UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35306

Re: Rehearing *En Banc* Scheduled June 23, 2005

JAMES RICHARD SMITH, Appellant, v. SALISH KOOTENAI COLLEGE, a Montana Corporation, and the COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, Appellees,	MOTION OF *AMICUS* NATIONAL CONGRESS OF AMERICAN INDIANS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF SALISH KOOTENAI COLLEGE AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION FOR CONSIDERATION BY THE *EN BANC* PANEL

INTRODUCTION

The National Congress of American Indians ("NCAI") respectfully requests leave to file an *amicus curiae* brief in support of appellees, Salish Kootenai College and the Confederated Salish and Kootenai Tribes of the Flathead Reservation, for consideration by the *en banc* panel scheduled to convene on June 23, 2005 pursuant to this Court's May 13, 2005 order in the above-captioned case. *See Smith v. Salish Kootenai College*, No. 03-35306, 2005 WL 1163208 (9th Cir. May 13, 2005). *Amicus* NCAI requests that the length of the brief not exceed 21 pages or, 4193 words. Attorneys for appellees Salish Kootenai College and the Confederated Salish and Kootenai Tribes of the Flathead Reservation state that

they do not oppose this motion. Attorneys for appellant, James R. Smith, state that they oppose this motion.

A copy of the proposed *amicus curiae* brief is attached to this motion.

STATEMENT OF INTEREST AND GROUNDS FOR RELIEF

Established in 1944, NCAI is the oldest and largest and American Indian organization, representing more than 250 Indian tribes and Alaskan native villages. The member tribes of NCAI represent a cross-section of Indian tribes from around the country. Great variations exist among them, including with respect to their land and economic bases, populations, and histories. All, however, seek to preserve tribal authority to regulate and adjudicate civil matters involving members and nonmembers on their reservations.

In the Ninth Circuit, an intra-circuit conflict exists in relation to the authority of Indian tribes to regulate the activities, and the ability of tribal courts to adjudicate the conduct, of nonmembers on tribal lands. *See McDonald v. Means,* 309 F.3d 530 (9th Cir. 2002) (tribal court jurisdiction on tribal lands); *contra Smith v. Salish Kootenai College,* 378 F.3d 1048 (9th Cir. 2004), *en banc review pending,* No. 03-35306, 2005 WL 1163208 (9th Cir. May 13, 2005) (no tribal court jurisdiction on tribal lands); and *Ford Motor Company v. Todecheene,* 394 F.3d 1170 (9th Cir. 2005) (no tribal court jurisdiction on tribal lands). *Amicus* is troubled by the panel's departure from firmly-established precedent in this case,

particularly as it bears on the ability of tribal courts to adjudicate matters involving nonmembers arising on tribal lands.

Amicus NCAI, its member tribes, and the 440 plus Indian tribes located within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, have a significant interest in ensuring that the jurisdiction of tribal courts are protected and that the rules in determining such jurisdiction are applied uniformly.

The attached *amicus* brief will assist the Court because the questions at issue touch upon fundamental principles of Indian law. *Amicus* believes its brief will be relevant to the Court by clarifying the governing federal Indian law principles in the present matter, particularly as they apply in the area of civil jurisdiction of tribal courts.

NCAI hereby proposes to submit its *amicus curiae* brief by the close of business on Tuesday, June 14, 2005. This would allow the *en banc* panel sufficient time to review *amicus* NCAI's brief in advance of the oral argument scheduled for June 23, 2005.

Respectfully submitted this 13th day of June, 2005.

Respectfully submitted,

Mary Smith

Richard L. Brusca, Esq.
Mary L. Smith, Esq.*
COUNSEL OF RECORD
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760

John Dossett, Esq.
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 466-7767

Richard Guest, Esq.
NATIVE AMERICAN RIGHTS FUND
1712 N Street, N.W.
Washington, DC 20036
Telephone: (202) 785-4166

Counsel for Amicus

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the *Motion of Amicus National Congress of American Indians For Leave To File Amicus Curiae Brief In Support Of The Salish Kootenai College And The Confederated Salish and Kootenai Tribes Of The Flathead Reservation For Consideration By The En Banc Panel* were served, via Federal Express, on this 13th day of June, 2005 on the following:

Rex Palmer, Esq.
ATTORNEYS INC., P.C.
301 West Spruce
Missoula, MT 59802
-and-
Lon Dale, Esq.
MILODRAGOVICH, DALE,
STEINBRENNER & BINNEY, P.C.
620 High Park Way
P.O. Box 4947
Missoula, MT 59806-4947
Attorneys for James Richard Smith, Jr.

Robert J. Phillips, Esq.
PHILLIPS AND BOHYER, P.C.
283 West Front Street, Suite 301
P.O. Box 8569
Missoula, MT 59807-8569
Attorneys for the Salish Kootenai College

I hereby certify that two (2) copies of the *Motion of Amicus National Congress of American Indians For Leave To File Amicus Curiae Brief In Support Of The Salish Kootenai College And The Confederated Salish and Kootenai Tribes Of The Flathead Reservation For Consideration By The En Banc Panel* were served, via U.S. Mail, postage prepaid, on this 13th day of June, 2005 on the following:

John T. Harrison, Esq.
Ranald McDonald, Esq.
Tribal Legal Department
CONFEDERATED SALISH AND KOOTENAI TRIBES
P.O. Box 278
Pablo, MT 59855-0278
Attorneys for the Confederated Salish and Kootenai Tribes of the Flathead Reservation

Pursuant to Federal Rule of Appellate Procedure 25, I also certify that an original and four (4) copies of *Motion of Amicus National Congress of American Indians For Leave To File Amicus Curiae Brief In Support Of The Salish Kootenai College And The Confederated Salish and Kootenai Tribes Of The Flathead Reservation For Consideration By The En Banc Panel* were sent, via Federal Express, this 13th day of June 2005, to the Clerk of the Court.

By: Mary Smith
Mary L. Smith

No. 03-35306

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES RICHARD SMITH
Plaintiff-Appellant

v.

SALISH KOOTENAI COLLEGE, a Montana Corporation,
and the COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION
Defendants-Appellees

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

AMICUS CURIAE BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE SALISH KOOTENAI COLLEGE AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

Richard Guest, Esq.
NATIVE AMERICAN RIGHTS FUND
1712 N Street, N.W.
Washington, DC 20036
Telephone: (202) 785-4166

Richard L. Brusca, Esq.
Mary L. Smith, Esq.*
COUNSEL OF RECORD
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760

John Dossett, Esq.
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 466-7767

Counsel for Amicus

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus* National Congress of American Indians is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages.

TABLE OF CONTENTS

I. STATEMENT OF AMICUS INTEREST 1

II. ARGUMENT 2

A. In a Continuing Line of Case Law, The Supreme Court Has Consistently Upheld *Montana's* Second Presumptive Rule and Reaffirmed Land Ownership as an Important Factor In Determining a Tribe's Civil Jurisdiction 8

B. *Nevada v, Hicks* is an Exceptional Case Which Did Not Disturb *Montana's* Second Presumptive Rule, While Limiting Its Holding to the Question of State Officers Enforcing State Law 11

III. BASED ON THE SUPREME COURT'S NARROW HOLDING IN *NEVADA V. HICKS,* THIS COURT SHOULD RESOLVE THE INTRACIRCUIT CONFLICT IN FAVOR OF A PRESUMPTION THAT INDIAN TRIBES HAVE JURISDICTION OVER NONMEMBER CONDUCT ON TRIBAL LANDS 14

A. *McDonald v. Means* Correctly Followed the Applicable *Montana* Presumption 15

B. The Panel Decision in This Case Applies the Incorrect Presumption and Runs Counter to *Montana* and Its Progeny 17

C. The Panel Decision Threatens To Substantially Undermine Tribal Sovereignty 19

IV. CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Allstate v. Stump, 191 F.3d 1071 (9th Cir. 1999) 7

Atkinson Trading Company, Inc. v. Shirley,
532 U.S. 645 (2001) 6, 11, 18

Babbitt Ford, Inc. v. Navajo Indian Tribe,
710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984) 7

Brendale v. Confederated Tribes and Bands of the Yakima Nation,
492 U.S. 408 (1989) 6, 8, 9, 10

Ford Motor Company v. Todecheene,
394 F.3d 1170 (9th Cir. 2005) 1, 3, 4, 7

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 19

McDonald v. Means, 309 F.3d 530 (9th Cir. 2002) .... *passim*

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 6, 8, 11

Montana v. United States, 450 U.S. 544 (1981) .... *passim*

Nevada v. Hicks, 533 U.S. 353 (2001) .... *passim*

Smith v. Salish Kootenai College, 378 F.3d 1048 (9th Cir. 2004),
en banc review pending, No. 03-35306,
2005 WL 1163208 (9th Cir. May 13, 2005) .... *passim*

South Dakota v. Bourland, 508 U.S. 679 (1993) 6, 9, 10

Strate v. A-1 Contractors, 520 U.S. 438 (1997) .... *passim*

Yellowstone v. Pease, 96 F.3d 1169 (9th Cir. 1996) 2, 3, 13, 17

United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005) 20

Washington v. Confederated Tribes of the Colville Reservation,
447 U.S. 134 (1980)..6

Williams v. Lee, 358 U.S. 217 (1959)..6, 17, 18, 19

I. STATEMENT OF AMICUS INTEREST

Amicus Curiae the National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. The member tribes of NCAI represent a cross-section of Indian tribes from around the country. Great variations exist among them, including with respect to their land and economic bases, populations, and histories. All, however, seek to preserve tribal authority to regulate and adjudicate civil matters involving members and nonmembers on their reservations.

In the Ninth Circuit, an intra-circuit conflict exists in relation to the authority of Indian tribes to regulate the activities, and the ability of tribal courts to adjudicate the conduct, of nonmembers on tribal lands. *See McDonald v. Means,* 309 F.3d 530 (9th Cir. 2002) (tribal court jurisdiction on tribal lands); *contra Smith v. Salish Kootenai College,* 378 F.3d 1048 (9th Cir. 2004), *en banc review pending,* No. 03-35306, 2005 WL 1163208 (9th Cir. May 13, 2005) (no tribal court jurisdiction on tribal lands); and *Ford Motor Co. v. Todecheene,* 394 F.3d 1170 (9th Cir. 2005) (no tribal court jurisdiction on tribal lands). *Amicus* NCAI, its member tribes, and the approximately 426 Indian tribes located within the jurisdiction of the U.S.

Court of Appeals for the Ninth Circuit, have a significant interest in ensuring that the jurisdiction of tribal courts are protected and that the rules in determining such jurisdiction are applied correctly.

II. ARGUMENT

Indian tribes, as separate sovereign governments, retain substantial authority over the conduct of both tribal members and nonmembers on "Indian lands," *i.e.,* land owned by a tribe, or land held in trust for a tribe or for its individual members by the United States. *Strate v. A-1 Contractors,* 520 U.S. 438, 454 (1997). In *Strate,* the Supreme Court declared that *Montana v. United States,* 450 U.S. 544 (1981), is the "pathmarking case concerning tribal civil authority over nonmembers." *Id.* at 445. However, in the wake of the Supreme Court's decision in *Nevada v. Hicks,* 533 U.S. 353 (2001), substantial confusion and conflict has arisen within the federal courts regarding the appropriate application of the "pathmarking" principles announced in *Montana,* including an intra-circuit conflict within the Ninth Circuit regarding tribal authority over nonmember conduct on tribal lands.[1]

---

[1] This Court's decision in *Yellowstone v. Pease,* 96 F.3d 1169 (9th Cir. 1996), a case decided prior to *Hicks,* is not at issue here and is not part of this conflict as that case involved non-tribal land. There, this Court determined that the tribal court did not have jurisdiction over a dispute involving a county government for non-payment of county taxes on non-tribal land. *Pease*, 96 F.3d at 1176 ("the Crow Tribe does not

See McDonald v. Means, 309 F.3d 530 (9th Cir. 2002); *contra Smith v. Salish Kootenai College,* 378 F.3d 1048 (9th Cir. 2004); *en banc review pending* No. 03-35306, 2005 WL 1163208 (9th Cir. May, 13, 2005); and *Ford Motor Co. v. Todecheene,* 394 F.3d 1170 (9th Cir. 2005).

In *McDonald,* the panel concluded that a BIA road right-of-way was not the legal equivalent of non-Indian fee land under *Strate,* and, therefore, the tribal court could exercise jurisdiction over a tort claim filed against a nonmember claiming negligence for an accident which occurred on the BIA road. *McDonald*, 309 F.3d at 539-40. The *McDonald* court held that the familiar test in *Montana* (hereinafter referred to as the "first presumptive rule") and its exceptions were not applicable because the BIA road was on tribal trust land. *Id.* at 540.

In the matter at hand, the three-judge panel in *Smith v. Salish Kootenai College* declared that "[f]or purposes of invoking and satisfying *Montana's* pathmarking principles, the important variable is that there is a nonmember of the tribe that is party to the specific claim being litigated" and the fact that action arose on tribal land is simply unimportant. 378 F.3d at

enjoy specific authority to exercise jurisdiction over the propriety of a county's property tax scheme"). The panel's decision in *Pease* is in keeping with the "government official exception" gleaned from *Nevada v. Hicks,* 533 U.S. 353 (2001). *See* Section II.B, *infra.*

1052. The panel's reasoning runs directly contrary to *Montana* and its progeny.[2]

In *Montana*, the Supreme Court rejected the Crow Tribe's claim of authority to regulate non-Indian hunting and fishing on the Big Horn River, the bed of which was owned by the State of Montana. The *Montana* Court set forth the basic analytical framework for determining when an Indian tribe can exercise civil jurisdiction over a person who is not a member of the tribe, absent express congressional delegation. This analytical framework consists of two presumptive rules. The primary or first presumptive rule, commonly referred to as the "*Montana* test," is contained in the following passage:

> To be sure, 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 nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing,

---

2 *See also Ford Motor Co. v. Todecheene* where a different panel specifically relied on the panel decision in *Smith v. Salish Kootenai College* that "'the general rule of *Montana* applies to both Indian and non-Indian lands. '" *Todecheene,* 394 F.3d at 1178-79 (citation omitted). The *Todecheene* panel held that, under *Hicks,* the application of *Montana's* first presumptive rule was required and that satisfaction of one of the exceptions was necessary to sustain the exercise of tribal court jurisdiction over a products liability claim involving a vehicle rollover accident on a tribal road located on tribal trust land. *Id.*

> contracts, leases, or other arrangements. 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.

Montana, 450 U.S. at 565-66 (emphasis added) (citations omitted). The *Montana* test and its two exceptions are a familiar paradigm to courts for analyzing whether an Indian tribe has authority over the activities of a nonmember on non-Indian fee lands. Critical to the matter at hand is the fact that *Montana's* first presumptive rule appeared in the context of Indian tribes regulating nonmember conduct on non-Indian fee lands.

Less familiar is *Montana's* second presumptive rule – a separate paradigm for analyzing whether an Indian tribe has authority over the activities of a nonmember on tribal lands – found in the following passage:

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, . . . , and with this holding we can readily agree. . . . What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

Id. at 557 (emphasis added) (citation omitted). Thus, the basic analytical framework of *Montana* maintains a tribal land versus non-Indian fee land dichotomy.

Not only has the Supreme Court applied this dichotomy in the cases following *Montana,* but this dichotomy has long-standing roots in the Supreme Court's *pre-Montana* jurisprudence. For instance, in *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134, 153 (1980) the Supreme Court upheld tribal taxes on cigarette sales to nonmembers and approvingly noted that "[e]xecutive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. " *See also Williams v. Lee,* 358 U.S. 217, 223 (1959) (exclusive tribal jurisdiction over dispute between Indian and non-Indian arising on trust land within a reservation).

Montana's dichotomy of tribal land versus non-Indian fee land also has been consistently reaffirmed by the U.S. Supreme Court in cases following *Montana*. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982); *Brendale v. Confederated Tribes and Bands of the Yakima Nation,* 492 U.S. 408 (1989); *South Dakota v. Bourland,* 508 U.S. 679 (1993); *Strate v. A-1 Contractors,* 520 U.S. 438 (1997); *Atkinson Trading Company, Inc. v. Shirley,* 532 U.S. 645 (2001); and *Nevada v. Hicks,* 533 U.S. at 370 (expressly disclaiming any intent to change the dichotomy

underlying *Montana*). And until recently, it has been consistently followed by this Circuit.[3]

Collectively, these cases reveal a clear line of authority supporting a tribal land versus non-Indian fee land dichotomy and reaffirming *Montana's* second presumptive rule as one of its pathmarking principles – a presumption favoring tribal authority over the activities of nonmembers on tribal lands. Absent exceptional circumstances or divestiture by Congress, tribes retain inherent authority over all activities occurring on land owned and controlled by the tribe.

---

[3] *See Babbitt Ford, Inc. v. Navajo Indian Tribe,* 710 F.2d 587, 594 (9th Cir. 1983), *cert. denied,* 466 U.S. 926 (1984) (Navajo Nation has authority to regulate the conduct of non-Indian business occurring on tribal lands); *Allstate v. Stump,* 191 F.3d 1071, 1073 (9th Cir. 1999) ("the *Montana* rule governs only disputes arising on non-Indian fee land, not disputes on tribal lands; otherwise, the *Strate* court's analysis of why a state highway on tribal land was equivalent to non-tribal land would have been unnecessary"); *McDonald,* 309 F.3d at 536 n.2 (*Montana* test and its exceptions were not applicable to question of tribal court jurisdiction since accident occurred on a BIA road – the equivalent of tribal lands); *but see Todecheene* 394 F.3d at 1178-79 (under *Hicks,* the application of the *Montana* test was required and that satisfaction of one of the exceptions was necessary to sustain the exercise of tribal court jurisdiction over a products liability claim involving a vehicle rollover accident on a tribal road located on tribal trust land).

A. In a Continuing Line of Case Law, The Supreme Court Has Consistently Upheld *Montana's* Second Presumptive Rule and Reaffirmed Land Ownership as an Important Factor In Determining a Tribe's Civil Jurisdiction

In the cases following *Montana*, the Supreme Court has consistently regarded land ownership as an important, sometimes dispositive, factor in determining whether a tribal court has civil jurisdiction over an action. In the discussion of these cases which follows, it is clear that *Montana's* second presumptive rule is intact and remains controlling law.

In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982), the Court held that the tribe's power to impose taxes on a non-Indian company doing business on tribal lands is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." The Court further held that the tribe's power to tax did not derive solely from the tribe's power to exclude non-Indians from tribal lands but from the tribe's general authority, as sovereign, to control economic activities within its jurisdiction. *Id.* at 137.

Brendale v. Confederated Tribes and Banks of Yakima Nation, 492 U.S. 408 (1989), also upheld the land-status dichotomy underlying *Montana* and reaffirmed *Montana's* second presumptive rule that tribes may subject nonmembers to their jurisdiction if the conduct which triggers the exercise of tribal jurisdiction occurred on tribal land or land held in trust for the tribe.

At issue in *Brendale* was whether Tribes had jurisdiction to enact zoning laws regulating nonmembers' use of their fee lands within the boundaries of a reservation.

Although the Court could not generate a majority, the Court fully considered the status of the land and the Tribe's interests in preserving its political integrity, economic security, and health and welfare in reaching a decision. *Brendale,* 492 U.S. at 423-425, 428-432 (White, J., joined by Rehnquist, C.J., and Scalia and Kennedy, J.J.); *id.,* at 433-435, 443-444 (Stevens, J., joined by O'Connor, J.); *id.,* at 454-455 (Blackmun, J., joined by Brennan and Marshall, J.J.). In the end, the Court held that the Tribe had inherent authority to zone lands owned by nonmembers located in an area of the reservation closed to the general public and dominated by tribally-owned and member-owned parcels, *id.* at 448 (opinion of Stevens, J.).[4]

---

[4] *South Dakota v. Bourland,* 508 U.S. 679 (1993), also did nothing to undermine the land status dichotomy underlying *Montana*. In *Bourland,* the Court addressed the power of the tribe to regulate hunting and fishing by non-Indians in an area of the tribe's reservation taken by, and then held in fee by, the United States for a federal dam construction project pursuant to the Flood Control Act and the Cheyenne River Act. *Id.* at 689-690. Although the Court concluded that the tribe lacked authority to regulate nonmember conduct on this land, this conclusion was based largely on treaty and statutory construction, *see id.* at 689 (tribe deprived of "any former right of absolute and exclusive use and occupation of the conveyed lands" by virtue of congressional enactments), and did not alter the land-status dichotomy. The *Bourland* Court declined to address whether

In *Strate,* 520 U.S. 438, the Court faced the question of whether a tribal court could exercise jurisdiction over a suit arising from an accident which occurred on a state highway traveling through an Indian reservation in North Dakota. The Court was directly confronted with the issue of whether the *Montana* test – the first presumptive rule and its exceptions – governed the case. The United States argued that the *Montana* test did not govern the case because the land underlying the right-of-way for the state highway was land held in trust for the tribe by the United States, citing the second presumptive rule in *Montana,* and subsequent cases relying on this rule, including *Brendale*, *supra*, and *Bourland*, *supra*. In response, the Court declared:

> We "can readily agree," in accord with *Montana*, that tribes retain considerable control over nonmember conduct on tribal land. On the particular matter before us, however, we agree with respondents: The right-of-way North Dakota acquired for the State's highway renders the 6.59 mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land.

Strate v. A-1 Contractors, 520 U.S. at 454 (footnotes and citation omitted). The Court further stated: "We express no view on the governing law or

---

Montana's first presumptive rule and either of its two exceptions applied, but rather decided to leave that issue for consideration on remand. *Id.* at 695-696.

proper forum when an accident occurs on a tribal road within a reservation." *Id.* at 442.

In *Atkinson Trading Company, Inc. v. Shirley,* 532 U.S. 645 (2001), the Court considered whether a tribe had authority to tax nonmember activity occurring on non-Indian fee land. The Court distinguished *Merrion v. Jicarilla Apache Tribe, supra*, on the basis that a tribe's inherent power to tax "only extended to 'transactions occurring on *trust lands* and significantly involving a tribe or its members.'" 532 U.S. at 653 (emphasis in original) (quoting *Merrion, supra* at 137). The Court further explained that "*Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling." *Id.*

Based on this continuous line of precedent, it is clear that the Supreme Court has consistently upheld *Montana's* second presumptive rule, despite the panel's view to the contrary.

B. *Nevada v. Hicks* is an Exceptional Case Which Did Not Disturb *Montana's* Second Presumptive Rule, While Limiting Its Holding to the Question of State Officers Enforcing State Law.

In *Nevada v. Hicks,* 533 U.S. 353 (2001), the Supreme Court expressly disclaimed any intent to change the dichotomy underlying *Montana*, limiting its jurisdictional ruling in the case to circumstances in

which Indian tribes attempt to exercise civil jurisdiction over state officials sued for their official conduct. *See Hicks*, 533 U.S. at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general").[5]

The Court went on to recognize that "it is certainly true that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate*." *Id.* at 359. And the Court readily acknowledged that land status "may sometimes be a dispositive factor. " *Hicks,* 533 U.S. at 360. In fact, in response to Justice O'Connor's concurring opinion, Justice Scalia explicitly stated that there was no intent to alter in any way *Montana's*

---

5 It would have been very surprising if the *Hicks* Court had altered the *Montana* dichotomy, in the light of the fact that such a drastic measure was never proposed during the *Hicks* argument. The possibility of eroding the land-status distinction (in cases not involving state officials) was not once mentioned at oral argument. Rather, the argument focused on different and much narrower issues, namely the notion that state officials should be immune from suit in tribal court, see Transcript of Oral Argument, Nevada v. Hicks, No. 99-1994 (March 21, 2001), 2001 WL 300601, at *3 - *10, *20, *31- * 34, *50, *53 - *54; related issues concerning the state's interest in extending its criminal process (concerning an off-reservation crime) onto reservation land, see id. at *11-*16, *26 - *30, *51; whether a state official defendant could remove the case from tribal to federal court, see id. at *16 - *20, *22 - *25, *46 - *48, *52; and whether federal-court review would be available to correct any errors of federal law made by a tribal court in adjudicating a Section 1983 claim, *see id.* at *34 - *37, *43.

second presumptive rule, which recognizes a tribe's ability to assert jurisdiction over nonmembers on tribal lands. Justice Scalia explained:

> [W]e acknowledge that tribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it "may sometimes be . . . dispositive," . . . We simply do not find it dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws.

533 U.S. at 370.

Hicks did not change *Montana's* second presumptive rule, but merely created a very narrow exception to this rule in the circumstances where state officers are enforcing state law.[6] This "official government conduct" exception employs a balancing of interests of the Tribe in preserving tribal sovereignty and the interests of the State in pursuing off-reservation violations of state law. *Hicks* is an exceptional case whose holding is expressly limited to its facts. The concurrences by Justices Souter and Ginsburg both recognize this fact. *See* 533 U.S. at 376 (Souter, J., joined Kennedy and Thomas, JJ., concurring)("the holding in this case is 'limited to the question of tribal-court jurisdiction over state officers enforcing state law'"); *see also* 533 U.S. at 386 (Ginsburg, J., concurring) ("As the Court plainly states, and as Justice Souter recognizes, the 'holding in this case is

---

6 This Court's decision in *Pease* is in this vein, as it involved a political subdivision of the state enforcing state law. *See Pease*, 96 F.3d at 1171.

limited to the question of tribal-court jurisdiction over state officers enforcing state law.'")

Accordingly, although the concurrence by Justice Souter in *Hicks* suggests applying *Montana's* first presumptive rule without consideration of the status of the land (the path followed by the panel in the matter before us), *see Hicks*, 533 U.S. at 375-76 (Souter, J., concurring), a clear majority of the Court rejected such a notion. As Justice Scalia noted, *Hicks* explicitly "leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general." 533 U.S. at 358 n.2, and reaffirms *Montana's* second presumptive rule which favors tribal jurisdiction over situations involving nonmembers on tribal or trust land.

III. BASED ON THE SUPREME COURT'S NARROW HOLDING IN *NEVADA V. HICKS,* THIS COURT SHOULD RESOLVE THE INTRACIRCUIT CONFLICT IN FAVOR OF A PRESUMPTION THAT INDIAN TRIBES HAVE JURISDICTION OVER NONMEMBER CONDUCT ON TRIBAL LANDS.

As noted above, until recently, the basic analytical framework of *Montana* has been followed by this Circuit, employing the second presumptive rule in cases involving the question of tribal jurisdiction over nonmember conduct on tribal lands. *See* Note 3, *supra.* Based on the Supreme Court's narrow holding in *Hicks,* this Court should follow

McDonald v. Means and reaffirm the second presumptive rule in *Montana* that Indian tribes have jurisdiction over nonmember conduct on tribal lands.

A. *McDonald v. Means* Correctly Followed the Applicable *Montana* Presumption

In *McDonald v. Means*, decided in 2002, a year after the Supreme Court's decision in *Hicks*, this Court held that a tribal court had jurisdiction over a suit between a tribal member and nonmember arising out of an accident on a tribal road located on tribal lands within the tribe's reservation. *Means*, 309 F.3d at 540. In so holding, this Court answered the question left open in *Strate v. A-1 Contractors*. *See Strate*, 520 U.S. at 442 ("We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.").

In reaching its holding, the *McDonald* court began with the applicable presumption – the second presumptive rule from *Montana* – that "[t]ribes maintain considerable authority over the conduct of both tribal members and nonmembers on Indian land, or land held in trust for a tribe by the United States." 309 F.3d at 536 (citations omitted). *See also Montana*, 450 U.S. at 557 ("The Court of Appeals held that the tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the tribe, . . . and with this holding we can readily agree").

McDonald explicitly rejected the argument that "*Hicks* suggests the rule in *Montana* should be extended to bar tribal jurisdiction not only over the conduct of nonmembers on non-Indian fee land but on tribal land as well." *McDonald*, 309 F.3d at 540 n.9. Further, the *McDonald* court addressed the first presumptive rule in *Montana* and specifically noted that the actual holding in *Montana* was limited to nonmember conduct on non-Indian fee land. *Id.* (citing *Montana*, 450 U.S. at 557 ("What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.")). *See also Strate*, 520 U.S. at 446.

In rejecting an argument that its holding did not reconcile with *Hicks*, the *McDonald* panel also emphasized the limited nature of the holding in *Hicks* regarding the jurisdiction of tribes over state officers enforcing state law. 309 F.3d at 540. The *McDonald* court concluded that "[t]he limited nature of *Hicks*' holding renders it inapplicable to the present case." *Id.* The *McDonald* court also explicitly acknowledged the point made in Section II.B, *supra:* "*Hicks* makes no claim that it modifies or overrules *Montana.*" *McDonald,* 309 F.3d at 540 n.9.

B. The Panel Decision in This Case Applies the Incorrect Presumption and Runs Counter to *Montana* and Its Progeny

While the panel decision in this case correctly noted that *Montana* is the "path-marking case" and supplies the applicable framework, the panel applied the incorrect presumptive rule from *Montana*. While this Court is correct that *Montana* does not apply only when there are nonmembers and the activity arose on non-tribal land, *see Smith*, 378 F.3d at 1051-52, *accord Yellowstone v. Pease*, 96 F.3d at 1174, the panel overlooked completely the second presumptive rule in *Montana*, which applies on tribal lands.

Because the panel ignored the applicable presumptive rule from *Montana*, the panel's holding resulted in the anomalous – and frankly, startling – conclusion that, despite the fact that the panel assumed that appellee Salish Kootenai College is a tribal entity and that one of the claims arose on tribal land, *see* 378 F.3d at 1056, the tribal court still did not have jurisdiction. *Id.* at 1059. This case is squarely controlled by *Montana's* second presumptive rule and by *Williams v. Lee,* 358 U.S. 217 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants). *Williams v. Lee* established that tribal courts can exercise jurisdiction over suits filed by nonmembers against a tribe or its members involving causes of action arising on that tribal land.

In *Williams v. Lee,* the Court held that the right of reservation Indians "to make their own laws and be ruled by them" preempted the exercise of state court jurisdiction over them and permitted the exercise of tribal court jurisdiction over such claims even though the Plaintiff involved was non-Indian:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Williams v. Lee, 358 U.S. at 223 (citations omitted).

Here, citing *Atkinson Trading Co.*, the panel began with the presumption that the tribal court does not have jurisdiction. *Smith,* 378 F.3d at 1053 ("we are required to start with a presumption that the tribal court did not have jurisdiction"). In beginning with this premise, the panel miscited *Atkinson Trading Co.* The passage cited actually refers to the presumption against tribal court jurisdiction in the exact opposite situation from the assumed facts in the present case, *i.e.,* where nonmembers and non-Indian fee land are involved.

The panel also made the unprecedented pronouncements that "the important variable is that there is a nonmember of the tribe that is party to

the specific claim being litigated" and that "it also does not matter whether the action arose on tribal land." *Smith,* 378 F.3d at 1052. Both of these pronouncements run directly counter to the Supreme Court precedents, including *Hicks, Montana,* and *Williams.* And even though *Hicks* is limited to the situation of state actors enforcing state law, in writing for the Court, Justice Scalia repeatedly emphasized the importance of tribal land ownership in determining tribal court jurisdiction. *Hicks,* 533 U.S. at 359, 360 and 370.

C. The Panel Decision Threatens To Substantially Undermine Tribal Sovereignty

The panel's disregard of the status of the land in determining whether tribal courts have jurisdiction over actions which arise on tribal land undermines tribal sovereignty. As the Supreme Court has stated:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (citations omitted). Thus, the panel's narrowing of tribal jurisdiction harms the ability of tribes to self-govern.

If the panel's decision were adopted, the administration and enforcement of tribal laws would become inefficient. The clear demarcation of tribal land would no longer determine tribal courts' jurisdiction. Rather,

the courts would have to focus on the litigants' tribal status, a more complex inquiry. Courts would expend significant time and resources investigating the status of the parties and determining jurisdiction before reaching the merits of a case. This type of inquiry makes more difficult not only for tribal courts, but on federal and state courts as well. *See, e.g., United States v. Bruce*, 394 F.3d 1215, 1223-27 (9th Cir. 2005) (discussing difficulty of determining who is an "Indian"). Therefore, the panel's decision adds an unnecessary step in an otherwise simple process, thereby reducing judicial efficiency and economy.

Finally, a presumption against tribal authority over nonmember activities on tribal and trust lands would result in a significant jurisdictional gap. In many instances, state laws do not apply to, and state courts have no jurisdiction over, the conduct of nonmembers on tribal and trust lands. And federal court jurisdiction requires a federal question, or diversity of citizenship, neither of which is automatic simply because the action arises on an Indian reservation. In short, a nonmember could inflict significant harm upon a tribal member on lands owned and controlled by the tribe; the tribe would be powerless to act to address the wrong; and the tribal member would be left without redress to any court. Clearly, a gap in jurisdiction should not be created.

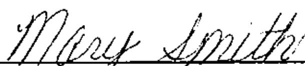
III. CONCLUSION

The basic analytical framework of *Montana* sets forth two presumptive rules: one, where the case involves nonmembers and the claim arose on non-Indian fee land, the presumption is that the tribe does not have jurisdiction, subject to the two exceptions to *Montana's* first presumptive rule; and two, where the case involves nonmembers and the claim arose on tribal land, the presumption is that the tribe has jurisdiction.

Hicks does not change these presumptive rules. Rather, even Justice Scalia, in writing the opinion of the Court in *Hicks,* emphasized that tribal land ownership may well be the "dispositive" factor. *Hicks*, 533 U.S. at 360, 370. Thus, the first inquiry in these types of cases should be whether the conduct in question occurred on tribal or trust land or on non-Indian fee land. Where the conduct occurred on tribal lands, the presumption of tribal jurisdiction pursuant to *Montana*'s second presumptive rule should apply.

For these reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,



Richard L. Brusca, Esq.
Mary L. Smith, Esq.*
COUNSEL OF RECORD
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760

John Dossett, Esq.
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 466-7767

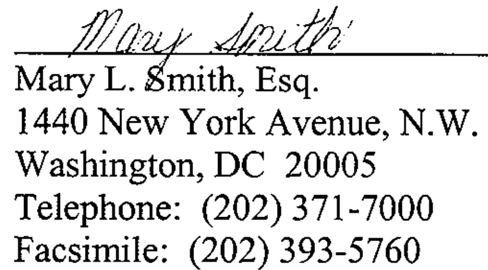
Richard Guest, Esq.
NATIVE AMERICAN RIGHTS FUND
1712 N Street, N.W.
Washington, DC 20036
Telephone: (202) 785-4166

Counsel for Amicus

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32

Pursuant to Ninth Circuit Rule 32-1, I certify that this brief is proportionally spaced, using a 14-point Times New Roman – Microsoft Word font. It contains 4193 words.

Date: June 13, 2005



Mary L. Smith, Esq.
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of *Amicus Curiae Brief of the National Congress of American Indians In Support Of The Salish Kootenai College and the Confederated Salish and Kootenai Tribes Of The Flathead Reservation* were served, Federal Express, on this 13th day of June, 2005 on the following:

Rex Palmer, Esq.
ATTORNEYS INC., P.C.
301 West Spruce
Missoula, MT 59802
-and-
Lon Dale, Esq.
MILODRAGOVICH, DALE, STEINBRENNER & BINNEY, P.C.
620 High Park Way
P.O. Box 4947
Missoula, MT 59806-4947
Attorneys for James Richard Smith, Jr.

Robert J. Phillips, Esq.
PHILLIPS AND BOHYER, P.C.
283 West Front Street, Suite 301
P.O. Box 8569
Missoula, MT 59807-8569
Attorneys for the Salish Kootenai College

I hereby certify that two (2) copies of *Amicus Curiae Brief of the National Congress of American Indians In Support Of The Salish Kootenai College and the Confederated Salish and Kootenai Tribes Of The Flathead Reservation* were served, Federal Express, on this 13th day of June, 2005 on the following:

John T. Harrison, Esq.
Ranald McDonald, Esq.
Tribal Legal Department
CONFEDERATED SALISH AND KOOTENAI TRIBES
P.O. Box 278
Pablo, MT 59855-0278
Attorneys for the Confederated Salish and Kootenai Tribes of the Flathead Reservation

Pursuant to Federal Rule of Appellate Procedure 25(A)(B)(ii), I also certify that the original and fifty copies of *Amicus Curiae Brief Of The National Congress of American Indians In Support Of The Salish Kootenai College and the Confederated Salish and Kootenai Tribes of the Flathead Reservation* were sent, via Federal Express, this 13th day of June 2005, to the Clerk of the Court.

By: *Mary Smith*
Mary L. Smith