DOCKET NO. 10-56521

United States Court of Appeals

For the

Ninth Circuit

RINCON MUSHROOM CORPORATION OF AMERICA,
a California Corporation,

Plaintiff-Appellant,

v.

BO MAZZETTI, JOHN CURRIER, VERNON WRIGHT, GILBERT PARADA, STEPHANIE SPENCER, CHARLIE KOLB, DICK WATENPAUGH,

Defendants-Appellees,

Appeal from a Decision of the United States District Court for the Southern District of California, No. 09-CV-02330 • Honorable William Q. Hayes

BRIEF IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC FOR *AMICI CURIAE* PALA BAND OF MISSION INDIANS;*ET AL.*

(Additional Amici Listed on Inside Cover)

Dorothy Alther*
CALIFORNIA INDIAN LEGAL SERVICES
609 S Escondido Blvd
Escondido, CA 92025
Tel (760) 746-8941
Fax (760) 746-1815

Stephen Quesenberry
HOBBS STRAUS DEAN & WALKER
2000 Hearst Ave Ste 401
Berkeley, CA 94709
Tel (510) 280-5135
Fax (510) 849-0749

*Counsel of Record

Additional Amici:

List of tribes
Bear River Band of the Rohnerville Rancheria, Big Lagoon Rancheria, Big Pine Paiute Band of the Owens Valley, Cahto Tribe of the Laytonville Rancheria, Cahuilla Band of Indians, Cedarville Rancheria, Colorado River Indian Tribe, Confederated Tribes of the Colville Reservation, Cortina Rancheria Kletsel Dehe Band of Wintun Indians, Hopland Band of Pomo Indians, Iipay Nation of Santa Ysabel, La Jolla Band of Luiseño Indians, Lone Pine Paiute Shosone Tribe, Los Coyotes Band of Cahuilla and Cupeno Indians, Resighini Rancheria, San Pasqual Band of Mission Indians, Shoshone Bannock Tribes, Southern California Tribal Chairman's Associations (representing 19 Tribes in San Diego County) Spokane Tribe of Indians, Swinomish Indian Tribal Community, Sycuan Band of Kumeyaay Nation, Tulalip Tribes of Washington, Wiyot Tribe, Utu Utu Gwaitu Paiute Tribe, Yocha Dehe Wintun Nation.

TABLE OF CONTENTS

TABLE OF CONTENTS……..i

TABLE OF AUTHORITIES……...ii

STATEMENT REGARDING FRAP Rule 29(c)(5)……1

INTERESTS OF AMICI ……...……1

STATEMENT OF THE CASE……..…….…3

ARGUMENT……..3

A. The Panel's Decision Forecloses The Essential Exercise Of Tribal Regulatory Jurisdiction To Prevent Potential Catastrophic Harm To Reservation Resources And Core Tribal Interest ……..……...3

B. Contrary To The Panel Decision, Neither The Supreme Court Nor This Court Has Set The Bar To Tribal Jurisdiction Over Non-Indians So High As To Effectively Deny Tribes The Ability To Protect Their Homelands From Catastrophic Threatened Harm……5

C. The Panel's Decision Could Result In Non-Indian Fee Lands Being Unregulated…….10

CONCLUSION…….14

CERTIFICATE OF COMPLIANCE…….……15

TABLE OF AUTHORITIES

Cases

Bugening v. Hoopa Valley Tribe
229 F.3d 1210, 1221 (9th Cir. Ct. 2000) *cert denied,* 535 U.S. 927 (2002)…….……...8

Cardin v. De La Cruz
671 F. 2d 363 (9th Cir. 1982), *cert. denied* 459 U.S. 967 (1982)..…….9, 10

Colville Confederated Tribes v. Walton
647 F. 2d 42, 52 (9th Cir. 1981), *cert. denied,* 454 U.S. 1092 (1981) ……7

Elliott v. White Mountain Apache Tribal Court
566 F.3d 842, 848 (9th Cir. 2009)……4

Knight v. Shoshone and Arapahoe Indian Tribes of Wind River Reservation
670 F.2d 900, 903 (10th Cir.1982)…….10

Montana v. United States
450 U.S. 544, 565 (1981)……2, 3, 4, 5, 7, 8, 10, 12

Montana v. U.S.E.P.A
137 F. 3d 1135, 1141 (9th Cir Ct. 1998) *cert. denied* 525 U.S. 921 (1998) 7

Plains Commerce Bank v. Long Family Land & Cattle Co.
554 U.S. 316 (2008)……5

Statutes

42 U.S.C. § 4368b……8

Amendments to the Clean WaterAct..……..……8
33 U.S.C. § 1251 et. seq.,

Clean Air Act
42 U.S.C. §7401 et. seq., …….8

Safe Drinking Water Act
42 U.S.C. §300f to 300j-2 ……..……8, 11

Amendments to the Water Quality Standards on Indian Reservations, 56 Fed. Reg.64,876, 64,878, 64,879 (Dec. 12, 1991) ……9

Other

"*Clean Water In Indian Country: The Risk (and Rewards) Of Being Treated In The Same Manner As A State,"*
William Mitchell Law Review (January 18, 2010) ……9

STATEMENT REGARDING FRAP Rule 29(c) (5)

Pursuant to Federal Rules of Appellate Procedure (FRAP) Rule 29(c) (5), *Amici Curiae* state that no counsel for either party authored this brief in whole or part, nor contributed money that was intended to fund preparation of the brief; and that no person — other than the *Amici Curiae*, their members, or their counsel — contributed money that was intended to fund the preparation or submission of the brief.

INTERESTS OF AMICI

Amici Curiae Pala Band of Mission Indians and all the additional tribes from California and other Ninth Circuit states listed herein (collectively "*Amici*" or "*Amici* Tribes") are federally recognized Indian tribes exercising powers of self-government. *Amici* Tribes represent a cross-section of tribal governments in the Ninth Circuit with land bases ranging from tens to thousands of acres. *Amici* are concerned that the Panel's decision departs from directly applicable precedent of the Supreme Court and this Circuit and, if allowed to stand, would deprive them of the ability to *prevent* situations of potentially catastrophic harm to tribal resources posed by the activities of non-Indians on fee lands within their reservations; would foreclose their tribal courts in the first instance from making a determination of "plausible" tribal jurisdiction; and would instead relegate them to seeking a remedy *after* the catastrophic harm has occurred.

All *Amici* share a common interest in their ability to protect their reservations from activities that threaten their lands and resources, including activities of non-Indians who either hold fee lands on their reservations or who visit or do business on their reservations. Many of the *Amici* administer, or are in the process of developing, environmental programs designed to protect water and air quality, and other resources, such as timber, fisheries, minerals, and agriculture and grazing lands. Because the Panel's decision effectively forecloses tribal governmental regulatory and adjudicative jurisdiction under the second exception under *Montana v. United States*, 450 U.S. 544, 565 (1981), it will have potentially far-reaching consequences for the *Amici* Tribes. Many of the *Amici* Tribes have non-Indian fee lands on their reservations where a range of activities occur that pose potential threats to the reservation environment. These activities include but are not limited to ship building and repair, residential development, manufacturing, mining, motor vehicle recycling, and agriculture and nurseries that use pesticides. Without the ability to determine the level of threat to reservation resources and interests through the application of tribal environmental laws and regulations, and the enforcement of these laws in tribal court, tribes will be hamstrung in their most essential role as governments – protection of the tribal homelands and tribal members living on those homelands.

STATEMENT OF THE CASE

The facts, as set forth in Petitioners' Statement of the Case, are incorporated herein by reference. *See* Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc* ("Petition"), at pp. 5-9.

ARGUMENT

A. The Panel's Decision Forecloses The Essential Exercise Of Tribal Regulatory Jurisdiction To Prevent Potential Catastrophic Harm To Reservation Resources And Core Tribal Interests.

In their petition for rehearing, Petitioners identify a question of exceptional importance for Indian tribes, state and local governments and the federal government: "whether an Indian tribe has inherent authority over non-Indian activities on non-Indian fee lands within its reservation to protect against direct threats to reservation water quality and wildfire safety." Petition at 1. In *Montana v. United States*, 450 U.S. 544, 565 (1981), the Supreme Court carved out an exception to the general rule "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Often referred to as *Montana's* second exception, the Court recognized that Indian tribes, in limited circumstances, may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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." [citations omitted] *Id.* at 566; *see also Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009).

This case presents a compelling paradigm of the second *Montana* exception that deserves to be considered by an *en banc* panel. Following a dangerous and disastrous wildfire which severely impacted tribal and non-tribal lands within the Rincon Indian Reservation in 2007, the Petitioners requested that the non-Indian landowner submit a plan for their proposed re-development of its property as required by tribal law. This plan is required of all persons, member and non-member, who propose commercial activities on their lands within the Reservation—"for the limited purposes of ensuring that proposed land use activities do not imperil critical Tribal interests." Petition at 5. The landowner refused to comply with tribal law and the petitioners initiated proceedings in tribal court. Rather than pursue their challenges to the jurisdiction of the tribal court, the land owners filed suit in state and, eventually, in federal court.

The federal district court found that the Tribal Defendants, the petitioners herein, had demonstrated "plausible" tribal jurisdiction and dismissed the non-Indian landowners' attempt to enjoin the tribal court proceedings and required them to exhaust tribal court remedies:

> [Tribal] Defendants have shown that conduct on Plaintiff's property plausibly could threaten the Tribe's groundwater resources and could

> contribute to the spread of wildfires on the reservation. District Court Order at 13.

Notwithstanding the district court's extensive findings and the pending tribal court proceedings to determine the level of threat and take preventive measures if necessary, the Panel summarily concludes that "these possibilities do not fall within *Montana's* second exception, which requires actual actions that *have significantly impacted* the tribe." April 20, 2012 Panel's Memorandum Decision, at 3 (emphasis added). If allowed to stand, this holding effectively strips Indian tribes of all regulatory authority over the conduct of non-Indians which "threatens or has some direct effect on the political integrity, the economic security, or the health, or welfare of the tribe." In short, the Panel's holding would require Indian tribes to wait until the catastrophe has occurred before they could exercise any authority over non-Indians under *Montana's* second exception.

> B. Contrary To The Panel Decision, Neither The Supreme Court Nor This Court Has Set The Bar To Tribal Jurisdiction Over Non-Indians So High As To Effectively Deny Tribal Governments The Ability To Protect Their Homelands From Catastrophic Harm.

In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), Chief Justice Roberts, writing for the Court, acknowledged that although an Indian tribe may not regulate or adjudicate the sale of non-Indian fee lands, it does have an interest in the use of those lands. The Court stated that "*uses* to which the land is put may very well change from owner to owner, and those uses

may well affect the tribe and its members." *Id*. at 336.Specifically, the Court found:

> As our cases bear out, see *supra*, at 14-16, the tribe may legitimately seek to protect its members from noxious uses that threaten tribal welfare or security or from non-member conduct on the land that does the same. … The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating non-member *activity* on the [non-Indian] land, within the limits set forth in our cases. *Id*.

It should be beyond dispute that the appropriate exercise of tribal regulatory jurisdiction includes governmental actions to protect against direct threats to reservation water supplies and to prevent hazardous conditions that contribute to reservation wildfires, irrespective of whether the precise lands involved are tribal or non-Indian fee lands.

At the heart of this case is the Petitioner's attempt, through their tribal court, to prevent environmental catastrophe for the Rincon Reservation by exercising the Tribe's inherent power to regulate activities on the Reservation so as to minimize or eliminate threats to tribal lands and resources. The tribal government had been in the process of establishing an evidentiary record, in a pending tribal court proceeding that it initiated, of the non-Indian landowners' past and potential future contamination of tribal ground water and the landowners' lack of fire prevention measures on their property. By refusing to acknowledge that the tribal government had demonstrated exactly the kind of significant threat that the Supreme Court in

Montana anticipated when it carved out the second exception, the Panel rendered the second exception a nullity and relegated the tribal government to the role of "paper tiger" armed with environmental laws and regulations, but with no authority to prevent actual or threatened environmental catastrophe.

With respect to reservation water rights and water sources, the case law of this Circuit is especially protective of tribal jurisdiction. In *Colville Confederated Tribes v. Walton*, 647 F. 2d 42, 52 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), the Court affirmed the Tribes' authority to regulate water use on former allotted land that had passed into non-Indian fee status based on the significance of water as a "unitary resource" and the "the lifeblood of the community":

> A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colville's complaint in the district court alleged that Walton's appropriations for the No Name Creek imperils the agricultural use of downstream tribal lands and the trout fishery, among other things…Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.

This Court again upheld tribal authority to regulate water quality and use on reservation fee lands owned by non-members (state and municipal entities) in *Montana v. Environmental Protection Agency*, 137 F. 3d 1135, 1141 (9th Cir Ct. 1998) *cert. denied*, 525 U.S. 921(1998) and reaffirmed the continuing vitality of

that decision in *Bugening v. Hoopa Valley Tribe*, 229 F.3d 1210, 122 (9th Cir. Ct. 2000) *cert denied*, 535 U.S. 927 (2002). [1]

Protection of reservation water sources and tribal governmental authority to regulate the uses and quality of this "unitary resource" also has been the focus of federal agency and congressional attention. The U.S. Environmental Protection Agency ("EPA") provides funding support to Indian tribes through its General Assistance Program ("GAP") to assist in the establishment of tribal environmental departments. Today, many of these once fledgling tribal departments, established through GAP grants, now operate comprehensive, sophisticated environmental programs implemented and enforced by tribal and federal environmental laws and supported by the infusion of tribal capital. The objective of the GAP program is to:

> . . . provide financial assistance to federally-recognized Indian tribes and intertribal consortium or consortia to build capacity to administer environmental regulatory programs in Indian Country and provide technical assistance from EPA in the development of multi-media programs to address environmental issues in Indian Country. [42 U.S.C. § 4368b.]

Congress has also recognized the significance of environmental regulation in the exercise of tribal self-governance and protection of the reservation environment. Amendments to the Clean Water Act, 33 U.S.C. § 1251 *et seq*., the Clean Air Act, 42 U.S.C. §7401 *et seq*., and the Safe Drinking Water Act, 42 U.S.C. §300f to

[1] In stating the second *Montana* exception, the Supreme Court noted the significance of reserved water rights as necessary to make the tribes' reservations "livable." *Montana*, *supra*, 450 U.S. at 566, fn. 15.

300j-26, have encouraged tribal environmental regulation to protect tribal natural resources. Thus, in addition to a tribal government's inherent authority to regulate the reservation environment, federal statutory law supports and recognizes tribal regulatory authority over natural resources that are key to the continued viability of tribal homelands.

In Marren Sanders', "*Clean Water In Indian Country: The Risk (and Rewards) Of Being Treated In The Same Manner As A State,"* Vol. 36 William Mitchell Law Review 533 (January 18, 2010), the author writes:

> EPA has stated that water management is absolutely crucial to the survival of many Indian reservations and that a "checkerboard" system of regulation, such as that endorsed by the *Brendale* opinion, 'would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards.' In addition, lending strong support for the proposition that tribal WQS [water quality standards] programs satisfy the second *Montana* exception, the EPA recognizes that 'water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-governance.'(Amendments to the Water Quality Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878, 64,879 (Dec. 12, 1991))

With regard to other tribal natural resource protection, the Ninth Circuit has recognized that tribal authority to regulate non-Indian fee lands in order to protect the health, safety and welfare of the tribe and its community is an essential government function. In *Cardin v. De La Cruz*, 671 F. 2d 363 (9th Cir. 1982), *cert. denied* 459 U.S. 967 (1982), this Court held that the tribe had retained

inherent sovereign power to impose its building, health and safety regulations on a non-Indian fee land owner within its reservation.

In *Cardin*, the non-Indian land owner operated a grocery store that posed a fire hazard and violated other health and safety regulations. The tribal court issued an injunction ordering that the store be closed until the store owner obtained a "certificate of occupancy." The store owner challenged the tribal court's jurisdiction in federal court. This Court reversed the district court's holding that the tribe could not impose its building, welfare and safety regulations on the land owner, holding under the second *Montana* exception that "the conduct the tribe is regulating 'threatens or has some direct effect on … health or welfare of the tribe.' Thus, the tribe retains inherent sovereign power to impose its building, health and safety regulations on the plaintiff business notwithstanding the plaintiff's ownership in fee of the land on which the store stands." *Id*., 671 F. 2d at 366; *see also, Knight v. Shoshone and Arapahoe Indian Tribes of Wind River Reservation*, 670 F.2d 900, 903 (10th Cir. 1982) (recogning tribal zoning authority over non-Indian fee land owners).

C. The Panel's Decision Could Result In Non-Indian Fee Lands Being Unregulated.

The harm and threat of harm caused to tribal health and welfare by non-Indian conduct on fee lands is very real and the lives of reservation residents could be threatened further if non-Indians can act with impunity. If a tribal government

is denied the authority to regulate non-Indian conduct that poses an actual threat to its natural resources and health and welfare of its community, it could create a situation in which the tribal government is forced to rely on state or local governments, neither of which are authorized or obligated to protect reservation resources, the health and well-being of reservation residents, or the economic and political security of the tribe and the reservation.[2] Creating such a potential jurisdictional void may encourage progressively noxious and reckless conduct by non-Indians, and thereby exploit a tribal government's inability to enforce its regulations against non-Indians on reservation fee lands.

This was the case for *Amicus* Pala Band of Mission Indians where a non-Indian owner operated a trailer park that lacked sanitation and public water systems, and electricity was supplied by running extension cords from one trailer to the next. No arrangements were made for trash removal service on the property, so garbage and refuse accumulated resulting in health hazards. With growing concerns for potential contamination of tribal ground water in the area and the unsafe and unhealthy living conditions on the property, the Pala Band complained to San Diego County and the EPA. EPA asserted limited jurisdiction under the Safe Drinking Water Act and fined the owner $500 for failure to properly operate a public water system; however, the County stated in a letter to the Band that it

[2] In these difficult economic times, state and local governments are unlikely to provide such protections.

lacked regulatory jurisdiction on the Pala Reservation, even on non-Indian fee lands. Although some of the immediate effects of the non-Indian landowner's actions have been addressed, the situation on the fee land remains an environmental problem that will likely need to be resolved through tribal court. Absent tribal jurisdiction under *Montana's* second exception, the non-Indian land owner would be able to continue actions on his land that pose direct threats to the surrounding reservation environment.

On the reservation of *Amicus* Tulalip Tribes of Washington, a non-Indian landowner, surrounded on three sides by tribal land, has continually diverted a stream that feeds the Tribes' treaty fish hatchery. In the dry season, the non-Indian's unauthorized diversion of the tribal water source threatens the Tribes' hatchery. The State of Washington has taken the position that it has no jurisdiction over the non-Indian, so the Tribes must either take action to prevent the diversion or suffer the resulting losses to its hatchery program.

Within the 1.4 million-acre *Amicus* Colville Indian Reservation, there are over 700,000 acres of forested trust lands – the *Amicus* Colville Tribes' primary source of revenue for decades. The Tribes are nationally recognized for their sustainable forest management practices. However, because the Reservation averages less than 20 inches of precipitation annually, Reservation forests are particularly susceptible to the ravages of wildfire. Hundreds of thousands of acres

of forested lands have been scorched on the Reservation in recent years. One situation in 2008 involved arson and consumed more than 22,000 acres, resulting in fire-fighting costs that exceeded $5 million and additional clean-up costs estimated at over $2 million. As result of the potential for fire devastation, the Tribes have enacted a comprehensive statutory scheme regulating fire and forest management, land use planning, fireworks, and water use throughout the Reservation, protecting fee and trust lands from fire. It is critical that the Tribes exercise regulatory and adjudicatory jurisdiction to enforce its tribal laws on non-Indian lands in order to protect its forestry resource and thereby sustain the economic well-being and health and welfare of the Tribes.

Indian reservations are, first and foremost, tribal homelands and often include aboriginal lands that have been occupied by tribes since time immemorial. If the resources that sustain these homelands---such as water, timber, fisheries, agriculture and grazing lands, as well as tribal investments in recreational, commercial and other facilities that generate needed governmental revenues---are subjected to direct threat of loss, damage, or contamination, tribes must be able to take immediate, preventative action through their regulatory agencies and courts. If tribal governments are held to lack such authority and jurisdiction on non-Indian fee lands within their own reservations, as the Panel's decision maintains, they will have been stripped of one of the most essential powers of self-government, the

power to secure the tribe's political and economic well-being and, more fundamentally, the ability to protect the safety, health and welfare of their own people.

CONCLUSION

The Panel decision, if allowed to stand, will severely limit or eliminate the authority of tribal governments to prevent actual threats to reservation resources and other core tribal interests from activities on non-Indian fee lands within their reservations. Instead, tribal governments will be relegated to a "reactive" form of jurisdiction in which they must wait for actual harm or catastrophe to occur before tribal agencies and courts may assert jurisdiction, which may be too late. This result is illogical and contravenes applicable precedent of the Supreme Court and this Court. Moreover, it would be devastating to the interests of the *Amici* Tribes.

For these reasons, *Amici* Tribes respectfully submit that the petition for rehearing should be granted, and if rehearing is denied, the petition for rehearing *en banc* should be granted.

Dated: May 21, 2012

/s/ Dorothy Alther
DOROTHY A. ALTHER
CALIFORNIA INDIAN LEGAL SERVICES

/s/ Stephen V. Quesenberry
STEPHEN V. QUESENBERRY
HOBBS, STRAUS, DEAN & WALKER, LLP

CERTIFICATE FOR BRIEF

I certify that: Pursuant to Federal Rules of Appellate Procedure 29(c) and 32(a), the attached brief is proportionally spaced, has a typeface of 14 points, and contains 3,297 words and 15 pages, exclusive of table of contents, table of authorities, and certificates of counsel, which does not exceed the applicable page length and word-length limits.

Respectfully Submitted,

Dated: May 21, 2012

/s/ Dorothy Alther
DOROTHY A. ALTHER
CALIFORNIA INDIAN LEGAL SERVICES
Attorney for Amici

/s/ Stephen V. Quesenberry
STEPHEN V. QUESENBERRY
HOBBS, STRAUS, DEAN & WALKER, LLP

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/EFC system.

Dated: May 21, 2012

/s/ Dorothy Alther
DOROTHY A. ALTHER
CALIFORNIA INDIAN LEGAL SERVICES
Attorney for Amici Curiae