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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

EXC, Inc., et al., Plaintiffs, v. Jamie Rae Jensen, et al., Defendants.	NO. CV 3:10-cv-08197-PCT-JAT **NAVAJO COURT DEFENDANTS' RESPONSE TO MOTION TO DISMISS WITHOUT PREJUDICE**

COME NOW, Defendants the Navajo Nation, the Kayenta District Court, the Navajo Nation Supreme Court, and Judge Jennifer Benally (collectively "Navajo Court Defendants"), who file their Response to the Jensen Defendants' Motion to Dismiss Without Prejudice. The Navajo Court Defendants concur with the Motion and ask that it be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for the reasons stated in the Jensen Defendants' Memorandum in Support of Jensen Defendants' Motion to Dismiss Without Prejudice. In support, the Navajo Court Defendants submit the following additional arguments.

I. The Tribal Court Is The Proper Fact Finder For Cases Challenging Tribal Jurisdiction.

Tribal jurisdiction challenges are a unique type of federal case. Though styled in the traditional form of complaint and answer, there are important differences between a case challenging tribal court jurisdiction and an ordinary a civil case filed in the federal court in the first instance. Most importantly, a plaintiff attacking tribal jurisdiction must exhaust tribal court remedies as a pre-requisite to filing in federal court. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). Absent one of four narrow exceptions established by the United States Supreme Court, *see Nevada v. Hicks*, 533 U.S. 353, 369 (2001), the federal plaintiff must present its jurisdictional arguments before the tribal district court and any tribal appellate court before being allowed to file a federal action. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("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."); *accord, Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009). In their Complaint filed in this Court, Plaintiffs allege they exhausted their trial court remedies prior to filing this action. *See* Third Amended Complaint at ¶ 6.

Exhaustion of tribal court remedies serves a dual purpose for subsequent federal court review. First, the tribal court's legal analysis assists the federal court by providing "the benefit of [its] expertise" on tribal jurisdictional questions. *See National Farmers*,

471 U.S. at 856-57. Second, and directly relevant to the pending Motion, exhaustion allows the tribal court to develop "a *full* record" before federal review. *Id.* (emphasis added). The tribal court is responsible for developing a full factual record to serve "the orderly administration of justice in the federal court.'" *Id.*; *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990) (quoting *National Farmers*). Thus, the federal district court serves a quasi-appellate role in tribal jurisdiction cases, not acting as a fact finder, but as a reviewer of legal error on questions of purely federal law. *See FMC*, 905 F.2d at 1313-1314; *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 n. 9 (9th Cir. 2011) (declining to consider document not submitted to tribal court based on appellate nature of federal review). Consistent with this unique role, the federal district court reviews tribal factual findings for clear error, and defers completely on questions of purely tribal law. *FMC*, 905 F.2d at 1313 ("The [clearly erroneous] standard accords with traditional judicial policy of respecting the factfinding ability of the court of first instance."); *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988) ("The [tribal] court's determination of tribal law is binding on this court.").

Based on these principles, the Navajo Nation courts are the appropriate forum to develop the full factual record in this case. This Court does not find facts in this unique type of case, but applies federal common law concerning tribal jurisdiction to the facts. Therefore, if further fact finding is necessary, such finding must be made by the Navajo courts before this Court considers the case.

II. The Expedited Nature Of Plaintiffs' Jurisdictional Challenge In The Navajo Nation Court System Precluded Full Factual Finding By The Navajo Courts.

Plaintiffs' procedural choice to seek expedited jurisdictional review precluded the Navajo Nation's courts from developing a full factual record. In the Kayenta District Court, Plaintiffs filed a motion to dismiss under Rule 12(b)(1) of the Navajo Rules of Civil Procedure. The Navajo rule is similar to the parallel federal rule. *Compare* Nav. R. Civ. P. 12(b)(1) *with* Fed. R. Civ. P. 12(b)(1). The Navajo courts deal with such motion the same way the federal courts do, depending on whether the motion is a "facial" or "factual" challenge to the jurisdictional facts alleged in the complaint. *See Dale Nicholson Trust v. Chavez*, 8 Nav. R. 417, 424; 5 Am. Tribal Law 365, 369 (Nav. Sup. Ct. 2004) (discussing approaches to jurisdictional facts adapted from federal civil procedure); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (discussing facial versus factual challenges). In this case, the Kayenta District Court interpreted Plaintiffs' motion to be a facial challenge, and therefore took the facts asserted by the Jensens to be true for purposes of considering the motion. *See Jensen v. EXC*, No. KY-CV-171-06, at 2, n.1 (Kay. Dist. Ct. December 4, 2009) (Order), Navajo Court Defendants' Exhibit 1.[1] After the Kayenta District Court concluded that the Nation had jurisdiction, Plaintiffs filed an appeal. Notice of Appeal, *EXC, Inc. v.*

[1]The Navajo Court Defendants are aware that LRCiv 7.1(d)(1) and (3) precludes attaching documents previously filed in a case or legal authorities to the original of a pleading. However, the pleadings and orders attached to this Response are not previous pleadings filed in this case, as they were filed in the Navajo Nation courts and not this Court. Further, they are provided solely to inform this Court of the relevant procedural history in the Navajo court system.

Jensen, No. SC-CV-57-09, Navajo Court Defendants' Exhibit 2. However, because interlocutory appeals are not allowed in the Navajo judicial system, see *Billie v. Abbott*, 5 Nav. R. 201, 203 (Nav. Sup. Ct. 1987), the Navajo Supreme Court quashed the appeal. *Jensen v. EXC, Inc.*, No. SC-CV-57-09 (Nav. Sup. Ct. March 7, 2010) (Order), Navajo Court Defendants' Exhibit 3. Plaintiffs alternatively filed a petition for a writ of prohibition, which the Navajo Supreme Court accepted for review. *See EXC, Inc. v. Kayenta Dist. Ct.*, No. SC-CV-07-10 (Nav. Sup. Ct. March 4, 2010) (Alternative Writ of Prohibition), Navajo Court Defendants' Exhibit 4.

Under the Navajo system, litigants request an extraordinary writ to challenge the subject matter jurisdiction of the lower court before a decision on the merits. *See* 7 N.N.C. § 303 (2005) (authorizing extraordinary writs); *In re A.P.*, 8 Nav. R. 671, 678, 6 Am. Tribal Law 660, 662 (Nav. Sup. Ct. 2005) (discussing types of extraordinary writs available in Navajo legal system). The facts are asserted through declarations made in the petition for the writ and any responses. Documents and affidavits may be attached to those pleadings, as well as pleadings and orders from the trial court. However, as an appellate court, the Navajo Supreme Court does not hold an evidentiary hearing, but considers the parties' declarations along with findings by the trial court. The process provides an expedited method to review a trial court's jurisdiction prior to a decision on the merits, and the Navajo Supreme Court relies on the allegations and documents submitted by the parties and facts found by the trial court.

In this case, Plaintiffs selected this expedited method to make an immediate challenge to the Kayenta District Court's jurisdiction before a hearing on the merits.

Given the Plaintiffs' approach, the Navajo Supreme Court made its jurisdictional decision based on the limited well-pleaded facts and evidence asserted by the parties. It did not find its own facts, except for those otherwise appropriately found through judicial notice. *See, e.g., EXC v. Kayenta District Ct.*, No. SC-CV-07-10, slip op. at 8-9; 16-17 (Nav. Sup. Ct. September 15, 2010), Navajo Court Defendants Exhibit 5 (noting facts concerning tourism and issues facing tribal law enforcement within Navajo Nation).

III. As Further Fact Finding On the Applicability Of *Montana v. United States* Is Necessary, Such Facts Must Be Found By The Navajo Courts Before Review By This Court.

As stated by the Jensen Defendants, further fact finding is necessary in this case, particularly concerning the relevance and application of the jurisdictional test deriving from *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the U.S. Supreme Court announced a general rule for tribal civil jurisdiction over non-Indians on land alienated from tribal ownership within the boundaries of a reservation. *See id.* at 564-66. According to federal common law, a tribe presumptively lacks jurisdiction over a non-Indian acting on alienated land unless (1) the non-Indian has a "consensual relationship" with the tribe or its members, or (2) the non-Indian's conduct threatens or has a direct effect on the political integrity, economic security, or the health or welfare of the tribe. *Id.* at 565-66. Initially the U.S. Supreme Court only applied this rule on non-Indian owned land within a reservation. *Id.* at 565; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31 (1983) (declining to apply *Montana* to question of jurisdiction on tribal lands).

In *Strate v. A-1 Contractors*, the U.S. Supreme Court expanded the scope of *Montana*, requiring the tribe to establish one of the two exceptions for non-Indian conduct on a state highway that crossed a reservation and that had been granted as a right-of-way to the State of North Dakota. *See Strate*, 520 U.S. 438, 454-56 (1997). The Court based its application of *Montana* on several facts concerning the nature of the state highway. *See id*. The Ninth Circuit has developed a five factor test derived from *Strate* to determine the status of a right-of-way granted to a state: (1) the legislation that created the right-of way, (2) whether the right-of-way was acquired by the state with the consent of the tribe, (3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way, (4) whether the land was open to the public, and (5) whether the right-of-way was under state control. *See Montana Dept. of Transportation v King*, 191 F.3d 1108, 1113 n.1 (9th Cir. 1999); *Wilson v. Marchington*, 127 F.3d 805, 813-14 (9th Cir. 1997).[2]

Thus, both the threshold question whether *Montana* applies to the state highway

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[2] The Ninth Circuit recently confirmed that *Montana* only applies on tribal land in very limited circumstances, and that a tribe's right to exclude includes the right to conform non-Indian conduct to tribal law. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813-14 (9th Cir. 2011) (declining to extend holding of *Nevada v. Hicks*, 533 U.S. 353 (2001), that *Montana* applies even on tribal land beyond facts of the case because "[d]oing otherwise would impermissibly broaden *Montana's* scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government"). Therefore, assuming *Montana* and *Strate* apply, *see infra*, n.3, determining whether the highway at issue in this case is alienated land or whether the factual circumstances render the highway sufficiently "equivalent, for nonmember governance purposes, to alienated, non-Indian land," *Strate*, 520 U.S. at 454, is a necessary component of this Court's analysis of the case.

where the accident at issue in this case occurred, and, if so, the general question whether either *Montana* exception is satisfied, require detailed facts to answer.[3] Several of those important facts could not be determined by the Navajo courts, as they were not fully presented by the parties. These include facts concerning whether the State of Arizona or the Navajo Nation controls the highway where the accident in this case occurred, the scope of Plaintiffs' touring activities within the Navajo Nation at the time of the accident, and whether Plaintiffs visited or toured the Nation at other times. Such facts are directly relevant to a *Montana* and *Strate* analysis. As these were not presented in the first tribal adjudication, this Court should defer to the Navajo courts as the proper fact finder to make those determinations now. *Cf. Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1216-1217 (9th Cir. 2007) (Order) (remanding to Navajo Supreme Court where non-Indian plaintiff failed to exhaust on question of applicability of second *Montana* exception); *Burlington Northern Santa Fe R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 775 (9th Cir. 2003) (remanding jurisdictional case to federal district court because more complete record on second *Montana* exception was necessary). Such deference is consistent with federal policy recognizing and promoting tribal self-government and the right of tribes to make their

[3] The Navajo Court Defendants do not concede that *Montana* and *Strate* indeed apply to this case, *see EXC, Inc. v. Kayenta Dist. Ct.*, No. SC-CV-07-10, slip op. at 4-5 (Nav. Sup. Ct. September 15, 2010) (holding Treaty of 1868 independently authorizes jurisdiction over this case), only that this Court might rule based on Plaintiffs' arguments that they do apply. Therefore facts relevant to the *Montana* and *Strate* analysis should be determined by the Navajo court system and made available to this Court in the event this Court decides that Defendants need to fulfill the tests from those cases.

own rules and be ruled by them, as recognized by the United States in the Treaty of 1868 with the Navajo Nation. *See Williams v. Lee*, 358 U.S. 217, 223 (1959) (discussing Navajo right to self-government recognized by Congress through Treaty of 1868); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813-14 (9th Cir. 2011) (declining to "restrain tribal sovereign authority" inconsistent with "Congress's clearly stated federal interest in promoting tribal self-government"). This case should therefore be dismissed without prejudice pending further fact finding by the Kayenta District Court, and potential review of those findings by the Navajo Supreme Court.

IV. Conclusion

Based on the above, the Navajo Court Defendants concur with the Jensen Defendants that this case be dismissed without prejudice. Alternatively, the Navajo Court Defendants believe that this proceeding should at least be stayed pending further fact finding by the Navajo Nation courts.

DATED, this 14th day of August, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14th, I electronically submitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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