

Docket No. 03-35306

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.

\* \* \* \* \*

On appeal from the United States District Court for the District of Montana

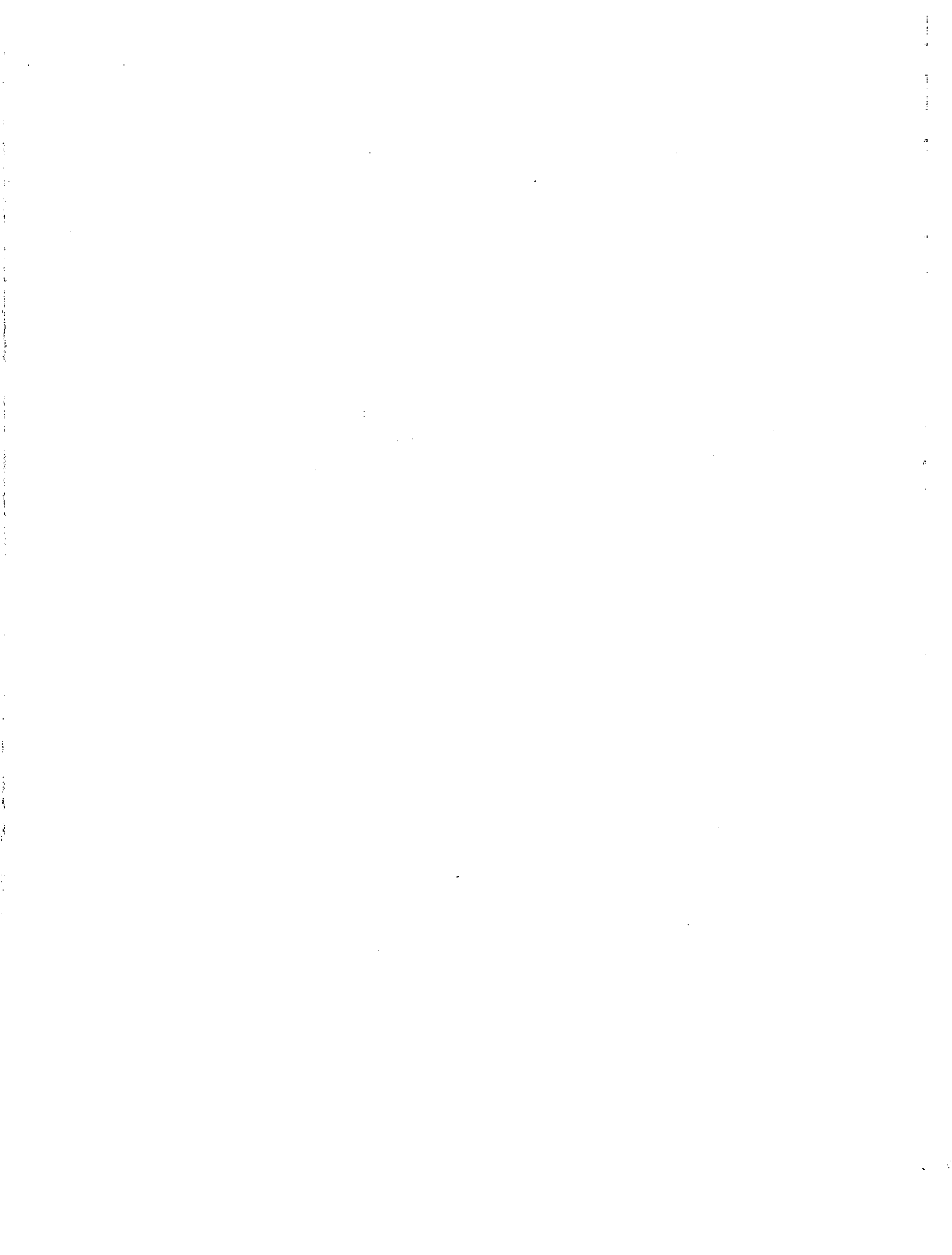
\* \* \* \* \*

**APPELLANT'S REPLY BRIEF**

\* \* \* \* \*

Rex Palmer  
ATTORNEYS INC., P.C.  
301 W Spruce  
Missoula, Montana 59802  
Telephone: (406) 728-4514  
ATTORNEYS FOR  
PLAINTIFF/APPELLANT

Lon J. Dale  
MILODRAGOVICH, DALE  
STEINBRENNER & BINNEY, P.C.  
PO Box 4947  
Missoula, MT 59806-4947  
Telephone (406) 728-1455  
ATTORNEYS FOR  
PLAINTIFF/APPELLANT



**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

I. Reply..... 1

    A. *Montana* and *Strate* proscribe tribal jurisdiction over this single vehicle accident on a public U.S. highway. .... 1

    B. The “Tribal” status of SKC does not change the mandate of *Montana* and *Strate*. .... 4

    C. The record does not support the assertion the Smith’s claims arose on tribal land. .... 8

        1. The injury claims. .... 8

        2. The spoliation of evidence claim. .... 10

II. Conclusion. .... 12

CERTIFICATE OF SERVICE ..... 14

CERTIFICATE OF COMPLIANCE ..... 15

**TABLE OF AUTHORITIES**

**Cases**

*Montana* 450 U.S. at 566 (1981), 101 S.Ct. at 1258. .... 1-4

*Montana v. United States*, 450 U.S. 544 (1981) ..... 1

*Nevada v. Hicks*, 533 U.S. 353 (2001) ..... 1

*Strate*, 520 U.S. at 457, 117 S.Ct. at 1415. .... 1-3

*Williams v. Lee* 358 U.S. 217, 79 S. Ct 269 (1959) ..... 3

**Statutes**

§ 501(c)(3) Internal Revenue Code 1954. .... 6

**I. REPLY.**

**A. Montana and Strate proscribe tribal jurisdiction over this single vehicle accident on a public U.S. highway.**

SKC and the tribal appellate court now contend that *Montana* and *Strate* are inapplicable to the determination of tribal jurisdiction in this action. In its own Opinion just three weeks before the district court's Order, the tribal appellate court recognized the primacy of *Montana* .

What is now considered to be the most significant contemporary United States Supreme Court statement of the scope of a tribe's civil jurisdiction over nonmembers is found in *Montana v. United States*, 450 U.S. 544 (1981). In what at first appeared to be a somewhat narrow view of retained inherent sovereignty, the Court stated, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Or, absent a controlling treaty or other federal enactment, the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of a tribe on non-Tribal land. *Id*<sup>9</sup>. In this case, the parties have not identified any controlling treaty provision or federal statute that would confer civil jurisdiction over nonmembers such as Smith. The question, then, is whether the Tribal Court has jurisdiction under the Tribes' inherent authority.

....

---

<sup>9</sup> *Nevada v. Hicks*, 533 U.S. 353 (2001), indicates that the *Montana* rule applies even on Tribal land. Our result would be the same because it is based on this case fitting within both *Montana* exceptions.<sup>1</sup>

Although the tribal appellate court applied the *Montana* exceptions too broadly and thereby reached the wrong conclusion, at least it recognized the controlling

---

<sup>1</sup> Tribal appellate court OPINION dated February 17, 2003, p. 12 (E.R. 8:12).

authority. The district court missed the mark by failing to even apply the *Montana* analysis. This fundamental failure to recognize controlling authority led to the unprecedented sweeping conclusion that tribal courts have civil jurisdiction over all claims against tribal members or tribal entities!

Smith is aware of no other court which has held that *Montana* is limited to non-member defendants. The logic employed by the district court to reach this conclusion would hold that the *Montana* analysis could not apply to highway accidents because *Montana* concerned the regulation of hunting and fishing, not tort claims on highways. We know from *Strate*, *Atkinson*, *Hicks*, and a litany of other decisions that *Montana* provides the definitive framework for determining the scope of a tribe's civil jurisdiction. The tribal appellate court recognized this framework but failed to recognize that Smith's tort claims could never trigger the exceptions to the general rule precluding tribal civil jurisdiction over non-members.

On the facts and allegations of record, *Montana* and *Strate* are dispositive that tribal jurisdiction is lacking. Smith cannot be said to have consented to tribal jurisdiction over torts committed by SKC. He cannot reasonably be deemed to have consented to tribal court jurisdiction over damages he suffered on non-Indian fee land. Likewise, tribal jurisdiction over this tort action for damages is not necessary to preserve the tribes sovereignty. Jurisdiction over a single vehicle roll-over does

not have a substantial impact on the tribe as a whole since it is not a threat to the political integrity, economic security or health or welfare of the tribe.<sup>2</sup>

Defendants contend that *Williams*<sup>3</sup> controls in actions against member defendants. This is simply not so. In fact, *Montana* supercedes *Williams* as a tribal jurisdiction test. *Strate*, however, explains how the landmark pronouncements of *Montana* are reconciled with the *Williams* result.<sup>4</sup> Specifically, *Williams* finding of tribal jurisdiction over lawsuits arising out of an on-reservation sales transaction between a non-member plaintiff and member defendants is one of the “type of activities the Court had in mind” when applying the consensual relationship exception under the *Montana* analysis.

The rule constructed by the district court and urged by defendants would lead to absurd results. For example, the claims between these parties originated as cross-claims filed between Smith and SKC as defendants in tribal court. The subject matter of these cross-claims was the dump truck rollover on U.S. Highway 93. The district court has held that tribal court had subject matter jurisdiction over Smith’s claims against SKC solely because the district court concluded the SKC was a tribal entity.

---

<sup>2</sup> *Montana* 450 U.S. at 566 (1981), 101 S.Ct. at 1258.

<sup>3</sup> *Williams v. Lee* 358 U.S. 217, 79 S. Ct 269 (1959).

<sup>4</sup> *Strate*, 520 U.S. at 457, 117 S.Ct. at 1415.

This rationale leads to the conclusion that tribal court would not have subject matter jurisdiction over SKC's claims against Smith, a non-member. Such a result is wholly incompatible with the concept of subject matter jurisdiction.

**B. The "Tribal" status of SKC does not change the mandate of Montana and Strate.**

SKC claims tribal status based on an assertion of alleged significant "*connection* to the tribes", and that it is "*owned* by the tribes" and "subject to significant *control* by the Tribal Counsel."<sup>5</sup>

Conversely, in an affidavit used in support of dismissing the Tribes from the tribal court action, Joe McDonald, President of SKC, made it very clear that the Tribes have minimal connection with SKC and do not "own" any interest in or maintain any control over the assets of the college.<sup>6</sup> McDonald also testified that SKC's officers, agents, and employees are not officers, agents, or employees of the Tribes.<sup>7</sup> In an effort to further differentiate the Tribes from SKC, McDonald testified that:

With the exception of authorizing the incorporation of The College

---

<sup>5</sup> SKC Brief, p. 6 (emphasis added).

<sup>6</sup> Affidavit of Joe McDonald dated October 29, 1999, p. 2 (E.R. 3:2).

<sup>7</sup> *Id.*



[SKC] by Ordinance 54A and the appointment and removal of members of the Board of Directors of The College as provided in the By-laws, the Tribes have *no other connection* or involvement with the *ownership or operation* of The College or its officers, agents or employees. The Tribes provide no funding to The College. Except as a sovereign governmental entity, The Tribe *does not control* or have responsibility for the operations of the College or its officers, agents or employees.<sup>8</sup>

McDonald's testimony and the Tribes' use of this affidavit are clear. The Tribes and SKC have minimal administrative contact, SKC is not an official, agent, or employee of the Tribes, and the Tribes do not own SKC. Notably, the McDonald affidavit was admitted into this proceeding by SKC.<sup>9</sup>

Further supporting the Tribes' and McDonald's conclusions is SKC's corporate organizational structure. SKC is an independent, non-profit corporation.<sup>10</sup> SKC may sue and be sued in tribal court or state court.<sup>11</sup> It may take, receive, purchase, or otherwise acquire real and personal property and dispose of the same on its own.<sup>12</sup> SKC appoints its own officers and agents and fixes their compensation and

---

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> See AFFIDAVIT OF FRED SIMPSON dated June 26, 2002, Ex G, Civil Docket #12 (E.R. 12:4).

<sup>10</sup> Tribal and State Articles of Incorporation (SKC Supplement E.R. pg 62-70)

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

qualifications.<sup>13</sup> SKC may borrow money from the Tribes and enter into contractual agreements of every description.<sup>14</sup> SKC may “exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.”<sup>15</sup> Finally, SKC retains the right to dissolve itself without the consent of the Tribal Council.<sup>16</sup> All of these factors reinforce the testimony of Mr. McDonald: that SKC is a separate and distinct entity from the Tribes and is not its official, agent, or employee.

Not only is SKC a distinct entity separate from the Tribes, the Tribes do not own any interest in SKC. SKC is a non-profit corporation that exists for the mutual benefit of all members. Pursuant to SKC’s Articles of Incorporation, SKC has no capital stock and maintains only one class of membership.<sup>17</sup> Membership in SKC comes through appointment and neither the Articles of Incorporation nor the By-laws contain any provision regarding the buying and selling of memberships in SKC. Finally, because SKC was organized as a corporation under Section 501(c)(3) of the

---

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* Art. X.

Internal Revenue Code of 1954, upon dissolution, all assets of SKC must be transferred to another non-profit corporation and not be disbursed to any individual or member. Therefore, the conclusion is undisputable, the Tribe does not “own” SKC, as SKC is a mutual benefit non-profit 501(c)(3) corporation and as such, there is no tribal ownership interest.

Although SKC’s By-laws require SKC’s Board of Directors to report to the Tribal Council “on a regular basis,” the record is void of any evidence that such reports are provided. Likewise, the record is void of any evidence as to whether the substance of the alleged reports support SKC’s present claims of a connection or prior claims of no connection with the tribe.

It should not be overlooked that Smith sued SKC the Montana corporation; the corporation that was chartered by the State of Montana<sup>18</sup> and incorporated by seven individuals, not the tribe. It is also significant that the record is void of any evidence of whether the land on which SKC is headquartered is or is not alienated fee land. Under the district court’s erroneous analysis, these are critical factors they cannot be simply presumed. Some of the above issues may have been clarified if the district court had permitted Smith to depose SKC president Joe McDonald. Instead, after

---

<sup>18</sup> See McDonald Affidavit, Ex. 2, State Charter (E.R. 3:8).

Smith scheduled Mr. McDonald's deposition, the district court stayed all discovery.<sup>19</sup>

If a defendant's status as a tribal entity was one of the criteria for determining tribal jurisdiction, SKC would not satisfy the criteria on the record before the Court. At best, SKC has raised a factual dispute as to its status.

**C. The record does not support the assertion the Smith's claims arose on tribal land.**

Smith's claims against SKC seek damages for personal injury and for spoliation of evidence. Defendants' argue that the district court correctly concluded that the conduct giving rise to these claims occurred exclusively on reservation land. There is no evidence on the record that supports the Defendants' argument.

**1. The injury claims.**

SKC contends that "every allegation of negligent conduct against SKC occurred off of Highway 93".<sup>20</sup> This is not true, it is not supported in the record, and it is not supported by logic. At the time of his injury, Smith was operating the dump truck within the course and scope of his instruction and class work as a student at

---

<sup>19</sup> See ORDER dated February 25, 2003, Civil Docket #66 (E.R. 12:10).

<sup>20</sup> SKC's brief pg 24.

SKC.<sup>21</sup> He was in his classroom, the dump truck on U.S. Highway 93. He was actively in training and logging mandatory hours on the road behind the steering wheel. Part of the training included mandatory inspections occurring on the roadside. Cautionary instruction and warning were routinely provided by the instructor sitting next to the student driver while on U.S. Highway 93 and other public state highways on and off the reservation.

Smith has alleged that SKC negligently failed to warn the students of the unsafe mechanical condition of the dump truck.<sup>22</sup> Again, this allegation is not limited to the campus classroom. It naturally extends to the over the road classroom in the dump truck. The fact that SKC failed to warn while the truck was parked at the campus (and not a danger to anyone) does not absolve it from liability for failure to warn while the truck was traveling down Highway 93 in violation of Montana law. SKC's obligation to warn of any unsafe mechanical condition did not cease when the truck was on the public highways. If anything, it increased since highway travel posed greater danger.

The above examples amply demonstrate that Smith's broad allegations of negligence necessarily include conduct occurring on Highway 93. Nothing in the

---

<sup>21</sup> Amended Complaint, para 20 (E.R. 6:4)

<sup>22</sup> Amended Complaint, para 27(k) (E.R. 6:6)

record suggests otherwise. Indeed, many of the statutory criteria which form the basis of Smith's claims of negligence per se are applicable only when a heavy truck is on a public highway. These criteria include statutory requirements for maintenance, training, inspection and warning.

The allegations of the complaint, demonstrate that the dump truck was the quintessential "an accident waiting to happen".<sup>23</sup> Put another way, it was a bomb with a lit fuse. Under the rule constructed by the district court any injured party would be subject to tribal court jurisdiction solely because a tribal entity lit the fuse. The district court would then bolster its conclusion with the presumption that the fuse was lit on tribally owned land. The rule of Montana and its progeny do not permit this result.

Smith concedes that SKC's classroom programs were negligent, as were its over the road programs. As stated above, since the district court stayed discovery before the scheduled deposition of Joe McDonald, the record is silent as to whether the SKC campus is or is not on alienated land within the Flathead Reservation. The burden rests with SKC to demonstrate facts necessary to overcome Montana's general rule that tribes lack civil subject matter jurisdiction over nonmembers. SKC has failed to carry its burden.

---

<sup>23</sup> Amended Complaint, para 27 (a)-(k).

## **2. The spoliation of evidence claim.**

Smith's allegations are clear that SKC undertook a post-rollover investigation which included interviews of several students.<sup>24</sup> The notes were not produced to Smith and are no longer available.<sup>25</sup>

It became apparent during deposition of the SKC employee who conducted the student interviews and made the notes that SKC president, Joe McDonald, or his staff might have relevant information about the disposition of the notes. As stated above, after Smith scheduled Mr. McDonald's deposition, the district court stayed all discovery. For this reason, the record is silent on where the notes were disposed of and, if disposed on the campus, whether it is on tribally owned land.

As a substitute for a factual record, the district court concluded "[p]resumably such conduct [spoliation of evidence] occurred at SKC"<sup>26</sup> Again, the record is silent as to whether the SKC campus is on tribally owned land.

Ultimately, the district court dismissed all of Smith's claims "[b]ecause proper deference to the tribal court system precludes relitigation of issues raised by [plaintiff] and resolved in Tribal Courts[.]" This rational and conclusion completely

---

<sup>24</sup> Amended Complaint, para 33-38. (E.R. 6:7)

<sup>25</sup> Defendant's Answer to Amended Complaint, para 24-27 (E.R. 7:4)

<sup>26</sup> Opinion dated March 7, 2003 (E.R. 9:10)

ignores the fact that Smith's spoliation claim was never filed or litigated in tribal court. Consequently, it could not be "relitigated" in the district court. It also overlooks the fact that SKC admitted that the district court had subject matter jurisdiction over Smith's federal court claims.<sup>27</sup>

## **II. CONCLUSION.**

Based on the foregoing, Smith respectfully requests the Court to:

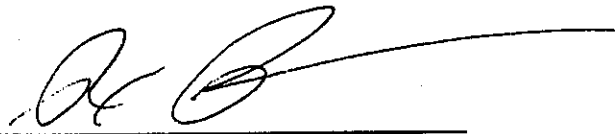
1. Reverse the district court's dismissal of his claims;
2. Enjoin the tribal court action; and
3. Remand with instructions that Smith's claims proceed to trial on the merits.

---

<sup>27</sup> Defendant's Answer to Amended Complaint, para 3 (R.R. 7:2)



RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of July 2003.



Rex Palmer  
ATTORNEYS INC., P.C.  
301 W Spruce  
Missoula, MT 59802  
(406) 728-4514

and

Lon J. Dale  
MILODRAGOVICH, DALE,  
STEINBRENNER & BINNEY, P.C.  
PO Box 4947  
Missoula, MT 59806-4947  
Telephone (406) 728-1455  
ATTORNEYS FOR  
PLAINTIFF/APPELLANT

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of July 2003, a true and correct copy of the foregoing was served upon the following by U.S. mail, hand-delivery, Federal Express, or facsimile:

Robert Phillips  
Phillips & Bohyer  
283 W Front Suite 301  
Missoula, MT 59802

U.S. Mail  
 Hand Delivered  
 Federal Express  
 Facsimile

John Harrison / Ranald McDonald  
Tribal Legal Department  
PO Box 278  
Pablo, MT 59855-0287

Margaret Marti

**Certificate of Compliance**  
**Pursuant to Circuit Rule 32-1**

Case No. 03-35306

(see next page) **Form Must Be Signed by Attorney or Unrepresented Litigant  
and Attached to the Back of Each Copy of the Brief**

I certify that: (check appropriate options)

**Oversize Briefs:**

The court granted permission to exceed the length limitations set forth at Fed. R. App. P. 32(a)(7) by an order dated \_\_\_\_\_

or

An enlargement of brief size is permissible under Ninth Circuit Rule 28-4.

The brief is

Proportionately spaced, has a typeface of 14 points or more and contains  
2568 words

or is

Monospaced, has 10.5 or fewer characters per  
inch and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of  
text

or is

In conformance with the type specifications set forth at Fed. R. App. P.  
32(a)(5) and does not exceed \_\_\_\_\_ pages

**Briefs in Capital Cases:** This brief is being filed in a capital case pursuant to the type  
volume limitations set forth at Circuit Rule 32-4 and is (check the applicable option):

Proportionately spaced, has a typeface of 14 points or more and contains

\_\_\_\_\_ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words, reply briefs must not exceed 9,800 words)

or is

\_\_\_\_\_ Monospaced, has 10.5 or fewer characters per inch and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words or 1,950 lines of text, reply briefs must not exceed 9,800 words or 910 lines of text)

or is

\_\_\_\_\_ In conformance with the type specifications set forth at Fed. R. App. P. 32(a)(5) and does not exceed \_\_\_\_\_ pages (opening, answering and the second and third briefs filed in cross-appeals must not exceed 75 pages; reply briefs shall not exceed 35 pages)

Margaret Marti  
Signature of Attorney or  
Pro Se Litigant