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No.

IN THE SUPREME COURT OF THE UNITED STATES

HEATHER LONG WARRIOR,
Petitioner

v.

MICHAEL BOXX,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

D. MICHAEL EAKIN
Counsel of Record
Montana Legal Services
P.O. Box 3093
2442 First Ave. North
Billings, MT 59103
(406) 248-7113

Attorneys for Petitioner

QUESTION PRESENTED

1. Must a tribal court defendant exhaust tribal remedies prior to initiating a challenge to tribal court jurisdiction in the federal courts when the action arises out of a private consensual relationship with a tribal member?

2. Does a tribal court have jurisdiction over a cause action between a tribal member and a non-Indian arising from a private consensual social relationship?

PARTIES

The parties to this action are those named in the caption. Petitioner knows of no other parties.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

No.

HEATHER LONG WARRIOR, Petitioner

v.

MICHAEL BOXX, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Heather Long Warrior respectfully petitions for a writ of certiorari to review the judgment of United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Court of Appeals for the Ninth Circuit (App., *infra* at 1a-13a) is reported at 265 F.3d 771. The opinion of the district court (App., *infra* at 14a -19a) is unreported .

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2001. A petition for rehearing was filed and the court of appeals amended its opinion. App., *infra,* 1a. With the amendment of the original opinion, the petition for rehearing was denied. App., *infra,* 20a-21a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The question presented, the need to exhaust tribal court remedies and the extent of tribal jurisdiction, are questions of federal common law. No statutes are involved.

STATEMENT

Petitioner Heather Long Warrior, a member of the Crow Tribe, and Respondent Michael Boxx, a non-Indian, entered into a private consensual relationship, an agreement to go for a drive in Boxx's pickup truck. The drive took them on a federal right-of-way on a road on the Crow Indian Reservation. During the course of the drive the pickup truck left the road and rolled over, causing injuries to Long Warrior.

Long Warrior filed an action in the tribal court alleging that Boxx's negligence was the cause of her injuries. Boxx moved to dismiss. Prior to a ruling from the tribal court, Boxx also filed an action in the federal district court seeking to enjoin Long Warrior from pursuing the action in tribal court.

The tribal trial court dismissed the tribal action for

want of jurisdiction and the federal district court dismissed the federal action as moot. Long Warrior appealed to the tribal court of appeals. Upon motion of Boxx, the federal district court vacated its dismissal and entered an order enjoining Long Warrior from proceeding with the appeal in the tribal appellate court, holding that exhaustion of tribal remedies is not necessary and that the tribe lacked jurisdiction. Long Warrior appealed that decision to the Ninth Circuit which affirmed the district court.

REASONS FOR GRANTING THE PETITION

I. The decisions of this Court have led to confusion on the need to exhaust tribal remedies.

This Court formulated the Indian abstention doctrine in *National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845 (1985), holding that tribal courts should have the first opportunity to rule on tribal jurisdiction. The abstention envisioned in *National Farmers Union* requires that a party first exhaust tribal remedies prior to bringing a federal action to challenge a tribe's exercise of jurisdiction over a non-Indian. This Court reaffirmed the abstention doctrine two years later in *Iowa Mutual Ins. Co v. LaPlante*, 480 U.S. 9 (1987), holding that the basis of federal jurisdiction, whether it be federal question or diversity, did not affect the policies supporting exhaustion of tribal remedies. This Court wanted to prevent liberal access to a federal forum that would result in the federal courts being in direct competition with the tribal courts.

The abstention doctrine was quickly embraced by the circuit courts of appeals. *Ninigret Development Corporation v. Narragansett Indian Wetuomuck Housing Authority,* 207 F.3d 21 (1st. Cir. 2000); *Bowen v. Doyle*, 230 F.3d 525 (2nd Cir. 2000)(enjoining state court proceedings prior to exhaustion of tribal remedies); *Wellman v. Chevron USA, Inc.*, 815 F.2d 577 (9th Cir. 1987); *Brown v. Washoe Housing Authority*, 835 F.2d 1327 (10th Cir. 1987); *Tamiami Partners, Ltd. v. Miccosukee Tribe,* 999 F.2d 503 at 508 (11th Cir. 1993); *see also*, *Weeks Construction v. Oglala Sioux Housing Authority,* 797 F.2d 668 at 674 (8th Cir. 1986). The circuits saw that the exhaustion not only conserved federal judicial resources, but also furthered the Congressional policy of allowing the tribes a greater voice in their own governance.

National Farmers Union recognized three exceptions to the exhaustion requirement, when there was a clear jurisdictional prohibition, when exhaustion was futile, or when the party invoking tribal jurisdiction does so in bad faith. *Id.* 471 U.S. at 856, n. 21.

In *Strate v. A-1 Contractors*, 520 U.S. 428 (1997), even though the parties had exhausted tribal remedies (Id. At 444), this Court intimated in a footnote that the exhaustion rule may contain another exception, when the lack of tribal jurisdiction is "plain." *Strate* at 459, n.14.

Two years after *Strate*, this Court again had the opportunity to address exhaustion doctine. In *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999) this Court held that the federal statute providing for exclusive federal jurisdiction over nuclear waste lawsuits

preempted tribal jurisdiction and obviated the need for exhaustion of tribal remedies. While so holding, this Court, again in a footnote, noted that the exceptions to the rule requiring exhaustion of tribal remedies would be rare. *Neztsosie,* 526 U.S. at 485, n. 7.

This last term, this Court again commented on the exhaustion requirement, citing with approval the language from *Strate* that exhaustion is not required when the lack of jurisdiction is "plain." *Nevada v. Hicks*, ____ U.S. ____, 121 S.Ct. 2304 at 2315 (2001). As in *Strate*, the parties in *Hicks* had provided the tribal appellate court an opportunity to address the various jurisdictional issues. *Id.* at 2308.

While the exhaustion rule is prudential and not jurisdictional (Compare *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)), the various decision on Indian abstention have given little guidance on how the federal courts are to exercise their discretion.

In short, since first enunciating the Indian abstention doctrine in *National Farmers Union*, this court has had four opportunities to comment on the need to exhaust tribal remedies. In two cases, exhaustion was found to be a viable rule. In two cases in which tribal appellate courts had the opportunity to rule on jurisdiction, comments were made that exhaustion is not required when the lack of jurisdiction is "plain." Because of the seemingly contradictory stances of these cases, a grant of certiorari in this case is appropriate to clear the confusion.

II. The Circuits are split on the issue of exhaustion of tribal remedies.

As might be expected with conflicting signals coming from this Court, the circuit courts of appeals are split on the issue of when exhaustion of tribal remedies is required. Since the decision in *Strate*, three circuits have had the opportunity to address the issue of exhaustion of tribal remedies. The first and second circuits have found that exhaustion of such remedies is still required if a colorable claim of tribal jurisdiction is made. *Ninigret Development Corporation v. Narragansett Indian Wetuomuck Housing Authority, supra*; *See also, Bowen v. Doyle, supra.* (State courts should abstain pending exhaustion of tribal remedies.) The Ninth Circuit, on the other hand, decides the merits of the jurisdictional claim and indicates that exhaustion is only required when a tribe has jurisdiction.. (Because we conclude that the tribal court lacks jurisdiction over this claim, exhaustion is not required. 265 F.3d at 776 , App at. 12a) A district court in the Eighth Circuit has chosen to follow the First circuit and the "colorable claim" standard, even in an automobile accident case. *Progressive Northwestern Ins. Co. v. Nielsen,* ____ F. Supp. ____, 2002 U.S. Dist. Lexis 923 (D.N.D. 2002). The district court noted a lack of directive in determining when a "colorable claim" has been made. (Though it has been unable to locate any clear definition, the Court takes a "colorable claim" of jurisdiction to be one sufficient to raise a legitimate question for the tribal court - a plausible or reasonable claim.). Id at 8.

Certiorari should be granted to remedy the split in the circuit courts of appeal and the district courts.

III. The decision below is in conflict with *Hicks* and traditional concepts of Indian Law.

The seminal case concerning tribal jurisdiction over non-Indian is *Montana v. United States*, 450 U.S. 544 (1981) In that action this Court held that Tribes normally do not have jurisdiction over non-Indian with two notable exceptions:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements [citations omitted]. A tribe may also retain power to exercise civil authority over 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.

Montana, 450 U.S. at 565 -566.

Nevada v. Hicks, supra, expounded on the first exception, the consensual relationship exception. *Hicks* holds that there needs to be a private consensual relationship between the tribal court plaintiff and a non-Indian defendant in order for a tribal court to properly assert jurisdiction over a non-Indian. *Hicks,* 121 S.Ct. at

2310, n.3. In this case the circuit court acknowledged that there was a private consensual relationship between Boxx and Long Warrior. (265 F.3d at 776, App. at 8a)(It is true that Long Warrior's relationship with Boxx was consensual.) The Ninth Circuit held, however, that a private consensual **social** relationship, is not the type that would justify the exercise of tribal jurisdiction. This conclusion was reached by reading the tests established in *Montana* as statutes rather than an opinion in that particular case. By doing a statutory construction analysis of the language in *Montana*, the circuit court reasoned that only **business** relationships qualify as allowing a tribe to exercise jurisdiction. If this Court had been enacting legislation, then perhaps the examples given in *Montana* would be limiting. However, the test in *Montana* is in a judicial opinion, not a statute enacted by Congress. See, *Hicks* 121 S.Ct. at 2316-2317. (To be sure, *Montana* is "an opinion . . . not a statute," and therefore it seems inappropriate to speak of what the *Montana* Court intended the first exception to mean in future cases.) The concurrence was even more direct. (The Court's decision in *Montana* did not and could not have resolved the complete scope of the first exception.) O'Connor concurring *Id.* at 2327. The Ninth Circuit overlooked this portion of *Hicks* and held *Montana* does set out the complete scope of the first exception.

The limit on tribal jurisdiction over non-Indians is essentially a Supremacy Clause issue. The tribes' inherent jurisdiction has been impliedly limited by various treaties, statutes, and their status under the Constitution. Undeniably the tribes must bow the

supremacy of the federal law limiting their jurisdiction. U.S. Const. Art. VI, Cl. 2. However, there is nothing that would indicate that the Supremacy Clause would allow tribes to exercise jurisdiction over actions arising from business relationships but not actions arising from social relationships. Tribes have traditionally been allowed much greater latitude in governing social relationships. *See*, *Ex Parte Mayfield*, 141 U.S.197 (1891); *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988); Indian Child Welfare Act, 25 U.S.C. 1901 et seq.; 28 U.S.C. 1738B (Full Faith and Credit for Child Support Orders); 28 U.S.C. 1738C (Defense of Marriage Act). Indeed, one basis for limiting tribal jurisdiction is the Indian Commerce Clause, U.S. Const. Art. I, §8, cl. 3. The Constitution expressly recognizes federal power to regulate business relationships between Indians and non-Indians, and impliedly limits tribal jurisdiction by doing so. There is no express constitutional provision concerning social relationships between tribes and non-Indians.

It should also be noted that social relationships are truly voluntary while business relationships often are not. A non-Indian living in an isolated community with one tribally owned store and gas station may have little choice as to where to take one's business. Similarly, if an allotment of trust land sits in the middle of other land owned or lease by a non-Indian rancher, there may be little choice from whom to lease land. But even when there is little choice in business dealings, one still has the ability to decide with whom to socialize in one's free time. If one of the elements in the *Montana* test is

whether the non-Indian has entered into a voluntary relationship with a tribal member, a social relationship meets the test much more so than does a business relationship.

The circuit court's conclusion that this Court limited the first *Montana* exception to business relationships is inconsistent with *Hicks*. It is appropriate to allow the tribal courts the first opportunity to determine if a particular voluntary relationship meets the first *Montana* exception. However, if this Court determines that exhaustion is not required, it should grant certiorari to reverse the determination that the *Montana* exception is limited to business relationships.

CONCLUSION

The decisions of this court have delivered conflicting signals as to the need of a litigant to exhaust tribal remedies. This has led to a split in the circuits on when exhaustion is required. A grant of certiorari in this action could give the opportunuty to give clear direction on the Indian exhaustion doctrine.

Respectfully submitted.

D. MICHAEL EAKIN
Attorney for Petitioner

February 2002

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35073

MICHAEL BOXX, Plaintiff-Appellee
vs.
HEATHER LONG WARRIOR, Defendant-Appellant

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

[Filed November 20, 2001]

Before: Pregerson, Tashima, and Thomas, Circuit Judges

OPINION

TASHIMA, Circuit Judge:

I.

Heather Long Warrior, a member of the Crow Tribe, and Michael Boxx, a non-Indian, are social acquaintances. While at a party, after enjoying some alcoholic libations,