No. 03-35306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES R. SMITH,
Plaintiff - Appellant,

v.

SALISH KOOTENAI COLLEGE;
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, Missoula Division

CONFEDERATED SALISH AND KOOTENAI TRIBES COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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I. INTRODUCTION AND RULE 35(b) STATEMENT OF COUNSEL.

Rehearing or consideration by the full court is necessary in this case to maintain uniformity of this Circuit's decisions and because this case involves questions of exceptional importance. By relying on *Nevada v. Hicks,* 533 U.S. 353 (2001), to find that the ownership status of land is not controlling when determining whether the Confederated Salish and Kootenai Tribes (CSKT, or Tribes) have jurisdiction over a claim brought by a non-member against a tribal entity, the Panel rendered an opinion that directly conflicts with this Circuit's clear limitations regarding the application of the *Hicks* decision in *McDonald v. Means,* 309 F.3d 530 (9th Cir. 2002).

Further, in finding that the Tribes did not have jurisdiction to hear a claim brought by a non-member against a tribal entity, the Panel opinion conflicts with *Williams v. Lee,* 358 U.S. 217 (1959) and the following authority not addressed in the opinion:; *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982); *Babbitt Ford, Inc., v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983); *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 459 U.S. 967 (1982); *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9 (1987) and several Montana Supreme Court cases addressed herein.

In counsel's judgment, this appeal involves questions of exceptional

importance, specifically the extent to which an Indian tribe retains civil jurisdiction over actions brought by non-members against tribes and tribal entities. The Panel's proposed standard on this issue conflicts with the cases cited above.

II. THE PANEL'S APPLICATION OF *HICKS* DISREGARDS THIS CIRCUIT'S PREVIOUS RULING IN *McDONALD v. MEANS.*

In *Montana v. United States*, 450 U.S. 544 (1981) the Supreme Court held that Indian tribes generally lack civil regulatory jurisdiction over non-member activity on non-Indian fee lands, with two exceptions: when non-members enter consensual relationships with the tribe or its members; and when non-member activities directly affect the tribe's political integrity, economic security, health, or welfare. The Supreme Court also adopted this framework for determining tribal civil adjudicatory jurisdiction over non-members on non-Indian fee land. See, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

While the *Montana* and *Strate* decisions limited themselves to the scope of tribal jurisdiction over non-members on non-Indian fee land[1], language in a recent

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[1]See, *Montana* 450 U.S. 557, where the question addressed was "the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." This limitation was reiterated by Justice Ginsburg in *Strate*: "[T]ribal courts may not entertain claims against nonmembers arising out of accidents on *state* highways....We express *no view* on the governing law or proper forum *when an accident occurs on a tribal road* within a reservation." *Strate*, 520 U.S. at 442 (emphasis added).

Supreme Court decision intimated, but did not hold, that the ownership status of land may not be a controlling factor when determining whether a tribal court has civil jurisdiction over non-members. See, *Nevada v. Hicks,* 533 U.S. 353 (2001)(Justice Souter concurring). However, the *Hicks* Court was careful to note that "[o]ur holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." *Id.*, at 358 n. 2. Recognizing *Hicks* is limited to circumstances where a state law enforcement officer enters a reservation to enforce state law for off reservation conduct, this Circuit expressly declined to utilize the *Hicks* decision as a standard for determining whether a tribal court has civil adjudicatory jurisdiction over non-members within reservations. See, *McDonald v. Means,* 309 F.3d 530 (9th Cir. 2002).

In *McDonald* a tribal member plaintiff filed a civil action against a non-member defendant for damages resulting from an auto accident on a Bureau of Indian Affairs (BIA) road within the Northern Cheyenne Reservation. In re-emphasizing that *Montana* and *Strate* were limited to questions of jurisdiction over non-members on non-Indian fee land, this Circuit concluded that the tribal court was the proper forum to adjudicate the dispute. *McDonald,* 309 F.3d at 540. Viewing the jurisdictional question under the light of *Montana* and *Strate* the *McDonald* court

found "...that the [Northern Cheyenne] Tribe retained enough of its gatekeeping rights that Route 5 cannot be considered non-Indian fee land, and that the Tribe thus maintains jurisdiction over Route 5." *Id.* The non-member countered that *Hicks* made land ownership irrelevant for jurisdictional purposes, and the mere fact that a non-member was present in the litigation was enough to require a *Montana* exception be met before the tribal court could adjudicate the claim. *McDonald,* 309 F.3d at 540. The response from this Circuit was unambiguous: "The limited nature of *Hicks's* holding renders it inapplicable to the present case." *Id.* As this Circuit explained, "*Montana* itself limited its holding to non-member conduct on non-Indian fee land....*Strate* confirmed that limitation....Even if *Hicks* could be interpreted as suggesting that the *Montana* rule is more generally applicable than either *Montana* or *Strate* have allowed, *Hicks* makes no claim that it modifies or overrules *Montana.*" *Id.*, n. 9 (citations omitted).

In *McDonald* this Circuit announced a clear standard: Tribes maintain jurisdiction over non-members on tribal lands; *Montana* and *Strate* control when a tribe wants to exert jurisdiction over a non-member on non-Indian fee lands and may require the tribe to satisfy a *Montana* exception, and that the application of *Hicks* is limited to its facts.

However, in a striking contradiction to this Circuit's holding in *McDonald*, the

Panel stated "...it might have been thought that *Montana* analysis applies only when there are non-members *and* the claim arose on non-tribal land. We have, however, rejected such a narrow reading of *Montana*." Slip op. at 10621. The Panel cites to *Yellowstone County v. Pease,* 96 F.3d 1169, 1174 (9th Cir. 1996), where this Circuit found no tribal court jurisdiction over a tax dispute between the Crow Tribe and a county in Montana. However, *Pease* was decided before the Supreme Court's decision in *Strate,* and *Pease* involved claims against non-members that arose *outside* the reservation, two key facts this Circuit used to distinguish *Pease* in *Nevada v. Hicks,* 196 F.3d 1020, 1026 n. 6 (9th Cir. 2000) (citing to Judge William C. Canby, Jr., *American Indian Law* 193-195 [1998]).

Seeking to bolster its use of *Hicks*, the Panel announced "[m]ost courts addressing jurisdiction in cases where a party is a non-member have reached the same result, applying the *Montana* framework even when the underlying claim arose on tribal land." Slip op. at 10623. However, this conclusion is suspect, in that the Panel fails to cite authority from the Supreme Court or any Circuit Court of Appeals, relying instead on one federal district court and two state court cases.

In an apparent attempt to deflect any conflict with *McDonald,* the Panel explained that this Circuit considered whether the facts in that case supported tribal jurisdiction "under *Montana*" and concluded that they did. Slip op. at 10621 n. 4.

Here, with misplaced reliance on *Hicks* and *Pease*, the Panel found the facts did not satisfy *Montana*, therefore there is no contradiction between *McDonald* and the Panel's decision because both decisions are based on a *Montana* analysis of jurisdiction. Slip op. at 10621 n. 4; 10624. Such a skewed reading of *McDonald* misapprehends the logic of that opinion. Not only did this Circuit *not* rely on a *Montana* exception to find the tribal court had jurisdiction, the *McDonald* Court expressly reiterated that *Montana* is limited to non-member conduct on *non-Indian fee land*. In *McDonald* the dispositive "fact" justifying tribal jurisdiction was that road was *tribal land*, thus this Circuit found tribal court jurisdiction over a non-member permissible "under *Montana*". The dissent in *McDonald* acknowledges as much by characterizing the majority's opinion as having "establishe[d] a presumption in favor of tribal civil jurisdiction over nonmembers in cases involving tribal land (land owned by the tribe within reservation boundaries)." *McDonald,* 309 F.3d at 542.

The Panel's misplaced reliance on *Hicks* and *Pease* deviates significantly from this Circuit's clear direction as to when a *Montana* exception applies. Rather than follow the rule announced in *McDonald,* the Panel instead crafted an opinion that mirrors the tone and text of the *McDonald* dissent. The result is a decision that now stands in direct contradiction to this Circuit's precedent.

III. THE PANEL HAS NARROWED THE FIRST *MONTANA* EXCEPTION TO AN UNPRECEDENTED LEVEL.

Monana's first exception "covers activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Strate,* 520 U.S. at 456-57. The consensual relationship exception requires that the jurisdictional authority imposed by the tribe "have a nexus to the consensual relationship itself". *Atkinson Trading Company, Inc. v. Shirley,* 532 U.S. 645, 656 (2001). In this case the Panel acknowledges that Smith was an enrolled student at Salish-Kootenai College (SKC, or the College) and assumes that SKC is a tribal defendant.[2] The Panel also accepts that Smith was driving the SKC owned dump truck as part of his coursework and may have been under the instruction of a fellow SKC student. Smith's own briefings in this case characterize the SKC dump truck as Smith's "classroom". See, Appellant's Brief, p.

[2]While not concluding that SKC was an arm of the tribe, the Panel nonetheless assumed the college was a "tribal member" for the purposes of this opinion. Slip op. at 10625-26. The panel does remark that "SKC is a Montana non-profit corporation and can be sued in that capacity, thus it can be fairly said that any political integrity risk was created by the tribe." Slip op. at 10633. However, the fact that SKC has chosen to incorporate under both Montana state law and CSKT Tribal law is inconsequential. The Montana Supreme Court has held that jointly incorporated entities retain their tribal status under Montana corporate law. *Flat Center Farms, Inc. v. Montana Dept. of Revenue,* 310 Mont. 206, 49 P.3d 578 (2002). See also, *General Constructors, Inc. v. Chewculator, Inc.,* 304 Mont. 319, 21 P.3d 604 (2001).

9. Any duty owed to Smith by SKC was a direct result of his status as an SKC student, and the accident occurred in his "classroom" during the course and scope of his instruction. Smith's suit claims negligent vehicle maintenance and inspection, coupled with negligent supervision. But for his status as a student at SKC, Smith would not have been present in the vehicle, and the College would not have owed him the duties alleged.

Smith's suit clearly has a nexus to the consensual relationship Smith had with SKC. However, the Panel found that it was not Smith's status as a student that gave rise to the action, but that somehow "this case arose from separate Montana tort law that applied between SKC and Smith rather than arising from any contractual relationship Smith has as [a] student at SKC." Slip op. at 10631. By diminishing the Smith-SKC relationship the Panel has *virtually eliminated* tribal court jurisdiction over all reservation-based tort claims brought by non-members against tribal defendants. Essentially, the Panel has held that the only qualifying relationships under the first *Montana* exception are disputes stemming directly from horn book contractual language. This unprecedented narrowing of the *Montana* consensual relationship exception creates a rule that swallows the exception.

IV. THIS DECISION CREATES A JURISDICTIONAL VOID.

The implications of the Panel's holding are profound. It explicitly and

exclusively vests jurisdiction over the merits of any tortuous conduct involving a non-member in federal courts. Slip op. at 10633-34.[3] The Panel's opinion fails to answer how non-members get a tort claim heard in federal court absent federal question jurisdiction (28 U.S.C. § 1331) or diversity jurisdiction (28 U.S.C. § 1332). In the state of Montana it can not be assumed that state courts will hear cases in which a non-member sues a tribal entity for a tort that occurred on a reservation.

The Montana Supreme Court has consistently held that state courts do not have jurisdiction over Indian defendants in situations arising entirely within an Indian reservation. See, *Balyeat Law, PC v. Pettit,* 291 Mont. 196, 967 P.2d 398 (1998) ("there is no doubt but that forcing [the tribal member defendant] to defend herself in state court...would infringe on the Tribes' sovereignty over its members and undermine its authority to govern its own affairs"). *Id.,* at 212-13, 967 P.2d at 408. The court elaborated:

> [a]sserting state court jurisdiction over [the tribal member defendant] pursuant to an area of law to which the Tribes did not consent, when [the defendant] herself took no steps to subject herself to the state court's jurisdiction, would essentially amount to an unlawful, unilateral

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[3] "A suit against SKC in federal court does not impinge upon interests of the tribe in the way that motivates the second *Montana* exception. Smith's claims present a simple tort case and nothing more...mere involvement of a tribal member in federal court litigation is not sufficient."

assumption of jurisdiction in violation of both state and federal law.[4]

Id., 967 P.2d at 408-09. This interpretation of law by Montana's high court is in lock-step with U.S. Supreme Court case law which distinguishes between Indian plaintiffs and Indian defendants when determining jurisdiction over Indian parties. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 148 (1984)[5]. It is also consistent with the "overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians." *Fisher v. District Court*, 424 U.S. 382, 390 (1976). Although the Panel does not discuss state court forums, it is important to note that requiring tribal entities to be answerable in state courts implicates the second *Montana* exception by eroding the political integrity of the tribe.

The Panel's unprecedented narrowing of *Montana*'s consensual relationship exception completely divests tribal courts of jurisdiction over claims brought by non-members. This decision renders tribal courts a near nullity, and simultaneously

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[4] See also, *Flammond v. Flammond*, 190 Mont. 350, 621 P.2d 471 (1980)(child support); *Geiger v. Pierce*, 233 Mont. 18, 758 P.2d 279 (1988)(debt collection); *In re: Marriage of Skillen*, 287 Mont. 399, 956 P.2d 1 (1998)(child custody.

[5] This case is in contrast to the Panel's statement that "[t]he Supreme Court has not distinguished between non-member plaintiffs and non-member defendants." Slip op. at 10623 n. 5 (citing, *Hicks*, 533 U.S. at 358 n. 2).

requires federal courts to further increase their caseload (with no Congressional direction to do so) while potentially leaving non-member plaintiffs who fail to meet federal diversity requirements without a forum for claims brought against reservation based tribal defendants.

V. SMITH CONSENTED TO TRIBAL COURT JURISDICTION.

The record in this case reflects that Smith not only failed to challenge the jurisdiction of the tribal court in this matter, he actually affirmed the jurisdictional statement of the initial plaintiff in his answer and cross claim,[6] a fact overlooked by the Panel. "It may be argued that by filing the cross-claim, Smith consented to [tribal] jurisdiction. We reject this theory, because Smith was required to exhaust his remedies in tribal court. *Strate,* 520 U.S. at 453." Slip op. at 10629 n. 8. But Smith *did* consent to tribal court jurisdiction.

Further, the exhaustion doctrine (based in comity) requires that federal courts abstain from ruling on challenges to tribal court jurisdiction in order to permit a tribal court the opportunity to determine in the first instance whether it has jurisdiction. *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9 (1987); *Allstate Indemnity Co. v. Stump,* 191 F.3d 1071 (1999). If the tribal court properly decides it has jurisdiction, it

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[6] See, SKC's Supp. E.R. p. 8, ¶ 1 and p. 15, ¶ 1.

proceeds with the case. *Id.* If the federal court later agrees that jurisdiction was proper, it will not relitigate the merits of the dispute. *LaPlante,* 480 U.S. at 19. Smith would indeed have been required to exhaust his tribal court remedies if he had initially challenged the jurisdiction of the tribal court, but this was not the case. Smith affirmed the jurisdictional statement, proceeded with his cross-claim, engaged in discovery and pre-trial motions all of which culminated in a five day trial on the merits and jury verdict. Only after litigating his claim and receiving an adverse jury verdict did Smith seek federal court intervention. This is not what the exhaustion doctrine requires, or even contemplates. The waste of judicial and litigant resources would be staggering. Exhaustion "allow[s] a full record to be developed in the Tribal Court *before* either the merits or any question concerning appropriate relief is addressed." *National Farmers,* 471 U.S. at 856 (emphasis added). Smith failed to question the tribal court's jurisdiction over him until *after* the lost a jury verdict. It was then that the exhaustion doctrine took effect. This is classic forum shopping.

In order to meet the newly narrowed first *Montana* exception, the Panel instructs SKC to make any student's submission to tribal court jurisdiction a condition of enrollment "and with fair disclosure." Slip. op at 10631. However, there is an ample body of law from the Supreme Court and this Circuit finding that non-members entering reservations to conduct business with a tribe or tribal members

submit themselves to the jurisdiction of the tribe. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 142 (1982) (a tribe's "limited authority" over non-members is triggered when non-member enters the tribal jurisdiction...[by entering] tribal lands or carries out business with the tribe); *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 459 U.S. 967 (1982) (although there was no explicit nexus between a non-Indian store owner and tribe, there was nonetheless a consensual relationship created through general commercial dealings). See also, *Confederated Salish and Kootenai Tribes v. Namen,* 665 F.2d 951 (9th Cir. 1982), *cert. denied,* 459 U.S. 977 (1982) (upholding tribes' right to regulate federal common-law riparian rights of non-Indian land owners). In upholding the Navajo Tribe's authority to impose a statutory measure of damages on a car dealership that wrongfully repossessed a vehicle on the reservation, this Circuit said "[t]ribal power includes 'a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.'" *Babbitt Ford, Inc. v. Navajo Tribe,* 710 F.2d 587 (9th Cir. 1983), *cert. denied,* 466 U.S. 926 (1984). See also, *Halwood v. Cowboy Auto Sales, Inc.,* 124 N.M. 77, 946 P.2d 1088 (1997). The Supreme Court has acknowledged "where tribes possess the authority to regulate the activities of non-members, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate,* 520 U.S. at 453 (quoting *LaPlante,*

480 U.S. at 18).

The Panel overlooks the fact that by entering the reservation and enrolling as a student at SKC, Smith subjected himself to the regulatory authority of a tribal entity. Whether Smith could enroll in a certain class, whether he was qualified or authorized to drive the dump truck, whether he would pass the course and receive his commercial driver's license or if he was even entitled to remain as a student at the College were all regulations that governed his relationship with a tribal entity and to which Smith submitted when he entered the Flathead Reservation, registered for classes and paid tuition at SKC. Smith solidified this relationship when he consented to have his claim against SKC heard in the CSKT Trial Court.

The Panel cautions that finding tribal jurisdiction over Smith's tort claim against the College based on his status as a student "...would have broad and undue implications for thousands of college students." Slip op. at 10631. This makes little sense, particularly when viewed against the backdrop of countless students throughout the nation who will travel out of state to attend college each semester, unquestionably becoming subject to the jurisdiction of the state they enter.

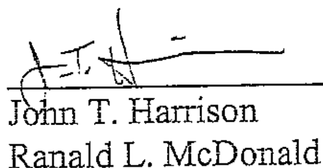
Finally, the Panel's decision is inconsistent with the Supreme Court's landmark case *Williams v. Lee,* 358 U.S. 217 (1959). In announcing that *Williams* should be viewed as nothing more than an example of the first *Montana* exception and no

longer a "as a separate jurisdictional doctrine" (Slip op. at 10622) the Panel ignores the precedent of that decision. For nearly fifty years courts have cited to *Williams* as the foundation for tribal jurisdiction over reservation-based claims against tribal defendants. To hold otherwise would be to "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves." *Williams,* 358 U.S. at 223. The Panel's decision shatters the underpinnings of federal Indian law, and the reverberation extends far and wide. Following the Panel's logic, tribal courts have no jurisdiction over non-member tort claims against a tribal entity (e. g. tribal colleges, tribal housing authorities, tribal businesses, or tribal health centers). The *Williams* decision remains solid authority that tribal courts are the proper *and only* forum for claims against reservation based tribal defendants.

VI. CONCLUSION

For the foregoing reasons this combined petition for panel rehearing and rehearing en banc should be granted.

DATED this 16th day of August 2004.



John T. Harrison
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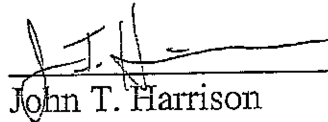
Confederated Salish and Kootenai Tribes

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, the attached petition for rehearing is proportionately spaced, has a typeface of 14 points and contains no more than 4,200 words.

Dated this 26th day of August 2004.



John T. Harrison

CERTIFICATE OF SERVICE

I, Pamela McDonald, do hereby certify that a true copy of the foregoing **"Confederated Salish and Kootenai Tribes Combined Petition for Panel Rehearing and Rehearing En Banc"** was mailed on the 26th day of August, 2004, by U.S. Mail, first-class, postage prepaid, to the following counsel of record:

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