

Docket No. 03-35306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES RICHARD SMITH,

Appellant,

-vs.-

SALISH KOOTENAI COLLEGE, a Montana
corporation, and the COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE FLATHEAD RESERVATION,

Appellees.

On Appeal from United States District Court for the District of Montana
Missoula Division, Cause No. CV 02-55-M-LBE
The Honorable Leif B. Erickson, Presiding

BRIEF OF APPELLEE SALISH KOOTENAI COLLEGE

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Reservation**

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I. CORPORATE DISCLOSURE STATEMENT

Appellant, Salish Kootenai College, is a non-profit tribal corporation chartered under the laws of the Confederated Salish & Kootenai Tribes (“Tribes”), and incorporated under the laws of the State of Montana. As a non-profit corporation, Salish Kootenai College issues no stock and is not otherwise owned by any corporation or entity other than the Confederated Salish & Kootenai Tribes.

II. STATEMENT OF JURISDICTION

In addition to the grounds set forth in Appellant James Richard Smith’s brief, the district court had jurisdiction to determine the issue of whether the Tribal Court of the Confederated Salish & Kootenai Tribes has jurisdiction over this matter, pursuant to 28 U.S.C. § 1331. This Court has jurisdiction to consider Smith’s appeal pursuant to 28 U.S.C. § 1291, as an appeal from a final judgment of the district court.

III. STATEMENT OF ISSUES

The issue for review before this Court is as follows:

Does the Tribal Court of the Confederated Salish & Kootenai Tribes have subject matter jurisdiction over the claim filed by Appellant James Richard Smith against Appellee Salish Kootenai College, Inc., alleging

tortious conduct occurring on the tribal land within the Flathead Indian Reservation?

IV. STATEMENT OF THE CASE

This appeal arises out of a claim filed by Appellant James Richard Smith (“Smith”) against Appellee Salish Kootenai College (“SKC”). SKC is located within the exterior boundaries of the Flathead Indian Reservation in Montana. Although Smith was a member of the Umatilla Tribe in Oregon, he moved to Montana to attend SKC in 1997. Smith was a student in SKC’s equipment operating class. Smith was driving a dump truck belonging to SKC when the vehicle went out of control and rolled. Smith and one other occupant were injured and a third student killed. Lawsuits were filed against SKC and Smith, who then filed cross claims against each other. All of the claims were filed in the Tribal Court of the Confederated Salish & Kootenai Tribes (“tribal court”). At the time of the tribal court trial, only Smith’s claim against SKC remained to be litigated. After a five-day trial, the jury returned a verdict in favor of SKC, finding that SKC was not negligent.

After the tribal court entered judgment against Smith, he filed a motion with the tribal court to dismiss his claim for lack of subject matter jurisdiction. The trial court denied Smith’s motion, which he appealed to the

Court of Appeals of the Confederated Salish & Kootenai Tribes (“tribal appellate court”). That Court also held that the tribal court had subject matter jurisdiction over Smith’s claim, finding that SKC is a tribal entity, and that the tortious conduct alleged in Smith’s complaint occurred on tribal land.

Before the tribal appellate court issued its ruling, Smith refiled his lawsuit in The United States District Court for the District of Montana, arguing that because the tribal court lacked jurisdiction over his claim, he need not exhaust his tribal court remedies before proceeding to federal court. In the process, Smith requested an injunction to prevent the tribal appellate court from reviewing his tribal court claim any further. For this reason, the tribal appellate court has been made party to the present case. The district court declined to enjoin the tribal appellate court.

After the tribal appellate court issued its decision finding tribal court jurisdiction, the district court issued its own order dismissing Smith’s claim. The district court found that the Tribes had jurisdiction over Smith’s claim because SKC is a tribal entity, or “arm” of the tribe for purposes of Indian jurisdiction, and because the tortious conduct alleged in Smith’s amended federal court complaint could only have occurred on tribal land.

Therefore, the present issue raised in Smith's appeal to this Court is whether the district court erred when it held that the tribes had jurisdiction over Smith's claim, thereby warranting dismissal of his claim from federal court. As discussed in detail below, the district court's decision was correct based on the applicable facts and law. SKC respectfully requests that this Court affirm the district court's order dismissing Smith's claim.

V. STATEMENT OF FACTS

SKC is located on tribal land in Pablo, Montana, which is the center of tribal government on the Flathead Indian Reservation. *See* tribal appellate court's Order at 7 (E.R. 8:7). SKC was originally chartered by the Tribes on November 18, 1977. *Aff. Joe McDonald*, ¶ 3 (Oct. 29, 1999) (Supp. E.R. 53). Less than one year after incorporation by the Tribes, SKC also incorporated as a nonprofit corporation pursuant to Montana law. *Aff. McDonald*, ¶ 4 (Supp. E.R. 53)

SKC's tribal charter provides that SKC has the power:

- B. To sue and be sued, complain and defend, in its corporate name in the Tribal Court.

Aff. McDonald, Ex. 1, Article III (Supp. E.R. 56).

Article II of both the Tribal and State charters also provide that SKC was formed for the following reasons:

To provide post-secondary educational opportunities **for residents of the Flathead Indian Reservation** in the following areas:

- i. Vocational training,
- ii. College Transfer Programs,
- iii. Occupational Training,
- iv. Community Service,
- v. Indian Culture and History,
- vi. Adult Basic Education.

To measure the needs, talents, and aspirations of the **residents of the Flathead Indian Reservation** and provide a comprehensive program in recognition of the desires of the **Flathead Indian Reservation community**.

To promote and conduct such research and development activities as deemed necessary to the efficient provision of postsecondary educational opportunities on the **Flathead Indian Reservation**.

Aff. Joe McDonald, Ex. 1, Article II; Exhibit 2, Article II. (Supp. E.R. 55-56 and 65-66) (emphasis added).

Article VII of the Tribal Charter requires SKC to annually report to the Tribal Council concerning college business. (Supp. E.R. 59). Pursuant to Article VIII of the Tribal Charter, the Tribal Council retains the authority to prescribe further regulations governing SKC. (Supp. E.R. 60). More

importantly, the Tribes retained the power to “amend, repeal or modify” the ordinance which created SKC. *Id.*

SKC’s “Bylaws” provide further evidence of SKC’s connection to the Tribes. Pursuant to Article III of the Bylaws, members of the board of directors of SKC are appointed by the Tribal Council. (Supp. E.R. 73). Article III further requires that all board members be enrolled member of the Tribes. *Id.* Further, the Tribal Council has the authority under the Bylaws, Article X (Cause and Procedures for Removal of Board Members), to remove board members “for just cause.” (Supp. E.R. 75). Article II of the Bylaws requires SKC to assure job preference in accordance with tribal personnel hiring procedures. (Supp. E.R. 72). SKC is owned by the tribes and is a “tribal organization” pursuant to 25 U.S.C. § 450(b)(1). (E.R. 5:5). Thus, by its Articles of Incorporation and Bylaws, it is clear not only that SKC was created by the Tribes, but also remains subject to significant control by the Tribal Council.

Under the foregoing rules and bylaws, over the past 25 years SKC has become a major educational institution on the Flathead Reservation, with 38 full-time instructors, 50 part-time instructors and over 850 full-time students,

providing “quality postsecondary educational opportunities for Native Americans locally, and from throughout the United States.” (E.R. 8:10).

On May 12, 1997, Appellant James Richard Smith (“Smith”) was a student at SKC when he was involved in a single-vehicle accident on U.S. Highway 93 within the boundaries of the Flathead Indian Reservation. (E.R. 9:1). Smith suffered injuries when he lost control of an SKC dump truck he was driving. *Id.* His passengers, Shad Burland and James Finley, who were also students at SKC, sustained injuries in the accident. Burland died at the scene. (E.R. 9:2).

A lawsuit was commenced by Finley and the personal representative of the estate of Burland against Smith and SKC. *Id.* Smith cross-claimed against SKC in his answer to Burland’s and Finley’s complaints and SKC cross-claimed against Smith. *Id.* Following a settlement conference in July, 2000, only Smith’s claim against SKC remained. Smith proceeded to trial against SKC during the week of September 25, 2000. *Id.* At the conclusion of the week-long trial, the jury returned a verdict in SKC’s favor, finding that SKC was not negligent, and the trial court thereafter entered judgment on the verdict in SKC’s favor. *Id.*

After Smith lost in tribal court, he raised for the first time the issue of the tribal court's jurisdiction by filing his Rule 60(b) Motion for Relief for Lack of Subject Matter Jurisdiction on or about October 13, 2000. (E.R. 9:3). Ultimately, the trial court denied Smith's Rule 60(b) motion by its order of April 6, 2001, which Smith appealed to the tribal appellate court on or about April 30, 2001. *Id.* Smith's tribal court appeal also asserts that he is entitled to a new trial on other grounds not pertinent to the present jurisdictional issues before this Court. The tribal appellate court issued its decision regarding jurisdiction on February 17, 2003, in which the court concluded that the Tribes properly exercised jurisdiction over the case. (E.R. 8:1-18). Specifically, the tribal appellate court determined that SKC was a tribal member for purposes of determining jurisdiction. (E.R. 8:11). The tribal appellate court further concluded that the tortious conduct alleged in Smith's claim against SKC extended "far beyond the accident itself." (E.R. 8:16).

Before the tribal appellate court issued its order upholding the Tribes' jurisdiction over Smith's claim, Smith re-filed his claim in district court on March 22, 2002, alleging that the tribal court did not have jurisdiction over his claim and requesting the district court to enjoin the tribal appellate court

from any further consideration of his appeal. The district court declined to enjoin the tribal appellate court and issued its own order regarding the jurisdictional question on March 7, 2003. (E.R. 9:1-12). The district court concluded that the Tribes had jurisdiction over Smith's claim. The district court's decision was premised upon two fundamental findings: (1) that SKC is a tribal entity or "arm" of the Tribes; and (2) the torts alleged against SKC occurred on tribally owned land. (E.R. 9:8-10).

VI. SUMMARY OF ARGUMENT

SKC's argument is two-fold. First, the district court did not err in determining the SKC was a Tribal entity. The facts of this case clearly establish that SKC is a tribally chartered corporation established by the Tribal Council through its authority set forth in the Tribes' Constitution. SKC was established by the Tribal Council for the express purpose of providing post-secondary education to tribal members in order to benefit the Tribes as a whole. The connection between the Tribes and SKC is well-established, well documented, and clearly supports the district court's conclusion that SKC is a tribal entity, or arm of the Tribes, for purposes of jurisdiction.

Second, the district court correctly found that Smith's claim arose at SKC, which is located on tribal land. The district court's conclusion is supported by the facts and allegations of Smith's Amended Complaint. All of the negligent acts that Smith attributes to SKC in his Amended Complaint occurred on the premises of SKC, which is located on tribally owned land.

As result of the foregoing, the district court properly concluded that this case involves a lawsuit filed against a tribal entity alleging claims that arose on tribal land. Therefore, the Tribes clearly have jurisdiction over Smith's claim pursuant to *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269 (1959). Furthermore, because SKC is clearly a tribal entity and Smith's claim arose on tribally owned land, the district court properly held that the U.S. Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981) is inapplicable to Smith's claim.

VII. ARGUMENT

In its Order dismissing Smith's claim, the district court noted, "the fundamental principle of federal Indian law supporting a tribal court's jurisdiction is the federal recognition of, and support for, tribal self-government, or the 'right of reservation Indians to make their own laws and be ruled by them.'" Order at 4 (quoting *Williams, supra.* at 220) (E.R. 9:4).

This inherent sovereignty provides the tribes with powers of self government, and the power to enforce laws among the members of the tribe. *Montana v. United States*, 450 U.S. 544, 563-64 (1981). Accordingly, tribal courts retain sovereignty and civil jurisdiction “over both their members and their territory.” *Id.* at 563 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

In *Williams, supra.*, the respondent Lee was a non-Indian who owned a store on the Navajo Indian Reservation. *Id.* at 217. Lee sued the Williams, who were members of the Navajo tribe, to collect for goods sold to the Williams on credit. *Id.* at 217-18. Lee sued in Arizona state court, which entered judgment in Lee’s favor despite the Williams’ contention that the state of Arizona had no jurisdiction over Lee’s claim. *Id.* at 218.

Reversing, the United States Supreme Court explained that Indian tribes have sovereignty over their own members and “exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants.” *Id.* at 222. The Supreme Court further emphasized that Lee’s status as a non-tribal plaintiff was irrelevant to the issue of jurisdiction: “It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.” *Id.* at 223.

Williams sets forth the bedrock principles of Indian jurisdiction: Indians exercise civil jurisdiction over both their members and their territory. It is under the foregoing standard that this Court must determine whether the Tribes have subject matter jurisdiction over Smith's claim against SKC. Therefore the relevant questions that must be answered are: (1) is SKC a tribal entity subject to the Tribes' jurisdiction?; and (2) did the allegedly tortious conduct that is the basis of Smith's lawsuit occur on tribal land?

The answer to the foregoing questions is clearly "yes." Smith's arguments to the contrary have been soundly rejected by both the tribal appellate court and the district court because of two rather simple and undeniable facts: (1) SKC is a tribal entity, or "arm" of the Tribes; and (2) the alleged negligent conduct of SKC took place **entirely** on tribally owned land.

B. SKC Is a Tribally Chartered College Pursuant to Tribal Law for the Purpose of Serving Tribal Members, and Subject to Decisions of the Tribal Council. Therefore, the District Court Correctly Held That SKC Is a Tribal Entity, or "Arm" of the Tribes for Purposes of Tribal Jurisdiction.

The district court correctly explained that the threshold issue to resolve with regard to tribal jurisdiction is to determine the status of SKC.

The district court concluded that SKC is a tribal entity, or “arm” of the tribe, and thus subject to tribal court jurisdiction under *Williams, supra*. See, district court’s Order at 8 (E.R. 9:8). Although Smith has contested SKC’s tribal status, he has provided no evidence throughout this case to demonstrate otherwise.

Through its Articles of Incorporation and Bylaws, SKC is clearly a tribally chartered corporation that was formed by the Tribes through their constitutional authority. Its principal place of business is within the exterior boundaries of the Flathead Indian Reservation. Its stated purpose is to serve residents of the Flathead Reservation. Additionally, it is a tribally controlled college as defined by 25 U.S.C. § 1801. SKC reports annually to the Tribal Council, and its board of directors consists entirely of tribal members appointed by the Tribal Council. By its Articles of Incorporation issued by the Tribal Council, SKC has specifically consented to being sued in the tribal court. To put it simply, SKC would not exist but for its creation by the Tribal Council.

Moreover, SKC’s relation to the Tribes goes far beyond what is merely stated in its Articles of Incorporation and Bylaws. As a very successful and respected institution, “SKC is the pride of the Salish-

Kootenai people.” Appellate Court’s Order at 11 (E.R. 8:10). SKC is a major educational institution on the Flathead Reservation, with 38 full-time instructors, 50 part-time instructors and over 850 full-time students. *Id.* It is well recognized that SKC’s fundamental purpose is to maintain “the cultural integrity of the Salish and Kootenai people,” and to provide “quality postsecondary educational opportunities for Native Americans locally, and from throughout the United States.” *Id.* Most of the students attending SKC are Indians from the Flathead Reservation. *Id.* As the tribal appellate court aptly concluded, “[t]o treat SKC as a nonmember for purposes of jurisdiction would be to deny both the fundamental nature and identity of the college and the complexity of federal Indian law.” *Id.*

Based on the foregoing facts, the district court held that “SKC is a tribal entity or an arm of the tribe for purposes of federal Indian law regarding tribal court jurisdiction.” Order at 8 (E.R. 9:8). To support its conclusion further, the Court relied on several cases in which similarly established organizations were determined to be tribal entities with regard to federal law. *See, e.g., Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998); *Duke v. Absentee Shawnee Tribe of Oklahoma*

Housing Authority, 199 F.3d 1123 (10th Cir. 1999); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8th Cir. 1998); and *Giedosh v. Little Wound School Board, Inc.* (D. S.D. 1997), 995 F.Supp. 1052.

For example, in *Hagen*, the Eighth Circuit found that because the Sisseton-Wahpeton Community College, was “chartered, funded, and controlled by the Tribe to provide education to tribal members on Indian land,” it served as an “arm of the tribe and not as a mere business.” *Hagen*, at 1043. Therefore, the Court concluded that the college was entitled to sovereign immunity from plaintiffs’ discrimination claim in federal court. *Id.*

Likewise, in *Pink* this Court held that the defendant, Modoc Indian Health Project, Inc., was an “Indian tribe” entitled to immunity under Title VII of the Civil Rights Act of 1964. *Pink*, at 1188. Just as SKC in the present case, Modoc was a “non-profit corporation created and controlled by the Alturas and Cedarville Rancherias,” and was organized by the tribes for “charitable educational and scientific purposes.” *Id.* at 1187. Because Modoc was a tribally chartered corporation, controlled by the tribes for the purpose of providing services to the tribes, the court concluded that “Modoc served as an arm of the sovereign tribes, acting as more than a mere

business.” *Id.* The status of SKC in the present case is no different than that of Modoc.

The district court’s conclusion that SKC is an entity of the Tribes is further supported by the Eight Circuit’s holding in *Duke, supra*. In *Duke*, the Court considered whether the Absentee Shawnee Housing Authority (ASHA) was considered an “Indian tribe” and therefore excluded from Title IV’s definition of “employer.” *Duke*, at 1124. Although ASHA was created to provide low-income housing to Indians, it was organized under Oklahoma state law. *Id.* The plaintiff argued that because ASHA was organized under the laws of Oklahoma, it could not be considered an “Indian tribe” under Title VII. *Id.*

Both the district court and the Eighth Circuit disagreed. Holding that ASHA qualified as an “Indian tribe,” the Court explained that ASHA’s organization under Oklahoma state law had no effect upon its tribal identity and affiliation:

. . . although the Authority was organized pursuant to state law, its members were selected by the tribe, its function was to serve the needs of the tribe, and its activities were supervised by the tribe. **Thus, appellant’s argument that the Authority’s creation by virtue of state statute precludes its character as an Indian tribal organization is unfounded.**

Id. at 1125 (quoting *United States v. Crossland*, 642 F.2d 1113, 1114-15 (10th Cir. 1981)) (emphasis added).

The Court in *Giedosh v. Little Wound School Board, Inc.* (D. S.D. 1997), 995 F. Supp. 1052, arrived at the same conclusion with regard to a tribally incorporated school that was simultaneously incorporated under the laws of South Dakota. The plaintiff, Giedosh, sued the Little Wound School Board (“Board”) for racial discrimination in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 1053. The issue before the Court was whether it had subject matter jurisdiction over Giedosh’s claim against the Board, or whether the Board qualified as an “Indian tribe” under the exemptions to Title VII and the ADA. *Id.*

Giedosh argued that because the Board was incorporated under the laws of South Dakota it was not a part of the Oglala Sioux Tribe. *Id.* at 1058. The court disagreed, relying on the following facts, all of which are present in the case *sub judice*:

The school was a nonprofit corporation organized under the laws of South Dakota;

the school was formed with the consent and authorization of the tribe;

the Board is a democratically elected Board, and the Board's membership was comprised solely of members of the Oglala Sioux Tribe;

the school is a tribally chartered entity;

the school must adhere to the Tribal Council's resolutions and ordinances; and

the school was directly responsible to the Tribe and the Tribe's education committee.

Id. at 1055.

Based on the foregoing, the court concluded that as a matter of law the Board was included within the definition of an "Indian tribe" under the exemptions to Title VII and the ADA. *Id.* at 1059. In so holding, the court emphasized that "the fact that the Board chose to incorporate under South Dakota law does not eliminate the Board's connection to the Tribe." *Id.* at 1055 (emphasis added). Likewise, in the present case SKC's decision to incorporate under the laws of the State of Montana has no bearing or effect upon its relation or connection to the Tribe. Therefore, the fact of such incorporation does nothing to divest the tribal court of jurisdiction over SKC.

Smith argues in his brief that the district court erroneously applied the foregoing authority because SKC was not chartered or organized by the

Tribes and because SKC is also incorporated under the laws of Montana.

Smith's arguments are without merit or basis in law or fact.

By way of example, Smith's argument at page 21 of his Brief sets forth three points that are so contrary to the factual record of this case that it leaves one wondering from where the arguments originate. Without citation to the record Smith states, "SKC was not chartered by the Tribes, is not an arm of the Tribes, was not directly responsible to the Tribes[.]" Brief at 21.

This argument cannot be reconciled with SKC's Tribal Articles of Incorporation, which state in the first paragraph as follows:

The Confederated Salish and Kootenai Tribes chartered Salish Kootenai Community College on November 18, 1977, by Tribal Resolution No. 5279 with a vote of 9 for, 0 opposed, and 0 not voting, pursuant to authority vested in it by Article VI, Section 1(a), (f), (o), and (u) of the Constitution and Bylaws of the Confederated Tribes.

(Supp. E.R. 55).

The foregoing facts establish beyond dispute that SKC is a tribal community college, incorporated as a tribal non-profit corporation, established under a tribal charter, after a unanimous vote of the Tribal Council, pursuant to the Council's authority under the Tribes' constitution and bylaws. SKC simply would not exist but for its creation by the Tribal

Council pursuant to tribal law. In light of the foregoing facts, Smith's persistent and erroneous argument that SKC was not formed or chartered by the Tribes simply defies explanation.

The Excerpts of Record Smith filed with his brief omit several pages from the foregoing documents. Smith omits three pages from the Tribal Articles of Incorporation, three pages from the Montana Articles of Incorporation, and two pages from SKC's bylaws. In pertinent part, the district court cited and relied on Article II of the Tribal and Montana Charters in determining SKC's status as an arm of the Tribes. District court's Order at 7 (E.R. 9:7). However, the relevant portions of Article II from both Charters were inadvertently omitted from Smith's brief and Excerpts of Record. A Supplemental Excerpt of Record is submitted herewith which includes full copies of both sets of Articles and the bylaws.

Finally, Smith's argument that SKC's incorporation under the laws of Montana forecloses its status as a tribal entity is equally without merit. See Brief at 16. As the Courts specifically held in *Giedosh* and *Duke, supra.*, simultaneous incorporation under both tribal and state law has no bearing on the issue of tribal identity. *See, Giedosh* at 1055 ("the fact that the Board chose to incorporate under South Dakota law does not eliminate the Board's

connection to the Tribe”); *Duke* at 1125 (“appellant’s argument that the Authority’s creation by virtue of state statute precludes its character as an Indian tribal organization is unfounded”). Therefore, the district court correctly relied on the foregoing authority in support of its holding that SKC is a tribal entity. Smith’s attempts to distinguish those cases are devoid of support in fact or law.

B. Without Exception, All of the Tortious Conduct Alleged Against SKC in Smith’s Amended Complaint Occurred on Tribal Land Within the Exterior Boundaries of the Flathead Indian Reservation.

The second relevant issue regarding tribal court jurisdiction is whether SKC’s allegedly tortious conduct occurred on or off tribal land. As noted by the district court, tribes presumptively exercise civil jurisdiction over matters arising on tribal land, even with regard to non-Indian defendants. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *see also McDonald v. Means*, 309 F.3d 530, 540 (9th Cir. 2002) (holding that tribal court jurisdiction exists over a nonmember defendant because accident occurred on reservation land).

The present case arises from Smith’s status as a student at SKC. According to Smith, he “was operating the dump truck within the course and scope of his instruction and class work as a student at SKC.” *Am. Compl.*

and Jury Demand, ¶ 20 (E.R. 6:4). Based on this relationship with SKC, Smith alleged that SKC owed him numerous duties, **none** of which were allegedly breached on a federal highway. Smith claimed that SKC failed to properly maintain the dump truck resulting in a cracked leaf spring, excessive steering lash, improper tires and improperly adjusted brakes. He alleged that SKC failed to properly supervise the driver (Smith) and the co-student (Burland) who was in charge of the truck and was directed to be instructing Smith at the time of the rollover. He further claimed that SKC failed to properly train the driver of the dump truck and failed to maintain documents and/or notes generated in the investigation of the accident. *Am. Compl. and Jury Demand*, ¶¶ 27-37 (E.R. 6:5-6).

Smith further alleges that SKC had “an absolute, non-delegable duty to protect the safety of its students” *Id.* Thus, Smith’s allegations of negligent conduct go well beyond a mere traffic accident. Indeed, **none** of the foregoing allegations against SKC involve conduct occurring on Highway 93. Rather, they occurred at SKC’s facilities, which are located within the exterior boundaries of the Flathead Indian Reservation, on tribally owned land. *See*, tribal appellate court’s order dated February 17, 2003, at 7, fn. 4 (taking judicial notice that SKC is located on tribal land) (E.R. 8:7).

Based upon the foregoing, the district court correctly determined that Smith's claim arose out of SKC's allegedly negligent conduct occurring on tribal land, not on Highway 93. District court's Order at p.10 (E.R. 9:10). Clearly, tribal jurisdiction exists where a claim "arises" out of "conduct" occurring on reservation land, not necessarily the location where a given tort may have ultimately accrued. Courts considering tribal jurisdictional issues routinely focus on where a defendant's tortious conduct occurred, and whether a claim arises out of such conduct. *See, e.g., McDonald v. Means*, 300 F.3d 1037 (9th Cir. 2002) ("Tribes maintain broad authority over the conduct of both tribal members and nonmembers on Indian land"); *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999) ("Analysis of Indian jurisdiction over cases involving non-Indians generally turns on whether the tribe controls the land upon which the dispute arose"); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (stating that tribes exercise civil authority over the "conduct" of members and nonmembers on tribally owned land).

To refute the district court's conclusion, Smith relies on *Johnson v. Orweat Foods Co.*, 785 F.2d 503 (4th Cir. 1986) and *Heil v. Morrison Knudsen Corporation*, 863 F.2d 546 (7th Cir. 1988) to support his argument

that, because the traffic accident itself occurred on Highway 93, his claim does not arise on tribal land, despite the fact that every allegation of negligent conduct against SKC occurred off of Highway 93. *See* Smith’s brief at 25-26, footnotes 54 and 55. However, because neither *Johnson* nor *Heil* even consider the issue of subject matter jurisdiction, they are inapplicable.

The issue in *Heil* was whether the federal district court in Illinois could exercise personal jurisdiction over a suit filed by an Illinois resident against Morrison Knudson, an Idaho corporation under Illinois’ “long arm statute.” *Heil*, at 547. The issue of subject matter jurisdiction is nowhere discussed in *Heil*. Moreover, to the extent that *Heil* could possibly apply to this case, it supports the Tribes’ jurisdictional argument because the court’s analysis of jurisdiction focused on Morrison Knudsen’s conduct that gave rise to the tort claim, not the place where any such tort accrued: “The **conduct** that [Heil] complains of occurred in New York in 1988, not Illinois in 1986 The adoption of the poison pill here was in a sense divided between two jurisdictions, Illinois and New York, but the relevant adoption occurred in New York, for it was there that the fatal amendment was made.” *Id.* at 551 (emphasis added). Thus, under the holding in *Heil*, it is a

defendant's conduct that gives rise to jurisdiction, not the place where a claim accrues. Smith's reliance on *Heil* is obviously misplaced.

The relevant issue in *Johnson* is not subject matter jurisdiction, but choice-of-law analysis. Smith's selective quotation from *Johnson* is clearly not applicable to this case when viewed in its complete context as follows:

The applicability of the Connecticut statute must be determined according to Maryland conflict-of-laws principles. The Maryland rule for torts would seem to be applicable here, because what is alleged – a violation of a statute – is essentially a matter of tort and not of contract. Under that rule, the law of the place of injury applies. [citation omitted]. **The place of injury is the place where the injury was suffered, not where the wrongful act took place.**

Id. at 511. (Emphasis indicates Smith's quotation on p. 26 of his Brief).

Once again, Smith's reliance on *Johnson* to support his arguments depends upon a selective quotation, taken out of context, and regarding an area of law that is irrelevant to any issue in this case. As Smith acknowledges, "[t]he conduct at issue in both this and the tribal litigation is SKC's tortious conduct[.]" Brief at 36. Clearly, such conduct occurred at SKC on tribally owned land.

Smith claims that SKC "challenged" the tribal court's jurisdiction in this matter and that the tribal court simply "did not address the question of

its subject matter jurisdiction” prior to trial. Brief at 3-4. To support his argument, Smith relies on several tribal court pleadings that are not a part of the record to these proceedings, and were not even provided to this Court for review. *See* Smith’s brief at 3, fn. 1 of 83.

No party to this case ever challenged the tribal court’s jurisdiction prior to trial. While counsel for SKC included the issue of jurisdiction as an affirmative defense in its Answer, it did so before any discovery was conducted regarding SKC’s status as a tribal entity. Nevertheless, no jurisdictional challenge was ever asserted by either party prior to the tribal court trial. This fact is reflected in the Pretrial Order entered into by Smith and SKC prior to trial, dated September 7, 2000. Under the headings of the Pretrial Order “Issues of Fact,” “Issues of Law,” and “Determination of Legal Issues in Advance of Trial,” neither party challenged or addressed the tribal court’s jurisdiction over this case. *See* Pre-Trial Order at 7-9 (Supp. E.R. 41-43). The Pre-Trial Order further stated as follows:

IT IS HEREBY ORDERED that this Pre-Trial Order will supersede the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

IT IS HEREBY ORDERED that all pleadings herein shall be amended to conform to this Pre-Trial Order.

Pre-Trial Order at 10 (Supp. E.R. 44) (emphasis added).

Therefore, prior to the tribal court trial **no** party to this case ever challenged the tribal court's jurisdiction. The foregoing Pre-Trial Order, which superceded all prior pleadings, contained no such challenge. As Smith's brief clearly reflects, not a single document in the record of this case supports his argument that SKC or any other party "challenged" the tribal court's subject matter jurisdiction prior to trial. Thus, Smith's repeated argument that SKC "challenged" the subject matter jurisdiction of the Tribal court and that the tribal court simply "did not resolve the issue prior to trial" fails in view of the record before the Court.

C. Because Smith's Claim Against SKC Is Against a Tribal Entity and Arose on Tribal Land, *Montana* and *Strate* Are Wholly Inapplicable to this Case.

The majority of Smith's brief involves a convoluted analysis of *Montana v. United States*, 450 U.S. 544. However, as the district court correctly explained, any analysis of the rule in *Montana*, or its exceptions contained therein, is meaningless to present case because Smith's claim is against a tribal entity and arose on tribal land. District court Order at 10 (E.R. 9:10). Unlike the present case, the Supreme Court in *Montana* considered whether a tribe has jurisdiction over activities of nonmembers of

the tribe conducted on alienated fee land owned by a non-Indian. *Id.* at 544. The general rule established in *Montana* is that tribal powers “do not extend to the activities of nonmembers of the tribes,” and the two exceptions to the general rule concern “activities of nonmembers” and “conduct of non-Indians.” *Id.* at 565-66.

However, consistent with the supreme court’s holding in *Williams, supra.* at 23 (“It is immaterial that [plaintiff] is not an Indian”), courts have consistently recognized that the *Montana* rule and its exceptions apply only to the conduct of a nonmember defendant. See *Box v. Warrior*, 265 F.3d 771, 775-77 (9th Cir. 2001) (applying *Montana*’s main rule and its exceptions to the conduct of a nonmember defendant); *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059, 1062-65 (9th Cir. 2000) (applying *Montana* analysis to nonmember defendant).

Based on the foregoing rule, the district court correctly determined that *Montana* has no application to this case because this case does not involve a nonmember defendant. Rather, based on the substantial undisputed facts of this case and applicable authority discussed above, SKC is clearly a tribal entity or “arm” of the Tribes and, therefore, is a tribal defendant. As such, *Montana* is entirely inapplicable to this case.

Smith's argument that *Montana* applies to this case is easily refuted by the first sentence of the Supreme Court's opinion in that case: "This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by **non-Indians** on lands within its reservation **owned in fee simple by non-Indians.**" *Id.* at 547 (emphasis added). The factual distinction between *Montana* and the present case could not be more clear. The present case neither involves a claim against a non-Indian, nor conduct occurring on land owned by non-Indians.

The district court also correctly determined that *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404 (1997) is inapplicable to this case. *Strate* involved a negligence claim arising out of an automobile accident between Gisela Fredericks and Lyle Stockert, while Stockert was driving a gravel truck for his employer, A-1 Contractors, on a stretch of North Dakota state highway that runs through the Fort Berthold Indian Reservation. *Id.* at 443. Fredericks sued Stockert, A-1 Contractors, and A-1 Contractors' insurer in the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Reservation. *Id.* Over objection by the defendants, the tribal court held that it had jurisdiction to hear the case, which was affirmed by the Northern Plains Intertribal Court of Appeals. *Id.* at 444.

The United States Supreme Court disagreed. First the Court emphasized that the North Dakota state highway running through the Fort Berthold Reservation was not Indian fee land: “the right-of-way acquired for the State’s highway renders the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land The Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right-of-way.” *Id.* at 454. Therefore, the negligent conduct giving rise to tort liability did not occur on Indian land.

Next, the Court relied heavily on the fact that the parties to the case were not members of the Three Affiliated Tribes of the Fort Berthold Reservation: “The dispute, as the Court of Appeals said, is ‘distinctively non-tribal in nature’ It ‘arose between two non-Indians involved in [a] run-of-the-mill [highway] accident.’” *Id.* at 457 (quoting *Strate*, 76 F.3d 930, 940). Therefore, because the tortious conduct occurred on non-Indian land between non-Indian litigants, there was no basis under *Montana* for the Tribal Court to exercise jurisdiction.

The facts of *Strate* simply do not exist in this case. *Strate* involved an automobile accident between two non-Indians on non-Indian land. The facts of this case are exactly the opposite of those in *Strate*. Here, SKC is a tribal

defendant that allegedly committed torts at its premises located on tribal land.

The holding in *Strate* that tribal jurisdiction was plainly lacking also relied heavily upon the fact that the tortious conduct giving rise to liability occurred **exclusively** on a state highway, over which the tribe had no ownership or control. However, this case presents a completely different scenario. Contrary to Smith's assertions, **none** of the alleged negligent acts by SKC occurred on Highway 93, or otherwise on non-Indian land.

Additional cases relied upon by Smith to support his *Montana* and *Strate* arguments are likewise inapplicable to this case because they involve non-Indian defendants engaged in activities on non-Indian fee land. *See e.g.*, *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 659 (holding that the Navajo Nation could not impose a tax upon a non-Indian defendant on non-Indian fee land within the reservation); *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944, 955 (holding that the Crow Tribe could not tax a nonmember utility located on non-Indian fee land); *Burlington Northern Santa Fe v. Assiniboine and Sioux Tribes*, 323 F.3d 767, 769 (9th Cir. 2003) (applying *Montana* to a non-Indian railroad operating on the equivalent of non-Indian fee land); *County of Lewis v.*

Allen, 163 F.3d 509, 515-16 (holding that tribe had no jurisdiction over minor crimes committed by nonmembers after the tribe yielded such law enforcement duties to the state).

Simply, none of the foregoing cases apply to Smith's claim because they all involve claims against non-Indian defendants for conduct occurring on non-Indian land. Therefore, Smith's reliance on the foregoing cases is wholly misplaced.

VII. CONCLUSION

The entirety of Smith's brief, consisting of 44 pages and 83 footnotes, fails to demonstrate any error in the reasoning employed by the district court in dismissing his claim. The facts of this case could not more clearly demonstrate SKC's status as a tribal entity, or arm of the Tribes for purposes of subject matter jurisdiction. SKC was created by the Tribes pursuant to tribal law, is managed by a board consisting only of tribal members selected by the Tribal Council, and was established for the purpose of educating the Salish Kootenai people. The fact that SKC has enjoyed such success as to attract and accept out-of-state students like Smith does nothing to detract from its tribal status.

Furthermore, the district court correctly found that none of Smith's allegations against SKC involve tortious conduct occurring on non-Indian land. Rather, all the negligent acts that Smith alleges occurred at SKC, located on tribal land. As a result, tribal jurisdiction clearly exists over Smith's claims against SKC.

The United States Supreme Court has long recognized the need to promote and encourage tribal self-government. Indian tribes and their courts must have jurisdiction to resolve disputes arising out of the activities of their tribal institutions and non-members who enter into consensual relations with them. In the case of tribal colleges, the tribes organize, charter and regulate their activity, and tribal courts are an important part of that regulatory power. Recognizing this power and responsibility requires that the decision of the district court be affirmed.

For all the foregoing reasons, the district court's dismissal of Smith's claim should be affirmed.

DATED this 23rd day of June, 2003.

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STATEMENT OF RELATED CASES

Ford Motor Company v. Todecheene, Docket No. 02-17048. Decision of the United States District Court for the District of Arizona appears at 211 F. Supp. 1070, 2002 U.S. Dist. Lexis 17936. Decided September 18, 2002.

Scheduled for oral argument before the Ninth Circuit Court of Appeals on July 7, 2003. Pursuant to Circuit Rule 28-2.6(c), this case raises a closely related issue regarding extent of Tribal jurisdiction.

Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
 - this brief contains 6,805 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii),

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 - this brief has been prepared in a proportionally spaced typeface using WordPerfect Ver. 8 in Times New Roman, 14 pt.

DATED this 23rd day of June, 2003.

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CERTIFICATE OF MAILING

I, Robert J. Phillips, one of the attorneys for Appellee Salish Kootenai College in the above-entitled action, hereby certify that on the 23rd day of June, 2003, I served the within ***Brief of Appellee Salish Kootenai College*** upon the attorneys of record by mailing two copies thereof, to each party represented, in an envelope, securely sealed, postage prepaid and addressed as follows:

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