluded just the opposite. *See* 520 U.S. at 448-53. Thus, one of the principal cases relied upon by Town Pump at the time, *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), *see* E.R. 45-46, was "effectively overruled by *Strate* for its general

propositions concerning tribal jurisdiction and is no longer viable law on those issues." *Wilson*, 127 F.3d at 815. And it is only recently that the Supreme Court clarified that *Montana*'s general rule applies equally to tribal land. Moreover, after decisions such as *Strate*, *Hicks* and *Smith*, it is clear that a tribe's interest in self-government is not affected by tort claims against non-members.

But even absent these changes in law, there is nothing inconsistent with the positions taken in the two cases. Town Pump's dispute with Travelers involved a claim for indemnification relating to the costs of remediation and payments made to the Blackfeet Community College, a tribal entity, for damage to its property. Town Pump had incurred remediation costs as a result of its cleanup of BCC's property in cooperation with tribal, state and federal authorities. It sued its insurers in Blackfeet Tribal Court, arguing that the availability of funds to remediate environmental harms to tribal lands affected the interests of the Tribe. *See* E.R. 50 ("This is especially true where, as here, the issue in dispute is the availability of insurance coverage to remediate and clean up contamination of private property and Tribal property within the exterior boundaries of the Reservation.").

Obviously, a claim for reimbursement of funds necessary to clean up tribal property implicates different tribal interests than a personal injury claim from an individual tribal member. Town Pump submits that its arguments made in good faith then would not satisfy the *Montana* standard under current law since, after

Strate, it is doubtful that the Tribe could ever exercise jurisdiction over a dispute between two non-members. *See Strate*, 520 U.S. at 459. But putting that aside, its arguments made against its insurer in that prior case are not so inconsistent with its position here as to require judicial estoppel.

Nor can LaPlante demonstrate that Town Pump was successful in those prior arguments. The federal district court rejected Town Pump's arguments, denying its motion to dismiss Travelers' federal complaint for failure to exhaust tribal remedies. *Travelers Indemn. Co. v. Town Pump, Inc.*, Order, No. 2:95-CV-048-PGH (D. Mont. Jan. 9, 1996) (attached as Addendum to this Brief). The tribal court of appeals later disagreed with the federal district court, but the parties' competing claims to jurisdiction were never fully resolved. They settled their claims before the district court reached a final judgment.

As a result, there is nothing unfair about declining to apply the doctrine of judicial estoppel here. Town Pump made good faith arguments at the time it sued its insurer, but those arguments have been superseded by subsequent decisions of the Supreme Court and this Court. Its current position that *Montana* does not permit the exercise of tribal court jurisdiction here is fully consistent with governing law and is distinguishable from its positions in prior litigation. This is not a case where Town Pump is playing "fast and loose" with the courts; rather, it

is a good faith change in position dictated by intervening changes in law. *See Shamrock Foods*, 729 F.2d at 1215. Judicial estoppel does not apply.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the United States District Court for the District of Montana.

Respectfully submitted,

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May 28, 2010

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CERTIFICATE OF SERVICE

I hereby certify that, on May 28, 2010, a copy of the attached Brief of Appellees was served on the following person through the Court's CM/ECF:

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STATEMENT OF RELATED CASES (LOCAL RULE 28-2.6)

No known cases related to this action are pending in this Court.

ADDENDUM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

THE TRAVELERS INDEMNITY COMPANY,

Plaintiff,

vs.

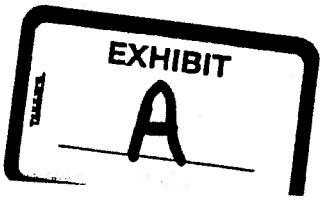
TOWN PUMP, INC.,

Defendant.

NO. CV-95-048-BU

O R D E R

Presently before the court is defendant Town Pump. Inc.'s motion to dismiss, invoking the principles of comity announced in National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985), and refined in Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987), that require federal courts to dismiss or abstain from deciding cases in which concurrent jurisdiction in an Indian Tribal Court is asserted. Having considered the merits of the arguments advanced by the parties, the court concludes defendant's argument is not well taken. In so holding, the court notes



the decision in American Reliable Ins. Co. v. Maggi, et al., 19 Mont. Fed. Rep. 40 (D.Mont. 1985), is distinguishable from the present action. Accordingly, defendant Town Pump's motion to dismiss is hereby DENIED.

IT IS FURTHER ORDERED that Employers Mutual Casualty Company's motion to intervene as a party plaintiff in the above-entitled action is hereby GRANTED.

IT IS SO ORDERED.

DATED this 9 day of January, 1996.

PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT