No. 09-187

IN THE
Supreme Court of the United States

VALINDA JO ELLIOTT,

Petitioner,

v.

WHITE MOUNTAIN APACHE TRIBAL COURT; HONORABLE JOHN DOE TRIBAL JUDGE; and WHITE MOUNTAIN APACHE TRIBE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether it is "plain" that a tribal court lacks jurisdiction over a non-Indian trespasser who starts a fire on the tribe's reservation trust land, leading to the destruction of thousands of acres of the tribe's commercial forest lands.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption. The Intertribal Council of Arizona, Inc. appeared as *amicus curiae* in the Ninth Circuit Court of Appeals in support of Respondents White Mountain Apache Tribal Court, Honorable John Doe Tribal Judge, and the White Mountain Apache Tribe of Arizona.

Respondent White Mountain Apache Tribe is a federally recognized Indian Tribe, organized under § 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476 *et seq*.

Petitioner Valinda Jo Elliott is an individual non-Indian and a non-member of the White Mountain Apache Tribe.

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STATEMENT OF THE CASE AND PROCEEDINGS BELOW

This case concerns the regulatory and adjudicatory authority of an Indian tribe over a non-Indian trespasser who started a forest fire on the tribe's reservation trust lands.[1] The issue before this Court is whether the non-Indian Petitioner must first exhaust tribal court remedies before seeking federal court review under federal question jurisdiction, or is it "plain" as Petitioner claims, that a Tribe lacks regulatory and adjudicatory authority over non-consenting non-Indians "*no matter how much damage a trespassing non-Indian causes to tribal land.*" (Pet. 3, 14).

The facts are generally not in dispute. In June 2002, Petitioner Valinda Jo Elliott, a non-Indian, in the company of her employer, entered the Fort Apache Indian Reservation of the Respondent White Mountain Apache Tribe of Arizona.[2] Neither of them had

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1. Respondent Tribe submits its own QUESTION PRESENTED as Petitioner's is argumentative, Supreme Court Rule 14.1(a).

2. The White Mountain Apache Tribe is a federally recognized Indian tribe, organized under § 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476 *et seq.* The Tribe's Fort Apache Indian Reservation, comprised of over 1.66 million acres of trust land, was established by President Grant's Executive Order on November 9, 1871. A distinguishing characteristic of the Fort Apache Indian Reservation is that it was never subject to the General Allotment Act of 1887, 24 Stat. 88, as amended, 25 U.S.C. § 331 *et seq.* That Act has no application to this case.

permission from the Tribe to enter the Reservation and to start a fire. They became lost and their private vehicle ran out of gas. Elliott and her employer split up or became separated. Elliott's employer eventually came upon tribal members who gave him assistance. Elliott, however, became lost and wandered for three days in the Tribe's forest. (Pet. App. 2-3).

On the third day, Elliott started a signal fire to attract the attention of a helicopter she had spotted overhead. The helicopter descended and rescued her. However, her signal fire grew into a substantial forest fire, later named the Chediski Fire, which eventually merged with the ongoing Rodeo Fire to become the Rodeo-Chediski Fire. The combined fire burned more than 400,000 acres of land within the State of Arizona and caused millions of dollars in damage. Thousands of acres of the Tribe's forest lands were destroyed by the fire.[3] (Pet. App. 3).

On June 11, 2003, the Tribe filed a civil action in its tribal court against Elliott for violation of the Tribe's Game and Fish and Natural Resource Codes seeking civil penalties and restitution for damages caused by the fire she started the year before.

On July 23, 2003, Elliott filed a motion to dismiss the Tribe's complaint for lack of subject matter and personal jurisdiction. On December 18, 2003, the tribal court, citing relevant United States Supreme Court

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3. The United States Attorney's Office did not criminally prosecute Elliott.

cases (App. 40-41), denied Elliott's motion to dismiss.[4] On January 19, 2004, Elliott sought interlocutory appellate review of that decision in the tribal appellate court. (Pet. App. 4).

The tribal appellate court issued an Order of Dismissal on April 12, 2005, denying Elliott's request for appellate review holding that, under its rules of appellate procedure as promulgated by the tribal legislature, it could not entertain interlocutory appeals. The appellate court dismissed Elliott's appeal finding no appealable order, and for lack of appellate jurisdiction, and returned the case to the tribal trial court for further proceedings. (Pet. App. 43-46). The parties subsequently

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4. Elliott has raised the specter in this case (often refrained in other tribal court jurisdiction cases), of being "forced" to defend in an "unfamiliar tribal court." Elliott is mistaken when she tells this Court that she would be "in front of a jury made up *only* of members of the Tribe to which she has caused so much damage." (Pet. at 19). Rule I-15B of the Tribe's Rules of Civil Procedure provides that the tribal trial court jury pool shall include non-tribal permanent residents of the Reservation. She also makes much ado about two Apache words used by the tribal trial court when it denied her motion to dismiss for lack of tribal court jurisdiction. The first one, "Nn'dee Bi-kee Yuh," is the Apache word for the tribe's reservation land. The second word, "*C'hinl-seeh Hoz-unh*," refers to standard of conduct. (Pet. at (i) and 19; P. App. 41-42). However, the tribal trial court foremost applied this Court's precedent when it denied Elliott's motion to dismiss. (Pet. App. 39-42). Elliott's claim that she will be subject to an unfamiliar forum or unfair trial is pure speculation and there is nothing in the record to suggest otherwise. Exhaustion of Tribal Court remedies in accordance with this Court's precedent will produce a complete record reviewable by a federal court.

appeared before the tribal trial court in the fall of 2005, to initiate pretrial (discovery) proceedings. (Pet. 3).

On December 27, 2005, Elliott filed an action in the Federal District Court in Arizona seeking injunctive and declaratory relief against the White Mountain Apache Tribe, Tribal Judge, and Tribal Court, from conducting any further proceedings in Tribal Court on the grounds that the Tribe lacked civil authority over her because she was a non-consenting non-Indian.[5] (Pet. App. 19-20).

On December 7, 2006, the Federal District Court denied Elliott's challenge to Tribal Court jurisdiction and rejected her argument that the Tribal Court's jurisdiction was "plainly lacking" or that Elliott came within other exceptions to the tribal court exhaustion doctrine. The District Court granted the Tribe's motion to dismiss without prejudice preserving Elliott's right to refile after she had exhausted her Tribal Court remedies. (Pet. App. 4, 25, 30, 37-38).

Elliott subsequently appealed to the United States Court of Appeals for the Ninth Circuit. The appeal was argued on October 22, 2008. On May 14, 2009, the Ninth Circuit unanimously affirmed the District Court's dismissal of Elliott's complaint for declaratory and injunctive relief without prejudice. (Pet. App. 1).

The Ninth Circuit agreed with the District Court that it was not "plain" that the Tribal Court lacked

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5. Tribal court authority over non-Indian non-members is a federal question, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-853 (1985).

jurisdiction and held that Elliott must first exhaust her Tribal Court remedies before refiling in Federal court. The Ninth Circuit determined that none of the exceptions to the exhaustion of tribal court remedies outlined by this Court in *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) were applicable. Both lower courts found that the tribal court's jurisdiction was "colorable" or "plausible" under *Montana v. United States*, 450 U.S. 544 (1981), *Hicks*, *supra*, and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). (Pet. App. 10-11, 14-17).[6]

Elliott filed a Petition for Certiorari on August 11, 2009, presumably based upon Supreme Court Rule 10 (c).[7] (Pet. 5).

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6. The Tribe filed a Citation of Supplemental Authority of this Court's opinion in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. ____ , 128 S. Ct. 2709 (2008), with the Ninth Circuit prior to oral argument on October 22, 2008.

7. The Tribe presumes that Elliott is relying on Rule 10 (c) as the basis for her Petition because Elliott makes no argument that the Ninth Circuit's Opinion represents a conflict of opinion and authority between the circuit courts of appeal. *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951), citing *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 337, 393 (1923). Cursory review of circuit courts of appeal opinions on tribal court jurisdiction and exceptions to the tribal court remedy exhaustion doctrine reveal no conflict between the circuits in light of this Court's criteria regarding exhaustion of tribal court remedies as most recently discussed by the Court in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. ___,128 S. Ct. 2709 (2008), a case never mentioned by Petitioner.

Elliott's Petition states that she is waiving any challenge to the Tribe's jurisdiction that she made to the U.S. Court of Appeals, except as follows, *viz.*, that:

> "[I]t is *plain* that the tribal court has neither regulatory nor adjudicatory jurisdiction . . . where the conduct at issue [is] by [a] non-consenting non-Indian on tribal land . . ." Pet. i; and that in regards to the second *Montana* exception:
>
> "[No] matter how much damage a trespassing non-Indian causes to tribal land, that action in no way touches on tribal self-government. Nor does it touch on tribal sovereignty." (Pet. 14.)[8]

REASONS TO DENY PETITION FOR WRIT OF CERTIORARI

A. Summary of Tribe's Argument

The right to regulate non-Indian "activities" or "conduct" on reservation trust lands stems from a tribe's retained sovereign authority to exclude

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8. Stated another way, Elliott is dissatisfied with the case by case factual context approach that this Court has taken in Indian tribal court cases and admonishes the Court that it "must move" to establish a "bright line rule" that tribal courts "lack" jurisdiction over "non-consenting non-Indians" and end questions of tribal jurisdiction over non-Indians that "have plagued this Court and others for many years," "[n]o matter how much damage a trespassing non-Indian causes to tribal land." (Pet. at 8, 14, 20).

nonmembers from its trust lands. A tribe's exercise of regulatory and adjudicatory authority over a non-Indian trespasser who starts a devastating fire on the tribe's trust lands is clearly within this Court's instructive rulings in *Montana v. United States*, 450 U.S. 544 (1981) and *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, (1985). The Ninth Circuit Court of Appeals did not commit reversible error when it found that tribal court jurisdiction was "plausible" under applicable law and the facts of the case, and that principles of comity required that it give the tribal court a full opportunity to determine its own jurisdiction in the first instance. Nor did the Ninth Circuit commit reversible error when it found that it was not "plain" that the Tribe lacked regulatory and adjudicatory authority over Elliott and her conduct on the Reservation, and because of that, Elliott did not come within one of the "exceptions" that would exempt her from first exhausting tribal court remedies to allow the tribal court to determine its own jurisdiction before *de novo* federal court review.

As a matter of policy, the "bright line" type of rule that Elliott seeks (*see* footnote 8), would cause great harm to Indian people and reservation land, leaving them defenseless to enforce civil and exclusionary regulations that protect them and their trust property from non-Indian intruders or violators of tribal laws. Regulatory authority without adjudicatory authority would eviscerate tribal sovereignty. The federal court remedy Elliott proposes as an alternative for the Tribe does not exist. Federal court jurisdiction is limited, as are criminal federal trespass statutes regarding Indian lands and property.

B. Discussion

Elliott takes two extreme positions in her Petition, (1) that it is "plain", e.g., *Nevada v. Hicks*, *supra*, that a tribal court "has neither regulatory nor adjudicatory jurisdiction" where the conduct at issue is by a non-consenting non-Indian (Pet. 5); and (2), that "[N]o matter how much damage a trespassing non-Indian causes to tribal land, that action in no way touches on tribal self-government. Nor does it touch on tribal sovereignty;" or comes within this Court's second exception in *Montana v. United States*, 450 U.S. 544, 565-566 (1981). (Pet. 14). Elliott's assertions are not even vaguely supported by this Court's precedent or by congressional policy regarding tribal authority over Indian trust lands, especially Indian forests, water, and other natural resources.

This Court has long recognized Indian tribes as "distinct, independent political communities," *Plains*, Slip Op. at 8, 128 S. Ct. at 2718 (2008) citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), qualified to exercise many of the powers and prerogatives of self-government, *id* at 8, citing *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). The Court has also frequently noted that the "sovereignty that the Indian tribes retain is of a unique and limited character," *Wheeler*, at 323, and centers on the land held by the tribe and on tribal members within the reservation. *See United States v. Mazurie*, 419 U.S. 544, 557 (1975) (tribes retain authority to govern "both their members and their territory," subject ultimately to Congress); *see also Nevada v. Hicks*, 533 U.S. 353, 392 (2001) ("[T]ribes retain sovereign interests in activities that occur on land

owned and controlled by the tribe") (O'Connor, J., concurring in part and concurring in judgment).

This Court has also held that, as a general matter, tribes do not possess regulatory and adjudicatory authority over non-Indians who come within their borders, subject however, to *certain exceptions* articulated in the Court's "pathmarking case," *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) citing *Montana v. United States*, 450 U.S. 564 (1981). The issue in *Montana* was the retained authority of the Crow tribe to regulate hunting and fishing on *non-Indian fee simple lands* within the Crow reservation.

In *Montana*, this Court provided two exceptions under which tribes may exercise civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," 450 U.S. at 565, which are (1) "[A] tribe may regulate, through taxation, licensing, or other means, the *activities* of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *Id.*, and that (2) "[A] tribe may also 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," *Id.* at 566.

Thus, this Court has made it clear that as part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, *Plains*, Slip Op. at 9, 128 S. Ct. at 2718 (2008) (internal citations

omitted). The Court observed that this retained power stems from the retained sovereign authority of tribes to exclude outsiders from entering tribal land, citing *Duro v. Reina*, 495 U.S. 676, 696-697 (1990). *See Plains*, Slip Op. 9, 128 S. Ct. at 2718-19 (2008).

Elliott is only arguing that the second *Montana* exception does not apply to her conduct, (Pet. 4), but this Court has observed that both exceptions stem from the same sovereign interests. *Plains*, Slip Op. 22, 128 S. Ct. at 2725-26 (2008). Thus, a tribe's regulatory legislation applies in both *Montana* exceptions, and its adjudicatory authority arguably also applies to both. This Court noted in *Plains*, "[b]y their terms, the exceptions concern regulation of "the *activities* of nonmembers" or "the *conduct* of non-Indians on fee land." (Court's emphasis), Slip Op. 11, 128 S. Ct. at 2720 (2008).

1. Under *Montana* and Its Progeny the Status of Land in This Case Is Dispositive in Determining Tribal Jurisdiction

Although, as Elliott points out, this Court has held that the inherent sovereign powers of an Indian tribe to regulate nonmembers, especially on non-Indian fee land, are "presumptively invalid," citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, at 659 (2001) (Navajo tribe's tax not applicable to non-Indian guests at non-Indian owned hotel on non-Indian fee simple land within reservation), it has also strongly suggested that the status of the land becomes relevant "insofar as it bears on the application of . . . the *Montana* exceptions . . ." *Hicks*, 533 U.S. at 376 (Souter, J., concurring).

In *Plains*, this Court distinguished tribal authority over nonmember activities taking place on the reservation when nonmember activity occurs on land *owned in fee simple by non-Indians* - what the Court called "non-Indian fee land," *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (internal quotation marks omitted), from nonmember activities that occur on land *owned and controlled by the tribe*. *See Plains*, Slip Op. at 8-9, 128 S. Ct. at 2718 (2008), citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (tribes retain authority to govern "both their members and their territory," subject ultimately to Congress); *Nevada v. Hicks*, 533 U.S. 353, 392 (2001) ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe"); *Montana*, 450 U.S. at 557, (Crow tribe retained power to limit or forbid hunting or fishing by nonmembers on lands still owned by or held in trust for the tribe."), cited by the Court in *Strate*, 520 U.S. at 446, and at 454 ("We "can readily agree," in accord with *Montana*, 450 U.S. at 557, that tribes retain considerable control over nonmember conduct on tribal land.")

The Court has consistently held that a tribe's retained or residual sovereign authority flows from a tribe's "traditional and undisputed power to exclude persons" from tribal land. *Duro v. Reina*, 495 U.S. 676, at 696-697 (1990) (right to exclude outsiders from entering tribal land); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n. 18 (1983) ("Our cases have recognized that tribal sovereignty contains a "significant geographical component."), citing *White Mountain*

Apache Tribe v. Bracker, 448 U.S. 136, at 151[9]; *South Dakota v. Bourland*, 508 U.S. 679, 691, n. 11 (1993) ("Regulatory authority goes hand in hand with power to exclude"). *See also Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515 (1832) (non-Indians allowed to enter Cherokee land only "with the assent of the Cherokees themselves." *Id.*, at 561); *One Op. Attorney Gen.* 465 (1821), 55 Interior Dec. 14, 48-50 (1934) (Powers of Indian Tribes). *See*, *e.g.*, *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir.1985) (tribe's exclusion of non-Indian through tribal court civil process upheld)

Against the backdrop of its own precedent, it is not surprising that this Court recognized in *Hicks*, "[W]e acknowledge that tribal ownership is a factor in the *Montana* analysis, and a factor *significant enough* that it may sometimes be dispositive." *Id.* at 370 (emphasis added).

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9. *Mescalero*, at 337:

> It is beyond doubt that the . . . tribe lawfully exercises substantial control over the lands and resources of its reservation, including its wildlife . . . [t]he sovereignty retained by the tribe includes its right to regulate the use of resources by members as well as nonmembers. In *Montana v. United States*, we specifically recognized that tribes in general retained this authority.

2. The Congressionally Recognized Authority of Tribes to Manage Their Own Forest Resources Favors Tribal Jurisdiction for Trespass Actions

The Tribe's reservation encompasses over 1.66 million acres of trust land of which a substantial portion is covered by ponderosa pine and mixed conifer forest. The Tribe is the beneficial owner of the forests and other natural resources located on its land. *United States v. Shoshone*, 304 U.S. 111 (1938); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 138 (1980) ("[u]nder Federal law, timber on reservation land is owned by the United States for the benefit of the tribe."). *See also United States v. Algoma Lumber Company*, 305 U.S. 415, 420 (1939) (the United States has no beneficial interest in the Indian timber and must use the proceeds from the reservation timber sales for the "benefit and protection of the Indians.") *See also United States v. West*, 232 F.2d 694 (9th Cir.), *cert. denied*, 352 U.S. 834 (1956) (the White Mountain Apache Tribe's title to its reservation is "as sacred as the fee simple title of whites."). In this case, the White Mountain Apache Tribe's Fort Apache Timber Company has been the mainstay of its economy for over 50 years and commercial logging has been on the Reservation since the early 1900's.

Congressional policies have long been protective of Indian ownership of their forest resources. The Indian Reorganization Act of 1934 (48 Stat. 984) (IRA), in recognition of Indian beneficial ownership of timber within tribal lands, required the Secretary of the Interior to enact regulations for the operation of "Indian forestry

units" on the principle of "sustained yield management," 25 U.S.C. § 466. The purpose of the provision was to insure the "proper and permanent management" of Indian forests under modern sustained-yield methods so as to assure that Indian forests would be "permanently productive and will yield continuous revenues to the tribes." *United States v. Mitchell*, 463 U.S. 206, 221 (1983) (*Mitchell II*).

The Tribe first adopted a constitution under § 16 of the IRA in 1938. The Tribe's most recent revised Constitution, approved by the Secretary of the Interior on November 12, 1993, retains provisions that confirm tribal sovereign authority over trust lands and timber dating back to the Tribe's original 1938 IRA Constitution. These provisions read in part:

> "In *addition* to all powers vested in the White Mountain Apache Tribe *through its inherent sovereignty or by existing law*, the White Mountain Apache Tribal Council shall exercise the following powers, subject to any limitations imposed by this Constitution . . . (i) to manage all economic affairs and enterprises of the Tribe, *including tribal lands*, *timber*, *sawmills* . . ." [10] (emphasis added)

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10. *See also* WMAT Const., Art. IV, § 1 (i) and (q) ([powers] the Tribal Council also has power, "To enact ordinances establishing and governing tribal courts and law enforcement on the reservation, . . . and providing for the *removal or exclusion* from the reservation of *any non-member* of the Tribe whose presence *may be injurious to the people or property* of the reservation." (emphasis added).

Although congressional policies involving the management of Indian forests goes back more than 100 years, in 1990, Congress enacted a comprehensive Indian Forest management statute, the National Indian Forest Resource Management Act, 25 U.S.C. §§ 3101-3120 (NIFRMA), to provide tribes with an even more active role in management of their forests.

In § 3101 (1) of the Act, Congress found and declared, *inter alia*, that,

> "The forestlands of Indians are among their most valuable resources and Indian forest lands are a perpetually renewable and manageable resource, provide economic benefits, including income, employment, and subsistence, and provide natural benefits, including ecological, cultural, and aesthetic values. . . . tribal governments make substantial contributions to the overall management of Indian forest lands; and *there is a serious threat to Indian forest lands arising from trespass* and unauthorized harvesting of Indian forest land resources." (Emphasis added).

In addition to establishing a management criterion framework and requiring that the Secretary must comply with all tribal laws pertaining to Indian forest lands, 25 U.S.C. § 3108, NIFRMA mandates the Secretary to establish civil penalties for forest trespass. 25 U.S.C. § 3106 (a); 25 C.F.R. § 163.29(a)(3). The Act provides that, at the request of a tribe, the federal government must defer to prosecutions in tribal court

and tribal court judgments on forest trespass are entitled to full faith and credit in federal and state courts. 25 U.S.C. § 3106 (c); 25 C.F.R. § 163.29(j)(2).

The White Mountain Apache Tribe adopted the Secretary's trespass regulations in 25 C.F.R. § 163.29, after Elliott trespassed and started a fire on the Tribe's reservation. However, that is of no moment, because the tribal court action against Elliott was filed pursuant to the Tribe's laws and regulations existing at the time of her trespass onto the Tribe's trust lands. The CFR trespass regulations promulgated by the Secretary expressly state in reference to the CFR trespass regulations that, "nothing shall be construed to prohibit or in any way diminish the authority of a tribe to prosecute individuals under its criminal or civil trespass laws where it has jurisdiction over those individuals." 25 C.F.R. § 163.29(j)(4).

3. Interference with the Tribe's Game and Fish and Natural Resource Code Fits Squarely within *Montana's* Jurisdictional Exceptions

Thousands of nonmember non-Indians come to the Tribe's Reservation every year for outdoor recreation activities, including skiing, fishing, hunting, camping, hiking, picnicking, and boating. The Tribe's entire economy and funding for its government operations depends upon proper territorial management and protection of its Reservation lands, forest, water, wildlife and other natural resources. Aside from outdoor recreation tourism development, commercial timber operations have been the mainstay of the Tribe's economy for generations. Now, the entire west side of

the Reservation where the fire took place, over 200,000 acres, cannot be logged for at least 150 years. The importance of tribal governmental regulatory and adjudicatory authority over members and nonmembers on its lands is self evident.

The Tribe's Game and Fish and Natural Resource Codes stem from the tribe's inherent sovereign authority to set (legislate) conditions on entry by nonmembers, preserve tribal self-government, or to control internal relations on tribal land. *See Montana*, 450 U.S. at 564. As this Court reiterated in *Plains*, "*Montana* and its progeny permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe's sovereign interests," *id.*, Slip Op. at 13, 128 S. Ct. at 2721 (2008) (Court's emphasis). Further, this Court has stated that "*Montana*, expressly limits its first exception to the "activities of nonmembers," 450 U.S. at 565, allowing these be regulated to the extent necessary "to protect tribal self-government [and] to control internal relations," *id.* at 564. For example, this Court in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983), approved tribal licensing requirements for hunting and fishing on tribal land by nonmember non-Indians.

The Tribe's Game and Fish and Natural Resource Codes regulate the activities of nonmembers on tribal trust land, whether invitees or trespassers, and is essential for the protection of tribal sovereign authority over the Tribe's natural resources on its trust land. Such authority, recognized by Congress and this Court for 200 years, is essential for tribal control of its internal relations, management of its economic resources, and

protection of the health, safety and welfare of tribal members, reservation residents, and tribal property. The Ninth Circuit had this to say about the nexus between the *Montana* exceptions and the Tribe's regulations at issue before it:

> "[T]he tribe makes a compelling argument that the regulations at issue are intended to secure the tribe's political and economic well-being, particularly in light of the result of the alleged violations of those regulations in this very case: the destruction of millions of dollars of the tribe's natural resources. See *Montana*, 450 U.S. at 566, ("a tribe may also 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.")" (Pet. App. 17.)

The Ninth Circuit based its observation on this Court's decisions in *Montana*, *Strate*, and *Hicks* (Pet. App. 12-17), regarding the significance of land ownership, noting that, "[T]he Supreme Court has strongly suggested that a tribe may regulate nonmembers' conduct on tribal lands to the extent that the tribe can "assert a landowner's right to occupy and exclude." (Pet. App. 15.)

Applying this Court's previous decisions on the relationship between a tribe's right to condition entry and exclusion of non-members to a tribe's right to regulate nonmember conduct, the Ninth Circuit

observed that the White Mountain Apache Tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands. (Pet. App. 15.) It also found that the tribal regulations at issue stem from the tribe's "land owner's right to occupy and exclude," and concluded that, "[T]respass regulations plainly concern a property owner's right to exclude, and regulations prohibiting destruction of natural resources and requiring a fire permit are related to an owner's right to occupy," citing *Hicks*, 533 U.S. at 359, (discussing a landowner's right to occupy and exclude) and *Strate*, 520 U.S. at 455-56, (same). (Pet. App. 15-16).

C. Elliott's Alternative Nullifies Tribal Sovereignty Over Tribal Resources and Grants Trespassers on Tribal Land Blanket Immunity for Their Actions

Elliott flatly ignores the relevance of land status by citing tribal court jurisdiction cases involving tribal regulatory and adjudicatory authority over nonmember *fee simple land*, or this Court's opinion in *Hicks*, *supra*, which involved compelling state law-enforcement interests, interests that are not present in this case. She ignores this Court's strong pronouncements regarding Indian tribes retained or residual sovereign authority *over their trust land*. Although she goes so far as to say that this Court has "*hinted* that land status could be dispositive," she then qualifies her statement by telling the Court that this "is only true if the status of the land is dispositive *in precluding* Tribal Court jurisdiction." (Pet. at 18), (Emphasis added). In other words, land status can only be applied by a court to diminish a tribe's

sovereignty over non-consenting non-Indians, but not to support it. Elliott's narrow view of the Supreme Court's precedent does not bear up under review of the Court's decisions on the significance of land as a factor in determining the extent of tribal authority over non-Indians.

Elliot argues that non-Indian activities, such as trespassing and starting forest fires on a tribe's reservation can never have a "discernible effect on the tribe or its members," and come within the first or second *Montana* exception. This defies commonsense. Tribal regulations regarding how, when, and where non-Indians may set fires on an Indian reservation certainly meet the "discernible effect" standard this Court gave as examples in *Plains*.[11] The Tribe's Game and Fish and Natural Resources Code regulating the activities of members and nonmembers alike is inextricably connected to the right of the Tribe to make its own laws and be governed by them, *Hicks*, *supra* at 361. Member or non-Indian activity which could threaten the Tribe's forest resources sufficiently affects the Tribe to justify tribal oversight through its regulatory and adjudicative authority.

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11. As noted by this Court's summary of four of its cases explaining the first exception in *Montana*, *Plains*, Slip Op. 13-14, 128 S. Ct. at 2721 (2008); *e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959) (contract dispute over a reservation debt); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152-158 (1980) (taxation of economic activity by nonmembers); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904) (Indian tax on nonmembers grazing cattle on Indian owned fee land within tribal territory); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (Creek Nation business privilege tax on nonmembers doing business within reservation upheld).

Elliott's logic becomes even more strained when she concedes on one hand that tribes have regulatory authority over nonmembers if they consent by purchasing a fishing or hunting license from the tribe, but not if they trespass and do the same activity. According to her understanding of the federal common law, a trespasser, such as Elliott, has more rights than the nonmember non-Indian who comes onto the Reservation and buys a hunting permit, and while hunting starts a fire in violation of the Tribe's fire control legislation.

Thus, according to Elliott, the tribe in *Mescalero*, *supra*, n. 9 would lack adjudicative authority under either *Montana* exception to *enforce* its hunting and fishing legislation on tribal trust lands, unless the non-Indian nonmember consented. Non-Indian trespassers would have *carte blanche* to do as they will.[12]

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12. Elliott argues that federal court is the only forum that the Tribe can use to enforce its regulations against Elliot. Federal courts are not small claims courts for violations of tribal civil game and fish and natural resource laws and other than certain criminal federal laws pertaining to theft of Indian property, federal courts lack civil jurisdiction. Elliott, on page 15 of her Petition, lists several cases in support of her analogy that "[j]ust like states that are faced with Indians who commit wrongs outside of the reservation, the proper forum for hailing (sic) a violator [a non-Indian violator on reservation land] into court is to hail (sic) her into court in the federal system." None of the cases cited are remotely applicable, *e.g.*, *Wagnon v. Prairie Potawatomie Nation*, 546 U.S. 95 (2005) (issue: did tribal sovereign immunity bar a state tax imposed on the fuel supplier for conduct all reservation); *Mescalero Apache Tribe v. Jones*,

(Cont'd)

D. Under the Common Law, the Tribe Is the Sole Sovereign with Authority to Try Members or Nonmembers for Illegal Trespass Entry onto Its Trust Land

Elliott's trespass onto tribal trust land and causing damages thereon constitutes the common-law tort of trespass to property. Such trespass occurs "when a person, without authority or privilege, physically invades or unlawfully enters private premises of another whereby damages directly ensue." *United States v. Operation Rescue*, 112 F. Supp. 2d 696 (1999 S.D. Ohio). Traditionally, trespass actions involving real property were deemed "local" as opposed to "transitory" and venue contesting them "cannot be changed into any other county than where the trespass to the realty was done, and never can be carried out of the sovereignty in which the land is." *McKenna v. Fisk*, 42 U.S. 241, 248 (1843) (*quare clausum fregit*, *i.e.*, trespass-unlawful entry to property, is a local matter). *See also Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895); *Casey v. Adams*, 102 U.S. 66, (1880).

(Cont'd)

411 U.S. 145 (1973) (state tax case involving tribe's ski area on leased Forest Service land off reservation); *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984) (tribes and oil company both intended dispute over lease to be resolved in federal court); *Richmond* v.*Wampanong Tribal Court Cases*, 431 F. Supp. 2d 1159, 1178 (D. Utah, 2006) (involved jurisdiction of Indian tribe off reservation vis-a-vis member Indian, has no application to on-reservation conduct by non-Indian Elliott).

A trespasser *consents* to the jurisdiction where the trespass occurs. No jurisdiction requires the consent of a trespasser before it exercises governmental legislative and adjudicative authority over the trespasser and any damages committed by the trespass. When Elliott trespassed onto tribal trust land, she *thereby* consented to the jurisdiction of the retained sovereignty of the Tribe to regulate non-member conduct. Accordingly, the maintenance of the Tribe's civil action against Elliott does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). She has consented *by and through her actions* on the Reservation to the Tribe's legislation and regulations at issue here, regulations which stem from the Tribe's inherent retained or residual sovereign authority to exclude nonmembers, to set conditions on nonmember entry to its reservation trust lands, to preserve tribal self-government, or to control its internal relations. *Montana*, 450 U.S. at 564.

E. The Second *Montana* Exception Applies in This Case.

Elliott argues that the second *Montana* exception does not apply to her conduct on the Tribe's trust land. (Pet. 4,12, 14). As this Court noted in *Plains*, Slip Op. 22-23, 128 S. Ct. at 2726 (2008), "[T]he second [*Montana*] exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The Court suggests that the conduct must do more than injure a tribe; it must "imperil the subsistence" of the tribal community. Elliott's trespass onto tribal trust lands and starting a forest fire that burned

thousands of acres of tribal forest satisfies that threshold. The Ninth Circuit concluded likewise:

> "... the tribe makes a compelling argument that the regulations at issue are intended to secure the tribe's political and economic well-being, particularly in light of the result of the alleged violations of those regulations in this very case: the destruction of millions of dollars of the tribe's natural resources." Citing *Montana*, 450 U.S. at 566. (Pet. App. 17).

This Court previously observed in *Plains* (Slip Op. at 18, 128 S. Ct. at 2724 (2008)), in reference to the tribe in that case, that "[T]he 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."

F. Tribal Authority is "Plausible" or "Colorable" in This Case

This Court observed in *Strate v. A-1 Contractors*, *supra*, at 453, in reference to its holding in *Iowa Mutual Ins. Co. v. LaPlante*, 450 U.S. 9 (1987), (and in other tribal court cases) regarding *presumptive* tribal court authority and jurisdiction, that:

> "[I]n keeping with the precedent to which *Iowa Mutual* refers, the statement stands for nothing more than the *unremarkable* proposition that, where tribes possess the authority to regulate the activities of nonmembers, "[c]ivil jurisdiction over [disputes arising out of] such activities, "*presumptively* "

> lies in the tribal courts," citing *Iowa Mutual*, 450 U.S. at page 18. (Emphasis added)

This Court recognized in *Iowa Mutual* that tribal courts "play a vital role in self government . . . and the [f]ederal [g]overnment has consistently encouraged their development" because they provide the most receptive forum for the defense of Indian Tribes' sovereignty. *Id.* at 14.

The U.S. District Court and the Ninth Circuit Court of Appeals in this case determined that Tribal Court jurisdiction was "colorable" or "plausible" regarding Elliott's admitted trespass and ensuing destructive conduct on the Tribe's reservation trust lands. The lower courts also correctly determined that trespass by a non-Indian who started the Tribe's forest on fire was not an exception to the exhaustion of tribal court remedies doctrine established by this Court in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), as reiterated in *Hicks*. Both lower courts applied this Court's precedent, beginning with *Montana v. United States*, 450 U.S. 544 (1981), in their respective analyses of whether the Tribe had residual sovereign authority *to regulate* Elliott's conduct, to condition her entry and other non-Indian entry onto its trust lands, or to exclude her, authority which Elliott concedes the Tribe has, *e.g.*, "The White Mountain Apache Tribe has the ability to exclude non-Indians from its land, but it has no ability to hail (sic) non-consenting non-Indians into tribal court." (Pet. 14).

Elliott concedes the Tribe's residual sovereign authority to exclude non-consenting non-Indians, but never explains what civil process the Tribe could use that she would tolerate to exclude a trespassing non-Indian from

its Reservation trust lands. The Tribe's Exclusionary Ordinance requires a tribal court hearing with requisite notice and due process before exclusion of a non-Indian, except for emergency exclusion pending a hearing at the earliest possible time. The rule of law and due process requires that the Tribe be able to hale non-Indians into tribal court and give them the opportunity to be heard before exclusion from the Reservation, which for a non-Indian reservation resident could have serious economic or other consequences.

Elliott's view of a tribe's right to exclude non-consenting non-Indians is a right which she apparently believes cannot be enforced or adjudicated in a tribal court. Her view is contrary to this Court's precedent that a tribe's authority over non-Indians "flows" from a tribe's "traditional and undisputed power to exclude persons" from tribal land," *Plains* at Slip Op. 16-17, 128 S. Ct. at 2723 (2008) (internal citations omitted) and is *not* limited to exclusion, but is the premise under which a tribe can exercise legislative or regulatory jurisdiction over non-Indians on tribal trust land. According to this Court's decisions, a tribe's residual sovereign authority to regulate non-Indian conduct is inextricably linked to a tribe's power to exclude and to condition entry or continued presence of non-Indians on its trust lands ("a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."), *Plains*, at Slip Op. 11-12, 128 S. Ct. at 2720 (2008) citing *Strate* at 453. It necessarily follows under *Strate* and *Plains* that non-Indians engaged in the type of activities that come within a tribe's regulatory authority also come within a tribe's adjudicatory authority.

The Ninth Circuit's decision below is not only consistent with that of other circuit courts of appeals

regarding tribal court jurisdiction, the exhaustion doctrine, and exceptions thereto, but squares with this Court's latest pronouncement on the extent of an Indian tribe's retained or "residual sovereignty" over nonmember activities or conduct taking place on an Indian reservation.

The U.S. District Court below and the Ninth Circuit Court of Appeals applied this Court's precedent when they determined that it was not "plain" that the White Mountain Apache Tribe lacked regulatory and adjudicatory authority over Elliott, and that, she must accordingly exhaust her Tribal Court remedies before returning to the federal court to challenge the tribal court's jurisdiction. Concluding that "tribal court jurisdiction is plausible," in accordance with this Court's precedent, the Ninth Circuit did nothing contrary to or outside the contours of this Court's previous statements regarding tribal regulatory and adjudicative authority.

CONCLUSION

The federal common law embodied in the decisions of this Court, the IRA, the Tribe's IRA constitution and revisions thereto approved by the Secretary the Interior, confirm the Tribe's retained or residual inherent sovereign authority to promulgate regulations to protect tribal trust lands, forests and other natural resources. The Tribe's power to exclude nonmembers and to condition their entry and continued presence on the reservation, and congressional policies embodied in NIFRMA, present a powerful historic and underlying premise for the Tribe's exercise of regulatory and adjudicatory authority over

Elliott and her activities on the Tribe's Reservation.[13] Until Elliott exhausts her Tribal Court remedies, her claims are not ripe for review by this Court.[14] Her petition for a writ of certiorari should be denied.

Respectfully submitted,

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13. This Court has recognized tribal courts, as "appropriate forums for the exclusive adjudication of disputes affecting important personal property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, (1978) (footnote and citation omitted); *See also Iowa Mutual Ins. Co. v. LaPlante*, 450 U.S. 9, 18 (1987) ("[W]here tribes possess the authority to regulate the activities of nonmembers,[c]ivil jurisdiction over [disputes arising out of] such activities, 'presumptively' lies in the tribal courts,")

14. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-918 (1950) ("Wise adjudication has its own time for ripening.") (Justice Frankfurter respecting the denial of the petition for writ of certiorari in that case).