

CASE NO. 03-35306

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JAMES RICHARD SMITH, )

No. 03-35306

Plaintiff - Appellant, )

vs. )

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

Defendants - Appellees. )

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On Appeal from the United States District Court  
for the District of Montana, Missoula Division  
The Honorable Leif B. Erickson, presiding

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BRIEF OF THE DEFENDANT/APPELLEE COURT OF APPEALS OF  
THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF  
THE FLATHEAD RESERVATION

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## INTRODUCTORY STATEMENT

Co-Appellee, Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, represented here by the Legal Department of the Confederated Salish and Kootenai Tribes, is aware that pursuant to Federal Rules of Appellate Procedure, Circuit Rule 28-4, multiple separately represented Appellees are encouraged to submit one joint brief. However, because Co-Appellee SKC and Appellant Smith still have issues pending in the court system of the Salish and Kootenai Tribes regarding the underlying merits of this appeal, the Tribal Council chooses to write separately in the interest of judicial integrity.

## JURISDICTIONAL STATEMENT

Co-Appellee, the Court of Appeals for the Confederated Salish and Kootenai Tribes of the Flathead Reservation agrees with Appellant James Richard Smith's (Smith) Statement of Jurisdiction with the following exception:

Smith incorrectly claims that the district court's basis for jurisdiction existed pursuant to diversity of parties pursuant to 28 U.S.C. § 1332. (Smith's Brief, p.1). The Tribes are aware that this Court has found that diversity jurisdiction can exist between a citizen of another state and incorporated tribes and tribal organizations. *American Vantage Company v. Table Mountain Rancheria*, 292 F.3d 1091, 1094 n. 1 (9<sup>th</sup> Cir. 2002). However, the district court based its jurisdiction on 28 U.S.C.

§ 1331, which allows federal courts to hear challenges to a tribal court's subject matter jurisdiction. *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985). (Smith's E.R. 9:3).

### **STATEMENT OF THE ISSUES FOR REVIEW**

The Tribes re-state the single issue to be resolved by this Court as follows:

Did the district court commit reversible error when it concluded that the Salish and Kootenai tribal court has subject matter jurisdiction over a tort action for negligent maintenance of instructional equipment, and negligent instruction and supervision of students, where the defendant is Salish-Kootenai College, a tribally chartered non-profit corporation located on the Flathead Reservation, and plaintiff Smith is a non-member Indian who was enrolled at the college.

### **STATEMENT OF THE CASE**

This appeal is based on the dismissal of Smith's federal court challenge to the subject matter jurisdiction of the Confederated Salish and Kootenai Tribes' court system.

Smith tried a negligence action against Salish-Kootenai College (SKC, or the College) before a jury in the Salish and Kootenai Tribal Court. The jury returned a verdict for the defendant SKC. Smith subsequently contested the subject matter jurisdiction of the Tribal Court and filed an appeal to the Tribes' Court of Appeals.



Prior to the Tribes' Court of Appeals jurisdictional ruling, Smith filed a request for declaratory and injunctive relief in the Federal District Court for the District of Montana (district court). He asked the district court to declare that the Salish and Kootenai court system had no subject matter jurisdiction over his case, that the Tribes' Court of Appeals be enjoined from further considering his case, and that he be allowed to re-litigate his negligence claim in federal court.

While Smith's request for relief was pending in the district court, the Tribes' Court of Appeals issued an opinion finding that subject matter jurisdiction was properly with the Tribal Court. The district court then issued an order in which it also found that jurisdiction was proper in the Tribal Court and dismissed Smith's federal court claim, stating that the principle of comity followed by federal courts under federal Indian law precluded the district court from re-litigating Smith's claims. Smith then brought this appeal.

### **STATEMENT OF THE FACTS**

Smith and SKC, as well as the district court, have provided this Court with a detailed factual background. The Tribes will forego another recitation of the case history and offer the following facts relevant to the Tribes' argument.

The Confederated Salish and Kootenai Tribes (Tribes) are a federally recognized Indian tribe organized as a constitutional government under the Indian

Reorganization Act of June 18, 1934, 25 U.S.C. § 461, et. seq. (IRA). The governing body of the Tribes is the Tribal Council. Under the Tribal Council's IRA § 16 governmental authority, the Tribes chartered the college that is now SKC as a tribal non-profit corporation on November 18, 1977 pursuant to Tribal Resolution No. 5279. Smith's E.R. 3:4 (Smith's selected excerpts of the Articles of Incorporation of Salish-Kootenai Community College, hereafter "Tribal Charter"). Nearly a year later, the College also incorporated as a Montana non-profit corporation. Smith's E.R. 3:9 (Smith's selected excerpts of the Certificate of Incorporation for Salish-Kootenai College, hereafter "State Charter").

SKC is separate from the Tribes' IRA § 16 governmental body, and as a tribally chartered corporation the Tribal Council does not involve itself in the day to day operations of the College. Smith's E.R. 3:2 (Aff. of SKC President Joe McDonald). However, in chartering the college, the Tribal Council reserved for itself a significant oversight role in the management of SKC. According to Articles III and X of SKC's By-Laws all seven members of the Board of Directors must be enrolled members of the Tribes and the Tribal Council alone shall appoint and remove members of the Board. Smith's E.R. 3:14. Additionally, Article VII of the SKC Tribal Charter requires the Board to file an annual report to the Tribal Council addressing the educational and financial activities of SKC. The By-Laws also

require the Board to meet with the Tribal Council "on a regular basis." Smith's E.R. 3:6; 9:7.

This appeal arises out of injuries Smith received in a one vehicle accident on May 12, 1997. Smith's E.R. 9:1-3. Smith is a member of the Umatilla Tribe and citizen of Oregon, and the defendant was SKC, a tribally chartered non-profit corporation located on the Flathead Indian Reservation in Pablo, Montana. *Id.* On the day of the accident Smith was operating one of SKC's dump trucks on U.S. Highway 93 near the town of Arlee. *Id.* Smith was operating the truck within the course and scope of his instruction and class work as a student at SKC. *Id.* While driving north on Highway 93, the right rear main leaf spring on dump truck broke causing the truck to veer to the left. *Id.* The truck rolled over, killing one of the passengers, and injuring Smith and a second passenger. *Id.*

Following the accident the injured passenger and the estate of the deceased passenger named Smith and SKC as defendants in a lawsuit in the Tribal Court. *Id.* Smith and SKC filed cross claims against each other in that case. *Id.* Smith alleged the College was liable for the accident, asserting legal theories of negligence and strict liability. *Id.* Following disposition of some of the various claims, the only lawsuit to proceed to trial was Smith's cross claims against the College. *Id.* The trial resulted in a jury verdict and judgement in favor of SKC. *Id.*

Following the trial, Smith moved in Tribal Court for relief on the basis that the Tribal Court lacked jurisdiction, and he also filed an appeal of the judgment. *Id.* On appeal the Tribes' Court of Appeals remanded the case for a ruling on jurisdiction. *Id.* The Tribal Court found that it properly had jurisdiction over the case. *Id.* Smith appealed the Tribal Court's jurisdictional finding back to the Tribes' Court of Appeals, along with his appeal on several issues on the merits from the trial in Tribal Court. Smith' E.R. 8:1. Prior to the finding of jurisdiction from the Tribes' Court of Appeals, Smith reinitiated his entire action in the district court. Smith's E.R. 6:1. The Tribes' Court of Appeals was named as an additional defendant in Smith's action because it presided over Smith's jurisdictional challenge.

The Tribes' Court of Appeals issued a February 17, 2003 Order affirming the Tribal Court's finding of jurisdiction, but there are still unresolved issues on the underlying merits of the case pending in the Tribes' Court of Appeals. Smith's E.R. 8:1,17.

The district court dismissed Smith's federal court action in a March 7, 2003 Order, finding jurisdiction was properly in the Tribal Court. Smith's E.R. 9:1. This appeal followed.

## SUMMARY OF ARGUMENT

The Tribes argue that SKC is a tribal entity, and therefore any jurisdictional analysis must be premised on *Williams v. Lee*, 358 U.S. 217 (1959). Smith has brought a negligence action against a tribal defendant for alleged negligent conduct that occurred on land owned by the tribal defendant. As a result, subject matter jurisdiction is with the Tribal Court.

Federal Indian law confirms tribal court jurisdiction over civil claims brought against tribes, tribal members and tribal entities. The controlling case law for this principle is *Williams v. Lee*. Under *Williams*, tribes have broad jurisdiction over civil actions brought by outsiders against Indian defendants.

In this case, the tribal defendant is Salish-Kootenai College. SKC was established as a tribally chartered corporation by the Tribal Council and the Tribal Council retains oversight of SKC. The Board of Directors for the college consists entirely of tribal members appointed by the Tribal Council, who are required to meet regularly with the Tribal Council in order to report on the financial and educational condition of SKC.

In *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9<sup>th</sup> Cir. 1998), this Court was faced with a similar issue and found that a non-profit corporation formed by two tribes for delivery of health care services was a tribal entity. As the

district court below explained, other Circuit Courts have also held that entities similar in structure to SKC are tribal entities. In *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8<sup>th</sup> Cir. 2000) the Eighth Circuit has specifically held that a tribal college similar in nature to SKC is a tribal entity, and therefore a contrary finding in the instant matter by would place the Eighth and Ninth Circuits in direct conflict.

Smith contends that SKC is a state entity because it has also incorporated under Montana law. The college was initially established as a tribally chartered corporation, and subsequent incorporation under Montana law did not divest SKC of its tribal status. Recently, in *Flat Center Farms, Inc. v. State Department of Revenue*, 310 Mont. 206, 49 P.3d 578 (2002), the Montana Supreme Court found that an Indian-owned business having incorporated under tribal and state charters is still a tribal entity and therefore could not be taxed by the Montana Department of Revenue. The fact that SKC has also chosen to incorporate under Montana state law does not make SKC a state entity.

Finally, contrary to Smith's argument, the jurisdictional test in *Montana v. United States*, 450 U.S. 544 (1981) is inapplicable to this case. Smith's fundamental misunderstanding is that a *Montana* analysis is used to measure whether an Indian tribe may exert jurisdiction over a non-member on fee lands,

none of which is at issue here. Regardless, the distinction is moot in this case as SKC is a tribal entity. The alleged negligence claimed by Smith occurred at SKC, under SKC management and control. The *Montana* analysis urged by Smith is not relevant to the circumstances of this case. Even if this Court finds that the tort arose on a state highway as Smith now contends, Smith had sufficient ties to the Tribe through his enrollment and participation as a student of SKC to satisfy a *Montana* test. The Tribes also have a compelling public safety and political interest in maintaining jurisdiction over their own college. The Tribes respectfully submit that tribal jurisdiction would survive both prongs of the *Montana* test.

The district court confirmed the findings of both the Tribal Court and the Tribes' Court of Appeals - subject matter jurisdiction in this case belongs with the Salish and Kootenai Tribes. The Tribes respectfully urge this Court to affirm the district court's dismissal of Smith's case.

### ARGUMENT

#### Standard of Review.

Questions of law relating to a tribal court's subject matter jurisdiction are reviewed *de novo* and factual findings are reviewed for clear error. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-1314 (9<sup>th</sup> Cir. 1990). Facts found by a tribal court are given deference unless they are clearly erroneous. *Bugenig v.*

*Hoopa Tribe*, 266 F.3d 1201, 1206 n.1 (9<sup>th</sup> Cir. en banc 2001)(citing *FMC v. Shoshone-Bannock Tribes*, 905 F.2d at 1313).

**I. Federal Indian law confirms tribal court jurisdiction over reservation based civil claims brought against tribal defendants, and in this case, Smith brought an action against a tribal entity, SKC, for alleged negligence which occurred at the college.**

In this era of Indian self-determination, the federal government has assisted tribes in developing strong reservation governments. One of the cornerstones of any government is the ability to adjudicate disputes. Because federally recognized Indian tribes are inherently sovereign governments, the United States Supreme Court has acknowledged the need for tribes to establish and maintain effective tribal court systems. *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985). The Supreme Court has encouraged the development of tribal courts, and has supported those courts by refusing to re-litigate issues properly within the jurisdiction of a tribal court system. *Id.*

*A. When a plaintiff brings a civil claim against a tribal defendant for an incident that occurred on the reservation, the controlling law is Williams v. Lee.*

Smith's appeal is based on a faulty assumption. He contends that the starting point in any analysis of tribal court civil jurisdiction is *Montana v. United States*, 450 U.S. 544 (1981). However, in a reservation-based case with a tribal defendant the controlling law is *Williams v. Lee*, 358 U.S. 217 (1959). *Williams*



held that a debt collection action brought by a non-Indian plaintiff for goods sold to an Indian defendant at the plaintiff's store on the Navajo Reservation was a matter for the Navajo tribal courts. Under *Williams*, tribes exercise broad civil jurisdiction which covers suits by outsiders against Indian defendants. *Id.* at 222. The *Williams* language most consistently cited by courts - the "right of reservation Indians to make their own laws and be ruled by them" - continues to be the controlling law when an Indian tribe, tribal entity or tribal member is sued for an on-reservation incident. *Id.* at 220. Accord, *Babbitt Ford, Inc., v. Navajo Indian Tribe*, 710 F.2d 587 (9<sup>th</sup> Cir. 1983)(tribe has on-reservation civil jurisdiction over repossession of motor vehicles by off-reservation dealers).

Even under the *Montana* analysis urged by Smith, the foundational holding of *Williams* remains undisturbed. See, *Montana v. United States*, 450 U.S. 544, 563-564 (1981)(tribes, as inherent self-governing sovereigns, possess civil jurisdiction over their members and their territory)(quoting *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978)).

In the present case, SKC is a tribal entity and the alleged negligence occurred at the college, therefore *Williams v. Lee* is the controlling law.

B. Smith's negligence claim against SKC is an action against a tribal defendant.

The primary reason that the Salish and Kootenai court system is the proper jurisdiction for Smith's negligence claim is because the college is a tribal entity. Under the *Williams* analysis, SKC is a tribal defendant being sued for alleged actions that occurred on the tribal defendant's land.

Smith attempts to disavow the connection between SKC and the Tribes through two arguments: (1) the connection that exists between SKC and the Salish and Kootenai government is not enough to support a finding that SKC is a tribal entity; and (2) SKC's incorporation under Montana state law makes SKC a state entity for the purpose of subject matter jurisdiction.

1. *As a tribally chartered corporation SKC has sufficient ties to the Tribes to be deemed a tribal entity for purposes of subject matter jurisdiction.*

Smith relies extensively on an old affidavit of SKC President Joe McDonald and the Motion to Dismiss submitted by the Tribal government as some kind of admission by the Tribes that SKC is a non-tribal entity. Smith's E.R. 3:1; 1:1. However, these materials have been routinely offered by Smith as evidence of a legal disconnect between the Tribes and SKC, and this assertion has been rejected by every court that has reviewed it. Furthermore, the *Bartell* decision from the district court, *infra*, p. 19 had already mooted these materials when Smith filed

them with the district court. Most importantly, however, Smith's reliance on these materials is based on a misapprehension of the structure of Indian tribes under the IRA.

Because the Tribes never expressly waived sovereign immunity in this case, the Tribes' IRA §16 *governmental* entity was immune from suit and was properly dismissed from Smith's claim. SKC is not part of the Tribes' §16 government. It is a tribally chartered non-profit educational corporation established *by* the Tribal government. Smith's E.R. 3:4-7 (Key sections omitted in Smith's E.R.). Similar to the Tribe's IRA §17 for-profit corporations, SKC can sue and allow itself to be sued in its own right. *See*, Smith's E.R. 3:10 (State Charter). Identical language in the Tribal Charter allowing SKC to sue or be sued in only Tribal Court was omitted in Smith's E.R. 3:4-7.

Because an entity is not organized as part of a tribe's IRA §16 governmental persona, does not implicitly divest that entity from any tribal connection. Tribally created business and educational entities carry the legal status of tribal entities. As the district court noted, the issue is not novel to this Court, nor other Circuit Courts. *See, Dillion v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8<sup>th</sup> Cir. 1998); *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123 (10<sup>th</sup> Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000). The district court

makes clear that there is ample case law relating to whether a particular entity should be considered a tribal entity, and based on this case law it correctly deemed SKC a tribal entity.

This Court has determined that a non-profit corporation created and controlled by two separate Indian tribes for the delivery of health care services constitutes a “tribe” for the purposes of Title VII of the Civil Rights Act of 1964. The decision in *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9<sup>th</sup> Cir. 1998) is directly on point. The *Pink* Court held that the corporation was an arm of the sovereign tribes, acting as more than a mere business, because its board of directors consisted of two representatives, from each tribal government, and it was organized to control a collective enterprise.

The *Pink* decision relied on a case from the Tenth Circuit holding that a collectively managed organization of multiple tribes formed to administer energy resources was a tribal entity within the scope of the tribal exemption found in the Civil Rights Act of 1964. *See, Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10<sup>th</sup> Cir. 1986).

However, in examining whether another healthcare entity should be deemed a tribal entity, this Court reached a different conclusion in *National Labor Relations Board v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (2003). The

*Chapa De* Court held the healthcare facility was on non-Indian land, at least half the non-professional employees were non-Indian, the executive administrator along with the entire board membership were all non-Indians, therefore it was not a tribal entity. The *Pink* holding is clearly distinguishable from the *Chapa De* decision. The *Chapa De* holding is also distinguishable from the facts of the present case. Here, the location and organizational structure of SKC is nearly identical to the tribal healthcare entity of *Pink*, and the district court correctly applied the *Pink* holding to the situation here.

In spite of the numerous judicial decisions upholding the tribal status of tribal colleges and other tribal entities that formed the basis of the district court's dismissal of Smith's case, Smith argues "[o]nly in the context of statutory discrimination claims did these cases apply a broad definition of 'Indian tribe'. *Montana* makes no suggestion that a similarly broad definition is appropriate for common law tort claims." (Smith's Brief, p. 20). He cites no authority on point for this dubious conclusion. Regardless, it is irrelevant what cause of action leads to a court's inquiry into the tribal status of a particular entity. Smith seems to suggest that there is no definition of "tribe" under a common law cause of action, therefore the case law that relies on a statutory definition, (such as the Civil Rights Act of 1964) is inapplicable in the present case. There is no legal basis for this

conclusion.

Moreover, Smith overlooks the fact that SKC already meets a statutory definition of a tribal entity, as SKC is eligible for funding under the Tribally Controlled Community College Act (TCCCA), 25 U.S.C. § 1801, et seq. This statute provides assistance to tribal colleges that are governed by, and primarily serve Indians, for the purpose of meeting the educational needs of Indian students. 25 U.S.C. §1804. SKC has been expressly listed as one of the tribal colleges that meet the eligibility criteria for funding as a Tribally Controlled College. *See*, Section 532(22) of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. § 301, historical notes).

Finally, while not binding in this Circuit, the district court did rely on the fact that the Eighth Circuit has determined that a tribal college very similar in structure to SKC is so closely tied to the tribe that it carries the tribe's sovereign immunity. *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8<sup>th</sup> Cir. 2000)(tribal college was an "arm of the tribe" because it was chartered as a non-profit corporation to provide education to its members and the board of trustees were members of the tribe). Smith's attempt to distinguish this case because the tribal status of the college went uncontested is unpersuasive. As in the present case, subject matter jurisdiction turned on the tribal status of the college, and the

Court there held that the college was a tribal entity.

In applying the case law above, SKC fits squarely within the definition of a tribal entity. The college is physically located on the Flathead Indian Reservation in Pablo, Montana, seat of the Salish and Kootenai Tribal government. Smith's E.R. 8:7 (Note 4, Tribes' Court of Appeals Order of February 17, 2003). In chartering the college, the Tribal Council reserved for itself a significant oversight role in the management SKC. Articles III and X of SKC's By-Laws requires all seven members of the Board of Directors be enrolled members of the Tribes, and the Tribal Council is the sole body that appoints and removes members of the Board. Smith's E.R. 3:14-15. Additionally, the Board is required to meet with the Tribal Council regularly and provide an update on the fiscal and educational condition of SKC. Smith's E.R. 3:6; 9:7. The purpose of SKC as stated in both the Tribal Charter and By-Laws is to provide educational opportunities to residents of the Flathead Indian Reservation. Smith's E.R.9:7. Finally, the college meets all Congressional criteria for funding under the Tribally Controlled Community College Act.

The record of this case supports a finding that SKC is a tribal entity. Affirmation of the district court's dismissal of Smith's case would also maintain consistency among the Circuit Courts of Appeals.

2. *Incorporation under Montana state law does not divest SKC of its status as a tribal entity.*

Notwithstanding Smith's suggestion to the contrary, the college's 1978 incorporation under Montana state law does nothing to alter the tribal status of SKC. The Tribal Council has never rescinded the Tribal Charter nor is there any language in the State Charter that expressly repudiates the original Tribal Charter.

The college's later incorporation under Montana law does not function as an implicit waiver of SKC's tribal status, either. The Montana Supreme Court - the final word on Montana state law - has specifically upheld the tribal status of an entity that is incorporated under both tribal and state law. *Flat Center Farms, Inc., v. State Department of Revenue*, 310 Mont. 206, 49 P.3d 578 (2002). There, the Montana Supreme Court held that an Indian owned company that was incorporated under Montana law, and later tribal law, was nonetheless exempt from the state corporate license tax because the corporation was owned and operated by Indians and conducted business entirely on Fort Peck Reservation. Similar to the *Flat Center Farms* situation, SKC is an Indian owned non-profit corporation carrying on the task of educating of Indian students, and is located entirely on the Flathead Reservation.



Finally, it is not inconsequential to note that in an unrelated case, the district court had previously found SKC to be a tribal entity for the purpose of certifying a state insurance question to the Montana Supreme Court. *Bartell v. American Home Assurance Company*, 310 Mont. 276, 49 P.2d 623 (2002). In re-stating the certified question, the Montana Supreme Court accepted the district court's determination that SKC was a tribal entity. In its Order of February 17, 2002 affirming jurisdiction over Smith's case, the Tribes' Court of Appeals cited the *Bartell* case with approval. Smith's E.R. 8:11 (note 8). The Courts of the State of Montana, the United States and the Tribes all recognize SKC as a tribal entity.

C. The negligent acts alleged by Smith against SKC arose at the college, a tribal entity.

While not dispositive, the location where a cause of action arose can be a significant factor in finding tribal court jurisdiction over a civil suit. One of the basic tenants of federal Indian law is that civil jurisdiction over disputes arising on tribal lands "presumptively lies in the tribal courts" regardless of whether there is a non-member plaintiff or defendant. *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 18 (1987).

Even if a plaintiff resides off-reservation, if the conduct giving rise to a cause of action occurred on the reservation and the claim is against a tribal defendant,

then it is a reservation-based claim and belongs in tribal court. The Supreme Court held in *Williams, supra*, that regardless of the fact that the plaintiff was a non-Indian residing off the Navajo reservation, the Indian defendant was residing on the reservation and the underlying activities that lead to the debt occurred on the reservation, it was a reservation-based claim and jurisdiction lay in the Navajo courts.

Smith suggests that *Nevada v. Hicks*, 533 U.S. 353 (2001), can be read to divest tribal court jurisdiction over reservation based civil claims, (Smith's Brief, pp. 26-27). However, *Hicks* involved non-Indian defendants and limited its holding to the question of tribal court jurisdiction over state officers enforcing state law. *Id.*, at 358 n. 2 (2001). *Hicks* simply does not apply to the facts of this case.

This Court recently confirmed that reservation based claims properly belong in front of a tribal court. *McDonald v. Means*, 309 F.3d 530, 540 (9<sup>th</sup> Cir. 2002)(upholding tribal court jurisdiction over a non-member Indian defendant in a single vehicle accident because the conduct giving rise to the claim occurred on land within the reservation that was tribally controlled).

In *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, *as amended*, 197 F.3d 1031 (9<sup>th</sup> Cir. 1999), this Court had to consider whether a bad faith insurance claim brought by a tribal member plaintiff against an off-reservation, non-Indian insurance

company was nonetheless an on-reservation dispute for the purpose of tribal jurisdiction. The *Stump* Court concluded that it was impossible to say that the claim plainly arose off the reservation. Therefore, federal courts should abstain from taking jurisdiction and the insurance company should exhaust its tribal remedies. In the present case however, the record is clear. All the negligent conduct alleged by Smith occurred on the Flathead Reservation and involved a tribal defendant.

In an effort to invoke *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), Smith now contends that all the tortious conduct occurred on a state highway. This assertion is contrary to the fact that in every court where Smith has brought his case, his negligence claims against SKC consist entirely of a variety of vehicle maintenance failures, coupled with failures in student supervision and instruction, all of which are actions that arose entirely at the college. The record in this case conflicts with Smith's revised legal theories of recovery based solely on a highway accident.

SKC is a tribal entity. Smith's cause of action arose from conduct that allegedly occurred at SKC. The district court correctly concluded that this case should be controlled by the *McDonald* and *Stump* decisions, and therefore, the *Montana* analysis advocated by Smith is inapplicable. The district court should be affirmed.

**II. Even if this Court chooses to apply the *Montana* test to this case, the Tribal Court still has jurisdiction based on Smith's relationship with SKC, and the Tribes inherent authority to adjudicate a dispute involving their own College.**

The district court was correct to consider the *Montana* test unnecessary in the present case. The *Montana* test is used by courts in determining the extent to which an Indian tribe may exert its jurisdiction over non-members on non-tribal land within an Indian reservation. However, to the extent that this Court feels it is appropriate to apply the *Montana* test to the present case, the Tribal Court would still retain jurisdiction.

Stated simply, under *Montana*, tribal jurisdiction over non-Indian fee lands is limited unless that tribal authority meets the criteria for one of the enumerated exceptions: (1) the non-member has entered into a consensual relationship with the tribe, or (2) the non-member's action directly threatens the political integrity, economic security, health or welfare of the tribe. *Montana v. United States*, 450 U.S. at 565-66.

The first *Montana* exception, which upholds tribal jurisdiction in cases where the activity of the non-member is based on a consensual relationship with a tribe or its members "through commercial dealing, contracts leases, or other arrangements" is clearly in place in the present case. As a student at SKC, Smith

had direct, undeniable financial and contractual ties to the tribal entity that he brought his claim against. At the time of the accident he was operating a training vehicle provided by the College as part of his coursework at SKC.

The second *Montana* exception deals with “conduct of non-Indians on fee lands...when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.*, at 566. It is illogical to conclude that under the second *Montana* exception the Tribes have no interest in maintaining public safety on the Flathead Reservation which is implicated directly by the activities SKC provides and which Smith was engaged in at the time of the accident. More importantly however, is the inherent authority of the Tribes to adjudicate disputes against tribal entities such as SKC. There is no logic to Smith’s assertion that the political integrity of the Tribes would not be eroded by a finding that the Tribes lack jurisdiction over their own college.

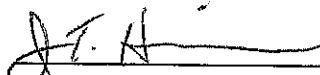
Even if this Court should find that the *Montana* test is necessary, the Salish and Kootenai court system would still retain subject matter jurisdiction over Smith’s claim.

### CONCLUSION

The district court was correct when it concluded that SKC was a tribal entity being sued for alleged negligence that occurred on tribal defendant’s land. Smith

has provided little reason for this Court to find that the district court committed reversible error when it dismissed his claim from federal court. Subject matter jurisdiction properly resides with the Tribal Court. The Tribes respectfully request that this Court affirm the district court's dismissal of Smith's case.

Respectfully submitted this 20th day of June 2003.

  
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CERTIFICATE OF COMPLIANCE  
PURSUANT TO CIRCUIT RULE 32-1

Case No. 03-35306

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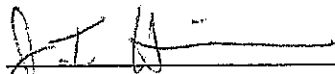
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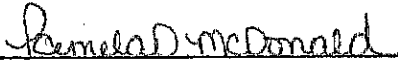
**CERTIFICATE OF SERVICE**

I certify that the foregoing "**Brief of the Defendant/Appellee Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Reservation**" was mailed on the 20<sup>th</sup> day of June 2003, via United States mail, postage prepaid, to the following:

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**STATEMENT OF RELATED CASES:**

*Ford Motor Company v. Todecheene*, Docket No. 02-17048

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.