

Docket No. 10-56521

In the
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 and 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*

**APPELLANT'S OPPOSITION TO PETITION FOR
REHEARING AND REHEARING *EN BANC***

GEORGE E. MCGILL, ESQ.
GEORGE MCGILL LAW OFFICES
1328 Sun Valley Road
Solana Beach, California 92075
(858) 481-8446 Telephone
(858) 481-1246 Facsimile

*Attorney for Appellant,
Rincon Mushroom Corporation of America*



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**APPELLANT’S OPPOSITION TO
PETITION FOR REHEARING AND REHEARING *EN BANC***

To the Honorable Chief Judge and Other Judges of the United States Court of Appeals for the Ninth Circuit:

I. INTRODUCTION

Appellant respectfully submits this response pursuant to this Court’s Order of May 25, 2012.

Appellees’ Petition For Rehearing by the panel is clearly flawed, both procedurally and substantively. The panel has not been shown to have made any error or mistake of law or fact whatsoever. To a certitude, Appellees have failed to demonstrate, with the required factual and case law support, that there is any discernible overlooked, mistaken or misapprehended fact or point of law, such to properly require or justify Appellees’ invocation -- or this Court’s application -- of FRAP 40(a)(2).

Similarly but even more conspicuously, Appellees’ suggestion for rehearing *en banc* is wholly lacking in merit. Appellees do not even begin to show that “*en banc* consideration is necessary to secure or maintain uniformity of the court’s decisions,” or that there is any need to harmonize the panel decision with any Supreme Court holding, or that such *en banc* consideration is necessary because of “one or more questions of exceptional importance”, compliant with FRAP 35(a)(1)(2), and 35(b)(1)(A) and (B).

Appellees have completely failed to posit any reasoned factual and/or legal basis or bases upon which to change or upset the clearly correct and eminently supportable panel decision. Appellees' combined petition is no more than losing parties' not-even-thinly-veiled (albeit entirely understandable) disappointment and disgruntlement with the panel disposition.

II. ARGUMENT

A. PANEL REHEARING IS NEITHER REQUIRED NOR JUSTIFIED.

1. Appellees' Petition Violates The "One-Bite-Of-The-Apple" Rule.

It is noteworthy, and very telling, that in their Petition Appellees mention but a single authority (*Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981); Petition 9, 10.) that they had not previously cited in their earlier-filed Brief Of Appellees. As will be shown below, *Colville* finds no proper application to the facts and circumstances of this case. Appellees' singular new case citation in their Petition is relevant, however, in that this fact illuminates and reveals what Appellees' Petition really is: A recasting and regurgitation of factual and legal arguments previously made in Appellees' Brief and at oral argument. Appellees' re-argument tactic is violative of the well-established "one-bite-of-the-apple" rule; as explained by this Court in *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962):

“... [Appellant plans, under the guise of a petition for rehearing, to study and reargue his case anew. Such is not the proper function of a petition for a rehearing, and an attempt to do as suggested is an abuse of the privilege of making such a petition. Furthermore, such efforts are ill-advised and self-defeating.”

**2. Appellees’ “Case Conflict” Contentions
Are Wholly Unmeritorious.**

The essential thrust of Appellees’ charge this Court has “overlooked or misapprehended” case law appears to be the insupportable assertion the panel disposition “is in direct conflict with the Supreme Court’s path marking decision in *Montana v. U.S.*, 450 U.S. 544 (1981) and this Circuit’s decisions in *Montana v. U.S. Env’t Prot. Agency*, 137 F.3d 1135 (9th Cir. 1998) and *Elliot [sic] v. White Mountain Apache*, 566 F.3d [at] 842 (9th Cir. 2009)....” (Petition, 1, 10-11; Emphasis Added). Additionally, Appellees aver, unmeritoriously, that the disposition “... also conflicts with the Supreme Court’s decisions in *Nat. Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)....” (*Id.*).

A charitable view would be that Appellees have simply misread the panel disposition, as occurred in *Wiener v. Federal Bureau of Investigation*, 951 F.2d 1073 (9th Cir. 1991) [“The government’s argument that our holding in this case conflicts with *Silets v. United States Department of Justice*, 945 F.2d 227 (7th Cir. 1991) (*en banc*) misreads our opinion.”].

In any event, it is pellucidly clear that there is no such conflict, “direct” or otherwise, as the panel is believed to have already determined, at least implicitly if not explicitly. Here, as in *United States v. Zolin*, 842 F.2d 1135 (9th Cir. 1988), “There is no conflict” (*Id.*, at 1136). Appellees’ “conflict” contention is particularly implausible, and wrong, as to the purported conflict with *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), since in *Strate* the Supreme Court gave its imprimatur to the concept that tribal court exhaustion is unnecessary where tribal court jurisdiction is “plainly lacking”; the Court articulated the often-relied-upon (including by Appellant herein) “*Strate* exception”:

“When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers’ conduct on land covered by *Montana’s* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. ... Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, ..., must give way, for it would serve no purpose other than delay” (*Strate, supra*, 520 U.S. at 459, n. 14)

Thus the panel disposition in this case is not at all “in conflict with” -- but rather, is completely congruent with -- *Strate* and progeny, including such prior Ninth Circuit decisions as *County of Lewis v. Allen*, 163 F.3d 509, 516 (9th Cir. 1998) (*en banc*) and *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059, 1065-1066 (9th Cir. 2000), cert. denied sub. nom. *Estates of Red Wolf & Bull Tail v. Burlington Northern Railroad Co.*, 529 U.S. 1110.

Appellees further argue the disposition herein inappropriately “also conflicts with” *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (Petition 1). Appellees overlook or ignore that in *Nat. Farmers Union*, the high court expressly acknowledged and approved the propriety of making certain exceptions to the otherwise-obtaining tribal exhaustion requirement (471 U.S. 845, 857, fn. 21). It is incontrovertible that *Nat. Farmers Union* -- taken together with subsequent Supreme Court decisions such as *Nevada v. Hicks*, 533 U.S. 353 (2001) and *Strate, supra* -- is entirely consistent with the panel disposition herein.

Thus it is seen that contrary to Appellees’ ill-founded contention, *Nat. Farmers Union* does not in any manner conflict with this Court’s determination that “[i]n this case, exhaustion is not required because ‘it is “plain” that tribal court jurisdiction is lacking, so that the exhaustion requirement “would serve no purpose other than delay.”’ *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009) (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001))....” (Panel Disposition, p. 2).

As the remaining prong to their ill-advised argument the panel has committed legal error, Appellees say the disposition is “in direct conflict” and “is ... at odds with” *State of Montana v. U.S.E.P.A.*, 137 F.3d 1135 (9th Cir. 1998) and *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009) (Petition 1, 11-12). The issue whether either of these two decisions is

applicable to this case has already been much-bruited. As developed in subsection 3, *infra*, each of these Circuit precedents is easily and readily distinguishable, and neither lends proper, or any, support for either the panel rehearing or the *en banc* determination Appellees seek in this case.

More importantly, it is immediately apparent the panel decision is non-conflicting -- indeed, is totally consistent with -- *Montana* and progeny, as elaborated in well-established Supreme Court and Circuit decisional law. This conclusion is quickly evinced by but a cursory review of *Strate v. A-1 Contractors, supra*; *Nevada v. Hicks, supra*; *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001); *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008); *County of Lewis v. Allen, supra*; *State of Mont. Dept. of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999); *Burlington Northern Railroad Co. v. Red Wolf, supra*; and *Boxx v. Long Warrior*, 265 F.3d 771 (9th Cir. 2001).

Recent other-panel Ninth Circuit opinions demonstrate intra-Circuit consistency on the issues decided by the panel in this case, and show how rejectable Appellees' "conflict" contention really is. In *BNSF Ry. Co. v. Ray*, 297 Fed. Appx. 675, 2008 WL 4710778 (9th Cir. 2008) [citable per FRAP 32.1, Circuit Rule 36-3], the Arizona District Court had enjoined a tribal court from proceeding further with a wrongful death action. In affirming, the Circuit panel found (297 Fed. Appx. at 677):

“The district court correctly held that exhaustion of tribal court remedies is not required because it is plain that the tribal courts lack jurisdiction. *See Boozer v. Wilder*, 381 F.3d 931, 934 (9th Cir. 2004) (stating that de novo review applies); *Nevada v. Hicks*, 533 U.S. 353, 368, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (holding that, when it is plain that the tribal court lacks jurisdiction, a party is not required to exhaust tribal court remedies)”

Grounding its decision on *Strate, supra*, and in lock step with the panel disposition in this case, the Ninth Circuit in *BNSF Ry. v. Ray* pointed out (297 Fed. Appx. at 677-678):

“... [T]he Supreme Court has instructed that the presence of an alternate adjudicatory system for the resolution of civil lawsuits involving non-tribal members arising out of accidents on non-tribal land does not affect the political integrity, the economic security, or the health or welfare of the tribe within the meaning of the second *Montana* exception. *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). For these reasons, the tribal court plainly lacks jurisdiction in this case, and exhaustion of tribal remedies is not required. *See Ford Motor Co. v. Todercheene*, 488 F.3d 1215 (9th Cir. 2007) (order) (noting the prudential requirement of exhaustion of tribal remedies unless the tribal court ‘plainly’ lacks jurisdiction).”

Additionally consistent with the panel resolution in this case is *Town Pump, Inc. v. LaPlante*, 394 Fed. Appx. 425, 2010 WL 3469578 (9th Cir. 2010) [citable per FRAP 32.1, Circuit Rule 36-3].

A tribal member of the Blackfeet Nation had made “toxic tort” claims in a tribal court personal injury action, allegedly stemming from fuel vapor intrusion and petroleum leaks from underground storage tanks maintained by Town Pump. Town Pump sought to enjoin the tribal member from further prosecution of her

toxic-discharge action in the Blackfeet Tribal Court. The Montana District Court granted the requested injunction, finding the alleged conduct did not fall within the *Montana* second exception. In affirming, the Ninth Circuit panel concluded, following the teaching of *Montana* and *Nevada v. Hicks, supra* -- and consistent with the reasoning of the panel herein (*Town Pump*, 394 Fed. Appx. at 427):

“... [T]he presumption against tribal court jurisdiction over non-members established in *Montana v. United States*, 450 U.S. 544, 564-44, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), and progeny applies to this case. *See Nevada v. Hicks*, 533 U.S. 353, 360, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (explaining that ‘the general rule of *Montana* applies to both Indian and non-Indian land;); accord *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135 (9th Cir. 2006) (*en banc*).

Citing *Strate, supra*, and this Circuit’s holding in *Burlington Northern, supra*, and rebuffing a “tribal safety”/John Donne exegesis for application of the *Montana* second exception and requirement of tribal court exhaustion, similar to that made by Appellees in this case, the *Town Pump* panel further held (*Id.*):

“Nor does LaPlante’s personal injury suit satisfy the second *Montana* exception. The conduct alleged does not have a ‘direct effect on the political integrity, the economic security, or the health or welfare of the tribe.’ *Montana*, 450 U.S. at 566, 101 S. Ct. 1245. Rather, LaPlante sues over her personal injuries alone. Although the Tribal Court of Appeals held that it had jurisdiction over LaPlante’s tort claims on the theory that ‘[t]he people, the members of the Blackfeet Tribe, are all one’ and that ‘where one of us is affected[,] all of us as members are affected,’ the Supreme Court has specifically rejected this ‘no man is an island’ logic with respect to the second *Montana* exception. *Burlington N. R.R. Co. v. Red Wolf*, 196 F. 3d 1059, 1065 (9th Cir. 1999) (internal quotation marks omitted) (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 458-59, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997)).”

Somewhat surprisingly, Appellees appear to argue Chief Justice Roberts' majority opinion in *Plains Commerce Bank*, *supra*, supports their claim of error of law by the panel in this case (Petition, 7-8). Properly viewed, however, *Plains Commerce Bank* fully buttresses the correctness of the panel disposition.

Appellees acknowledge, as Chief Justice Roberts in *Plains Commerce Bank* instructs (and the panel decision itself also points out), in its evolution over the years the *Montana* second exception has come to be construed as more and more limited and cabined, such to ensure the exception does not "swallow the [*Montana* main] rule, or severely shrink it" (Petition, 7; Panel Disposition, 3). It is in this precise context that Chief Justice Roberts also noted in *Plains Commerce Bank* (554 U.S. at 330):

“The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Atkinson*, 532 U.S., at 654, 121 S. Ct. 1825. These exceptions are 'limited' ones, *Id.*, at 647, 121 S. Ct. 1825, and cannot be construed in a manner that would 'swallow the rule' *Id.*, at 655, 121 S. Ct. 1825” (Emphasis Added.)

Rehearing could well be denied simply on the indisputable basis Appellees failed to carry their burden so to establish applicability of the *Montana* second exception in the District Court -- a failure noted in the Panel Disposition (p. 4, fn.1). Appellees' assertions concerning such alleged facts as "no confining layer over the aquifer to protect it from surface contamination", etc. (Petition, 3) constitute

merely a regurgitation of factual claims made in their arguments concerning alleged “water resource threats” and “wildfire threats” (see Appellees’ Brief, pp. 7-10) that were shown to be fictitious or “conjured-up” (see Appellant’s Reply Brief, pp. 10-17).

The panel has merely held that Appellees failed to carry their indisputable burden of persuasion and proof, in the fact-specific inquiry whether the purported “water resource threats” and “wildfire threats” actually existed. The obvious lacunae in Appellees’ “threat” contentions were also present, and central, to the panel decision in *Elliott v. White Mountain, supra*, relied upon by Appellees. It is significant that the *Elliott* panel carefully stated “... [i]n the circumstances of this case, we cannot say that the tribal court plainly lacks jurisdiction.” (Petition 10; 566 F.3d at 850). Likewise herein: the panel disposition is clearly based in large part upon Appellees’ failure to carry their burden, in an inquiry that is, as noted, uniquely and entirely fact-specific (Panel Disposition, p. 4, fn. 1).

Further indicating that Appellees themselves err by suggesting that the Supreme Court majority opinion in *Plains Commerce Bank* undermines or diminishes the reasoning of and/or shows error by the panel in this case is the well-settled presumption in Indian Country law that was also restated by Chief Justice Roberts in *Plains Commerce Bank* (554 U.S. at 330):

“Given *Montana*’s “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,” *Atkinson, supra*, at 651, 121 S. Ct. 1825 (quoting *Montana, supra*, at 565, 101 S. Ct. 1245), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid.’ *Atkinson, supra*, at 659, 121 S. Ct. 1825” (Emphasis Added.)

In quarreling with the decision in this case, characterized by Appellees as necessitating a showing that “a non-Indian’s ‘actual actions’ [have resulted] in catastrophic water contamination or wildfire damage” (Petition, 13), Appellees ignore or overlook that in *Plains Commerce Bank*, the majority opinion may be read to require just such an actual demonstration of threatened “catastrophic consequences” (554 U.S. at 341):

“... The conduct must do more than injure the tribe, it must ‘imperil the subsistence’ of the tribal community. *Ibid.* One commentator has noted that ‘th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.’ Cohen § 4.02[3][c], at 232, n. 220.” (Emphasis Added.)

Plains Commerce Bank also supports the Panel’s reliance upon *Strate, supra*, for a very limited construction of the *Montana* second exception, restricting application thereof primarily or only “... to preserve the right of reservation Indians to make their own laws and be ruled by them’ “ Or, as put by Chief Justice Roberts in *Plains Commerce Bank* (554 U.S. at 335, 337):

“... While tribes generally have no interest in regulating the conduct of nonmembers, ... they may regulate nonmember behavior that implicates tribal governance and internal relations.”

“ ...

“... [N]onmembers have no part in tribal government--they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. See *Montana*, 450 U.S., at 564, 101 S. Ct. 1245.” (Emphasis Added.)

3. *State of Montana v. U.S.E.P.A. and Elliott v. White Mountain Apache Are Factually Distinguishable And Inapposite*

Appellees apparently cavil the failure or refusal of the panel to give controlling effect to *State of Montana v. U.S.E.P.A.*, *supra* (Petition, 8-10). This insupportable position was argued at considerable length in Appellees' Brief, as well as opposed at pp. 21-22 of Appellant's Reply Brief on the basis of the factual distinguishability of the decision, rendering it “completely unavailing to aid the tribal defendants' claim of ‘plausible’ or ‘colorable’ Rincon Tribal Court jurisdiction.” (*Id.*) The panel was clearly right to reject Appellees' contention this Circuit precedent is controlling; rather, it has no apposition herein.

State of Montana v. U.S.E.P.A. was decided well before the more recent narrowing and limiting of the *Montana* second exception. Further, the facts therein bear no resemblance to the facts of this case; the Circuit panel in this 1998 decision identified sources of water pollution that included “feedlots, dairies, mine tailings, auto wrecking yards and dumps, construction activities and landfills, ... waste water

treatment facilities, commercial fish ponds and hatcheries, slaughterhouses, hydro-electric facilities and wood processing plants.” (137 F. 3d @ 1140). These facts are sufficient to qualify under the criterion “[t]he potential impacts of regulated activities on the tribe must be ‘serious and substantial.’ [Citation Omitted.]” (137 F.3d at 1139). This is a criterion the EPA would not be able to meet or satisfy in the circumstances of this case. These facts of *State of Montana v. U.S.E.P.A.* provide distinguishability, alone and without more.

More importantly, *State of Montana v. U.S.E.P.A.* did not provide the Confederated Salish and Kootenai Tribes with any unfettered power to regulate, the decision merely upholding the validity of the EPA regulations involved, pursuant to which a tribe’s TAS authority may be granted by the EPA. As the Circuit panel stated: “... TAS status does not confer enforcement authority on the Tribes; it only enables the Tribes to set the standards. Even if the Tribes applied for enforcement authority, the NPDES permits would still be issued by EPA and enforced in federal, not tribal courts” (137 F.3d at 1142; Emphasis Added.)

This interpretation has more recently found expression in the language of much-respected Seventh Circuit Judge Diane P. Wood, in *Wisconsin v. E.P.A.*, 266 F.3d 741 (7th Cir. 2001):

“... The tribe cannot impose any water quality standards or take any action that goes beyond the federal statute or the EPA’s power. To the contrary, the EPA supervises all standards and permits. Far from allowing a tribe to veto a state permit, granting TAS status to

tribes simply allows the tribes some say regarding those standards and permits “ (266 F.3d at 749; Emphasis Added.)

“

“... [I]t is the EPA, not the tribe or the state, that has the ultimate authority to decide whether or not to issue a permit.” (266 F.3d at 759; Emphasis Added.)

For these reasons, causing and constituting obvious factual distinguishability, the panel committed no error in declining to give determinative effect to *State of Montana v. U.S.E.P.A.*

Colville Confederated Tribes v. Walton, supra -- the sole and only new authority cited by Appellees as supportive or suggestive of rehearing (Petition, 9-11) -- is also of no assistance to the proposition that “colorable” or “plausible” tribal jurisdiction exists in this case. Following this 1981 holding, tribal exhaustion contentions were decided by the Ninth Circuit and a Washington District Court “adversely to [the tribes involved]” (*Holly v. Confederated Tribes and Bands of Yakima Indian Nation*, 655 F. Supp. 557, 559 (E.D. Wash.) 1985) (“... The defendants have not come forward with facts to show existence of a material factual question with respect to whether non-Indian conduct related to non-Indian use of excess waters threatens the political integrity, economic security, or health and welfare of the Tribes....”). See also, *United States v. Anderson*, 736 F.2d 1358, 1366 (9th Cir. 1984) (no infringement upon “the tribal right to self-government nor

impact on the Tribe's economic welfare" by the conduct of nonmembers using excess water on fee land).

Elliott v. White Mountain Apache, supra, is also inapposite because factually distinguishable. This is chiefly because in Elliott -- unlike herein -- no nonmember fee land was at all involved, or even implicated. The Court's analysis was obviously based upon one of the central, essential facts of the case: tribal ownership of tribal land "within the borders of the White Mountain Apache Tribe's reservation" (566 F.3d at 844).

Herein, there is no involvement of tribal land or of "... the tribe's 'landowner's right to occupy and exclude.'" Indeed, the fact that only non-Indian fee land is at issue in this case easily and readily distinguishes it from *Elliott*, as the *Elliott* panel itself appears to have acknowledged: "... the tribe's ownership of the land may be dispositive here...." (566 F.3d at 850)

4. The Panel Disposition is Consistent With Very Numerous District Court Decisions

Appellees say: "... there is uniformity among the lower courts that tribal jurisdiction lies to protect against demonstrable threats that imperil critical reservation natural resources." (Petition 10, fn. 6). While perhaps irrelevant herein, this statement is patently untrue.

Illustrative are *Atkinson Trading Company, Inc. v. Many-goats*, 2004 WL 5215481 (D.Ariz.2004) ("... [T]his Court finds that the operation of the trading

post its employment of Navajo members does not threaten the political integrity of the Navajo Nation.”); *Tejesova v. Bone*, 2007 WL 1160059 (W.D.N.C. 2007) (“... Because the Tribal Court lacks jurisdiction over this claim, ex- haustion is not required. *Boxx*, 265 F.3d at 778 (citing *Nevada v. Hicks, supra.*”); and most recently, *Rolling Frito-Lay Sales L.P. v. Stover*, 2012 WL 252938 (D.Ariz.2012), wherein the Arizona District Court stated and held:

“To this day, the Supreme Court has ‘never held that a tribal court had jurisdiction over *a* nonmember defendant.’ *Hicks*, 533 U.S. at 358, n.2, 121 s.ct. at 1209 n.2. This speaks volumes...” (Emphasis Added.)

“

“... [S]ubjecting non-Indians to the jurisdiction of a tribal court without their consent would subject them to an entity outside the Constitution. *Id.* at 337, 128 S.Ct. at 2724. Government with the consent of the governed is everything in America.

“

“In sum, it is clear that Stover’s allegations against plaintiff do not fall under either of the two *Montana* exceptions. Because we hold that tribal jurisdiction is clearly lacking and exhaustion would merely cause delay, plaintiff was not required to exhaust tribal court remedies...” (Emphasis Added.)

B. EN BANC DETERMINATION IS ALSO NEITHER REQUIRED NOR JUSTIFIED

FRAP 35(a) states explicitly that *en banc* hearings are “not favored and ordinarily will not be ordered.” Appellees have utterly and completely failed to show *en banc* determination “is necessary to secure or maintain uniformity of

the court's decisions" or that *en banc* rehearing would involve any "question of exceptional importance" (FRAP 35(a)(1)(2)). Nor have Appellees shown the Panel Disposition is inconsistent with any U.S. Supreme Court decision, or that any intra-or-inter circuit conflict is implicated or occasioned by the Panel Disposition.

As the Seventh Circuit has observed, with complete apposition herein: "The function of *en banc* hearings is not to review alleged errors for the benefit of losing litigants. *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 2437, 256-259, 75 S. Ct. 656, 97 L. Ed. 986; F.R.A.P. 35(b)...." (*U.S. v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974.)

III. CONCLUSION

For the foregoing reasons, panel rehearing should be denied and the suggestion for *en banc* rehearing should be rejected.

Dated this 15th day of June, 2012

Respectfully submitted,

s/ GEORGE E. MCGILL

GEORGE E. MCGILL
Attorney for Appellant,
Rincon Mushroom Corporation, Inc.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Opposition to Petition for Rehearing and Rehearing *En Banc* is proportionately spaced, has a typeface of 14-point or more and contains 4,134 words.

Dated this 15th day of June, 2012

Respectfully submitted,

s/ GEORGE E. MCGILL

GEORGE E. MCGILL

Attorney for Appellant,

Rincon Mushroom Corporation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 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/ECF system.

s/ Stephen Moore