No. 02-

IN THE

Supreme Court of the United States

SAN JUAN COUNTY, UTAH, SAN JUAN COUNTY COMMISSIONERS J. TYRON LEWIS, LYN STEVENS AND MANUAL MORGAN, FORMER COMMISSIONER BILL REDD, COUNTY ATTORNEY CRAIG HALLS, and COUNTY ADMINISTRATOR RICHARD BAILEY,

Cross-Petitioners,

v.

FRED RIGGS, DONNA SINGER, and AL DICKSON, *et al.*,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit Court of Appeals err in remanding the case to District Court for a determination of tribal court jurisdiction despite the District Court's ruling that San Juan County, its county officials and county attorney, are immune from suit in Navajo Tribal Court under the doctrine of sovereign immunity?

PARTIES TO THE PROCEEDINGS

The following Cross-Respondents are not listed in the caption: San Juan Health District, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway, John Lewis, Lauren Schafer, Farmer's/Truck Insurance and attorney Dennis Ickes.

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San Juan County, Utah, San Juan County Commissioners J. Tyron Lewis, Lyn Stevens, and Manuel Morgan, former San Juan County Commissioner Bill Redd,[1] San Juan County Attorney Craig Halls, and San Juan County Administrator Rick Bailey (collectively "San Juan County Defendants") respectfully file this Conditional Cross-Petition for Writ of Certiorari to review the ruling of the Tenth Circuit Court of Appeal in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals was entered on October 7, 2000, and is reported as *MacArthur, et al. v. San Juan County, et al.*, 309 F.3d 1216 (10th Cir. 2002). The Memorandum Decision and Order, which formed the basis for the appeal was entered on October 30, 2000 and was certified for interlocutory appeal on March 7, 2001, pursuant to F. R. Civ. P. 54(b). These decisions are reprinted in the appendix to the Petitioners' Petition for Writ of Certiorari at P. App. 2a and P. App. 26a, respectively.

STATEMENT OF JURISDICTION

The original Petition for Writ of Certiorari was docketed on February 26, 2003. The jurisdiction of this Court is

1. At the time the lawsuit was filed in Navajo Tribal Court, Plaintiffs named San Juan County and San Juan County Commissioners J. Tyron Lewis and Bill Redd in both their official and personal capacities, and San Juan County Commissioner Mark Maryboy in his official capacity only. The current San Juan County Commissioners, Manuel Morgan and Lyn Stevens, have been substituted for Bill Redd and Mark Maryboy pursuant to F. R. Civ. P. 25(d) and are named only in their official capacities. Bill Redd remains in the lawsuit in his personal capacity only and Mark Maryboy has been dismissed.

invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon this Court's grant of Petitioners' Petition for a Writ of Certiorari.

STATUTES OR OTHER PROVISIONS INVOLVED

Utah Code Ann. § 17A-2-1304(1)(a)(vi) provides in pertinent part that:

> A county or municipality may establish a special service district for the purpose of providing within the area of the special service district any of the following services or any combination of them: healthcare.

Utah Code Ann. § 17A-2-1313(1) provides in pertinent part that:

> After the adoption of the resolution establishing a service district, the service district so established shall be a separate body politicked incorporate and a quasi-municipal public corporation distinct from each county or municipality in which the service district is located.

Utah Code Ann. § 63-30-3(1) provides in pertinent part that:

> Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home or other governmental health care facility, and from

> an approved medical nursing, or other professional healthcare clinical training program conducted in either public or private facilities.

Utah Code Ann. § 63-30-4(2) provides in pertinent part that:

> Nothing in this chapter may be construed as adversely affecting any immunity from suit that a governmental entity or employee may otherwise assert under state or federal law.

Utah Code Ann. § 63-30-4(4) provides in pertinent part that:

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that: (a) the employee acted or failed to act due to fraud or malice.

Utah Code Ann. § 63-30-10(1) provides in pertinent part that:

> Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or

> results from: (1) the exercise of performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused.

Utah Code Ann. § 63-30-16(1) provides in pertinent part that:

> The [state] district courts shall have exclusive original jurisdiction over any action brought under this chapter.

STATEMENT OF THE CASE

San Juan County, a political subdivision of the State of Utah, acting through its Commissioners, exercised the statutory authority given to it by the Utah Legislature and created the San Juan Health Services District ("Health Services District") to facilitate the delivery of medical care to residents of a remote area of San Juan County. By statute, the Health Services District is a distinct and independent entity, separate from San Juan County. The Health Services District operated the Montezuma Creek Clinic (the "Clinic") which provided outpatient care to Navajo Tribe members pursuant to a contract with Indian Health Services, a federal agency. The Clinic is situated on fee land owned by the State of Utah as part of the Utah Navajo Trust Fund. Neither the facility nor the land is owned by San Juan County.

Plaintiffs Singer, Riggs, and Dickson were employed at the Clinic. Singer served as the Clinic's manager, Riggs was a physicians' assistant, and Dickson was an office clerk. Both Riggs and Dickson are Navajo Tribe members; Singer is a non-Indian married to a member of the Navajo Tribe. When the Clinic's contract with Indian Health Services expired on

December 31, 1999, the operation of the Clinic was transferred to the Utah Navajo Health Systems, Inc., a non-profit organization affiliated with the Navajo Tribe.

On April 12, 1999, prior to the transfer of the Clinic's operations to Utah Navajo Health Systems, Singer, Riggs, and Dickson ("Tribal Court Plaintiffs") sued San Juan County Defendants, among others, in the Navajo Tribal Court alleging violations of the Navajo Preference in Employment Act ("NPEA") at the Clinic. Tribal Court Plaintiffs' objective was to compel the continued operation of the Clinic and to reinstate certain discharged employees, including Singer, who had been fired for fraud, embezzlement and other misconduct. Tribal Court Plaintiffs also brought 42 U.S.C. § 1983 claims for civil rights violations and a variety of state common law tort claims.

On the same day, Singer obtained a Restraining Order from the Navajo Tribal Court requiring San Juan County Defendants to return her "to her management position," award back pay and other benefits, turn over control of the Clinic to a "Special Master" to be paid for by all defendants, expunge Singer's personnel file of all records referring to "fraud," "misconduct," and "other violations," ordered San Juan County Defendants and the other defendants not to enter onto the Clinic property without the Special Master's approval and not to charge Navajo patients for medical care, regardless of whether that medical care was provided at the Clinic or some other off-reservation Health Services District facility. On June 22, 1999, San Juan County Defendants answered the Navajo Tribal Court Complaint and raised sovereign immunity and lack of subject matter jurisdiction as affirmative defenses.

The Navajo Tribal Court entered its Findings, Opinion and Judgment on December 28, 1999, requiring San Juan County Defendants to reinstate Singer and the other Tribal Court Plaintiffs with back pay and benefits, as well as pay their attorneys' fees. The Navajo Tribal Court also ordered that medical services were not to be eliminated at the Clinic, that a Special Master was to be placed in charge of that facility, that San Juan County Defendants were not allowed on the Clinic's premises without permission of the Special Master, and that Navajo patients were not to be billed for the medical care they received, regardless of whether that medical care was provided at the Clinic or some other off-reservation facility.

Subsequently, the Navajo Tribal Court entered another Order on March 1, 2000, denying San Juan County Defendants' Motion to Dissolve or Modify Preliminary Injunction. In this same Order, the Navajo Tribal Court again ordered the reinstatement of Singer and other employees with back pay and benefits even though the Clinic's operations had been transferred two months earlier to Utah Navajo Health Systems. The Navajo Tribal Court also ordered San Juan County Defendants not to interfere with the operation of the Clinic, not to eliminate of any medical services at the Clinic and to cease billing Navajo patients for medical care regardless of whether that care was received at a facility on the reservation or off the reservation. Additionally, and without a hearing, the Navajo Tribal Court imposed a $10,000 per day fine for each day its orders were not complied with and further ordered that "every personal Defendants and Defendants counsel will pay $1,000 per day of the $10,000 daily fine from their own personal assets."

On March 2, 2000, the Navajo Tribal Court entered a "Special Order" granting Tribal Court Plaintiffs leave to sue in "any Utah or Federal Court" to enforce the Navajo Tribal Court's judgment. Tribal Court Plaintiffs then brought suit in the United States District Court, District of Utah, against San Juan County Defendants and others. As previously noted, plaintiffs in the District Court action were the original three Tribal Court Plaintiffs plus additional Plaintiffs.[2] The Complaint filed in the United States District Court sought, among other relief, enforcement of the Orders entered by the Navajo Tribal Court against San Juan County Defendants. In addition, Plaintiffs asserted numerous additional claims against San Juan County Defendants. San Juan County Defendants moved to dismiss Plaintiffs' claim for enforcement of the Tribal Court Orders on the basis of sovereign immunity, which the District Court granted on October 30, 2000. On March 6, 2001, the District Court certified its October 30, 2000 Order for appeal to the Tenth Circuit. Subsequently, the Tenth Circuit vacated the dismissal of San Juan County Defendants by the District Court and remanded the matter for further proceedings, stating "it would be premature to decide the sovereign immunity question because there remains a threshold question of the tribe's jurisdiction under *Montana*."

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2. The District Court found that this Special Order, plus the fact that *plaintiffs* brought suit in the United States District Court to enforce the Navajo Tribal Court Orders, made it unnecessary for San Juan County Defendants to exhaust their Navajo Tribal Court remedies. This Court has held that exhaustion of claims in tribal court is not required before seeking federal court relief when it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459-60 (1997).

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. THE TENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT CONFLICTS WITH DECISIONS OF THIS COURT.

The Tenth Circuit Court of Appeals concluded that the issue of whether the Navajo Tribal Court has jurisdiction over a Utah County, its commissioners and administrator, should be addressed by first defining the scope of the tribes' inherent sovereignty, beginning with an analysis under *Montana v. United States*, 450 U.S. 544 (1981) rather than addressing the application of statutory and common law sovereign immunity as it applies to San Juan County Defendants. This conclusion is erroneous and it conflicts with the decisions of this Court including *Nevada v. Hicks*, 533 U.S. 353 (2001).

A. Sovereign Immunity Deprives a Court of Jurisdiction Without a Subject Matter Jurisdiction Analysis.

The Tenth Circuit stated that "it would be premature to decide the sovereign immunity question because there remains a threshold question of the tribe's jurisdiction under *Montana*." *MacArthur v. San Juan County*, 309 F.3d at 1226. Without ruling on whether the District Court was correct in determining that San Juan County Defendants enjoyed immunity from suit in Tribal Court, the Tenth Circuit remanded this case to District Court to determine whether the Navajo Tribal Court had subject matter jurisdiction under *Montana*. As the basis for its decision that subject matter

jurisdiction must be decided first, the Tenth Circuit relied on *Nevada*. However, the Tenth Circuit misinterprets the Court's decision in *Nevada* and its reliance on it is misplaced.

Nevada originated in the Ninth Circuit. Hicks, the plaintiff and a member of the Falon Paiute-Shoshone Tribe, sued Nevada officials in tribal court for various torts and violations of civil rights under 42 U.S.C. § 1983 resulting from the execution of a search warrant for Hicks' residence. Nevada officials immediately challenged the tribal court's jurisdiction but the tribal court held that jurisdiction was proper. Defendants then brought suit in federal district court seeking a declaratory judgment that the tribal court lacked subject matter jurisdiction over these claims. The district court decided for Hicks, ruling that the Nevada officials must first exhaust their qualified immunity defense in tribal court. On appeal, the Ninth Circuit affirmed, reasoning that because Hicks' residence was on the reservation, it gave sufficient support to tribal court jurisdiction over civil claims against Nevada officials arising from their activities within reservation boundaries. This Court reversed that decision for the following reasons: (1) the Indians' right to make their own laws and to be governed by them did not exclude all state regulatory authority on reservations; thus, state sovereignty did not end at a reservation border; (2) "a tribe's adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction;" and (3) because an Indian reservation is considered part of the territory of the state, "state officials operating on reservation . . . are properly held accountable for misconduct and civil rights violations in either State or Federal Court, but not in tribal court." *Nevada*, 533 U.S. at 374.

The principle of law central to *Nevada* is the holding in *Strate* that: "As to nonmembers . . . a tribe's adjudicative

jurisdiction does not exceed its legislative jurisdiction . . ." *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). The *Nevada* Court's initial inquiry, therefore, was whether the tribe could regulate state wardens executing a search warrant for off-reservation crime. *Id.* Using the principles set forth in *Montana*, this Court noted that both *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not "assert a landowner's right to occupy and exclude." *Nevada*, 533 U.S. at 359. Moreover, under the *Nevada* analysis, this Court examined whether regulatory jurisdiction over state officers is necessary to protect tribal self-government or control internal relations, and if not, whether such regulatory jurisdiction has been congressionally conferred. This Court determined that a long succession of case law make clear that Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. When San Juan County Defendants created the Health Services District, they were acting pursuant to the State of Utah's statutes and thus, can be considered a state actor, acting under the color of law, for these purposes.

The Tenth Circuit thought it would be premature to decide the sovereign immunity question because there remained the threshold question of whether the Tribal Court had jurisdiction under the *Montana* analysis. However, sovereign immunity does determine whether a tribunal has jurisdiction and therefore, the District Court was correct in addressing and deciding to dismiss San Juan County Defendants on the basis of sovereign immunity.

The District Court correctly held that San Juan County Defendants are immune from suit in Tribal Court. As independent sovereigns, states enjoyed sovereign immunity

before joining the Union and ratifying the Constitution. In joining the Union, the states waived some immunity in return for certain benefits. But they did not waive their sovereign immunity from suit in tribal court. This is demonstrated by the fact that there is no mutuality of concession with Indian tribes. Just as states did not waived their immunity from suit in tribal court, Indian tribes have maintained their immunity from suit in state court.

In determining whether political subdivisions of the State of Utah share in the state's sovereign immunity, the District Court properly looked to state law. In this case, the Utah Governmental Immunity Act demonstrates that the State of Utah intended to extend its sovereign immunity from suit in tribal court to all political subdivisions. The District Court correctly ruled on the issue of sovereign immunity without reaching the jurisdictional issue. If these defendants are immune from suit in tribal court, then the question of subject matter jurisdiction would never be reached because the tribal court could not exercise any jurisdiction.

The question of tribal dominion was also answered by this Court in *United States v. Kagama*, 118 U.S. 375 (1886), which presented the question of whether the United States could punish tribal members for crimes committed within the reservation boundaries against other Indians. This Court ruled that such laws were enforceable. In doing so, the Court made this statement:

> But these Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States or the States of the Union. There exists within the broad

> domain of sovereignty but these two. There may be cities, counties and other organized bodies with limited legislative function, but they are all derived from , or exist in subordination to one or the other of these.

Id. at 379. From the early days of the United States, this Court has recognized the power of tribal governments to govern their own but did not see them as exercising dominion over state and local governments.

Simply put, sovereign immunity is a common law doctrine that precludes litigation against an unconsenting government. *See, e.g. Montana v. Gilham*, 932 F. Supp. 1215, 1219 (D. Mont. 1996) (citing Restatement (Second) of Torts, § 895B (1979), *aff'd* 133 F.3d 1133 (9th Cir. 1997). Moreover, sovereign immunity deprives courts of the power to hear a case. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."), *Dahl v. United States*, __ F.3d __, 2003 WL 294983 (Feb. 11, 2003) (10th Cir.) ("Sovereign immunity is jurisdictional in nature."); *In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002) ("Sovereign immunity is quasi-jurisdictional in nature."); *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 39 n.2 (2002) ("Sovereign immunity is a jurisdictional issue that may be raised at any time during the course of the litigation."); *MCI Telecomm. Corp. v. Alhadhood*, 82 F.3d 658, 661 (5th Cir. 1996) (noting that immediate appeal from order denying sovereign immunity under the Foreign Sovereign Immunities Act is permitted "because it raises the issue of the court's subject matter jurisdiction"). The District Court, therefore, was correct in dismissing the claims based upon sovereign immunity.

B. No Mutuality of Concession Further Supports the Navajo Tribal Court's Lack of Jurisdiction Over San Juan County Defendants.

Indian tribes enjoy immunity from suit in state court, which supports the District Court's determination that states retain sovereign immunity from suit in tribal court. As this Court stated in *Blatchford*:

> We have repeatedly held that Indian tribes enjoy immunity against suit by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe it surrendered the States' immunity for the benefit of the tribes.

Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991). San Juan County Defendants enjoy sovereign immunity as codified in the Utah Governmental Immunity Act and the common law because there is no mutuality of concession between Utah or its political subdivisions and Indian tribes. *See Montana v. King*, 191 F.3d 1108 (9th Cir. 1999) (although the states surrendered some of their inherent sovereignty as a mutual concession to the other states, this surrender was limited to the other states and did not extend to Indian Tribes). *Cf. White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 656-657 (Ariz. 1971) (a tribe's sovereign immunity extends to a tribe's subordinate governmental agency); *Snowbird Construction Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987) (tribal sovereignty extends to tribal housing authority). Furthermore, even if the Utah Legislature had waived sovereign immunity

for the State and its political subdivisions, suit against San Juan County Defendants could only be brought in Utah State Courts, not Navajo Tribal Court. *See Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1233 (10th Cir. 1999); *Johns v. Stewart*, 57 F.3d 1544 (10th Cir. 1995). *Accord Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (holding that a state's consent to being sued in its own courts does not waive its sovereign immunity for purposes of being sued in federal court).

II. THE TENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN ISSUE PERTAINING TO A STATE OFFICER THAT IS IN CONFLICT WITH A DECISION OF THIS COURT.

Craig Halls is one of the San Juan County Defendants sued by Plaintiffs in Navajo Tribal Court. Mr. Halls, the San Juan County Attorney, is an elected state official who prosecutes public offenses on behalf of the State of Utah, represents the State of Utah in civil cases, and assists the State of Utah as required by the Utah Attorney General. *See Utah Code Ann.* § 17-18-1(2). Plaintiffs' claims in Navajo Tribal Court stem from an alleged failure of Mr. Halls to perform his official duties as county attorney. In *Nevada*, this Court stated that "state officials . . . are properly held accountable for misconduct and civil rights violations in either State or Federal Court, but not in Tribal Court." *Nevada*, 553 U.S. at 364. Mr. Halls is a state official. *Arnold v. McClain*, 926 F. 2d 963 (10th Cir. 1991). The Tenth Circuit's decision, therefore, is in direct conflict with *Nevada*.

CONCLUSION

If and when local governments can be subject to suit in tribal court is a significant question. There are in excess of 50 million acres of reservation land within the United States. There are hundreds of tribal courts and thousands of county and/or city governments potentially subject to suit in tribal courts. With the United States government retreating from its obligations to fund services for tribal governments, there is a very real potential, as in the instant case, for tribal courts to order local governmental entities to provide those services, such as free medical care, not provided to non-Indian citizens. Consequently, if the Writ of Certiorari is granted, San Juan County Defendants respectfully request that their Conditional Cross-Petition likewise be granted.

Respectfully submitted,

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