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 FOR *AMICI CURIAE* SANTA YNEZ BAND OF CHUMASH INDIANS; CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA; *ET. AL* IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Brenda L. Tomaras*
TOMARAS & OGAS, LLP
10755-F Scripps Poway Parkway #281
San Diego, CA 92131
Tel. (858) 554-0550
Fax. (858) 777-5765
**Counsel of Record*

Timothy C. Seward
HOBBS, STRAUS, DEAN & WALKER, LLP
1903 21st St # 3
Sacramento, CA 95811
Tel. (916) 442-9444
Fax. (760) 416-6638

Attorneys for the Santa Ynez Band of Chumash Indians, Cher-Ae Heights Indian Community of the Trinidad Rancheria, et. al

Additional Amici:

JAMESTOWN S'KLALLAM TRIBE OF WASHINGTON; SHERWOOD VALLEY RANCHERIA OF POMO INDIANS; EWIIAAPAAYP BAND OF KUMEYAAY INDIANS; BISHOP PAIUTE TRIBE; CALIFORNIA ASSOCIATION OF TRIBAL GOVERNMENTS (35 TRIBES); FORT INDEPENDENCE INDIAN COMMUNITY OF PAIUTE INDIANS; PECHANGA BAND OF LUISEÑO MISSION INDIANS; PORT GAMBLE S'KLALLAM TRIBE; KASHIA BAND OF POMO INDIANS OF THE STEWART POINT RANCHERIA; JAMESTOWN S'KLALLAM TRIBE; MANCHESTER BAND OF POMO INDIANS; ELEM INDIAN COLONY OF POMO INDIANS; ELK VALLEY RANCHERIA; PIT RIVER TRIBE; QUARTZ VALLEY INDIAN COMMUNITY OF THE QUARTZ VALLEY RESERVATION OF CALIFORNIA; REDDING RANCHERIA; YUROK TRIBE OF THE YUROK RESERVATION

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I. REASONS FOR GRANTING THE PETITION FOR REHEARING OR REHEARING EN BANC

The Panel's decision in *RMCA v. Mazzetti* creates an intra-circuit conflict by sharply deviating from the tribal exhaustion doctrine crafted by the U.S. Supreme Court and implemented through the precedents of this Circuit. The Panel decision will effectively require an Indian Tribe to demonstrate tribal jurisdiction in federal court before the applicable tribal court has had the opportunity to develop an evidentiary record in order to determine its own jurisdiction in the first instance, as anticipated by the Supreme Court in the *National Farmers Union Insurance v. Crow Tribe*, 471 U.S. 845, 856-857 (1985). In order to restore uniformity of decisions within the Circuit, the petition for rehearing or rehearing en banc should be granted.

In addition, the petition presents a question of exceptional importance. In crafting the tribal exhaustion doctrine, the Court intended to advance the following interests: "(1) furthering congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary." *National Farmers*, 471 U.S. *at* 856-857. By not fully considering these interests, the Panel's decision jeopardizes tribal self-governance—the ability of Indian tribes to make their own laws and to be ruled by them.

II. STATEMENT REGARDING FRAP Rule 29(c)(5)

Pursuant to Federal Rules of Appellate Procedure (FRAP) Rule 29(c)(5), *Amici Curiae* state that Appellees/Petitioners' ("Petitioner") counsel neither 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.

III. INTERESTS OF *AMICI CURIAE*

Amici Curiae Santa Ynez Band of Chumash 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 tribes in the Ninth Circuit with land bases ranging from tens to millions of acres. Many of the *Amici* administer, or are in the process of developing, public health and safety services and environmental programs designed to protect water and air quality, and other resources. All *Amici* share a common interest in interpreting and adjudicating tribal laws to protect their members, visitors and natural resources from on-reservation activities that threaten them, including activities of non-Indians.

Amici Tribes are concerned that the Panel's decision departs from the precedent of the Supreme Court and this Circuit and, if allowed to stand, would deprive them of the ability to interpret their own laws and determine, in the first instance, tribal jurisdiction to *prevent* situations of potentially catastrophic harm to tribal members and resources posed by the activities of non-Indians on fee lands within their reservations.

IV. STATEMENT OF FACTS

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

V. ARGUMENT

A. The Panel Decision Undermines Congress' Policy of Tribal Self-Government

Tribal sovereignty inherently implicates the authority of a tribe to adjudicate matters concerning its lands, people and resources. "If courts are to honor Congress's commitment to tribal self-government, tribal courts must be allowed to exercise their authority…absent over-whelming countervailing concerns." *Kerr-McGee Corporation v. Farley*, 115 F.3d 1498, 1508 (10th Cir. 1997). Indeed, it is the commitment to enhancing tribal self-government that led the Supreme Court, in the *National Farmers* case, to craft the doctrine of tribal exhaustion, and to conclude that "the forum whose jurisdiction is being challenged" should be given

the first opportunity to determine whether such jurisdiction exists. *National Farmers*, 471 U.S. *at 856.*

The policies for promoting tribal self-government and self-determination through exhaustion of tribal court remedies were further acknowledged by the Court in *Iowa Mutual Insurance Company v. LaPlante*. *Iowa Mutual v. LaPlante*, 480 U.S. 9 (1987). There the Court noted that "[t]ribal courts play a vital role in tribal self-government [citation omitted] and the Federal Government has consistently encouraged their development." *Id.* at 14. As such, "considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court." *Id.* at 15 (Citing *National Farmers Union*, 471 U.S. at 857). Thus, the Court recognized that considerations of both comity and the promotion of tribal self-determination favor tribal court exhaustion:

> [P]roper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors." The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. *Id.* at 16.

Without reconsideration, the Panel's decision would allow courts to improperly disregard these long-standing principles of comity and respect for tribal self-governance by allowing the exception to the tribal exhaustion doctrine to swallow the rule. *See, e.g, Elliott v. White Mountain Apache* 566 F.3d 842 (9th Cir. 2009). "[I]f a federal court accepts the reasoning that a party does not have to

exhaust tribal remedies in a case where the party says the underlying tribal action is preempted, there will never be an exhaustion rule." *Reservation Telephone Cooperative v. Three Affiliated Tribes*, 76 F.3d 181, 185 (8th Cir. 1996) (internal quotations omitted). Moreover, the Panel decision ignores the Supreme Court's mandate that:

> Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." *Iowa Mutual*, 480 U.S. at 16.

B. By Denying the Tribal Court the Opportunity to Develop a Full Record in the First Instance, the Panel Decision Inhibits the Orderly Administration of Justice and Precludes the Benefit of Tribal Expertise

Tribal courts are best suited to determining, in the first instance, what potential impacts an action or activity may have on the tribe, its people and its resources. The Supreme Court has determined that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *National Farmers*, 471 U.S. at 856.

The Court further observed that the risk of a "procedural nightmare" "will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." *Id.* at 857. The tribe must itself first interpret its own law and define its own jurisdiction. *Burlington Northern R. Co. v. Crow Tribal Council*, 940 F.2d

1239, 1246 (9th Cir. 1991). "Without the tribal record, the federal district court here faced an action based on an uninterpreted tribal ordinance and an obscure factual background." *Id.* Tribal court exhaustion thus allows the tribal courts to make a record regarding the factors that underlie a determination of whether there is tribal jurisdiction.[1]

In the case before the Panel, Plaintiffs prematurely sought relief from the District Court, which properly directed Plaintiffs to exhaust their tribal court remedies in accordance with Supreme Court precedent. If, after exhausting tribal court remedies, Plaintiffs disagree with the tribal court's determination, they may challenge the Tribe's exercise of personal and subject matter jurisdiction in District Court.[2] Rather than litigate in multiple courts simultaneously, Supreme Court precedent directs that parties challenging tribal court jurisdiction exhaust such remedies prior to seeking relief before the federal courts with the courts deferring to the tribal court to make the initial determination of jurisdiction.

Where, as here, the Tribe's jurisdiction turns in part on the interpretation of a disputed tribal law and whether the Plaintiffs' activities threaten or have some

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[1] Even in the *Plains Commerce Bank v. Long*, 554 U.S. 316, which the Panel seems to heavily rely on, the posture of the case was such that by the time it got to the Supreme Court, tribal court remedies had been exhausted. *Plains Commerce Bank v. Long, 554 U.S. 316 (2008)*

[2] (*See e.g., National Farmers Union,* 471 U.S. 845, *Elliott,* 566 F.3d 842, *Burlington Northern*, 940 F.2d 1239, *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000)).

direct effect on the Tribe's resources, the Petitioners' tribal court must have the opportunity to interpret tribal law and decide the scope of tribal jurisdiction before the Plaintiffs can resort to federal court. *See*, *Burlington Northern*, 940 F.2d at 1247; S*ee also Stock West v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992).

In finding that exhaustion was required, the District Court, in the present case, considered evidence that the Plaintiffs' conduct on their property "pose[s] direct threats to the Tribe's groundwater resources" and that "[c]onditions on the Subject Property during the [2007] Poomacha Fire contributed to the spread of wildfire from that property to Tribal lands. . ."[3] 9/21/2010 *District Court Order*, p. 13. This case, in which there are *pending* tribal court proceedings, underscores the need for a full evidentiary record to interpret the Tribe's law and determine the nature of the threat to the Tribe posed by the Plaintiffs' activities.

C. The Record in This Case Demonstrates "Colorable and Plausible" Tribal Jurisdiction in Direct Contradiction of the Panel's Conclusion that Tribal Jurisdiction is "Plainly Lacking."

The Supreme Court has crafted narrow exceptions to the tribal exhaustion doctrine. *Atwood v. Fort Peck Tribal Court*, 513 F.3d 943, 948 (9th Cir. 2007). The initial exceptions were articulated in *National Farmers*, 471 U.S. at 856 n. 21, and added to and refined in later Supreme Court cases such that there are now four

[3] Petitioners seek judicial notice of evidence, developed as part of the tribal court proceedings, showing an actual plume of diesel-based petroleum contamination in the groundwater below the RMCA property. *See* Petition for Rehearing En Banc at 6.

exceptions to the tribal exhaustion remedy that are utilized by courts.[4] The Panel, referencing the fourth exception, determined 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.'" *4/20/2012 Memorandum Decision* at p. 2, citing *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d at 847 (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). However, "*Hicks* did not purport to overrule the Supreme Court's precedents establishing that a plaintiff must exhaust his tribal remedies even if tribal jurisdiction is not conclusively established." *Paddy v. Mulkey*, 656 F.Supp.2d 1241, 1246 (D. Nev. 2009). The Panel's determination that jurisdiction is "plainly lacking" runs contrary to this and other Circuit's precedent. (*See, e.g., Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) – tribal court had jurisdiction in action arising out of an accident on a public highway within the reservation; *Kerr-McGee Corporation v. Farley*, 115 F. 3d 1498 – tribal court jurisdiction was plausible despite controlling federal act such that tribal exhaustion was required).

The courts have "equated" the inquiry into whether jurisdiction is "plainly" lacking "with whether jurisdiction is 'colorable' or 'plausible.'" *Atwood*, 513 F.3d at 948 (internal citations omitted). "By colorable we mean that on the record

[4] (*See, e.g.*, discussion of exceptions to exhaustion of tribal court remedies by this Circuit, *Elliot*, 566 F.3d at 847).

before us, the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis." *Stock West*, 964 F. 2d at 919. Based on this standard, the court found that the question of whether tribal law applied to the claim at issue "present[ed] a colorable question that must be resolved in the first instance" by the tribal court. *Id.* at 920. This Circuit has found that where tribal court proceedings regarding the jurisdiction issue have not been fully exhausted, and no binding precedent applies to the particular situation at issue, a federal court cannot say that the tribal court plainly lacks jurisdiction over the dispute. *Ford Motor Co. v. Todecheene*, 474 F.3d 1196 (9th Cir. 2007) (en banc *order amended and superseded by Ford Motor Co. v. Todecheene*, 488 F.3d 1215 (9th Cir. 2007)) (finding that because the jurisdiction question presented in the case was not resolved by the Circuit's en banc opinion in *Smith v. Salish Kootenai College*, 434 F. 3d 1127, the court could not say that tribal courts plainly lack jurisdiction over the dispute, and remanding the case to the district court with instructions to stay proceedings pending exhaustion of available proceedings in tribal courts, including appellate review).[5]

Although the Supreme Court held, in *Montana v. United States*, that tribes generally do not have jurisdiction over non-Indian activities occurring on reservation fee lands, that general rule is subject to two important exceptions. 450

[5] The Panel hearing the case issued a new decision in accordance with the en banc decision. *Ford Motor Co.*, 488 F. 3d 1215 (9th Cir. 2007).

U.S. 544, 565-66 (1981). Under the second *Montana* exception, a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservations when that conduct threatens or has some direct effect on the political integrity, the economic security of the health or welfare of the tribe." *Id*. at 566. Although the *Montana* exceptions are narrowly construed, the Supreme Court clearly did not foreclose tribal jurisdiction over the conduct of non-Indians on reservation fee lands.

Tribes may have jurisdiction over the conduct of a nonmember when that conduct (setting a fire without a permit on tribal lands) destroyed natural resources of tribal lands. *Elliott*, 566 F. 3d at 849. Although the nonmember's conduct, in *Elliott*, was on tribal lands, the court applied the second *Montana* exception and found that tribal court had jurisdiction because the tribe has a strong interest in enforcement of its regulations governing trespass, prevention of forest fires, and preservation of its natural resources, and that such regulations are intended to secure the tribe's political and economic well-being. *Id*. at 850. Furthermore, "[a] tribe retains the 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 health and welfare of the tribe… *This includes conduct that involves the tribe's water rights*." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) (emphasis added). This is because such *threats* pose

tangible and direct threats to tribal health and welfare thereby making tribal jurisdiction plausible. *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (noting that "tribes will normally be able to demonstrate that the impacts of regulated activities are serious and substantial due to "generalized findings" on the relationship between water quality and human health and welfare." *Id.* at 1139).

The Eighth Circuit has held that "[t]he issue of tribal exhaustion is a threshold one because it determines the appropriate forum." *Gaming World International v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003). Here, the appropriate forum was the tribal court because the Tribe was exercising its core governmental authorities by protecting the natural resources of the Reservation and pending tribal court proceedings were developing a record of the non-Indian activities that threatened those resources. Although not on all fours, the threat to the Tribe caused by the non-Indian conduct in the present case is much the same as the situation considered by the court in *Elliott*. In *Elliott*, *Montana v. EPA*, and *Colville Confederated Tribes v. Walton* this Circuit has found that conduct of nonmembers, which threatens Reservation water and creates and contributes to a wildfire threat, may under certain circumstances be regulated by the Tribe under the second *Montana* exception and thus presents "colorable" and "plausible" tribal court jurisdiction. The Tribe seeks to regulate the conduct of the Plaintiffs that adversely affects Reservation lands, and the Tribe has presented

ample evidence that such conduct has contaminated the limited groundwater supply and contributed to the documented wildfire threat on the Reservation. Therefore, tribal jurisdiction is plausible and is not plainly lacking in this matter.

D. Existing Precedent does not Bar Tribal Court Jurisdiction to Regulate Non-Indian Conduct Threatening Tribal Resources.

Though the precise jurisdiction question presented in the present case has not been decided by the Supreme Court or this Circuit, the Tribe's assertion of tribal court jurisdiction under the second *Montana* exception is not barred by existing precedent. The Panel decision relies on *Plains Commerce* to point out that "the tribe has no authority … to regulate the use of fee land." *Plains Commerce Band v. Long*, 554 U.S. at 329, *4/20/2012 Memorandum Decision*, p. 2. However, the Supreme Court noted that certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. *Plains Commerce,* 554 U.S. at 335. As to tribal regulation of fee land, the Court observed that "the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same." *Id.* at 336. Similarly, although this Circuit, based on the Supreme Court's reasoning in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), has declined to apply the second *Montana* exception in the context of certain tort actions involving motor vehicle accidents on right-of-ways, that line of cases does

not bar tribal court jurisdiction in the present case.[6] In *Strate* the Court found that tribal court jurisdiction over a commonplace state highway accident claim was not necessary to protect tribal self-government and was not crucial to the political integrity, the economic security, or the health or welfare of the tribes. *Strate, 520 US* at 459. The line of cases following *Strate* rely on the same basic reasoning. The *Strate* line of cases, however, do not consider the assertion of tribal jurisdiction, at issue in the present case, to regulate the nonmember conduct that threatens to impair or destroy the natural resources and economic base on which the reservation depends. Therefore, tribal court jurisdiction would not be "plainly lacking" under *Strate* and its progeny. Distinguishing the *Strate* line of cases, this Circuit in *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1075 (9th Cir. 1999) found plausible tribal court jurisdiction over a bad-faith insurance claim because the conduct is related to the reservation.

Tribal court jurisdiction in the present case, moreover, is particularly not foreclosed by the Court's decision in *Hicks*, 533 U.S. 353, or similar Circuit decisions such as *State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir.1999); or *Yellowstone County v. Pease,* 96 F.3d 1169 (9th Cir.1996). Unlike those cases, the Tribe, in the present case, is not asserting jurisdiction over state or county officials carrying out state duties, and the interests of the Tribe are not

[6] *See, e.g., Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999); *Wilson v. Marchington*, 127 F.3d 805 (9TH Cir. 1997).

balanced against the interests of the state. Thus, in the present case, the Tribe's assertion of its jurisdiction to regulate the conduct of nonmembers, on reservation fee lands, for the purpose of preventing contamination of the reservation's limited groundwater and preventing catastrophic reservation wildfire, is not barred by existing precedent but rather demonstrates "colorable" and "plausible" jurisdiction by the tribal court.

VI. CONCLUSION

This Circuit has acknowledged that "[t]here is no simple test for determining whether tribal court jurisdiction exists." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989). The Panel decision inappropriately shifts the burden onto the Tribe to show conclusive tribal jurisdiction in the district court proceedings contrary to Supreme Court precedent holding that as long as there is some plausible or colorable basis for tribal court jurisdiction, the tribal court – not the district court – must have the first opportunity to make that determination. Based on the evidence considered by the District Court, tribal jurisdiction is not plainly lacking and there is a plausible or colorable basis for tribal jurisdiction.

The circumstances presented in this case are precisely why the Supreme Court requires exhaustion of tribal court remedies. The Panel's decision is contrary to Congress' policy of tribal self-determination and self-government, and

its deviation from well-established Supreme Court and Circuit precedent undermines on-going tribal court proceedings to interpret tribal law and develop an evidentiary record necessary to make an initial determination of jurisdiction. This decision threatens Indian tribes located throughout this Circuit, many of whom have developed sophisticated laws, regulations, and court systems and must, as a matter of federal law and policy have the right to interpret their own laws, and make the first determination of their jurisdiction based on a full record. Therefore, *Amici* Tribes respectfully request that the request for rehearing or rehearing en banc be granted.

Respectfully submitted,

Dated: May 21, 2012

/s/ Brenda L. Tomaras
BRENDA L. TOMARAS
TOMARAS & OGAS, LLP

/s/ Timothy C. Seward
TIMOTHY C. SEWARD
HOBBS, STRAUS, DEAN
& WALKER, LLP

Attorneys for *Amici* Tribes

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 3,335 words.

s/Brenda L. Tomaras
Brenda L. Tomaras
Attorney for *Amici* Tribes

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.

s/Brenda L. Tomaras
Brenda L. Tomaras
Attorney for *Amici* Tribes